



**Registered Trustees Africa Gospel Church v Kamunge & 2 others;
National Land Commission (Interested Party) (Civil Appeal (Application)
E756 of 2022) [2023] KECA 1117 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1117 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E756 OF 2022
HA OMONDI, JM MATIVO & GWN MACHARIA, JJA
SEPTEMBER 22, 2023**

BETWEEN

THE REGISTERED TRUSTEES AFRICA GOSPEL CHURCH APPLICANT

AND

CONTINENTAL DEVELOPERS LIMITED 1ST RESPONDENT

VICTOR MUNGAI KAMUNGE 2ND RESPONDENT

THE LAND REGISTRAR, NAIROBI 3RD RESPONDENT

AND

THE NATIONAL LAND COMMISSION INTERESTED PARTY

(Being an Application under rule 5 (2) (b) of the Court of Appeal Rules for stay of execution of the judgment and orders of the Environment and Labour Court, Nairobi (Wabwoto, J.) dated 30th August, 2022 in ELC Case No. 252 of 2018)

RULING

1. Vide an application dated May 15, 2023 brought under rule 5(2)(b) of the Court of Appeal Rules, 2022, the applicant prays for stay of execution of the judgement and orders issued on August 30, 2022 in Environment and Land Case No. 252 of 2018 pending hearing and determination of Civil Appeal No. E756 of 2022.
2. The application is supported by grounds on its body and the supporting affidavit of Robert Kipkemoi Langat, the applicant's Bishop and Registered trustee sworn on May 15, 2023 together with annexures thereto. The application is opposed though the 1st and 2nd respondents replying affidavit sworn on May 18, 2023 by Benard King'ori Thiga, a director of the 2nd respondent.



3. Briefly, by a plaint dated May 30, 2018, the 1st and 2nd respondents moved the Environment and Land Court (ELC) seeking, inter-alia, a declaration that Nairobi Block 82/5893 is a public utility plot reserved as a green area and a playground for children. After hearing the suit on merit, in the impugned judgment delivered on August 30, 2022, the trial Court ordered the cancellation of title number Nairobi Block 82/5893 in the applicant's name and issued a permanent injunction restraining the applicant from interfering with the said land.
4. Aggrieved by the verdict, the applicant filed the instant appeal, being Civil Appeal No. E756 of 2022, *The Registered Trustees Africa Gospel Church v Victor Mungai & Others*.
5. The applicant claims that it is the registered proprietor of Nairobi/Block 82/3436 and Nairobi/Block/82/3477 otherwise known as Nairobi/Block 82/5893. The applicant claims that vide an allotment letter dated 23rd August, 1995, the Commissioner of Lands allocated it the said land which was then described as "unsurveyed church and nursery school Donholm Nairobi" in plan number 42/12/95/14. It claims that it paid Kshs.6,004/= as required by the said letter of allotment and that it executed a lease dated July 16, 1996 pursuant to which it was issued with a certificate of lease of even date. It also claims that subsequently, the two parcels were surveyed and the Director of Physical Planning amalgamated the two and one title number Nairobi/Block 82/5893 was issued. The applicant claims that it settled on the said property, built a nursery school as per the special conditions on the lease, and at no time did the respondents visit the suit property or approach the applicant raising any dispute. Further, it enjoyed quiet possession of the property until 2018 when the dispute arose.
6. It is the applicant's case that it was shocked by the 1st respondent's claim that he bought the properties from the 2nd respondent, yet the 2nd respondent subdivided the original land being LR No. 212/2/R and surrendered the two properties to the government, after which they were allotted to the applicant.
7. On whether the appeal is arguable, the applicant argued that the ELC erred by wholly relying on the testimony of the 2nd respondent. The applicant further claimed it owned the suit property and that the property was never surrendered to the government. In addition, it submitted that the 2nd respondent did not provide any title to prove its ownership of the suit properties. It contented that the cancellation of the title was premised on mere presumptions.
8. On the nugatory test, the applicant stated that the spiritual lives of more than four hundred christians who worship at the Africa Gospel Church shall be left at the mercy and whims of the 1st respondent, who has already demonstrated eagerness to demolish the church before the determination of the appeal. Further, the lives of youths who use the church and its playing grounds will be adversely affected, the nursery school established, and run by the church risks being demolished, or being transferred to a different entity gravely disrupting children's education thus violating their right to education.
9. In opposition to the application, the 1st and 2nd respondents maintained that the instant application is res Judicata, since the appellant had filed a similar application seeking stay of execution of the same judgment under rule 5 (2) (b) of the *Court of Appeal Rules* being Civil Appeal (Application) No. E384 of 2022, *The Registered Trustees Africa Gospel Church v Victor Mungai Kamunge Continental Developers Limited & 2 Others* involving the same parties, the same subject matter, the same cause of action and the same reliefs/prayers as in the present application. The 1st and 2nd respondents maintain that the earlier application was supported by an affidavit sworn by Dr. Robert Kipkemoi Langat, the Bishop and Trustee of the appellant, who has also sworn the affidavit in support of the present application. Therefore, the appellant is well aware of the fact that they are filing a similar application to the one which was dismissed with costs on April 24, 2023.



10. It is the 1st and 2nd respondent's case that the appellant is not keen on having the substantive appeal heard and determined because despite filing the appeal, it has deliberately refused and failed to comply with the directions expressly given by this Court on the filing of written submissions within 30 days from February 14, 2023. As a result, it has stalled the appeal because the respondent has failed to file its submissions. Further, the applicant intends to stall the prosecution of the substantive appeal, which is not arguable and has no merit. Consequently, the present application should therefore be struck out with costs.
11. Our invitation to intervene on behalf of the applicant has been invoked under rule 5 (2) (b) of the [Court of Appeal Rules, 2022](#). The principles for granting a stay of execution, injunction or stay of proceedings under the said rule are well settled. As was held in [Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others](#) (2013)eKLR, an applicant seeking relief premised on the above rule must demonstrate that the appeal or the intended appeal is arguable and that the appeal will be rendered nugatory should it ultimately succeed after its substratum is no more or out of reach of the successful appellant.
12. From the brief background highlighted above, we discern a preliminary issue that must be determined before delving into the merits of the application, which is whether this application is res judicata.
13. The applicant's counsel, Ms. Misiati justified the filing of the instant application despite the earlier application, which was dismissed on grounds that the applicant has filed an application for additional evidence dated May 19, 2023. That the said application if admitted by this Court will shed light on the main issues that were raised before the High Court. Counsel argued that the application will show that any amalgamation of the parcels of land was done by the director of surveys and not by the applicant and, therefore, fraud was not proved on the part of the applicant and that the applicant owns the suit properties.
14. It is not denied that this Court recently delivered a ruling in Civil Appeal (Application) No. E384 of 2022, [The Registered Trustees Africa Gospel Church v Victor Mungai Kamunge Continental Developers Limited & 2 Others](#) in which it dismissed the applicant's application brought under rule 5 (2) (b) seeking to stay the same judgment.
15. In our view, the argument that the instant application is res judicata has properly been raised. Res judicata is defined in the Black's law Dictionary as follows:

“ 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.”
16. The object of res judicata is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement or ruling between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. Res judicata contemplates 5 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. (See *Lotta v Tanaki* (2003) 2 EA 556).



17. The Supreme Court in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another* (2016) eKLR 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 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.

58. 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.”

18. A litigant is 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. Res Judicata is one of the factors that limit a court’s jurisdiction. This doctrine serves a salutary purpose, which is key to the due administration of justice. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law, so, where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.

19. The key point here is that 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 to protect the finality of the decision. The effect is that the court is prevented from trying the case in limine.

20. Granted, the orders sought in the present application are similar to the orders, which were sought by the applicant in Civil Appeal (Application) No. E384 of 2022, *The Registered Trustees Africa Gospel Church v Victor Mungai Kamunge Continental Developers Limited & 2 Others*. This Court while dismissing the said application held that the applicant had not demonstrated that it had an arguable



appeal. Consequently, we find that the present application by the applicant amounts to litigations by instalments, since it is only after this Court found that the applicant had no arguable appeal, that the applicant found it necessary to come up with an application seeking to introduce additional evidence on the issue of amalgamation of the two parcels on appeal.

21. The applicant cannot evade the wrath of *res judicata* by using the pending application seeking to adduce additional evidence and purport to seek orders, which had been sought and declined in a previous application. What matters is whether the instant application raises the same issues as those raised in the already decided application. The applicant cannot change the character of the instant application by purporting to cite new grounds. The test is whether the instant application would have been superfluous if the orders sought had been granted in the earlier application. The answer in our view would be in the affirmative.
22. Therefore, the instant application offends the doctrine of *res judicata*. In our considered view, inviting this Court to once again deliberate on the issue of stay of execution of the same judgment delivered on August 30, 2022 is tantamount to asking this Court to sit on an appeal from its own decision. We decline the invitation to do so. The upshot and totality of the foregoing is that the notice of motion dated May 15, 2023 has no merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 22nd day of September, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

