



REPUBLIC OF KENYA



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Ethics and Anti-Corruption Commission v Gathoni & 2 others (Land Case E256 of 2024) [2026] KEELC 697 (KLR) (12 February 2026) (Ruling)

Neutral citation: [2026] KEELC 697 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E256 OF 2024
OA ANGOTE, J
FEBRUARY 12, 2026

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

EMMANUEL KURIA GATHONI 1ST DEFENDANT

EMROSE ACADEMY LIMITED 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

RULING

1. Before this court for determination is the 1st and 2nd Defendants'/Applicants' Notice of Motion application dated 7th March, 2025, brought pursuant to the provisions of Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules seeking the following reliefs:
 - i. That this Honourable Court be pleased to issue an order staying all proceedings in this suit pending the hearing and determination of the Applicants' intended appeal; and
 - ii. Costs be in the cause.
2. The Motion is supported by the Affidavits of Emmanuel Kuria Gathoni, the 1st Defendant/Applicant and Simon Maina Kamuiru, the 2nd Defendant/Applicant's Director dated the 6th March, 2025. They deponed that this court delivered a ruling on 20th February, 2025 allowing part of the Plaintiff's/ Respondent's Notice of Motion application dated 28th June 2024 and dismissing the 1st and 2nd Defendants'/Applicants' Notice of Motion application dated 20th September 2024 and a Notice of Preliminary Objection of an even date.



3. According to the Deponents, they are aggrieved with the entire decision aforesaid and intend to appeal to Court of Appeal; that they filed a Notice of Appeal on the 26th February, 2025 and that as advised by Counsel, they have an arguable appeal with high likelihood of success.
4. As further advised, they deponed, an appeal does not act as a stay of proceedings in the suit from which the decision is made and that if the proceedings in this suit are not stayed, the intended appeal will be rendered nugatory. They urged that the Respondents will not suffer any prejudice if the application is allowed and that the interests of justice warrant the grant thereof.
5. In response to the Motion, the Plaintiff/Respondent, through Advocate Irene Sambu, swore a Replying Affidavit on 25th March, 2025. She deponed that she is an investigator, duly appointed as such by the Plaintiff under Section 23 of the *Anti-Corruption and Economic Crimes Act, 2003 (ACECA)* and that she is a member of the team that investigated allegations of illegal and unlawful disposal and transfer of public land planned and alienated for children's playground for the exclusive and private benefit of the 2nd Defendant to the detriment of the intended public interest.
6. According to Ms Samba, the present Motion is res judicata having been orally made before the court on 20th February 2025 and dismissed after hearing submissions from both Counsel and that there were no directions that a formal application be made.
7. In any event and without prejudice to the above, she stated, an order for stay of proceedings is grave and fundamentally interferes with the right of a litigant to conduct litigation thereby hindering the right of access to justice, right to be heard without delay and the right to a fair trial. In the circumstances, she stated, nothing has been placed before this court to warrant the exercise of its discretion to grant an order of stay.
8. Ms Samba deponed that this court issued temporary injunctive orders preserving the subject matter and averting any dealings that may defeat the interests of justice, pending the determination of the suit. As such, no injustice will be occasioned to the 1st and 2nd Defendants should the matter proceed to hearing before this court which has jurisdiction pursuant to Article 162(2) (b) of *the Constitution*.
9. She asserted that the 1st and 2nd Defendants have not demonstrated how they will suffer substantial loss if the order sought is denied and therefore have not satisfied the conditions set under Order 42 Rule 6 (2) of the Civil Procedure Rules. She contended that the Motion serves no purpose other than to shield the 1st and 2nd Defendants from complying with the court's directive to file their Defence and supporting documents, while also delaying the hearing and determination of the suit to the detriment of the public.
10. The 1st and 2nd Defendants' filed submissions on 4th November, 2025. Counsel submitted that under Order 42 rule 6 of the Civil Procedure Rules, the filing of an appeal does not automatically operate as a stay of execution or proceedings. Relying on *Mursal Guleid & Others v Daniel Kioko Musau* [2016] eKLR, Counsel emphasized that a stay can only issue upon an order of the trial or appellate court, and that the central consideration in applications for both stay of execution and stay of proceedings is whether refusal of a stay would render the intended appeal nugatory if it ultimately succeeds.
11. Counsel argued, relying on *Butt v Rent Restriction Tribunal* (1979) eKLR as affirmed in *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee)* [2019] eKLR [2019] eKLR, that the power to grant a stay as sought is discretionary but must be exercised so as not to hinder an appeal.
12. It was submitted that a stay should ordinarily be granted where no overwhelming hindrance exists, to avoid rendering the appeal nugatory should the appellate court overturn the decision and that the court



should not decline a stay simply because other remedies may eventually be available to the applicant, and must assess the special and unique circumstances of each case when exercising its discretion. Reliance was also placed on the case of *Global Tours and Travel Ltd v Five Continents Travel Ltd* (2015) eKLR.

13. According to Counsel, the 1st and 2nd Defendants' appeal challenges this court's refusal to dismiss the Plaintiff's suit, which they contend discloses no cause of action, is time-barred, and falls outside the court's jurisdiction. As such, it would be illogical for the proceedings to continue while its legality is contested, and that the Plaintiff has not, vide its response, shown any compelling reason to deny a stay of proceedings.
14. The Plaintiff's counsel filed submissions on 17th November, 2025. Counsel submitted that the stay sought is a drastic and exceptional remedy which should only be granted sparingly and in the clearest of cases as it interferes with a litigant's right to have their case heard on its merits.
15. It was submitted that the court in *William Odhiambo Ramogi v Attorney General* [2019] eKLR set down the principles established by the courts for the grant of stay of proceedings pending determination of an appeal over an interlocutory application, to wit, the Applicant to demonstrate the existence of an appeal; justification for seeking stay in the trial court; that the intended appeal raises substantial or arguable issues; that the appeal would be rendered nugatory absent a stay; that exceptional circumstances exist; and that the application was filed expeditiously.
16. Counsel averred that the 1st and 2nd Defendants' have failed to demonstrate any exceptional circumstances warranting a stay of proceedings. On the contrary, it was averred, the suit discloses a clear and reasonable cause of action and the suit property is public land reserved as a children's playground and was unlawfully allocated and converted for the private benefit of the 1st and 2nd Defendants.
17. On limitation, it was asserted that the same is inapplicable pursuant to Section 42(1)(d) of the *Limitation of Actions Act*, which excludes proceedings to recover public land from limitation. Counsel further averred that this court has the requisite jurisdiction under Article 162(2)(b) of *the Constitution* to determine disputes concerning ownership, use and title to land and the interests of justice favour the continuation of the proceedings.

Analysis and Determination

18. Having considered the Motion, Affidavits and submissions, the issues that arise for determination are:
 - i. Whether the Motion is res judicata? And if not?
 - ii. Whether the Applicant has satisfactorily demonstrated the conditions warranting the grant of stay of proceedings pending Appeal?
19. Vide the present Motion, the 1st and 2nd Defendants seek for an order staying these proceedings pending the hearing and determination of their appeal against this court's ruling delivered on 20th February 2025.
20. That ruling arose from the Plaintiff's Motion dated 28th June 2024, which sought temporary injunctive relief, as well as the 1st and 2nd Defendants' Motion and Preliminary Objection dated 20th September 2024, by which they sought the dismissal of the suit on grounds including, inter alia, failure to disclose a cause of action, limitation, and non-compliance with mandatory provisions of the law. In that ruling, the 1st and 2nd Defendants' Motion and Preliminary Objection were dismissed. The Plaintiff's Motion was found to be merited and temporary injunctive reliefs granted.



21. The Plaintiff is opposed to this Motion and contends that the same is not only unmerited but incompetent. The Plaintiff's objection in this respect is that the Motion is res judicata and the court subsequently functus.

22. 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.”

23. In the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata thus:

“...The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and 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 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 Judgment, 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” [emphasis supplied].

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^{3/4}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. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”

24. The Plaintiff/Respondent asserts that this Motion is res judicata having already been canvassed before this court vide an oral application on the 20th February, 2025 to which a decision was rendered.

25. The court has carefully reviewed the record. On 20th February 2025, Counsel for the 1st and 2nd Defendants made an oral application seeking a stay of proceedings pending appeal. In opposition, Counsel for the Plaintiff submitted that no cogent or sufficient reasons had been advanced to warrant the grant of such a stay, further noting that the suit property was already preserved.



26. In a brief reply, Counsel for the Applicants merely stated, “I stand guided.” The court thereafter rendered itself as follows:

“I decline to stay these proceedings as no good reason has been given for the application.”

27. From the foregoing, it is clear that the issue of stay of proceedings pending appeal was not only expressly raised but was fully considered and conclusively determined by this court on 20th February 2025. At no point did Counsel suggest that the oral application was interlocutory, or intended merely as a holding position pending the filing of a formal written application.

28. Equally significant was Counsel’s response when directly challenged on the absence of any cogent or reasonable basis for the stay sought. Rather than advancing arguments to meet this objection or placing before the court any material to justify the exercise of its discretion, Counsel chose not to engage substantively and simply stated, “I stand guided.”

29. It is well established that res judicata applies with equal force to applications whether brought orally or in writing. An oral application is not a lesser procedural vehicle. Orders emanating from it bind the parties with the same authority as those issued upon a formal written Motion.

30. The court’s determination on 20th February 2025 was final in so far as the question of a stay of these proceedings is concerned. The same is only amenable to review or appeal.

31. Ultimately, it is the finding of this court that the present Motion is res judicata. The issue of stay of proceedings having been conclusively pronounced upon, this court is barred from reopening it, and the Motion must therefore fail. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH FEBRUARY, 2026

O. A. ANGOTE

JUDGE

In the presence of:

Ms Wambugu for Ms Kibogy for Plaintiff

Mr. Muriithi for Prof Muigua for 1st and 2nd Defendant

Court Assistant: Tracy

