Barongo v Chemelil Sugar Co. Ltd (Civil Appeal 97 of 2019)
[2023] KECA 1400 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1400 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 97 OF 2019

PO KIAGE, M NGUGI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

DANIEL OMARE BARONGO ..... APPELLANT

AND

CHEMELIL SUGAR CO. LTD ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Kisumu (Cherere, J.) dated 6th December, 2018inPetition No. 11 of 2018)

JUDGMENT

JUDGMENT OF JOEL NGUGI, JA

1. The appellant in the present appeal first filed suit against the respondent herein in 2015. The suit was Nyando Senior Principal Magistrate's Court Case No 36 of 2015. It was a claim for breach of contract in which the appellant sought the following prayers:

    i. Kshs. 91,615/= in special damages.

    ii. General damages of Kshs. 4,879,615/=.

    iii. Costs of the suit.

    iv. Any other relief.

2. The appellant's theory of the case was that some time in 1997 the respondent breached an alleged contract for cane ploughing, harvesting and purchasing between himself and the respondent. The appellant claimed that as "common practice", he hired the respondent's machinery to plough his farm at a fee to be recovered after harvesting. The appellant further claimed that when the cane matured, the respondent gave authorization for it to be harvested but thereafter neglected to collect the harvested cane, causing it to rot on the farm thereby causing him economic damage.

3. The respondent's position in the suit was simply that there was no contract between it and the appellant.

4. The suit went to trial. At the conclusion of the trial, the learned magistrate found that there was no contract between the appellant and the respondent and dismissed the case with costs to the respondent.

5. The appellant was aggrieved by that decision and lodged an appeal in Kisumu High Court Civil Appeal No 61 of 2016. One of his grounds of appeal was that the trial court omitted to record many things in the proceedings. At the High Court, the appellant appeared in person. He relied on and adopted as evidence his plaint, statement, lease agreement between himself (appellant) and the land owners with whom he leased the farm land, and two documents for work he said had been done on his farm by the respondent. Of the two documents, one was for area survey, ploughing, and first harvesting which was signed on 23rdAugust, 1995 and 18th August, 1995, by the appellant and the respondent respectively; and the other was for area survey and ploughing which was signed on 23rd February, 1996 and 13th February, 1996, by the appellant and respondent respectively.

6. During the appeal, learned counsel for the respondent maintained that there was no contract between the appellant and the respondent. He contended that a copy of the contract or authorization form was always given to a private farmer or his co-operative society, and that even if it was not supplied, the appellant would have issued a notice to produce which he did not do. He denied the allegation that the trial court omitted any materials in the proceedings and contended that the same should have been raised during trial and not at the appellate stage. Additionally, counsel for the respondent pointed out to the High Court that regarding the work done on the appellant's farm (area survey and ploughing), one Joel Kiprop Kiplagat (DW1) had testified that these were services which were paid for in cash by the appellant; a fact that was not denied.

7. In the end, the appellate court found that the appellant had failed to tender cogent evidence of a contract between himself and the respondent that would have obliged the respondent to harvest and purchase his cane. The High Court, therefore, affirmed the lower court's decision and dismissed the appeal with costs to the respondent.

8. Ordinarily that should have ended matters unless there was an appeal on matters of law to this Court. In this case it did not.

   The appellant did not file an appeal to the Court of Appeal against the High Court decision. Instead, he changed course. He brought a constitutional petition, being Kisumu High Court Petition No 11 of 2018 to the self-same High Court. The decision of the High Court in that petition is the subject matter of this appeal. In that petition, the appellant sought the following orders:

   i. Declaration that the withholding of the document sought, that is, cane availability form and authority to harvest cane by the respondent is irregular and denies the petitioner his fundamental rights.

   ii. Declaration that the respondent provides the petitioner the documents in (i) above.

   iii. An order that costs of the petition be borne by the respondent and such orders that the honourable court may deem just and expedient

9. The respondent opposed the petition through its response dated 4th September, 2018 and contended that the subject matter in the petition was *res judicata*, as the same had been determined in Nyando

Senior Principal Magistrate's Court Case No 36 of 2015 and Kisumu High Court Civil Appeal No 61 of 2016.

10. After analyzing and considering the petition, submissions and annexures thereto, the learned judge coined three questions for determination namely: -

    a. Whether or not the petition was *res judicata*.

    b. Whether what was directly and substantially in issue in Nyando Senior Principal Magistrate's Court Case No 36 of 2015 and Kisumu High Court Civil Appeal No 61 of 2016, was the same subject matter in the petition.

    c. Whether the doctrine of *res judicata* applied and can be raised as a bar to constitutional petitions.

11. In dealing with the first question on the ingredients of the doctrine of *res judicata*, the learned judge relied on the provision of section 7 of the *Civil Procedure Act*; and the decisions in *Hoystead and others v Taxation Commissioner*, (1925) ALLER Rep 56; and Tanzania Court of Appeal's decision in *Lotta v Tanaki & others*, [2003] 2 EA 556 (CAT). The learned judge also relied on the definition of the word "suit" as defined in section 2 of the *Civil Procedure Act*, being "All civil proceedings commenced in any manner prescribed"; and held that the proceedings in Nyando Senior Principal Magistrate's Court Case No 36 of 2015 and Kisumu High Court Civil Appeal No 61 of 2016 were suits capable of being tested on their viability with regard to the doctrine of *res judicata*.

12. In dealing with the second question, the learned judge observed that the record revealed that the issue in dispute before the lower court and the appellate court, involved an alleged breach of contract between the appellant and the respondent for cane harvesting. Further, the learned judge held that the appellant had the right to ask for whatever documents he wished to have from the respondent, in the two lower courts, but he did not. Thus, in the circumstances, the learned judge was satisfied that the issue in the petition had already been determined and the suit was, therefore, *res judicata*.

13. On the third question, the learned judge relied on this court's decision in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR (John Florence Maritime Services Case) and *John Njue Nyaga v Attorney General & 6 others* [2016] eKLR, wherein it was held that the doctrine of *res judicata* was applicable to both constitutional and civil litigations, as it is a doctrine of general application but with a rider, that it should be invoked in constitutional litigation in the rarest and clearest of cases.

14. After this analysis, the learned judge concluded that the constitutional petition was *res judicata* and proceeded to dismiss it with costs to the respondent.

15. Aggrieved by the decision of the High Court, the appellant filed a Notice of Appeal dated 20th December, 2018 and a Memorandum of Appeal dated 5th January, 2019, in which he raised five (5) grounds of appeal. These are that the learned judge: erred in law and fact by importing into the petition extraneous matters of civil nature into a constitutional petition; ruled in favour of the respondent who he awarded costs even though the respondent never served the appellant a statement of defence; ignored the issues in the petition and failed to distinguish that the issues raised in the petition were totally different; erred and determined a petition prematurely without complying with order 11 of the *Civil Procedure Rules*; and, erred in law and fact by adjudicating the petition when the respondent never served upon the appellant and decided the petition without the respondent being heard in court.

16. Consequently, the appellant prayed that: the appeal be allowed, orders of the superior court be set aside and that, this Court orders a fresh trial and parties comply with Order 11, and the costs of the suit be borne by the respondent.

17. During the virtual hearing of the appeal, the appellant, Mr. Barongo, appeared in person and learned counsel, Mr. Odhiambo, appeared for the respondent. Both parties filed written submissions and relied entirely on them.

18. In his submissions, before delving into the grounds of his appeal, the appellant contended that he lost his two previous suits on the singular basis that the respondent retained two critical documents, that is, the authority forms(s) for the month of September 1997, and a copy of the termination letter and reasons for dismissal of Philemon Oyoyo from the respondent's employ, and that he was entitled to that information. That information, the appellant argued, would have enabled the court to award him compensation. The appellant insisted that the respondent had knowledge and possession of those documents but intentionally concealed them from the court, in order to have undue advantage over the appellant and steal the match on him. The appellant argued that prior to instituting his claim in the lower court and preferring an appeal thereafter, he was neither aware, nor was he privy to the existence of the said documents, despite all due diligence on his part.

19. Therefore, in keeping with the provisions on access to information under sections 4(2)(a), 4(3), 4(4), 7 and 8(1) of the *Access to Information Act* and Articles 40, 43, 48 and 50 of the *Constitution*, the appellant submitted that he wrote a letter dated 28th March, 2018 to the respondent, in which he asked to be furnished with the documents, but the respondent never responded to his letter. This eventuality prompted him to prefer the constitutional petition whose judgement is the subject matter of this appeal.

20. The appellant, who was acting in person, submitted that his grounds of appeal raised the following five (5) issues for determination:

    a. Whether the trial court "attended" to a wrong issue than as pleaded by the appellant.

    b. Whether the finding of the trial court on *res judicata* infringed on the appellant's right to a fair hearing, thus condemning him unheard.

    c. Was the trial court justified in holding that the doctrine of *res judicata* was applicable in the circumstances of the appellant's petition.

    d. Was the appellant's case such a rarest and clearest constitutional case for the doctrine of *res judicata* to be applied.

    e. Whether this court is amenable to an order for a retrial of the petition or the appellant's petition be allowed as prayed.

    f. Who is to bear the cost of the appeal.

21. In addressing the above stated issues for determination, the appellant condensed them into three (3) points of arguments. Since the appellant was acting in person, I took every care to understand and restate his arguments even though they generally overlapped. The three condensed areas, as he named them and as he submitted on at length, were:-

    a. The applicability of the doctrine of *res judicata* to the appellant's petition.

b. The issues and subject matter in the petition was very different.

c. The appellant was not privy to the information sought in the petition at the time of filing the previous suits, even after due diligence.

22. As regards the first point, the appellant argued that the doctrine of *res judicata* was not applicable in the circumstance of his petition; and that in the unlikely event that this Court finds that it was applicable, then he is entitled to an exemption by virtue of the Supreme Court's decision in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others*, Petition No 17 of 2015 [2021] KESC 39 (KLR), wherein it was held that the principle of *res judicata* should only be invoked in constitutional litigation in the rarest and in the clearest of cases but that rights keep on evolving, mutating, and assuming multifaceted dimensions, so that it may be difficult to specify what is rarest and clearest. Thus, the Supreme Court set parameters that would be considered with regard to a party seeking to have a court give an exemption to the application of the doctrine of *res judicata*; one of which is, where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. In this regard, the Supreme Court opined that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well as address the factors for and against the exercise of such discretionary power. However, in the alternative, a litigant must demonstrate special circumstances warranting the court to make an exception.

23. As regards the second point, the appellant contended that the issues and subject matter in the petition and the previous suits were totally different. He argued that while in the previous suits he sought for compensation in damages, the contrast in his petition was that he sought for information which he had been denied. He argued that the petition was not a new cause of action that sought the same remedy as the previous suits, and relied on this court's decision in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR. He further relied on the Supreme Court's decision in Communications Commission of Kenya & 5 others v Royal Media Services & 5 others [2014] eKLR, for the proposition that an argument concerning *res judicata* can only succeed when it is established that the issue before a court is essentially the same as another one already satisfactorily decided before a competent court.

24. As regards the third point, the appellant contended that he was not privy to the information sought in his petition despite his due diligence to gather evidence; and that even when he found out about the existence of the said information, he could not access it as it was in the respondent's possession, who could not freely give it out. He also argued that he was disadvantaged as he did not have legal representation. In this regard, he relied on the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* (*supra*), wherein it was held that the exceptions to the doctrine of "issue estoppel", included the discovery of decisive fresh evidence which could not have been adduced at the earlier proceedings by the exercise of reasonable diligence.

25. The appellant further argued that whereas litigation must come to an end, the same should not be at the expense of substantive justice where a party knowingly or unknowingly withholds critical information, that would have enabled justice to be served, from its opponent or the court. To this end, he submitted that it would be constitutionally justifiable for an aggrieved party to compel the other party to release such information, for purposes of achieving justice. For this proposition, the appellant relied on *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* (*supra*), wherein it was held that the 1st, 2nd and 3rd respondents in the case clothed their grievance as a constitutional question and sought the intervention of the High Court in the firm belief that their right had been violated by a state organ.

26. Opposing the appeal, the respondent submitted that it would address this appeal on only two (2) issues, namely: -

    a. Whether the appeal is *res judicata*.

    b. Whether the doctrine of *res judicata* is applicable to constitutional petitions.

27. On the first issue, the respondent contended that by virtue of section 7 of the *Civil Procedure Act*, the doctrine of *res judicata* allows a litigant only one bite at the cherry. To buttress this, the respondent relied on this court's decision in *Pop-In (Kenya) Ltd & 3 others v Habib Bank Ag Zurich* [1990] eKLR and *John Omolo Oracha & 3 others v Kenya Petroleum Refineries Ltd & 3 others* [2017] eKLR, wherein it was held that the doctrine of *res judicata* operates to ensure an end to litigation between parties or their representatives on the same matter or issue, by a court of competent jurisdiction in the subject matter of the suit. To this end, the respondent argued that the record showed that the issue in dispute between the appellant and the respondent, in the previous suits involved a breach of contract, which matter was determined and concluded. In addition, the respondent argued that both lower courts found that the appellant had the right to ask for whatever he wished to rely on from the respondent, which he never did. Therefore, the issue raised in this appeal has already been determined and is *res judicata*.

28. On the second issue, the respondent argued that for the doctrine of *res judicata* to be invoked, the following four elements must be demonstrated: a former judgment or order which was final, the judgment or order was on merit, the judgment or order was rendered by a court of competent jurisdiction on the subject matter between the parties, and the subject matter must involve similar parties in subsequent causes of action. For this proposition, the respondent relied on the decision in *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and *Nicholas Njeru v Attorney General & 8 others*, Civil Appeal No 110 of 2011 [2013] eKLR.

29. The respondent further argued that the Supreme Court, in its decision in John Florence Maritime Services Case, affirmed this this Court's finding in the same case that the doctrine of *res judicata* is applicable to both constitutional and civil litigation, as it is a doctrine of general application, but with a rider that it should be invoked in constitutional litigation in the rarest and clearest of cases. To buttress this argument, the respondent relied on this Court's decision in *Accredo AG & 3 others v Steffano Ucceli & another*, Civil Appeal No 43 of 2018 [2019] eKLR and *John Njue Nyaga v Attorney General & 6 others* [2016] eKLR, where in the former case, the court reiterated its decision in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, and in the latter case,the court made a finding that the appeal fell in the realm of the clearest cases alluded to.

30. Ultimately, the respondent urged this Court to find that the appeal is *res judicata* and dismiss it with costs to the respondents.

31. Having exhaustively considered the record of appeal, the judgment of the constitutional court, the appellant's grounds of appeal and the rival submissions of the parties, two related issues present themselves for determination in this appeal:

    a. First, whether the finding by the learned judge on *res judicata* was justified in the circumstances of this case; and

    b. Second, whether in the circumstances of the case, the appellant is exempt from the doctrine of *res judicata* on the ground that there is potential for substantial injustice if the court does not hear and determine the constitutional matter on its merit.

32. As the learned judge correctly pointed out, the doctrine of *res judicata* is provided for under Section 7 of the *Civil Procedure Act*, 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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."

33. The appellant, in his submissions as rephrased above, contended that the issues and subject matter in the previous suits and the petition were totally different since the former suits sought for compensation in damages, while the latter suit sought for information which he had been denied. Therefore, according to the appellant, the petition was not a new cause of action that sought the same remedy as the former suits.

34. The factors the Court takes into consideration in deciding if a matter is *res judicata* were laid out by the Supreme Court in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* [2016] eKLR, as follows:

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

35. Applying the same principles to this case, it requires little analysis to conclude that the petition which was before the High Court was *res judicata*. As the learned judge analyzed, the parties to the petition and the earlier suit were the same. The underlying cause of action was the same: it was a claim for breach of contract. The issues were, therefore, identical. There is no doubt that the earlier suit was heard and determined by a court of competent jurisdiction; indeed, an appeal was preferred and determined.

36. The appellant claims that the petition was different from the earlier suit because the earlier suit was a breach of contract action strictu sensu while the petition is a constitutional claim for information. However, the learned judge was able to easily see the illusion of the new cause of action by barely scratching the surface: the appellant admitted both before the High Court and this Court that in truth, he wanted the documents in the constitutional petition so that he can potentially use them to support his claim for breach of contract.

37. Three things can be said about the appellant's attempted technical distinction between the constitutional petition and the earlier suit. First, as the appellant admits, the underlying cause of action in both the earlier suit and the constitutional petition is an alleged breach of contract action. Second, he could have requested for the documents in the course of his earlier suit through the available procedural

mechanisms for discovery. It is rather transparent that, having failed to succeed in the earlier suit, the appellant hopes to patch up his case by "discovering" new evidence which he hopes to use to relitigate the same issues. The doctrine of *res judicata* not only covers issues and material actually raised and adjudicated upon in an earlier suit but all issues and material that could have been raised in the earlier controversy. The information sought by the appellant falls under the realm of issues that properly belonged to the subject of litigation of the earlier trial and which the parties, exercising reasonable diligence, might have brought forward at the time; or differently put, the information sought by the appellant were issues that ought to have been brought forward during trial as part of the subject in contest, but which was not brought forward at the time necessitating the court to form an opinion and pronounce a judgment on things as they stood. As the learned judge pointed out, the appellant had the right to ask, during trial and at the appellate court, for whatever documents he wished to have from the respondent, but he did not. He cannot now do through a new suit that which he could have done in the earlier suit in the hope that the information he recovers can then be used to revive his earlier suit.

38. Third, an attempt to transmogrify a simple contractual dispute into a constitutional petition does not thereby defeat a *res judicata* plea. As the Supreme Court said in the *Kenya Commercial Bank Limited Case* (*supra*):

> 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 *ET v Attorney-General & another*, [2012] eKLR, thus:
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> > "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. In the case of *Omondi v National Bank of Kenya Limited and others*, [2001] EA 177 the court held that, 'parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and another*, Nairobi HCCC No 2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*....."

39. This is a good segue to the second issue: does the appellant's case fit into the narrow category of cases which are exempted from the application of the doctrine of *res judicata*? In short, the answer is in the negative. This is because, in reality, the appellant's new suit is not at all about enforcing his threatened or violated fundamental rights in the *Constitution*. It is, at the core, simply a vehicle for enforcing an alleged breach of contract. Exemptions from the application of the doctrine of *res judicata* are rare and only permitted in cases where the main issue at stake is the fundamental rights of the individual. Here, the main issue is not an alleged breach of fundamental rights of the appellant but a breach of contract; an economic injury. There is simply no justification to grant the appellant an exemption from the application of the doctrine. This reasoning is in line with the Supreme Court's decision in *John Florence Maritime Services Case*.

40. It is important to recall that contrary to what the appellant says about the doctrine of *res judicata*, it is not a technical tool that somewhat subverts substantive justice. It is a doctrine of substantive law; one which plays a pivotal role in our judicial system. Again, I can do no better than cite the Supreme Court in the *Kenya Commercial Bank Limited Case* (*supra*):

> " 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. It would appear that the doctrine of *res judicata* is to apply in respect of matters of all categories, including issues of constitutional rights.....
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> 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.
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> 55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of *res judicata* is not affected by the substantial-justice principle of article 159 of the *Constitution*, intended to override technicalities of procedure. *res judicata* entails more than procedural technicality, and lies on the plane of a substantive legal concept.
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> 56. The learned authors of *Mulla, Code of Civil Procedure*, 18th Ed 2012 have observed that the principle of *res judicata*, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):
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> The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

41. The upshot is that, in my view, the appeal wholly lacks merit. I would propose that it be dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER,2023.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, JA

I have had the benefit of reading in draft the judgment of Joel Ngugi, JA and I am in full agreement with his reasoning, the conclusion he reaches, and the order he proposes.

As Mumbi Ngugi, J.A is in agreement, the appeal is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL AT KISUMU

JUDGMENT OF MUMBI NGUGI, JA

I have had the benefit of reading in draft the judgment of my brother, Joel Ngugi, JA. which I entirely agree with and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR