



**Waititu v Republic (Anti-Corruption and Economic Crimes Appeal E006 of 2025)
[2025] KEHC 5678 (KLR) (Anti-Corruption and Economic Crimes) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E006 OF 2025**

LM NJUGUNA, J

MAY 8, 2025

BETWEEN

FERDINAND NDUNG’U WAITITU APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Before the court is the Appellant’s/Applicant’s application dated the 14th day of March,2025 seeking orders as follows;
 1. Spent
 2. Withdrawn
 3. That this Honourable court be pleased to place the Appellant on bond with an alternative of cash bail pending the hearing and the determination of the appeal
 4. That this Honourable court do grant any further orders it deems fit
 5. That the costs be in the cause.
2. The application is brought under Articles 20, 49(1) (h) and 51 of *the Constitution* and Section 357 of the *Criminal Procedure Code*. It is premised on the grounds set out on the body of the same and on the annexed supporting affidavit dated the 13th March 2025, the supplementary affidavit dated the 25th April, 2025 and the further affidavit dated the 29th April 2025.
3. The application is opposed vide the Preliminary Objection dated the 18th March, 2025, Replying affidavit dated the 29th April, 2025 and the Grounds of Opposition dated the 18th March,2025.



4. The Applicant in his supporting affidavit depones that the appeal herein arises from his conviction on four counts of corruption whereupon, he was sentenced to serve a term of imprisonment of 12 years or in the alternative pay a fine of Ksh. 53,500,000. That the charges related to a construction tender awarded to Testimony Enterprises Limited under the Provisions of Public Procurement and Assets Disposal Act Cap 412.
5. That upon being awarded the tender, Testimony Enterprises Limited embarked on performing the contracted works, and was subsequently paid some money for the actual work done and that in the normal course of life, Testimonies and its Directors had every right to spend their lawfully obtained money as they chose to do, the money having been paid by a county government pursuant to a contract that has not been challenged or adjudged as unlawful under the PPAD Act and as such, the money cannot be termed as proceeds of crime.
6. That the foregoing notwithstanding, on the 14th December, 2021 the applicant was arrested and charged with the offence of conflict of interest and dealing with suspect property alongside his 12 co-accused. That the 6th -10th Accused persons who were members of the Tender committee of Kiambu County Government were arrested and charged in Anti- corruption case number 22 of 2019 with the offence of wilful failure to comply with the law relating to procurement, and being dissatisfied by the Prosecution's decision to charge them, they challenged the prosecution through a Constitutional Petition on the grounds that the charges against them were unconstitutional and an abuse of the legal process and the Petition ended in their favour. However, the prosecution in the wake of the High court decision, filed substituted charges against the remaining accused persons which, after a full hearing ended up in their convictions, which are now the subject of the appeals before this court.
7. The Applicant avers that his conviction by the Trial court was neither lawful or justified in view of the additional grounds set out in the Amended Petition of appeal inter alia, that; the charges were defective in that there was a discrepancy in the evidence tendered, and on the charge sheet on the amount of money received by the Appellant; material inconsistency between documentary evidence tendered by the prosecution as set out in the charge sheet and the bank statements; the Trial court usurped the jurisdiction of the Public Procurement and Review Board; the Trial court failed to take into consideration the fact that the 11th Accused had other monies in its bank account; the Trial Magistrate erred in convicting the Applicant of the offence of conflict of interest notwithstanding the provision of Sections 33 and 80 of the *Public Procurement and Asset Disposal Act* Cap 412 and that in the absence of evidence linking the moneys the Applicant and his companies received, to the award of the tender to Testimony Enterprises Limited, his conviction did not meet the standard of proof beyond reasonable doubt.
8. The Applicant avers that the sentence is manifestly harsh, oppressive and grossly disproportionate to the circumstances of the case, and his continued imprisonment will cause a miscarriage of justice which is both unlawful and unjustified, as his appeal has overwhelming chances of success.
9. The application is opposed vide a Replying Affidavit dated the 29th April, 2025, Grounds of opposition dated the 18th, March, 2025 and a Notice of Preliminary Objection dated the 18th, March, 2025.
10. In the Replying affidavit, the Respondent through its Principal prosecution counsel has deponed that, following the dismissal of the Applicant's application for bail pending appeal dated the 14th, February, 2025, the Applicant filed an application before the Court of Appeal seeking leave to appeal the said ruling which he had failed to disclose to this Honourable Court.
11. The Respondent contended that the Applicant has not demonstrated that there has been change of circumstances warranting this court to review its orders of 3rd March, 2025 and that the amendment



of the Petition of appeal does not, and, cannot be deemed a change in circumstances justifying this court's intervention through its review jurisdiction.

12. In the Respondent's Grounds of Opposition, it states that; the instant application offends the rule on hierarchy of courts, and that the same is a blatant abuse of the court process, in that, the Applicant has not demonstrated that there has been change of circumstances warranting this court to review its orders of 3rd March, 2025.
13. In addition, the Respondent filed a Preliminary Objection on the grounds that the application is Res Judicata, and that the court is Functus officio having delivered its ruling on bail pending appeal, on the 3rd March, 2025.
14. In his supplementary affidavit, the Applicant averred that the cumulative effect of the evidence that was tendered by the prosecution and the testimonies by the key witness, is that, any conviction was not based on credible evidence and that the conviction and the sentence were procured in a manner that constitutes gross violation of his procedural and substantive rights guaranteed under Articles 27 and 50 of *the Constitution*.
15. The Applicant in his further affidavit admitted to having filed an application at the court of appeal seeking leave to appeal out of time but deponed that the application was withdrawn, which decision was informed by the late realization that the Court of Appeal does not have jurisdiction to hear and determine an appeal from the decision of the High court refusing to grant bail pending appeal
16. The application was disposed of, by way of written submissions.

Applicant's submissions.

17. The Applicant admitted that this is the second application for bail pending appeal, the first application having been dismissed vide a ruling dated the 3rd March, 2025. He averred that by filing the present application, he conceded the correctness of the finding by the court that his first application failed to set out the points of law that indicated that his appeal had overwhelming chances of success Further, that having applied and having been granted leave to amend his Petition of Appeal, he is now relying on the grounds set out in the amended Petition.
18. He has submitted that the present application is neither seeking a review of the ruling of the court dated the 3rd, March, 2025 nor is it a direct or indirect appeal against the said ruling, but rather, it is a fresh application that should stand or fall on its merits in accordance with the laid down laws and principles. Reliance was placed on the case of Republic Vs Nottingham Justice, EX-parte Davies (1981) qb 35 and that of Ng'ati Farmers Co-operative Society Limited Vs. Ledidi & others (2009) KLR 331.
19. The Applicant identified two issues for determination as follows;
 - a. Whether from the totality of the circumstances, the appeal is likely to be successful on account of some substantial point of law.
 - b. Whether there exists exceptional or unusual circumstances upon which this court can grant bail pending appeal
20. On the first issue, the Applicant submitted that the amended Petition of appeal sets out substantial points of law that prima facie makes it likely that the appeal will be successful and has relied on the case of Mbugua & Others Vs. Office of the Director of Public Prosecutions & 2 Others (2022) KEHC 13798(KLR). He has also relied on the Provisions of Public Procurement and Assets Disposal Act. It



is also his contention that there was no direct evidence linking the moneys received by the Applicant and his companies to the award of tender by Testimonies limited.

21. On the second issue, the Applicant contends that his continued imprisonment will cause a miscarriage of justice that is both unlawful and unjustified, given that he has an option to pay a fine in lieu of serving the term of 12 years imprisonment in the event that his appeal is not successful- an option he will certainly exercise, and as such, it is neither fair nor logical for him to serve part of the sentence only for him to pay the fine in the event that his appeal does not succeed. That bearing in mind the jurisprudence in the lead cases on bail pending appeal, and the import of the 2010 Constitution, it is prudent for this court to apply Articles 20 and 259 (1) to admit the Applicant to bail pending appeal in order to uphold his right to fair hearing and secure substantial justice.
22. On the issue of whether the application is Res judicata, the Applicant made reference to the case of Gladys Nduka Nthuki vs. Lelshego Kenya Limited & Others (2022) eKLR on the doctrine of Res Judicata as provided for under Section 7 of the *Civil Procedure Act*. He cited the case of Abok James Odera Vs. John Patrick Machira Civil Application No. Nai. 49 of 2001 on the elements of Res Judicata, and submitted that the present application is not based on the same facts and circumstances as it is premised on the amended Petition of appeal dated the 23rd April, 2025.
23. On whether the court is functus officio, the Applicant relied on the case of ICEA Lion Insurance Co. Limited Vs. Julius Nyaga Chomba (2020) eKLR which quoted the Supreme court of Kenya expounding on the doctrine of Functus officio in Election Petitions Nos. 3,4, & 5 Raila Odinga & others vs. IEBC & others (2013) eKLR as cited with approval on an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine”, with specific reference to its Application in Administrative law”, (2005) 122 SALJ 832. In that regard, the applicant contended that this court is not functus officio unless and until it makes a decision on the substantive appeal herein. That unless and until that happens, this Honourable court has unfettered powers and discretion to determine whether to grant bail pending appeal to the Applicant depending on the facts and the circumstances at any given time.
24. On its part, the Respondent set out four issues for determination as follows;
 - a. Whether the application offends the principle of Res judicata
 - b. Whether this Honourable court is functus officio
 - c. Whether the Applicant has satisfied the conditions to warrant this court to review its orders of 3rd March, 2025.
25. On the application of the Doctrine of Res judicata, the Respondent cited the case of Uhuru Highway Development Vs. Central Bank (1996) LLR CAK 2126 on the elements of the said Doctrine and submitted that the Applicant had filed a similar application dated 14th February, 2025 which was heard and dismissed by this court and yet, the instant application seeks the same orders. He relied on the case of Stanley Kiplangat Cheruiyot & 12 others Vs. DPP (2017) eKLR referred to in the case of Mburu Kinyua Vs. Gachini Tuti (1978) KLR in which the court stated in part;

“.....where a given matter becomes the subject of ligation and adjudication by a Court of competent jurisdiction, the court requires that the parties to that ligation to bring forward their whole case, and will not (except under special Circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the Subject in the contest, but which was not brought forward,



only because they have, from negligence, in advertence or even accident, omitted part of their Case”.

26. The Respondent urged that the Applicant ought to have brought his whole case forward while making his application for bail pending appeal in the first instance. It is its case that the application before the court is Res judicata since the facts on which it is premised were known to the Applicant at the time he made the first application. The Respondent contended that the instant application has been brought to remedy the failure in the initial application that was dismissed for lack of merit.
27. On whether the court is functus officio, the Respondent submitted that the filing of an application for bail pending appeal before the same court that made a determination on a similar application is equivalent to asking the court to sit as an appellate court against its own decision.
28. On whether the Applicant has satisfied conditions for review of the court’s decision, it was submitted that for the applicant to succeed, he ought to demonstrate that there is a change of circumstances to warrant the review of the orders. Reliance was placed on the case of Samuel Mburu Njenga (2018) eKLR and that of Cecilia Aoko Ondieki Vs. Republic (2021) eKLR.

Analysis And Determination.

29. This court has considered the application, the affidavits, the preliminary objection and the submissions filed by the parties herein. The Respondent filed a notice of Preliminary Objection and in my view, the determination of the same will have a bearing on the substantive application.
30. In that regard there are two issues for determination as follows;
 - a. Whether the application before the court offends the principle of Res judicata.
 - b. Whether the court is functus officio
31. The Doctrine of Res judicata is defined in the Black’s law Dictionary as;-

“An issue that has been definitely settled by judicial decision ; an affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been, but was not raised in the first suit.”
32. For the Doctrine of Res judicata to apply, the following conditions must be satisfied;
 - a. That there was a former suit or proceeding in which the same parties as in the subsequent litigated
 - b. The matter in issue in the latter suit must have been directly and substantially in issue in the former suit;
 - c. That a court competent to try it had heard and finally decided the matters in controversy.
33. The rationale of the Doctrine of Res judicata was discussed by the Court of Appeal in the case of Independent Electoral & Boundaries Commission V Maina Kiai & 5 others (2017) eLKR;

“.....the rule or the 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 common –sensual 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 favourable 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 and calumny. The foundations of Res judicata thus rest in the public interest for swift, sure and certain justice”.

34. In the Maina Kiai case, the court quoted with approval the Indian Supreme court in the case of Lal Chand Kishan, AIR 1977SC789 where it stated;

“The principle of Res judicata is conceived in the larger public interest which requires that all litigation must, sooner or later, come to an end. The Principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the Res judicata doctrine is that a complete estoppel against any suit that runs afoul of it, and there is no any way of going around it- not even by consent of the parties- because it is the court itself that is debarred by a jurisdictional injunct,from entertaining such suit”.

35. The plea of Res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for Res judicata to apply.
36. On this issue of Res judicata the Applicant has contended that the present application is not based on the same facts and circumstances for the reason that it is based on the amended Petition of appeal, and further that the High court has powers to entertain more than one application for bail concerning the same person depending on the facts and circumstances. To this submission, the court observes that by the time the earlier application for bail pending appeal was filed, the proceedings had already been typed and there was nothing that prevented the Applicant or his advocate from preparing a comprehensive Petition of appeal covering all the grounds that have now been included in the amended Petition of appeal.
37. The issues now raised in the present application ought to have been raised in the earlier application as they are points of law and the same ought to have been within the knowledge of the Applicant and/ or his counsel. These grounds belonged to the subject of litigation and if the applicant had exercised reasonable diligence, he ought to have brought them forward at the time.
38. The court of appeal while discussing the rationale of the doctrine of Res judicata, in the case of John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR had this to say;
- “courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistencies in judgments of concurrent courts.”
39. The Applicant has clearly stated that the application herein is not a review of the ruling of this court dated and delivered on the 3rd March, 2025. This court notes that the prayers in the earlier application are exactly the same as those prayed for in the present application. This is an indirect admission that he has been caught up by the Doctrine of Res judicata and he cannot run away from it!



40. On whether this court is functus officio, the court in the case of Telkom Kenya Limited Vs. Joshua Ochanda suing on his own behalf and on behalf of 996 others (Former Employees of Telkom Kenya Limited) 2014 eKLR cited in the case of Re Estate of Kinuthia Mahuti (Deceased) Miscellaneous Application No. 158 of 2017, 2018 eKLR observed as follows;

“.....Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a Doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century”.

41. Similarly, Election Petitions Nos. 3,4, & 5 Raila Odinga & others Vs. IEBC & Others (2013) eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius (supra):-

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person is vested with Adjudicative or decision making powers only once in relation to the same matter...the principle is that once such a decision has been given, it is (subject to any right of appeal to a superior body of functionary), final and conclusive. Such a decision cannot be revoked or varied by the decision maker”.

42. In view of the foregoing, this court is not persuaded by the Applicant’s contention that this court is not functus officio unless and until it makes a decision on the substantive appeal. In so far as the present application is concerned, and for the reasons that this court has given herein above, the Court holds the strong view that it is functus officio.

43. In the end, I find that the application is devoid of merits and the same is hereby struck out.

44. It is so ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT ON THIS 8TH DAY OF MAY, 2025.

.....
L.M. NJUGUNA

JUDGE

In the presence of:-

Mr. Kibe Mungai appearing with Mr. Ndegwa Njiru for the 1st Appellant and holding brief for Mr. Swaka and Mr. Njenga for the 2nd and 3rd Appellants respectively

Mr. Monda for the Respondent

Court assistant – Wilson

