



**Kipsirgoi Investments Limited v Local Authorities Pension Trust Registered Trustees; National Environment Management Authority (Interested Party) (Petition E033 of 2021) [2022] KEELC 15665 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 15665 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
PETITION E033 OF 2021  
OA ANGOTE, J  
OCTOBER 6, 2022**

**BETWEEN**

**KIPSIRGOI INVESTMENTS LIMITED ..... PETITIONER**

**AND**

**LOCAL AUTHORITIES PENSION TRUST REGISTERED TRUSTEES ..... RESPONDENT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY**

**RULING**

1. Vide a Notion of Motion application dated June 23, 2022 brought pursuant to the provisions of Section 1A, 1B, 3 & 3A of the *Civil Procedure Act* and Article 159 of *the Constitution*, the Respondent/Applicant seeks the following reliefs:
  - a. That the Honourable Court be pleased to find and hold that the Respondent/Applicant's Trustees; Dr George Kwedho, Hosea KILI, Julius Korir, Matilda Kimetto, John Oscar Juma, Peter Musa Kitesho, Lucy Munjuga, Hon Joseph Kaberia I.A MBS & Winfred Syombua have purged contempt and complied with to the fullest possible extent to this Honourable Court's Ruling and Orders delivered on September 17, 2021.
  - b. That this Honourable Court be pleased to discharge the Respondent/Applicants' Trustees; Dr George Kwedha, Hosea Kili, Julius Korir, Matilda Kimetto, John Oscar Juma, Peter Musa Kitesho, Lucy Munjuga, Hon Joseph Kaberia I.a MBS & Winfred Syombua for any contempt and that the Honourable Court be pleased to declare that the proceedings in respect of the



Contempt Application dated September 29, 2021 be terminated and marked as closed and/or settled.

- c. That the costs of the Application be in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Isaac K Mitei, the Corporate Secretary of CPF Financial Services, who deponed that CPF Financial Services is a limited liability company registered on June 16, 2011 under the Companies Act under the name Laptrust Administration Services Limited and that Laptrust Administration Services Ltd changed its name to CPF financial services on April 3, 2014.
3. It was deponed by the Corporate Secretary of CPF Financial Services that CPF Financial Services Limited is registered by the Retirement Benefits Authority and Companies Act and is duly licensed to act as an authorized administrator of Retirement Schemes in Kenya and that the Local Government (Local Authority Pension Trust) Rules (2007) and the Retirement Benefits(Administrators) Regulations, 2007 empower the Trustees to appoint an administrator to handle certain administrative duties for the scheme
4. According to the Corporate Secretary of CPF Financial Services, *vide* an Administration Agreement entered into between the Respondent and CPF Financial services, CPF was appointed as the Corporate Administrator of the Respondent and as such, the Respondent's Trustees are not involved in the day to day running of its pension scheme which duties are undertaken by CPF's company secretary.
5. It was deponed that the above notwithstanding, the Respondent has always been keen to obey court orders; that on receipt of the Court orders of September 17, 2021, the Respondent's Corporate Administrator wrote to the contractor advising it to cease construction and/or roadworks on L.R No 13065(Original No 6939/1 and 5830/9) and that the contractor responded *vide* a letter of September 22, 2022 confirming that it had ceased construction in full compliance of the Court orders.
6. According to the Respondent, on or about September 29, 2021, the Corporate Administrator through its Company Secretary was served with a contempt application citing the Trustees for contempt; that upon receipt of the application aforesaid, the Respondent instructed the firm of Gazemba Wekesa & Company Advocates to handle the matter and that the Respondent was surprised to hear that the application was allowed.
7. The Petitioner, through its Director reiterated the averments in the Petitioner's pleadings in support of the contempt application and in reply to the review application. The Petitioner's Director deponed that the application is res judicata and otherwise an abuse of court process and that the application seeks similar reliefs based on similar grounds as those in the application of December 9, 2021 which was dismissed by the court's Ruling of May 26, 2022.
8. It was deponed by the Petitioner's Director that it is apparent from the instant application that the contemnors have not purged the contempt at all; that the Respondent is clearly asking the court to sit on Appeal of its decisions of December 2, 2021 and May 26, 2022 without any basis in law and that there is no evidence of restoration of status quo ante of the subject road.
9. In response to the Petitioner's Replying Affidavit, the Respondent's officer filed a Further Affidavit where he deponed that the Petitioner's assertions are misleading; that the Respondents have purged their contempt; that the contractor did indeed remove the cabro from the road and has since completed the process and authored a report showing that the road has been restored and that the Respondent has ceased all the works and restored the road to its original state.



10. In the Supplementary Affidavit, the Petitioner through its Director deponed that the photographic evidence attached to the Respondent's Further Affidavit of June 25, 2022 allegedly taken on June 12, 2022 juxtaposed with the Petitioner's Affidavit taken in September and October, 2021 shows that the Respondent is far from purging the contempt and that the Respondent has only removed the cabro but has not removed the upgraded drainages, the loose gravel and the foundation rocks from the road.
11. According to the Petitioner, the ultimate result of the impugned road presented by the Further Affidavit is still an upgraded road and or the fruits of the Respondent's contemptuous actions; that the Respondent cut down 8 indigenous trees which have yet to be replaced and that the application is devoid of merit and should be dismissed with costs.
12. The parties did not file submissions.

### **Analysis and Determination**

13. Having considered the Motion and Affidavits in support and in opposition thereto, the issues that arise for determination are;
  - i. Whether the Application is competent?
  - ii. Whether the Respondent has purged its Contempt of the Court orders of September 17, 2021?
14. The Respondent has filed the present application seeking a declaration that the contemnors have purged the contempt and the proceedings with respect to the contempt proceedings be marked as settled. In response, the Petitioner asserts that the application is res judicata and otherwise constitutes an abuse of court process. It is their argument that the application is similar to or seeks similar reliefs based on similar facts and grounds as the Respondent's application of December 9, 2021 which application was dismissed on May 26, 2022 and that the application is an attempt to review the aforesaid orders.
15. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

16. The Court of Appeal in the case of [The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others](#), [2017] eKLR, held that:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

The suit or issue was directly and substantially in issue in the former suit.

That former suit was between the same parties or parties under whom they or any of them claim.

Those parties were litigating under the same title.

The issue was heard and finally determined in the former suit.



The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

17. It is apparent that for the bar of res judicata to be effectively raised, the aforesaid elements must be proved in conjunctive terms. The Court has considered the application of December 9, 2021. In it, the Respondent sought to review the Ruling delivered on December 2, 2021 which found the Respondent guilty of contempt and cited its Trustees. In the application for review, this court held as follows:

“Having declined to review and/or set aside the orders as sought, there is no basis upon which the court can enter into an independent interrogation as to whether the contempt has been purged as that is not the question before the court. That is an issue that can be taken either in a separate application or in mitigation.”

18. In the present application, the Respondent is asking the Court to find that it has purged the Contempt. This, unlike the earlier application, necessitates an inquiry into the evidence adduced to find out if indeed the Respondent has purged the contempt. The issues in the current application cannot therefore be said to be res judicata the application of December 9, 2021.
19. The Respondent is seeking for a declaration that they are fully compliant with court orders and prays that the Contempt proceedings be marked as settled. The Petitioner has opposed the application.
20. The record shows that on September 17, 2021, this Court issued temporary conservatory orders restraining the Respondent or anyone under its authority from carrying out any works on the suit property pending determination of the Applications of 13<sup>th</sup> and September 16, 2021.
21. On September 29, 2021, the Petitioner filed an application seeking to cite the Respondent for contempt stating that despite knowledge of the existence of the Court orders of September 17, 2021, the Respondent instructed its contractors to carry on with the roadworks. The court having found the contemnors to have disobeyed the court order, the question before this Court is whether the Respondent has now purged the contempt, and the consequences thereof.
22. In discussing what constitutes purging contempt of court, the Court of Appeal in *Rose Detho vs Ratilal Automobiles Ltd & 6 others* [2007] eKLR, stated thus;
- “In my mind, purging contempt is not composed of merely appearing in court and apologizing to the Court. It means atoning for or wiping out the offence or putting right what the court had ordered to be done and which was not done....”
23. In support of the application, the Respondent relies on the letter dated September 22, 2021 by the contractor affirming that they have ceased construction on the property, the letter dated June 30, 2022 asking the contractor to remove the cabro and restore the road and the progress report from



- Endeavours Construction Limited dated July 14, 2022 which confirmed that all the cabro had been removed and the road restored to its original state.
24. Indeed, the photos attached to the report show that as at July 13, 2022, the cabro had been removed from the road and what remained was the gravel.
25. The Petitioner on its part has produced photographic evidence of the site taken on June 30, 2022, July 2, 2022 and July 26, 2022 showing that the current position of the road which the Petitioner asserts shows that the Respondent has only the removed cabro on the road but has clearly not removed the upgraded drainages, the loose gravel and foundation rocks that were placed on the road and covered by gravel at all.
26. The Court has considered the evidence. The record shows that as at the time of filing the application on the September 16, 2021, the Respondent had laid rocks as a foundation for the road. This was the prevailing status when the orders of September 17, 2021 were made. The photographic evidence attached to the Affidavits both in support and in opposition to the motion show that presently, the road consists of gravel, the cabros having been removed.
27. Taking into account the position of the road as at the time of the grant of the orders, it is apparent that the only activity that was undertaken by the Respondent post the orders of September 17, 2022 was the laying of cabro.
28. I say so because in its application of September 16, 2021, the Petitioner's Director deponed as follows:
- “ 3. That subsequent to filing of these proceedings, the Respondents commenced accelerated actual massive construction or roadworks on the suit property which as at September 16, 2021, the Respondent had completed grading the roads and are leveling ballast/gravel with a view of doing final cabro or tamarc works, complete the road at any time within a week or so and commence use thereof.”
29. It is therefore clear from the Petitioner's deposition of September 16, 2022 that by the time the court issued the temporary injunction on September 17, 2021, the Respondent had completed grading the roads and was leveling ballast/gravel. The only thing that had not been done as at September 16, 2021 was the laying of cabro, which was done after the orders of this court had been granted and served.
30. The Respondent having removed the cabro, it is the finding of this court that the contemnors have purged the contempt. In the case of *Directline Assurance Co Ltd vs Jamii Bora Bank Ltd & 5 others* (2015) eKLR, the court discussed the options the court has in the event a contemnor purges contempt as follows:
- “ A civil court has no interest in punishing a litigant, unless a litigant leaves the court with no option but to resort to quasi- criminal proceedings to punish a litigant. When a court orders are being disobeyed, or are about to be disobeyed, and the contemnor comes down and purges the contempt, either out of his own freewill or at the prompt of the court, the court will accept the purge of the contempt unless circumstances exist to suggest that the coming down, or the alleged purging of the contempt, is not genuine, or is done in bad faith, or is in itself a continuation of the original contempt. In accepting the coming down of the contemnor, the court will assess the reasons given for the disobedience, the time taken to come down, and the cost incurred in the process.”
31. Having considered the affidavit in support of the current application, and the efforts the Respondent took to stop the contractor from laying the cabro on the impugned road, and the fact that indeed the



said cabro have been removed, it is the finding of this court that the contemnors should be discharged, and the Petition proceeds to hearing on merits.

32. For those reasons, the application dated June 23, 2022 is allowed as follows:

- a. This court hereby finds that Dr George Kwedho, Hosea Kili, Julius Korir, Matilda Kimetto, John Oscar Juma, Peter Musa Kitesho, Lucy Munjuga, Hon Joseph Kaberia and Winfred Syombua have purged the contempt and complied to the fullest possible extent with the Court's Orders delivered on September 17, 2021.
- b. Having purged the contempt, the court hereby discharges the Respondent's/Applicant's Trustees: Dr George Kwedho, Hosea Kili, Julius Korir, Matilda Kimetto, John Oscar Juma, Peter Musa Kitesho, Lucy Munjuga, Hon Joseph Kaberia and Winfred Syombua.
- c. Costs of the application to be in the course.

**Dated, signed and delivered virtually in Nairobi this 6<sup>th</sup> day of October, 2022.**

**O. A. Angote**

**Judge**

**In the Presence of;**

Mr. Litoro for Petitioner

Mr. Otieno for 1<sup>st</sup> Respondent

No appearance for Interested Party

