



**Gatheru Gathemia & Company Advocates v Dado & another (Miscellaneous Civil Case E1006 of 2020) [2025] KEHC 5644 (KLR) (Commercial and Tax) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5644 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL CASE E1006 OF 2020**

**JWW MONG'ARE, J**

**MAY 5, 2025**

**BETWEEN**

**GATHERU GATHEMIA & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**HUSSEIN DIBA DADO ..... 1<sup>ST</sup> RESPONDENT**

**TULLA RESERVE SUPPLIES (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 4<sup>th</sup> December 2024, Defendants by a Notice of Motion application moved this Honourable court under Articles 50 and 159(2) of *the Constitution* of Kenya, Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and by Certificate of Urgency seeking the following orders:-
  1. Spent
  2. That the ruling dated 31<sup>st</sup> July 2023 be set aside and the decree therefrom be set aside pending the hearing and determination of this application.
  3. That this Honourable Court be pleased to review the Ruling delivered in this matter on 31<sup>st</sup> July, 2023 and rehear the matter.
  4. That this Honourable Court do set aside the Consent Order dated 4<sup>th</sup> October 2020 entered between the parties herein pending the hearing and determination of this application.
  5. That this Honourable Court restrains the Respondent herein from executing in any form or manner the Decree arising from the Ruling Delivered in this matter on 31<sup>st</sup> July 2023 pending the hearing and determination of this application.
  6. That costs of this application be borne by the Respondent.



7. Any other reliefs or order that this court deems appropriate.
2. The application is supported by the grounds set out on its face and the supporting affidavit sworn on 4<sup>th</sup> December 2024 by Hussein Diba Dado. The Application is opposed and the Respondents have filed a replying affidavit sworn on 16<sup>th</sup> December 2024 by Gatheru Gathemia Advocate. Both parties have filed their written submissions which I have carefully considered.
3. In opposing the application, the Respondent has urged that the present application is res judicata and this court should not entertain the same as the issues being raised have been canvassed and by the ruling delivered to the parties on 31<sup>st</sup> July 2023, the court rendered itself on the same and cannot therefore revisit the same.
4. Res judicata is defined under the *Civil Procedure Act* section 7 as follows:-
  - “7. . Res judicata- 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. Explanation. —
    - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it. Explanation. —
    - (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. Explanation. —
    - (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Explanation. —
    - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation. —
    - (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. Explanation. —
    - (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”
5. The Courts have narrowed down the above section on res judicata in various court decisions. In the *John Florence Maritime Services Limited & Another vs Cabinet Secretary and Infrastructure & 3 others* (2021) eKLR, the Supreme court set out the conditions that must be present for the principle of res judicate to apply. The Supreme Court stated thus; “For res judicata to be invoked in a civil matter the following elements had to be demonstrated:-



- i. There was a former judgment or order which was final;
  - ii. The judgment or order was on merit;
  - iii. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
  - iv. There had to be between the first and second action identical parties, subject matter and cause of action.”
6. I have looked at the prayers sought by the applicant in the present application and I note that the applicant seeks to either have the court vacate its ruling of 31<sup>st</sup> July 2023 or strike out the Consent Order entered herein. I have had an opportunity to relook at the proceedings that preceded the issuance of the said ruling by the court and I agree with the Respondent that the issue being raised herein were carefully considered and an oral examination of the Advocate McRonald was undertaken on oath and before the court.
7. Section 80 of the [Civil procedure Act](#) grants the court to review its own decision but narrows the grounds upon which such a review can be conducted. Section 80 of the [Civil Procedure Act](#) provides as follows:-
- “ 80. Review - Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
8. The Application for review of a Courts decision is anchored under Order 45 of the Civil procedure Rules which provides as follows:-
- “ 1. Application for review of decree or order [Order 45, rule 1]-
- (1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
9. Having the above provisions of the law in mind, I have considered the present application by the Defendants. I find that the same fails the test on the two fronts set out herein. The issues raised on the consent order and the affidavits of the parties who witnessed the execution of the consent were



considered by this court and a finding was made in the courts ruling of 31<sup>st</sup> July 2024. I also find that there is no disclosure of a discovery of a new material evidence that was not available when parties argued the previous application and nor is there an error on the face of the record to warrant this court reconsider and review its previous decision. To my mind, what the court is being invited to do is to sit on appeal against its own decision.

10. I find therefore the present application is without merit and I dismiss the same with costs to the Plaintiff.

11. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY 2025**

.....

**J.W.W. MONG'ARE**

**JUDGE**

ThatIn the Presence of:-That

Ms. Kalimi holding brief for Mr. Owuor for the Applicant.

Mr. Macharia for the Respondent/Advocate.

Amos- Court Assistant

