



Mumbu Holdings Ltd v Spire Bank Ltd & 5 others (Commercial Civil Suit E336 of 2020) [2021] KEHC 15 (KLR) (Commercial and Tax) (14 September 2021) (Ruling)

Neutral citation: [2021] KEHC 15 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E336 OF 2020**

JM MATIVO, J

SEPTEMBER 14, 2021

BETWEEN

MUMBU HOLDINGS LTD PLAINTIFF

AND

SPIRE BANK LTD 1ST DEFENDANT

MBUKABU LTD 2ND DEFENDANT

GEOFFREY WEKESA ADVOCATE 3RD DEFENDANT

KIMANI & MICHUKI ADVOCATE 4TH DEFENDANT

MINISTRY OF LANDS 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. This ruling determines two applications all dated 20th May 2021, namely, the Plaintiff's and the 1st defendant's applications of even dates. In order to put the two applications into a proper perspective, a brief account of the Plaintiff's case as enumerated in its Plaint dated 12th August 2020 and also a brief history of this litigation is necessary. In a ruling dated 26th February 2021 dismissing the Plaintiff's application for injunction to inter alia restrain the 1st defendant from exercising its Statutory power of Sale, this court gave a generous account of the Plaintiff's averments as disclosed in its Plaint. Instead of replicating the account as captured in the said ruling, it will suffice to state that Plaintiff acquired LR. Nos. 715/312 (IR 1555347), 12948/134, 12948/137, 209/8336/66 all situated at Spring Valley, Nairobi and on 27th July 2016, the 2nd defendant, 2 days after its incorporation applied for a loan of Kshs. 90,000,000/= from the 1st defendant to purchase LR. No. 209/2054 along Muthithi Road,



Westlands, Nairobi. It claims that the 1st defendant ought to have known that the 2nd defendant had no capacity to borrow the said sum within 2 days of its incorporation.

2. It also avers that Article 16 of the 2nd defendant's Memorandum and Articles of Association, the Plaintiff could not borrow money for any other entity, and that the 1st defendant without carrying out any due diligence granted the 2nd defendant credit facilities of Kshs.90,000,000/= to finance the purchase of the property subject to a raft of terms and conditions including requiring the 3rd defendant to deposit Kshs 50,000,000/= to be held by the 1st defendant in a margin account prior to drawdown. Additionally, it avers that on the 15th of December 2016, the 3rd defendant, Mr. Geoffrey Wekesa, the Advocate for the 4th defendant wrote to the 1st defendant confirming that the sum of Kshs 60,000,000/= had been paid by the 2nd defendant to the vendor without providing of the said payment and the 1st defendant accepted the same in absence of proof.
3. The Plaintiff maintains that the advocates omission constitutes conflict of interest which rendered them incapable of independently offering legal advice to the parties and as a result, they exposed the Plaintiff's property to danger. The Plaintiff avers that it has suffered and continues to suffer loss and damage. Further, the Plaintiff states that the 1st defendant did not adhere to its own terms and conditions before draw down, specifically condition number 12 of the Letter of Offer and it instead released Kshs 90,000,000/= without conducting due diligence expected of a reasonable bank suggesting fraud. Also, a search at the Lands Office done on 30th day of July 2020 revealed that the property was none-existent, that LR No. 209/2054 is registered in the name of Esquire Investments Ltd, and IR No. 176236 in the name of Francis Munene Hiram. The Plaintiff avers that the foregoing could not have been possible without the 1st, 2nd, 3rd and 4th defendant's either jointly and/or severally acting in collaboration with 5th defendant. The Plaintiff avers that the 1st defendant on the 18th day of August 2020 served it with a 90-day Statutory Notice threatening to exercise its Statutory Power of Sale recover the sum of Kshs 46,801,181.70 on account of the loan. The Plaintiff states that by the acts and or omissions complained of herein above, its property is at the risk of being auctioned. As a consequence of the foregoing, the plaintiff prays for judgement against the defendants jointly and severally for: -
 - a) A permanent injunction restraining the 1st defendant by itself, agents and/ or servants from advertising or selling by public auction the suit property.
 - b) A permanent injunction restraining the 1st defendant by itself agents and /or servants from proceeding in any way with the exercise of its statutory powers of sale.
 - c) A declaration that the Charge document herein is so tainted with illegality and fraud and as such rendering the same null and void.
 - d) An order directing 1st defendant to discharge forthwith the charge registered by the 1st defendant against the suit property.
 - e) That in the event that the 1st defendant fails to do so, the Deputy Registrar of this Court to execute a discharge of the aforesaid charge.
 - f) General damages.
 - g) Costs and interests of the suit.
 - h) Any other relief as will be deemed fit and just by this Honourable Court.



4. Contemporaneous with the plaint, the Plaintiff filed an application seeking an injunction to restrain the 1st defendant by itself agents and/or servants from serving it with any redemptive notice(s) or from instructing any Auctioneer or advertising or in any way proceeding with the sale by public auction or by private treaty or in any way proceeding with the 1st defendant's statutory Powers against the said property pending the hearing and determination of this suit. Additionally, it prays for costs of the application to be provided for and any other expedient orders the court may grant in the interest of substantial justice and fairness. The application was premised on the grounds that the transaction upon which the charge herein is founded was tainted with illegality and fraud, hence it cannot form the basis upon which the 1st defendant can exercise its Statutory Power of Sale. The Plaintiff alleged a raft of illegalities as enumerated on the face of the said application.
5. Vide the ruling dated 26th February 2021, this court dismissed the said application for lack of merits. Aggrieved by the ruling, the Plaintiff filed a Notice of Appeal dated 26th February 2021 signifying intention to appeal to the Court of Appeal.

The Plaintiff's application

6. In its application, the Plaintiff prays for an order that Pending the hearing and determination of its application by the Court of Appeal, this court restrains the 1st defendant or its agents from advertising, putting up for sale, selling, charging, transferring, alienating, trespassing onto and or in any other way interfering with LR. No. 7158/312. It also prays for an order that pending the hearing and determination of the review application in the Court of Appeal, this court issues orders maintaining the status quo relating to the ownership of the said property. Lastly, it prays that this court issue any orders it deems just in the circumstances. Prayers (a), (b) & (c) of the application are spent.
7. In support of the application, the Plaintiff states that it owns the said property. It states that its application was dismissed because the 1st Respondent was deemed capable of settling any damage that the Plaintiff might suffer, but it is public knowledge that the 1st defendant is going through financial losses which was not disclosed to the court. It states that the Court of Appeal dismissed its application on the same grounds, but it has applied for review. It states that the 1st defendant has moved to advertise the property for sale by auction because it has realized that the application for review reveals its financial status and its apprehensive that the 1st defendant will sell the property before its review application in the Court of Appeal is determined. Lastly, that the suit property has tenants whose tenancy is now in limbo because of the impending auction.

The 1st defendant's Reply

8. The 1st defendant filed the Replying affidavit of John Wageche, the its Senior Legal Officer. The nub of its opposition to the application is that the Plaintiff's application is res judicata, that the Plaintiff filed a Notice of Appeal and an application in the Court of Appeal which was dismissed for want of merit; that the Plaintiff's Advocates approached the 1st defendant for negotiations and the Plaintiff paid Kshs. 2,000,000/= towards the debt, but, upon halting of the auction the Plaintiff ignored the negotiations prompting the 1st defendant to schedule another auction on the 25th May 2021 but it did not attract bids because the prospective purchasers were unable to view the property.
9. The 1st defendant states that the application is bad in law, frivolous and vexatious because the court declined similar orders; and that the Plaintiff should have filed an application for review; that the 1st defendant is not aware of the review application before the Court of Appeal; and that the allegations concerning the Plaintiff's financial distress are in bad faith. Further, that the Plaintiff has not met the conditions of granting an injunction nor can an injunction be granted when a debt is owing. Lastly, the Plaintiff has not come to court with clean hands.



The 1st defendant's application

10. In its application, the 1st defendant prays that this court grants an order allowing prospective buyers to access LR. No. 7158/312 (I.R 55347) Spring Valley, Nairobi for viewing and inspection, and that the OCS Spring Valley Police Station be directed to enforce compliance with the said orders. It also prays for the court to grant such further and/or other relief as the court may deem fit and expedient. Lastly, it prays for costs of the application to be in the cause. The application is founded on the grounds that the 1st defendant's statutory power of sale has crystalized, but the Plaintiff is sabotaging it's exercise by preventing intended purchasers from inspecting the property. Lastly, the applicant states that it is in the interests of justice and fairness that prospective purchasers are afforded an opportunity to view the property before the auction so as to attract the highest bids.
11. The applicant's grounds are explicated in the supporting affidavit of John Wageche. He avers that after the Plaintiff's application for injunction was dismissed, the Plaintiff filed Civil Appeal No. E068 of 2021 in the Court of Appeal under *Rule 5(2)(b) of the Court of Appeal rules* seeking stay pending appeal but the same was dismissed.
12. He deposed that the 1st defendant proceeded to exercise its Statutory Power of Sale and a public auction was scheduled for 16th March 2021 but vide an e-mail dated 16th March 2021 from the Plaintiff's Advocates proposed to liquidate the debt by paying in instalments of Kshs. 5 million every month and Kshs. 2 million to be paid on 17th March 2021. Additionally, he deposed that the 1st defendant considered and accepted the proposal and by consent agreed stop the auction, and the Plaintiff paid Kshs. 2,000,000/= on 31st March 2021 but it failed to record a consent and or make further payments prompting the 1st defendant to advertise the property for sale and the auction was scheduled for 25th March 2021 (now past) but the Plaintiff frustrated the sell by refusing to facilitate viewing of the property by prospective buyers. He averred that under the Charge instrument the Plaintiff is obligated to give access to the 1st defendant to inspect the suit property.

The Plaintiff's grounds of opposition

13. The Plaintiff filed grounds of opposition stating that the auction date has lapsed thus the orders sought are superfluous; that pursuing the application is an abuse of court process, vexatious and bad in law. It states that accessing the property will require consideration of the constitutional rights of the tenants residing in the premises. Lastly, that the application violates *Constitution of Kenya* and sections 90, 91, 92, 93 and 94 of the *Land Act*.

The Plaintiff's Replying affidavit

14. In addition to the above grounds, the Plaintiff filed the Replying affidavit of Peter Mucheri, its general Manager dated 5th June 2021. He deposed that the Plaintiff has never authorized the property to secure the loan; that the statutory notice was issued as a ploy to hoodwink it to pay the alleged loan; that there is a suit challenging the fraudulent dealings relating to the said loan, hence the sale ought to be halted; that the property houses several tenants whose rights will be violated by the intended visits. Lastly, he averred that the 1st defendant will not suffer any prejudice if this court dismisses the application.

The 2nd defendant

15. The 2nd defendant's counsel stated that he did not file any reply to the 2 applications nor did he file submissions.

The Plaintiff's submissions



16. The Plaintiff submitted that it has a pending application for review before the Court of Appeal and that its application meets the tests set out in *Giella v Cassman brown & Co. Ltd.*¹ It submitted that a prima facie case can be established where a contract relating to land is in writing and has been executed by both parties and attested and cited *Valeria Tanzi v Giulio Giro & 2 others.*² It argued that the contract dated the 30th day of June 2016 pursuant to which the loan was disbursed and the charge registered does not have the representative of the vendor who purportedly executed it though it is attested to by the 3rd Respondent. The Plaintiff submitted that there were no documents guaranteeing the loan agreement and that the only documents available is a sale agreement made a month before the formation of the 2nd defendant which was never executed properly by the vendor but it was attested to by the 3rd defendant as instructed by the 4th defendant. Additionally, it argued that the consent of the registered proprietor was not attached to the contract (citing *Gabriel Mbui v Mukindia Maranya*³).
17. The Plaintiff argued that the loan amount is quantifiable, that the value of the suit property is over three times the loan amount, that the subject property is a residential premises with many tenants, and that the right to own property under the Constitution transcends all other rights and a party that owns property can only be disinherited of such property where all avenues to recoup the loan amount have failed or are unavailable. (Citing Article 40 of the Constitution and sections 90(1), 91, 92,93,94 and 95 of the *Land Act*). It submitted that selling the charged property is the most offensive remedy to the constitutional right of any chargor and is only exercised where the remedies contemplated under 91(3) (a-d) of the *Land Act* have been exhausted.
18. On balance of convenience, the Plaintiffs' counsel submitted that the suit property is a commercial property inhabited by tenants who have long term leases which under Article 40 of the Constitution that the 1st defendant would have to compensate. Regarding costs, counsel cited section 27 of the *Civil Procedure Act* and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others*⁴ and argued that the costs of both applications should be awarded to the Plaintiff.

The 1st defendant's submissions

19. The 1st defendant submitted that it is not disputed that its Statutory Power of sale has crystallized, that, the sale was to proceed on the 16th of March 2021, but the Plaintiff's advocate approached the Bank and requested the auction be suspended offering settlement proposals and the Plaintiff paid Kshs. 2,000,000/= only to renege thereafter prompting the 1st defendant to schedule another auction on the 25th May 2021 which was not successful because prospective purchasers were not willing to purchase a property they had viewed. It argued that the Plaintiff has frustrated efforts by prospective buyers to view the property. It argued that it is an implied condition in the charge instrument that the Plaintiff is obligated to grant the 1st defendant access of the premises, and, that, the Plaintiff's refusal to grant access is just a ploy to frustrate the 1st defendant's exercise of its Statutory Power of Sale.
20. Regarding the argument that granting access would impinge the constitutional rights of the tenants in the premises, the 1st defendant argued that the Tenant's Rights can never supersede the rights of the

¹ Civil Appeal 53 of 1972.

² {2014} e KLR.

³ {1993} e KLR.

⁴ {2014} e KLR.



Chargee and relied on *Paul Gatete Wangai v Capital Realty Ltd & Another*⁵ which held that the bank being the holder of the charge has first priority over the property. It argued that the Plaintiff has not met the conditions to warrant an injunction and that the application is res judicata citing Section 7 of the *Civil Procedure Act* and *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*.⁶ The 1st defendant submitted that the Plaintiff has attempted to tweak the facts in order to evade the doctrine of res judicata citing *E.T. v Attorney General & another*⁷ which held that courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court.

Determination

21. A pertinent question which warrants early resolution is whether the instant application offends the doctrine of res judicata defined in the Black's law Dictionary as: -

“An issue that has been definitely settled by judicial decision; An affirmative defense 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. The three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties.”

22. The court in *James Karanja alias James Kioi (Deceased)*⁸ cited *James Karanja alias James Kioi (Deceased)*⁹ outlined the ingredients of res judicata as: -

23. The Supreme Court in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* stated the following regarding res judicata: -

“(52) *Res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.

(54) The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and

⁵ {2020} e KLR.

⁶ Nairobi CA Civil Appeal No. 105 of 2017 {2017} e KLR.

⁷ {2012} e KLR

⁸ {2020} e KLR.

⁹ {2014} e KLR.

“For the doctrine of *Res Judicata* to apply, three basic conditions must be satisfied. The party relying on it must show: - (a) That there was a former suit or proceeding in which the same parties as in the subsequent suit 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 between the parties.”



it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

(58) Hence, whenever the question of *res judicata* is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction

(59) That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the *res judicata* principle was judicially remarked in *E.T v. Attorney-General & Another*, (2012) eKLR, thus: “The Courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction.”

24. A reading of the above decisions shows that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. It follows that if in any subsequent proceedings (unless they be of an appellate nature or review) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment or ruling is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment or ruling can be pleaded by way of estoppel in the subsequent case.
25. Undisputedly, the most articulate elucidation of *res judicata* is to be found in the words of Somervell L.J.¹⁰ who stated that *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. It is basic law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.¹¹ The requirements for *res judicata* are that the same cause of action, the same relief involving the same parties was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the ‘determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.
26. *Res Judicata* is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a

¹⁰ In *Greenhalgh vs Mallard (1) (1947) 2 All ER 257*.

¹¹ *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others 2013 (6) SA 499 (SCA) paras 20-21*.



question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by the same parties in subsequent litigation.¹²

27. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. Res judicata halts the jurisdiction of the court. That is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case in limine i.e. from the beginning.¹³ The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.¹⁴ Res judicata, also known in the US as claim preclusion, is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.
28. *Res judicata* is provided for in Section 7 of the *Civil Procedure Act*.¹⁵ Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.¹⁶ In *Gurbachan Singh Kalsi v Yowani Ekor*,¹⁷ the former East African Court of Appeal stated: -
29. The Plaintiff's application for an injunction to stop the 1st defendant from exercising its statutory power of sale was dismissed by this court on 26th February 2021. Also, the Plaintiff's application for stay in the Court of Appeal was dismissed. The Plaintiff claims that it has applied to the Court of Appeal to review its ruling alleging that the 1st defendant is undergoing liquidity problems. (The same issue has been cited in this case, even though before me is not an application for review, and even if it was,

¹² <http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html> -Accessed on 16 December 2017.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Cap 21, Laws of Kenya.

¹⁶ See *Lotta v Tanaki* {2003} 2 EA 556.

¹⁷ Civil Appeal No. 62 of 1958.

“ Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation 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 a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, 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...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”



- the said ground would be a non-starter). The Plaintiff claims that the said issue was not brought to the attention of this court and the Court of Appeal. It claims that the said reason is a sound ground for this court to stay stop the 1st defendant from exercising its Statutory Power of Sale pending hearing of its application in the Court of Appeal.
30. The above argument collapses not on one but on several fronts. First, its basic law that introducing new parties or a new ground or a new prayer(s) as has happened in this application does not necessarily render the doctrine of *res judicata* inapplicable because a party cannot escape the wrath or *res judicata* by simply undertaking a cosmetic surgery to his pleadings or introducing new grounds to secure the earlier refused orders. Second, if the added parties or prayers peg the claim under the same title as the parties in the earlier suit, or if the added grounds or prayer(s) still stands on the same grounds cited and determined earlier simply to re-litigate the same issues, the doctrine will still be invoked because citing a new ground or adding a new prayer would in that case be for the sole purpose of decoration and dressing and nothing else.¹⁸ This is because *Res judicata* covers issues which could have been raised in the earlier proceedings. The test here as I see it is whether if the earlier application had succeeded, the Plaintiff would have filed the instant application. Looking at the prayers sought in the instant application and the earlier application, the answer is that had the earlier application succeeded, the Plaintiff would not have filed the instant application because it would add no value. The Plaintiff's application offends the doctrine of *res judicata*.
31. Third, the Plaintiffs application for stay was dismissed by the Court of Appeal. The instant application is a disguise to secure an order which the Plaintiff could not obtain from the Court of Appeal. Put differently, the Plaintiff is mischievously inviting this court to overturn the decision of the Court of Appeal. Fourth, having escalated the dispute to the Court of Appeal, the Plaintiff is now aggrieved by a decision of the Court of Appeal and it claims that it has applied for review before the said court. The matter is now not within this court's jurisdiction. The Plaintiff cannot come back to this court for any orders because it challenges the decision of a higher court. The concept of stay pending appeal or review only applies where the orders being appealed or reviewed emanated from the court whose orders are being appealed or reviewed. To my mind, the Plaintiff cannot approach this court for stay as it seeks to overturn the decision of the Court of Appeal either by way of appeal or review. The Plaintiff has misconstrued the law on stay pending appeal or review and is inviting this court to create dangerous precedent whereby parties aggrieved by decisions of higher courts approach a lower court for stay as they appeal or review a decision of the higher court. Again, on this ground, the Plaintiff's application collapses.
32. Complementary to the doctrine of *resJudicata* is the conception that, when a judicial tribunal becomes *functus officio* in respect of a particular case, its powers and jurisdiction are exhausted in respect of that issue. A judicial tribunal, after giving a decision as to the merits of a case, ceases to exist as an instrumentality in its previous form or at all, or is deprived of all the judicial functions it previously possessed, it is *functus officio* in respect of the issues decided. (See *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Limited (Garnisbee*¹⁹).
33. A court which, after a trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law.²⁰ This test is applicable

¹⁸ *Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] eKLR.

¹⁹ Miscellaneous Civil Application No. 241 of 2019.

²⁰ (1943-4) 68 C.L.R. at p. 590.



only if there happens to have been a "final" and "determinative" decision, after a trial; and that a judicial tribunal becomes *functus officio* in this sense only in relation to a particular matter, not in respect of all matters. For a judicial tribunal to become *functus officio*, it must have delivered a valid judgment, decree or order of a final and conclusive nature and *res judicata* must have come into existence. The court pronounced itself on the first application. This court is being invited to sit on appeal on the same decision. I decline the invitation to travel along this forbidden route. The Plaintiff's application having failed on the above grounds, it will serve no purpose to address it on merit. However, for avoidance of doubt, notwithstanding my above findings, it is also my finding that the application lacks merit, its bad in law, in fact and in substance and a clear abuse of court process.

34. I now turn to the Plaintiff's application seeking an order that prospective buyers be granted access to view the premises. I have considered the grounds in support of the application and also the grounds in opposition to the application. The parties having covenanted and bound themselves to the terms and conditions of the charge instrument, and the 1st defendant's Statutory Power of Sale having arisen, I find no bar either legal or equitable to stand on the way of the 1st defendant's application. The Plaintiff is obligated to grant the 1st defendant, its authorized agents or servants and prospective buyers unhindered access to the premises. Accordingly, I issue the following orders: -
- a. That the Plaintiff's application dated 20th May 2021 be and is hereby dismissed.
 - b. That the 1st defendant's application dated 20th May 2021 is allowed.
 - c. That the Plaintiff be and is hereby ordered to grant the 1st defendant, its agents or servant's and prospective buyers unrestricted access to the premises erected on L.R. No. 7158/312 (I.R. 55347) Spring Valley, Nairobi for purposes of viewing and inspection during reasonable hours.
 - d. That an order be and is hereby issued directing the Officer Commanding Station, Spring Valley Police Station to enforce, implement and/or otherwise oversee compliance with the said orders.
 - e. That each part shall bear its own costs.

Orders accordingly. Right of appeal

Dated, signed and delivered at Nairobi via e-mail this **14th** of **September** 2021

John M. Mativo

Judge

