



REPUBLIC OF KENYA



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Balongo & another v Municipal Council of Busia & another (Environment and Land Appeal 55 of 2010) [2024] KEELC 13395 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL 55 OF 2010**

BN OLAO, J

NOVEMBER 14, 2024

BETWEEN

SHEM SANYA BALONGO 1ST APPELLANT

WILLIAM MIRERI 2ND APPELLANT

AND

MUNICIPAL COUNCIL OF BUSIA 1ST RESPONDENT

ALICE IKOLOMI THURAIRA (SUBSTITUTED WITH REGINA KARAMBU THURANIRA) 2ND RESPONDENT

RULING

1. The dispute between Shem Sanya Balongo, William Mireri (the 1st and 2nd Appellants respectively) as against the then Municipal Council Of Busia and Alice Ikolomi Thurairanira (now substituted with Regina Karambu Thurairanira) being the 1st and 2nd Respondents respectively) was heard by Hon E. O. Obaga Principal Magistrate (as he then was). The dispute revolved around the land parcel known as plot No Busia Municipality/527 (the suit plot) and which the Appellants wanted the Court to direct that the same be registered in the name of the 1st Appellant. Having heard the parties, the trial magistrate dismissed the Appellants' claim with costs vide a judgment dated 28th September 2010.
2. Aggrieved by that judgment, the Appellant filed this appeal.
3. After considering the appeal, Omollo J set aside the trial magistrate's order dismissing the Appellants' suit. Instead, the Judge made the following orders vide a judgment dated 20th January 2023:
 - a. This appeal is allowed."
 - b. The judgment of the trial Magistrate be reversed and in place thereof Judgment be entered for the Appellants that:



- i. Registration of the lease in respect of plot No Busia/ Municipality/527 in favour of the 2nd Respondent be and is hereby cancelled and the 1st Appellant shall be registered as the owner.”
- ii. The 2nd Respondent to avail the original certificate of lease for the suit plot within 60 days hereof to facilitate the registration of the land in favour of the 1st Appellant. In default and after the expiry of the 60 days, the production of the original title to be dispensed with.”
- c. Costs of this appeal awarded to the Appellants to be paid by the 1st Respondent.”

Thereafter, the parties have inundated this Court with the following applications:

1. Notice of Motion dated 3rd November 2023 by the 2nd Respondent.
2. Notice of Motion dated 16th November 2023 also by the 2nd Respondent.
3. A Preliminary Objection dated 8th February 2024 filed by the Appellants in response to the 2nd Respondent’s Notice of Motion dated 16th November 2023.
4. Notice of Motion dated 7th December 2023 also by the 2nd Respondent.

The applications having been filed in quick succession even before the Court had determined the first one. I directed that the rulings on each of the application would be determined simultaneously in one ruling. That is therefore the subject of this ruling.

1. Notice of Motion Dated 3rd November 2023:

4. This application was filed by the 2nd Respondent who is aggrieved by the Judgment of Omollo J delivered on 26th January 2023 (not 23rd January 2023 as stated in the application). The application is premised on the provisions of Articles 50 and 159 of the Constitution, un-disclosed provisions of the Environment and Land Court Act, Sections 1A, 1B, 3A and 65 of the Civil Procedure Act and Orders 40, 42, 50 and 51 of the Civil Procedure Rules. It is predicated on the grounds set out therein and supported by the 2nd Respondent’s affidavit of even date. The 2nd Respondent seeks the following orders vide the application:
 1. Spent
 2. That the firm of Anya Kalwa & Company Advocates be granted leave to come on record for the Respondent.
 3. Spent.
 4. That the time be extended and the Notice of Appeal be deemed as duly filed as per the copy attached herewith.
 5. That the 2nd Respondent be issued with certified copies of the proceedings for appeal purposes.
 6. That there be a stay of execution of the judgment herein pending the hearing and determination of the intended appeal.



7. That there be a stay of construction upon the plot No Busia Municipality/527 pending the hearing and determination of the intended appeal.
8. That costs of this application be in the cause.
5. The gravamen of the application is that the 2nd Respondent intends to appeal the judgment herein and has appointed the firm of Anya Kalwa & Company Advocates to act for her. That the 2nd Respondent has an arguable appeal which is premised on, inter alia, the ground that the Court failed to consider the full facts and the law placed before it. That the Court ordered that the suit plot be registered in the name of the 1st Appellant who has since commenced construction thereon yet his financial capacity is unknown and there is a risk of the suit plot, which is unique, being sold hence rendering the intended appeal nugatory.
6. That the delay herein is excusable and was caused by the breakdown in communication given the fact that the 2nd Respondent is from Meru County whereas this case was heard in Busia County and her counsel did not inform her about delivery of the judgment herein. That the 2nd Respondent only became aware about the judgment when unknown persons started constructing on the suit plot and so she reported to the Police on 30th October 2023 and was issued with OB No 35/30.10.2023. That she had secured a loan with the Fina Bank using the original title deed for the suit plot and when she went to enquire, she was informed that the said Fina Bank still hold the original title deed and no decree from this Court has been issued to it. Upon enquiry at the Lands Registry, the 2nd Respondent was informed that the suit plot has since been registered in the names of the 1st Appellant who has since commenced construction thereon. The suit plot being unique, getting an equivalent is impossible and it is in the interest of justice that the orders sought be granted as no prejudice will be caused to the Appellants.
7. The following documents are annexed to the application:
 1. Notice of Appeal dated 3rd November 2023.
 2. Draft Memorandum of Appeal.
 3. Charge by 2nd Respondent on the suit plot.

In response to the application, the 1st Appellant filed a replying affidavit dated 27th November 2023 in which he has deposed, inter alia, that the remedy for extension of time to file a Notice of Appeal can only be granted by the Court of Appeal and in any case, the 2nd Respondent has not been granted leave to appeal.
8. That the application has been filed after ten (10) months which delay is inordinate and this suit has been in Court since 2009. The draft memorandum of appeal does not disclose any point of law and the 2nd Respondent has not disclosed what loss he will suffer. The 1st Appellant has meanwhile incurred expenses which are quantified in Section 9 of the replying affidavit and this application is an afterthought which will prejudice her.
9. Annexed to the replying affidavit are the following documents:
 1. Copies of land rent receipts.
 2. Copies of receipts for building materials.
 3. Copy of contract for security services between 2nd Respondent and service provide.
 4. Copy of Green Card for the suit plot.



The 1st Appellant also swore a supplementary replying affidavit dated 20th November 2023 in which he added that he has continued to suffer loss following the ex-parte order issued herein on 22nd November 2023 and to-date, he has not been served with any application filed in the Court of Appeal. That the ex-parte order issued on 22nd November 2023 was obtained with the sole aim of destroying him financially. Annexed to the supplementary affidavit is a report by his Architect dated 8th April 2024.

10. The applications have been canvassed by way of written submissions. These have been filed by Ms Anya instructed by the firm of Anya Kalwa & Company Advocates for the 2nd Respondent and by Mr Juma instructed by the firm of J. V. Juma & Company Advocates for the 1st Appellant.
11. I have considered the Notice of Motion dated 3rd November 2023, the rival affidavits and annexures thereto as well as the submissions by counsel.
12. The 2nd Respondent seeks the following substantive remedies:
 1. The firm of Anya Kalwa & Company Advocates do come on record for her.
 2. Stay of execution of the judgment herein pending appeal.
 3. Stay of construction on the suit plot pending appeal.
 4. Costs.

With regard to prayer No 1 above, the 2nd Respondent was represented by the firm of Ipapu P. Jackah & Company Advocates during the trial in the subordinate Court. She now seeks that the firm of Anya & Company Advocates come on record for her. No doubt the 2nd Respondent has in mind the provisions of Order 9 Rule 9 of the Civil Procedure Rules which reads.

“Where there is a change of advocate, or where a party decides to act in person having previously engaged advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –

- a. Upon any application with notice to all parties; or
- b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

I am aware that there are many decisions of the High Court and the Courts of equal status to the effect that compliance with Order 9 Rule 9 of the Civil Procedure Rules is mandatory before a new counsel can come on record after judgment. However, the Court of Appeal while faced with a similar issue in the case of Tobias M. Wafubwa -v- Ben Butali 2017 eKLR held thus:

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate Court is not a continuation of proceedings in the lower Court, but a commencement of new proceedings in another Court where different rules may be applicable for instance, the Court of Appeal Rules 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same counsel on appeal without being required to file a Notice of Change of Advocates or



to obtain leave from the concerned Court to be placed on record in substitution of the previous advocate.” Emphasis added.

It is clear therefore that the firm of Anya & Company Advocates did not even require leave to come on record in these proceedings.

13. Prayer No 2 is therefore granted.
14. With regard to prayer No 3, the 2nd Respondent seeks extension of time to file a Notice of Appeal and the annexed copy thereof be deemed as duly filed. The 1st Appellant’s rejoinder to that prayer is that such remedy is the preserve of the Court of Appeal and further there has been delay in filing this application. It is not correct to say, as the 1st Appellant has done, that extension of time to file a Notice of Appeal is the preserve of the Court of Appeal. Section 7 of the [Appellate Jurisdiction Act](#) (cap 9 Laws of Kenya) provides that:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant of the sentence.” Emphasis mine.

Since the promulgation of the [Constitution](#) of Kenya 2010, the High Court must of course now include this Court. Therefore, this Court also has the jurisdiction to extend time for filing of a Notice of Appeal. The discretion to extend such time is however not a matter of course. It must be exercised on good grounds and any delay should be explained to the satisfaction of the Court. In the case of *Leo Sila Mutiso -v- Hellen Wangari Mwangi* 1999 2 E.A 23 the Court of Appeal identified the following principles to guide a Court in such application:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are; first the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

In the case of *Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 7 Others* 2014 eKLR, The Supreme Court listed the following as the factors which the Court should consider in such an application:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
3. Whether the Court should exercise the discretion to extend time is a consideration to be made on a case to case basis;



4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
6. Whether the application has been made without undue delay; and
7. Whether in certain cases like election petitions, public interest should be a consideration for extending time.

All the above conditions must be satisfied before the order of extension of time to appeal is allowed.

15. The judgment sought to be appealed was delivered via email on 26th January 2023. This application was filed on 3rd November 2023 some ten (10) months later which is a delay that is clearly inordinate. The explanation for that delay is found in paragraphs 6, 7 and 8 of the 2nd Respondent's supporting affidavit wherein she has deposed as follows:

- 6: That the delay is excusable and inadvertent cause (sic) by the breakdown in communication given the distance and that I hail from Meru County whereas the matter is at Busia County.”
- 7: That my previous counsel did not inform me on the outcome of the said judgment delivered on 23rd January 2023.”
- 8: That I only came (sic) aware of the said judgment when unknown person began constructing on the said parcel of land known as plot No Busia Municipality/527 (hereinafter referred to as the suit property).”

I have considered those grounds to see if they satisfactorily explain the reason for the delay and although the 2nd Respondent says it is “excusable”, I am not persuaded that the delay has been satisfactorily explained. With the advent of technology including mobile phones, I do not see what difficulties the 2nd Respondent and her counsel had in communicating about the judgment once it was delivered and what steps, if any, the 2nd Respondent should take with respect to lodging any appeal. And even if the 2nd Respondent only became aware about the delivery of the judgment “when unknown person began constructing on the said parcel of land known as plot No Busia Municipality/527,” the Court has not been told when the 2nd Respondent discovered that some unknown person was constructing on the suit plot. The delay has not been explained to my satisfaction and the prayer for extension of time does not meet my favourable exercise of discretion.

16. That prayer is declined.
17. Prayer No 5 seeks that the 2nd Respondent be supplied with certified copies of the proceedings. That prayer is granted.
18. Prayers No 6 and 7 are identical. The 2nd Respondent seeks orders that there be a stay of execution of the judgment herein and specifically a stay of construction on the suit plot. Those are basically the same prayers.
19. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provide that:
 - 6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and



whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (1) unless -
- (a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

It is clear, therefore, that the 2nd Respondent was required to satisfy all the following conditions for the grant of an order of stay of execution pending appeal;

1. Show sufficient cause.
2. Demonstrate that she will suffer substantial loss unless the order is granted.
3. File the application without unreasonable delay.
4. Offer security.

The jurisdiction of this Court while considering an application for stay of execution pending appeal was circumscribed by the Court of Appeal in the case of *Vishram Ravji Halai & Another -v- Thornton & Turpin (1963) Ltd* 1990 KLR 365 as follows:

“ Thus the Superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

The 2nd Respondent was therefore required to prove all the above four (4) requirements to be entitled to an order of stay of execution.

20. This Court has in the proceeding paragraphs of this ruling declined to grant the 2nd Respondent the order of filing a Notice of Appeal out of time. It follows therefore that there is no pending appeal to justify the grant of an order of stay of execution pending appeal. No sufficient cause has been disclosed because, in the absence of a pending appeal, there is no basis to warrant a stay of the judgment herein. The 2nd Respondent has deposed in paragraph 5 of the grounds upon which this application has been founded that he has “a prima facie arguable appeal”. That is not a ground on which such an application can be justified because this Court cannot gauge the arguability or otherwise of an intended appeal from it’s own judgment.
21. Substantial loss, as was held in the case of *Kenya Shell Ltd -v- Kibiru & Another* 1986 KLR 410, is the “cornerstone” of such an application. Although the 2nd Respondent has not specifically made reference to the substantial loss which she will suffer unless the order of stay of execution is granted, she has nonetheless alluded to the fear that the Appellants’ financial capacity is unknown and there is the fear of the suit plot, which is unique, being disposed off. That, in my view, amounts to substantial loss.



22. The 2nd Respondent was also required to approach this Court “without unreasonable delay”. The judgment sought to be appealed was delivered on 26th January 2023 and this application was filed on 3rd November 2023 a delay of ten (10) months which is unreasonable. The explanation given for that delay which is that she had no communication with her counsel due to the fact that she was in Meru and this case was determined in Busia cannot be satisfactory given the fact that the judgment could have been communicated to her through a phone call. In any event, the 2nd Respondent has not told this Court when exactly she eventually became aware about this judgment to enable this Court exercise its discretion in her favour.
23. On the offer of security, the 2nd Respondent has deposed in paragraph 11 of her supporting affidavit “that the suit property shall serve as adequate security and preserved as such”. However, the title to the suit plot is no longer in her name following the judgment delivered herein on 22nd January 2023. The 2nd Respondent therefore has no capacity to offer it as security to any person including to this Court. In any event, the Green Card to the suit plot shows that it has since 10th October 2023 reverted to the trustee of County Council of Busia following the cancellation of the name of the 2nd Respondent.
24. The prayer for stay of execution of the judgment/stay of construction on the suit plot is therefore not well merited. It is declined.
25. On the issue of costs, they follow the event. The 2nd Respondent shall meet the 1st Appellant’s costs of the Notice of Motion dated 3rd November 2023.

2. Notice of Motion Dated 16th November 2023

26. This application was also filed by the 2nd Respondent vide Certificate of Urgency. The 2nd Respondent sought the following remedies:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to grant a temporary injunction restraining the Appellant whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the suit property being plot No Busia Municipality/527 pending the hearing and determination of the intended appeal.
 4. That the Officer Commanding Busia Police Station do enforce compliance of the orders above.
 5. That this Honourable Court be pleased to hear this application together with the application dated 3rd November 2023.
 6. That the costs of this application be in the cause.
27. This application is based on the grounds set out therein and is supported by the affidavit of Esther Ivan Anya counsel for the 2nd Respondent. It is premised on the provisions of Order 40 Rule 1 and 4, Order 42 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Article 159 of the [Constitution](#).
28. The basis of the application is that the legal and rightful owner of the suit plot is yet to be determined yet the Appellants are interfering with it by erecting structures thereon. If the Appellants are not restrained by this Court, the 2nd Respondent is likely to suffer irreparable damage. That this Court while considering the Notice of Motion dated 3rd November 2023 did not issue any ex-parte orders in relation to the prayer for stay of execution of the judgment pending appeal.



29. The following documents are annexed to the said application:
1. Copy of the Notice of Motion dated 3rd November 2023.
 2. Copy of the order issued by this Court on 9th November 2023 following the Notice of Motion dated 3rd November 2023.
 3. Photographs of land with foundation under construction.
30. In opposing the application, the 1st Appellant has filed a replying affidavit dated 18th January 2024 together with a Notice of Preliminary Objection dated 8th February 2023. He has deposed therein, inter alia, that the 2nd Respondent had earlier been granted 60 days stay of execution when the judgment was delivered on 22nd January 2023. And since the 2nd Respondent did nothing with those 60 days, the 1st Appellant proceeded to have the suit plot registered in his names and has commenced construction of a shopping mall thereon and so far, he has spent Kshs.2,500,000 excluding the costs of security. It is not true therefore that the ownership of the suit plot is yet to be determined.
31. Annexed to the application are the following documents:
1. Photographs of the site under construction.
 2. Copy of the valuation report by Chrisca Real Estate Valuers dated 16th January 2024 showing that the development on the land parcel No Busia Municipality/527.
- The 1st Appellant also filed a Notice of Preliminary Objection dated 8th February 2024 in which he pleaded that this application is sub judice because the issues raised herein are directly and substantially in issue in the Notice of Motion dated 3rd November 2024. This application therefore amounts to forum shopping which is an abuse of the process of this Court and should be struck out.
32. This Court did on 21st November 2023 direct that the Notice of Motion dated 16th November 2023 be canvassed by way of written submissions. However, only MR. J. V. Juma counsel for the 1st Appellant filed his submissions dated 11th June 2024 in respect to the Notice of Motion dated 16th November 2023. There was no record of any submissions filed by Ms Anya the counsel for the 2nd Respondent.
33. I have considered the Notice of Motion dated 16th November 2023, the rival affidavits and annexures thereto, the Preliminary Objection as well as the submissions by counsel.
34. The 1st Appellant's Preliminary Objection raises the issue that the Notice of Motion dated 16th November 2023 is an exact duplicate of the 2nd Respondent's earlier Notice of Motion dated 3rd November 2023 which was then still pending and is therefore sub-judice. This Court has in the proceeding paragraphs of this ruling already delivered its ruling on the Notice of Motion dated 3rd November 2024. It is therefore no longer pending. The Preliminary Objection should, in the circumstances, be based on the ground that the Notice of Motion dated 16th November 2024 is now res judicata. The principle of res judicata is provided for in Section 7 of the [Civil Procedure Act](#) which reads:
- 7: 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.”

Of course by the time the Notice of Motion dated 16th November 2023 was being filed and canvassed, the Notice of Motion dated 3rd November was still alive and pending determination. Therefore, the Preliminary Objection dated 8th February 2024 was correctly premised on the plea of sub-judice which is defined in Black’s Law Dictionary 10th Edition as:

Before the Court or Judge for determination”

The doctrine of res judicata on the other hand is defined in the same Dictionary as:

An issue that has been definitively settled by judicial decision.”

Therefore, since I have already delivered a ruling on the Notice of Motion dated 3rd November 2024, and in view of the fact that the doctrines of sub-judice and res judicata both serve the same purpose of barring the Court from considering similar issues which are either still pending or have been heard and determined, this Court will consider the plea of res judicata which is the appropriate one in the circumstances of this case.

35. The matter before me is an application. However, the doctrine of res judicata applies both to applications and to suits – *Kanorero River Farm Ltd & Others -v- National Bank of Kenya Ltd* 2002 2 KLR 207. See also *Uhuru Highway Development Ltd -v- Central Bank of Kenya & Others C.A. Civil Appeal No 36 Of 1996* [1996 eKLR] where the Court of Appeal after considering similar provisions in the Indian Code of Civil Procedure as well as Indian authorities on the equivalent to our Section 7 of the *Civil Procedure Act* said:

“This shows only one intention on the part of the legislature in Indian and our *Civil Procedure Act*. That is to say, there must be an end to applications of similar nature; that is to say, further and wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”

36. I have looked at the orders which the 2nd Respondent sought in the Notice of Motion dated 3rd November 2023 and those which she now seeks in the Notice of Motion dated 16th November 2023. In the Notice of Motion dated 3rd November 2023, the 2nd Respondent sought, inter alia, stay of execution of the judgment herein and a stay of construction on the suit plot pending the hearing and determination of an intended appeal. In the Notice of Motion dated 16th November 2023, the main order which she seeks is an injunction to restrain the Respondents from trespassing, wasting or constructing on the suit plot. Those were the substantial remedies being sought. Those are essentially the same remedies seeking to preserve the suit plot pending the hearing and determination of the intended appeal. I agree with the submissions by Mr J. V. Juma counsel for the 1st Appellant on this issue when he states at paragraph 4 thus:

- 4: That the prayers sought in the notice of motion application dated 16th November 2023 is an exact duplicate of order 7 of the applicant’s own notice of motion application dated 3rd November 2023 which is pending determination by the Court. That the facts and issues raised in the notices of motion application dated 16th November 2023 are directly and substantially in issue in the notice of motion application dated 3rd November 2023 between the same



parties who are litigating under the same title before a Court, of competent jurisdiction.” Emphasis mine.

The Notices of Motion dated 3rd November 2023 and 16th November 2023 involve the same parties being the 1st Appellant and the 2nd Respondent. The subject matter is the suit plot and other than the prayer for extension of time to appeal and the prayer for the Officer commanding Busia Police Station [OCS] to enforce compliance with the orders of this Court, the issues are substantially the same in both applications. And as was held in the case of Henderson -v- Henderson 1843 – 60 ALL ER 378, the Court observed that:

“... 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 subject of litigation in respect of a 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. That 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 mine.

The remedy of injunction now sought in the Notice of Motion dated 16th November 2023 clearly “belonged” to the Notice of Motion dated 3rd November 2023 and could have been brought up and canvassed in that application. The Preliminary Objection dated 8th February 2024 is well founded and raises a pure point of law as set out in the case of Mukisa Biscuit Manufacturing Co Ltd -v- West End Distributors Ltd 1969 E.A 696. The Notice of Motion dated 16th November 2023 must therefore be struck out for being res-judicata.

37. Even assuming that the Notice of Motion dated 16th November 2023 was to be considered on its merit, it would collapse for the following reason.
38. The 2nd Respondent seeks the main remedy of an injunction pending appeal. This Court has already declined to grant the remedy of extension of time to appeal which was sought in the Notice of Motion dated 3rd November 2023. That means, therefore, that there is no pending appeal to warrant the grant of any order of injunction pending appeal. In the same vein, the prayer for the Officer Commanding Busia Police Station (OCS) to be directed to enforce any orders cannot be granted.
39. The Notice of Motion dated 16th November 2023 is hereby struck out with costs for being res judicata.

3. Notice of Motion Dated 7th December 2023

40. Finally, I shall now consider the Respondent’s Notice of Motion dated 7th December 2023. The same is premised under the provisions of Section 5(1) of the Judicative Act, Order 51 of the Civil Procedure Rules, Order 52 of the Supreme Court of England Rules, Sections 1A, 1B, 3A and 63(c) of the Civil Procedure Rules and Article 159 of the *Constitution*. The 2nd Respondent seeks the following substantive orders against the Appellants:
 1. Spent.
 2. That this Honourable Court do issue an order of Committal against Shem Sanya Balongo and William Mireri the Appellants herein to prison for such period for six months.



3. That the Officer Commanding Busia Police Station do enforce compliance of the orders above.
 4. That this Honourable Court be pleased to make such other and further orders as it may deem fit.
 5. That the costs of this application be awarded to the 2nd Respondent.
41. The application is based on the grounds set out therein and is supported by the affidavit of the 2nd Respondent also dated 7th December 2023.
42. The gist of the application is that this Court did issue an order of temporary injunction on 21st November 2023 restraining the Appellants whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering with the suit plot being plot No Busia/Municipality/527 pending the hearing and determination of the application dated 3rd November 2023. The said order was served upon the Appellants on 23rd November 2023 through their advocate on record Mr J. V. Juma. However, the Appellants have continued meddling with the suit plot by way of construction. That the acts of the Appellants are in clear contempt of the Court order issued on 21st November 2023.
43. Annexed to the application are the following documents:
1. A copy of the order issued on 21st November 2023.
 2. Photographs of a foundation of a building.
 3. A copy of a letter dated 4th December 2023 addressed to the Appellants' counsel by the 2nd Respondent's counsel.

Although the Court did direct that all the above application be canvassed by way of written submissions, both parties appear to have confined their submissions on the Notices of Motion dated 3rd November 2023, 16th November 2023 and the Preliminary Objection dated 8th February 2024. This Court must therefore do the best it can with what is on the record in determining the Notice of Motion dated 7th December 2023.

44. I have looked at the 1st Appellant's replying affidavit dated 18th January 2024 and filed in response to the Notice of Motion dated 16th November 2023. The 1st Appellant has deposed therein, inter alia, that following the delivery of the judgment herein on 26th January 2023, the 2nd Respondent was granted 60 days to avail the certificate of lease of the suit plot to facilitate its registration in the name of the 1st Appellant. When that was not done, the 1st Appellant proceeded to execute the decree by paying all the outstanding rates which had remained un-paid, caused to be deleted the registration of the suit plot in the name of the 2nd Respondent, excavated the ground and laid the foundation for construction of a shopping mall. In paragraph 17 of the said replying affidavit, the 1st Appellant has specifically deposed as follows:

- 17: That I moved to the site and started construction after the judgment had been delivered in my favour.

Paragraph 5 of the said supporting affidavit is also misleading. I am not a trespasser.”

The 2nd Respondents seeks an order that the Appellants be committed to civil jail for contempt of this Court's order issued on 21st November 2023. Contempt proceedings are serious being quasi-criminal in nature. They



require a higher standard of proof. In the case of *Githiga & 5 Others -v- Kiru Tea Factory Ltd* Petition No 13 of 2019 [KESC 41 (KLR) 16th June 2023, the Supreme Court stated as follows on this issue at paragraph 58:

- 58: In enforcing compliance with lawful Court orders, the procedures adopted by the Court must be fair and reasonable in which full opportunity is given to an alleged contemnor to defend himself or herself. This is because contempt proceedings being quasi-criminal, require a higher standard of proof than in normal civil cases and one can only be committed to civil jail or penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability." Emphasis mine

From the 1st Appellant's replying affidavit dated 18th January 2024, it is clear that he commenced construction on the suit plot soon after the Judgment herein was delivered. That judgment was delivered on 26th January 2023 and if the 1st Appellant, as he has deposed in paragraph 11 of his replying affidavit dated 18th January 2024:

"... excavated the ground and have laid the foundation for the construction of the shopping mall"

then this Court can only conclude that the construction on the suit plot had long commenced by the time this Court issued the injunction orders on 21st November 2023. Photographs of a foundation have been annexed to the application and in view of the un-controverted averment by the 1st Appellant that he commenced the construction after the Judgment delivered on 26th January 2023, it cannot be said, with certainty, that the photographs annexed to the Motion were taken after the orders issued on 21st November 2023. If indeed the foundation was commenced soon after the Judgment herein was delivered, it would be unfair to penalize the 1st Appellant for conduct that took place prior to 21st November 2023. Any doubt must be resolved in favour of the 1st Appellant.

45. The Notice of Motion dated 7th December 2023 is not proved. It is dismissed. Since none of the parties filed submissions on it, I make no orders as to costs thereof.
46. Ultimately therefore and having considered the three (3) applications herein, I issue the following disposal orders:
1. The Notice of Motion dated 3rd November 2023 is dismissed. The 2nd Respondent shall meet the 1st Appellant's costs.
 2. The Notice of Motion dated 16th November 2023 is struck out. The 2nd Respondent shall meet the 1st Appellant's costs.
 3. The Notice of Motion dated 7th December 2023 is dismissed. No orders as to costs.

BOAZ N. OLAO

JUDGE

14TH NOVEMBER 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 14TH DAY OF NOVEMBER 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE



14TH NOVEMBER 2024

