



**Mbuthia v Republic (Anti-Corruption and Economic Crimes Appeal E007 of 2025)  
[2025] KEHC 13654 (KLR) (Anti-Corruption and Economic Crimes) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13654 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E007 OF 2025**

**LM NJUGUNA, J**

**OCTOBER 1, 2025**

**BETWEEN**

**CHARLES CHEGE MBUTHIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. What is before the court for determination is the Notice of Motion dated the 16<sup>th</sup> June, 2025 brought under Rule 5 (2) (b) of the Court of Appeal Rules. It is based on the grounds set out on the body of the same, and it is supported by the annexed affidavit sworn by the applicant herein, on even date. Through the application, the applicant has sought the following Orders;
  1. Spent.
  2. That pending hearing and determination of the Applicant’s intended appeal against the Ruling of the High Court dated 8<sup>th</sup> May, 2025 in Nairobi High Court Anti-Corruption Court Criminal Appeal No. E007 of 2025 the Honourable Court he pleased to admit the Applicant to bail or bond on appropriate terms and conditions.
  3. That the costs of this application, if any, be in the appeal.
2. The applicant’s case is that he seeks leave of this court to amend his Petition of Appeal in light of newly discovered grounds, material errors, and critical omissions that, if left unaddressed, would occasion a miscarriage of justice. He avers that unless leave is granted expeditiously, the applicant will be prejudiced and denied a fair opportunity to articulate the true and proper basis of the intended appeal.
3. He states that the proposed amendments are not intended to introduce a new cause of action or to delay the hearing of the appeal, but rather to clarify, correct, and properly particularize the existing grounds



- of appeal in accordance with the dictates of justice and procedural fairness. That failure to amend the Petition of appeal at this stage would irreparably compromise and impede the just determination of the real questions in controversy.
4. The applicant further states that he has filed a Notice of Appeal dated the 12<sup>th</sup> May, 2025 in the Court of Appeal against the ruling of this court that was delivered on the 8<sup>th</sup> May, 2025 denying the applicant bail pending appeal and has already applied for a certified copy of the proceedings.
  5. It is also his case that by dint of Section 7(1) of the Sixth Schedule of the Criminal Procedure Code and common law Doctrines, res-judicata must be enforced or applied in conformity with the Provisions of *the Constitution*. He avers that in this court's impugned ruling, the court has effectively subverted and elevated doctrines of common law above the principles and values of *the Constitution*.
  6. The respondent filed a replying affidavit sworn by Faith Mwilu, on the 26<sup>th</sup> June, 2025. Through the affidavit, the respondent avers that after the applicant was convicted by the trial court, he filed the present appeal and on the 17<sup>th</sup> February, 2025 he filed an application seeking bail pending appeal which was heard and determined by this Honourable court.
  7. That the said application was dismissed on the grounds that the applicant did not meet the conditions for granting of bail pending appeal. That the applicant has never filed an application seeking to amend his Petition of Appeal or review of the ruling of 3<sup>rd</sup> March, 2025, save for the instant application.
  8. The respondent further states that the application herein seeks to have him admitted to bail pending the hearing and determination of his intended appeal against the ruling of the High court dated 8<sup>th</sup> May, 2025, yet the application dated the 14<sup>th</sup> March, 2025 was filed by Ferdinand Ndung'u Waititu and not by the applicant herein. As such, the intended beneficiary of the Orders sought in the application dated the 14<sup>th</sup> March, 2025 was Ferdinand Waititu and not the applicant herein. The respondent further avers that the applicant cannot purport to appeal against a ruling which does not directly affect him.
  9. It is also the respondent's contention that the applicant has not demonstrated that he lodged a Petition of appeal challenging the Ruling dated the 3<sup>rd</sup> March, 2025 and that the applicant's Petition appears to seek Orders to amend the Memorandum of Appeal dated the 14<sup>th</sup> February, 2025 through the back door.
  10. That the applicant's application, the grounds advanced in support thereof, and the contents of the supporting affidavit are riddled with inconsistencies and are materially at variance with each other, thereby rendering the application ambiguous. Further that a party is bound by its pleadings and the applicant cannot expect this court to grant the Orders sought.
  11. That by filing the present application, the applicant is abusing the court process and wasting precious judicial time as the appeal has already been set down for hearing and directions on filing of submissions were issued on the 8<sup>th</sup> May, 2025.
  12. The respondent avers that the applicant has not demonstrated any change of circumstances warranting this court to review its Orders issued on the 3<sup>rd</sup> March, 2025. That the application lacks merits and it is only aimed at causing substantial and un warranted delays in the hearing and determination of the appeal.
  13. In addition to the replying affidavit, the respondent filed a Preliminary Objection dated the 26<sup>th</sup> June, 2025 on the following grounds;
    - a. The application offends the principle of res judicata



- b. The Honourable court is Functus Officio
  - c. The applicant/appellant has not demonstrated that there has been change of circumstances warranting this court to review its Orders of 8<sup>th</sup> May, 2025.
14. The court gave directions on filing of submissions but only the respondent complied with the said directions.

### **Respondent's Submissions**

15. The respondent submitted that the applicant's application is replete with untruthful and misleading information in that he stated that he filed an application dated the 18<sup>th</sup> March, 2025 seeking to amend the Petition of appeal in order to raise substantial issues of law in support of his appeal, which application was allowed vide a ruling dated and delivered on 23<sup>rd</sup> April, 2025. That while it is true that the applicant filed an application to amend his Petition of Appeal, the said application was in fact dated the 8<sup>th</sup> July, 2025 and was allowed on the 22<sup>nd</sup> July, 2025.
16. That the applicant has also not been truthful on the assertions that he has made in Grounds 6-10 in support of his application, regarding the application dated the 14<sup>th</sup> March, 2025 which application, though prosecuted, was not prosecuted by him but rather, the same was prosecuted by Ferdinand Waititu. That though the applicant is seeking bail pending determination of his intended appeal against the ruling of 8<sup>th</sup> May 2025, he has not demonstrated the existence of the Notice of Appeal and, in any event, he has no right to appeal against a decision in proceedings to which he was not a party.
17. The respondent identified three issues for determination as follows;
- a. Whether the application before the court 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 3<sup>rd</sup> May, 2025.
18. Relying on the case of Uhuru Highway Development vs Central Bank (1996) LLR CAK 2126, the respondent submitted on the doctrine of res judicata and the conditions that must be satisfied as follows;
- a. That there must be a previous suit in which the matter was in issue.
  - b. The parties must be the same or litigating under the same title.
  - c. The matter must have been heard by a court of competent jurisdiction.
  - d. The issue must have been raised once again in a fresh suit.
19. The respondent submitted that the applicant filed an application dated the 17<sup>th</sup> February, 2025, seeking to be admitted on bail pending appeal, which application was heard and determined by this Honourable court. That the court found that the applicant had not met the conditions for grant of bail pending appeal and dismissed the application. That the instant application seeks the same Orders and it substantially relies on the amended Petition of appeal dated the 8<sup>th</sup> July, 2025, which he avers, introduces additional grounds of appeal and supports the application for bail pending appeal.



20. The respondent further made reference to the cases of Stanley Kiplangat & 12 others vs DPP & another (2017) eKLR which referred to the case of Mburu Kinyua vs Gachini Tuti (1978) KLR in which the Court of Appeal rendered itself thus on the question of res judicata;

“.... where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the courts requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to re-open the same subject of litigation in respect of the matter which might have been brought forward, as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, in advertence or even accident, omitted part of their case.

The plea of res judicata applies, except in special cases, not only 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 not have brought forward at the time.”

21. The respondent also relied on the case of John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others (2015) eKLR which discussed the doctrine of res- judicata at length and stated in part;

“.....The rationale behind res judicata is based on Public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases.....”

22. On whether the court is Functus officio the respondent relied on the Supreme court of Kenya Election Petitions Nos. 3, 4, and 5; Raila Odinga & others vs IEBC & others (2013) eKLR cited with approval from an Article by Daniel Malan Pretorius in the “The origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative law” (2005) 122 SALJ 832; in the following words;

“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 who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter .... The principle is that once such a decision has been given, it is not subject to any right of appeal to a superior body or functionary, it is final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

23. On whether the applicant has satisfied the conditions for review of the court’s decision, the respondent submitted that the applicant has not demonstrated that there has been a change of circumstances to warrant any review of the Orders of the court. He relied on the case of Samwel Mburu vs Nottingham Justices Exparte Davies (1981) QB 38 viz;

“The court considering afresh the question of bail is both entitled and bound to take into account not only of a change in circumstances which has/have occurred since the last occasion, but also circumstances which, although they existed, were not brought to the attention of the court. To do so, is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider that ‘Has there been



a change?’ Are there any new considerations which were not before the court when the accused was last remanded in custody.”

24. Further reliance was placed on the case of *Concelia Aoko Ondieki vs Republic* (2021) in which the court while dismissing an application for bail pending appeal held;

“The applicant is essentially asking this court to revisit an issue which has been canvassed and ruled on substantially by a court of concurrent jurisdiction. This, this court does not have jurisdiction to do. Neither *the Constitution*, nor any statute confers upon this court any such powers of revision over orders or findings of a court of similar jurisdiction.

The applicant, has based this application on the letter of the officer in charge of the prison stating the various ailments that the applicant allegedly suffers from. Without venturing into the probative value of this information in the form of a letter, I am not convinced by the submissions of counsel for the applicant, that this is new information that should convince the court to revive the orders of 14.4,2021. I say this in view of the substantive finding of the court, based on the past judicial precedent, that ill- health is not a ground for granting of bail pending appeal. Neither is it an exceptional and unusual circumstance to warrant the grant of bail.”

### **Analysis And Determination**

25. The court has considered the application, the supporting affidavit, the Preliminary Objection, the replying affidavit, the submissions by the respondent and the authorities relied on.
26. The applicant has moved the court under Rule 5(2) (b) of the Court of Appeal Rules and has sought for bail pending the hearing and determination of intended appeal against the ruling of this court dated the 8<sup>th</sup> May, 2025.
27. From the application and the responses by the respondent, the issue for determination is;

### **Whether the applicant has satisfied the conditions to warrant this court to review its Orders of 3<sup>rd</sup> March, 2025.**

28. It is not in dispute that the applicant herein filed an application dated the 17<sup>th</sup> February, 2025 seeking to be admitted to bail pending appeal, which application was heard and determined by this Honourable court. The court found that the applicant had not met the conditions for grant of bail pending appeal and thus dismissed the application. The instant application seeks the same Orders and though the applicant has relied on the amended Petition of appeal to contend that the same has introduced additional grounds of appeal on the basis of which the court can grant the application herein, the applicant has not even bothered to explain why the information contained therein was not brought to the attention of the court when the court was initially moved with an application for bail pending appeal, yet the information was within the knowledge of the applicant.
29. Further, the court has noted that the applicant is seeking bail pending appeal to the court of appeal against a ruling that was delivered by this court. The applicant was not an applicant in the application dated the 14<sup>th</sup> March, 2025 which was the subject of the ruling dated the 8<sup>th</sup> May, 2025 which he is seeking to appeal against and therefore, he cannot purport to appeal against a decision in which no Orders were issued against him.
30. Furthermore, even assuming that he can file such an appeal, there is no evidence placed before the court to convince the court that he has filed the appeal or the notice of appeal at the very least. In my



considered view, one of the considerations in an application of this nature is whether the applicant's appeal is arguable. In the absence of a draft Memorandum of appeal, it would be impossible for this court to ascertain whether the applicant's appeal is arguable or not or even whether the same shall be rendered nugatory if the Orders he has sought are not granted by the court.

31. The court has carefully read the application and the supporting affidavit, and as pointed out by the respondent in its replying affidavit, the applicant's application, the grounds he has advanced in support thereof are riddled with inconsistencies and are materially at variance with each other, thereby rendering the application ambiguous. A Party is bound by its pleadings and it is the duty of the party that has moved the court to not only file proper pleadings but to also argue its case to the satisfaction of the court. The court has also noted that the applicant did not file his submissions despite having been given sufficient time by the court to do so.
32. Clearly, and without any iota of doubt, the applicant's application is an abuse of court process and only meant to delay the prosecution of the substantive appeal which is pending before this Honourable Court.
33. In view of the foregoing, the court finds that the application has no merits and it is hereby dismissed.
34. The applicant should comply with the directions of this court that were issued on the 17<sup>th</sup> September, 2025 on the expeditious prosecution of all the appeals as consolidated.
35. It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 1<sup>ST</sup> DAY OF OCTOBER, 2025.**

.....

**L.M. NJUGUNA**

**JUDGE**

In the presence of:-

Miss Kamau holding brief for Mr. Swaka for the Appellant

Miss Mwila appearing with Mr. Mwasaro for the Respondent

Court assistant - Adan

