

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. APPEAL NO. E197 OF 2023

BETWEEN

GLADYS NJERI MUTURI.....
....APPELLANT

AND

SAMUEL GITAHU GATHARA.....1ST
RESPONDENT

JOSEPH KAHUHO.....2ND
RESPONDENT

RULING

Introduction and Background

1. Before the court for determination is the Respondents' Notice of Motion dated 6th October 2025 seeking the firm of *Messrs. Kavaka J & Company Advocates* to come on record on their behalf and take over from their previous advocates, that the court grants a stay of execution of the judgment rendered on 25th July 2024, that the court reviews and sets aside its judgment dated 25th July 2024 and/or that the court directs that the appeal filed by the Appellant

be placed and/or transferred for a fresh hearing before the Environment and Land Court in Nairobi

2. The application is supported by the affidavits of the 1st Respondent sworn on 6th

October 2025 and 22nd October 2025. It is opposed by the Appellant through her replying affidavit sworn 15th October 2025 and Grounds of Opposition of the same date. The application was canvassed by way of written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. The Appellant has assailed the application on the technical ground that the same is *res judicata* as the prayer for stay of execution has already been heard and determined by the court in the ruling dated 24th January 2025. The principle of *res judicata* and the law in respect of the same have been aptly submitted by the Appellant. Germane is **section 7** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** 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 can 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.

4. Therefore, for the doctrine of *res judicata* to apply; the issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that previously heard and determined the issue was competent to try the suit in which the issue is raised (see **Gichuki v Gichuki [1982] KECA 37 (KLR)** and **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR)**). It is also not lost that the same principles apply with equal force to applications and the Court of Appeal, in **Uhuru Highway Development Limited v Central Bank of Kenya, Exchange Bank Ltd (Involuntary Liquidation) & Kamlesh Mansukhlal Pattni [1996] KECA 102 (KLR)** held that “.....once an application for

injunction within a suit has been heard and determined under the principles laid down in Giella v. Cassman-Brown, a similar application cannot be brought unless there are new facts, not brought before the court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling."

5. The Supreme Court, in **Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited & 3 others [2016] KESC 6 (KLR)** summed it all up by stating that 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 it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
6. I do not think it is in dispute that the Respondents filed a previous application for stay of execution of the same judgment delivered

on 25th July 2024 and that application was heard and dismissed by this court on 24th January 2025. The present application seeks substantially the same relief of stay of execution based on the same judgment. As stated above, once a court of competent jurisdiction has finally determined an issue between the same parties, that issue cannot be relitigated. The Respondents' attempt to reframe the application as a "review" rather than a stay does not change the fact that the main issue of stopping execution of the judgment has already been decided. In any case, a review of the court's judgment must be under **Order 45 Rule 1** of the **Civil Procedure Rules** which allows an application for review on grounds that there is discovery of new and important evidence which was not within the applicant's knowledge at the time the judgment was passed, that there is a mistake or error apparent on the face of the record and; for any other sufficient reason.

7. The Respondents have pointed to no such evidence new evidence and their jurisdiction argument existed at the time of the earlier stay application and could have been raised then. It is also my finding that the judgment is not facially erroneous and the Respondents' argument about jurisdiction is a legal argument

which is a ground for appeal, not review. I am also in agreement with the Appellant's submission that one cannot exercise the right of appeal and at the same time apply for review of the same judgment/decree. One must elect either to file an appeal or to apply for a review (see **Abdulkadir v Ali alias Shuikha Mohamed Ali & 4 others [2026] KECA 66 (KLR)**)

8. Further, the Court of Appeal has repeatedly held that an erroneous view of law is not a ground for review but a ground for appeal (see **Swai v Kenya Breweries Limited [2014] KECA 883 (KLR)**). I therefore reiterate that the jurisdiction issue was available to the Respondents at the time of the first stay application but they did not raise it then and they cannot now use it as a "new" ground for review. In my view, the present application reeks of abuse of the court process. The Respondents have already had a stay application dismissed, filed a notice of appeal dated 5th August 2024 but not prosecuted it and they are now back before this very same court seeking to re-open the same judgment under the guise of "review". This is precisely the kind of serial, repetitive litigation that the doctrine of *res judicata* and the *functus officio* principle are designed to prevent.

9. In sum, I find and hold that the application for stay is *res judicata*, the application for review fails to meet the **Order 45** threshold and the Respondents are attempting to appeal through the back door after failing to prosecute a real appeal.

Conclusion and Disposition

10. The upshot is that the application dated 6th October 2025 is dismissed with costs.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
8th DAY of MAY 2026**

.....
**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF

1. Mr. Njuguna for the Appellant/Respondent
2. Ms. Ngati holding brief for Mr. Ngala and Mr. Kabaiku for the Respondents/Applicant
3. Amos - Court Assistant