



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mativo v KCB Bank Kenya Ltd (Cause E001 of 2021)  
[2023] KEELRC 2407 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2407 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E001 OF 2021  
AK NZEI, J  
OCTOBER 5, 2023**

**BETWEEN**

**BENEDICT KITHUKU MATIVO ..... CLAIMANT**

**AND**

**KCB BANK KENYA LTD ..... RESPONDENT**

**RULING**

1. On May 9, 2022, this court made the following orders:-
  - “(1) the application for adjournment is allowed; and is marked as the last adjournment on the part of the respondent.
  - (2) the respondent is granted leave to file and serve a further list of documents placing on record certified copies of its documents nos. 4,5,6 and 8 within 14 days of today.
  - (3) defence hearing on September 26, 2022.
2. The respondent did not file a further list of documents within the 14 days ordered, and did not seek extension of time and/or leave to file the documents outside the time limit set by the court if, for whatever reason, it was unable to file the documents within the time ordered. On September 16, 2022, the respondent filed a further list and bundle of documents dated September 15, 2022 without first seeking the court’s leave to file the documents out of time.
3. Subsequently, the claimant filed an application seeking orders:-
  - a. that the court be pleased to strike out and/or expunge from the court’s record the respondent’s further list and bundle of documents dated September 15, 2022.
  - b. that costs of the application be provided for.



4. This court considered the said application, which the respondent had opposed, and delivered a ruling February 9, 2023, rendering itself as follows:-

“ 12. The respondent’s list and bundle of documents dated September 15, 2022 and filed in court on September 16, 2022, out of time and without leave, is not legally on record. It is invalid and an illegality.

13. consequently, the claimant’s notice of motion dated September 20, 2022 is merited and is allowed. The respondent’s further list and bundle of documents dated September 15, 2022 is hereby struck out, and is expunged from the court’s record.”

5. The court’s record shows that on February 10, 2023, the respondent filed a notice of appeal regarding the said ruling of this court. The respondent has to date not addressed this court on the position of the appeal instituted vide the said notice of appeal; on whether a record of appeal was filed in the Court of Appeal under the rules of that court, and the position of such appeal.

6. On February 24, 2023, the respondent filed an evenly dated notice of motion seeking the following orders:-

a. that the time granted on May 9, 2022 for the respondent to file a further list and bundle of documents be extended to September 16, 2022; or for such other time as the court may deem fit.

b. that upon grant of prayer (a) above, the further list and bundle of documents dated September 15, 2023, which was struck out on February 9, 2023 be readmitted, and be deemed as being properly on record.

c. that costs of the application be in the cause.

7. The application was opposed by the claimant, and upon considering the same, this court rendered itself as follows:-

“7. It is to be noted that *vide* its ruling delivered on February 9, 2023, this court found the respondent/applicant’s further list and bundle of documents dated September 15, 2022 to be “illegally on record and to be invalid and an illegality,” and proceeded to strike it out and to expunge it from the court’s record.

The word expunge means to obliterate or to remove completely.

The *Blacks Law Dictionary* (10<sup>th</sup> Edition) defines the word expunge as:-

“to remove from record, list or book; to erase or destroy.

Something expunged is noted in the original record as expunged and is redacted from all future copies.”

8. The court having found the documents sought to be re-admitted to have been invalid and an illegality that was not legally in the court’s record, and having struck it out and expunged it from the court’s record, there is absolutely nothing on record for this court to re-admit, even if time were to be extended as sought.



9. In my view, once a document is struck off and expunged from the court's record, the document is in effect removed and obliterated and from the court's record, and ceases to exist in the form and presentation in which it was at the time of being struck off and expunged from the court's record.

The document goes outside the scope of the proceedings in issue. Asking a court to re-admit a document that the court has struck off and expunged from its record, and particularly when the court's decision striking out and expunging the document from the court's record has not been varied and/or set aside on appeal is an abuse of the court's process.

10. I find no merit in the respondent's notice of motion dated February 23, 2023. The same is hereby dismissed with costs."

8. The respondent did not appeal against my aforesaid decision/ruling, and has instead filed yet another application/notice of motion, dated June 5, 2023, seeking the following orders:-

- a. that the time granted on May 9, 2022 for the respondent to file a further list and bundle of documents be extended for such time as the court may deem fit.
- b. that upon grant of prayer (3) above, the respondent be permitted to file a fresh further list and bundle of documents to introduce the documents expunged by the court.
- c. that costs of the application be in the cause.

9. This is the application before me for determination, and is opposed by the claimant. Both parties have filed written submissions, for and against the said application. The claimant submitted that the application is *res-judicata*, while the respondent/applicant submitted that the application was neither *res-judicata* nor bad in law. It is worthy noting that orders sought in the dismissed notice of motion dated February 23, 2023 are basically similar to those sought in the present application (dated June 5, 2023). Whereas the respondent/applicant tactfully uses the words "fresh" further list and bundle of documents in prayer No 4 in the application, it goes ahead to state in the same prayer that the documents sought to be introduced are those "expunged by the court."

10. I exhaustively addressed the meaning and legal import of "a struck off and expunged document" in court proceedings in my rulings herein delivered on February 9, 2023 and May 25, 2023 respectively, and I will not say more on that particular issue, at least for now.

11. I will only address the principle of *re-judicata* and the issue of whether or not the application dated June 5, 2023 is *res-judicata*.

12. The *Black's Law Dictionary* defines *res-judicata* as an issue that has been definitely settled by judicial decision. The three essential components of *res-judicata* is that there must have been an earlier judicial decision, a ruling or judgment, the decision must be final on the merits of the issue involved, and the latter suit must involve the same parties as the previous suit, or persons claiming under them. This is the creed of section 7 of the *Civil Procedure Act* which provides as follows:-

"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 are 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."



13. Section 2 of the Civil Procedure Act defines the word “suit” as meaning all civil proceedings commenced in any manner prescribed.
14. As already stated in this ruling, I have previously heard and finally determined the issue of re-introduction and admission on record of the documents that this court struck off and expunged from its record herein by dint of its ruling delivered on February 9, 2023. Any dissatisfied party ought to have taken up the issue on appeal by now. Otherwise this court has previously fully rendered itself on the issue, and I have nothing to add on what I have previously ruled.
15. The upshot of the foregoing is that the respondent’s notice of motion dated June 5, 2023 is *res-judicata* and therefore incompetent and bad in law, and is hereby dismissed with costs.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> OCTOBER 2023**

**AGNES KITIKU NZEI**

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant

..... Respondent

