



REPUBLIC OF KENYA



KENYA LAW
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**JC (A Female Minor Suing Through Her Father and Next of Friend GKN) v Bariwott & another
(Civil Appeal 1376 of 2023) [2025] KEHC 11469 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 1376 OF 2023

AC MRIMA, J

JULY 31, 2025

BETWEEN

**JC (A FEMALE MINOR SUING THROUGH HER FATHER AND NEXT OF
FRIEND GKN) APPELLANT**

AND

KIPKEMOI BARIWOTT 1ST RESPONDENT

NOBEL TRADING COMPANY LTD 2ND RESPONDENT

*(Being an appeal against the Ruling and Order of W. Mbulikab (PM) in Nairobi
Chief Magistrate Civil Case No. 9396 of 2019 delivered on 30th November 2023)*

JUDGMENT

Background:

1. Through an application by way of a Notice of Motion dated 24th March 2023, Nobel Trading Company Ltd, the 2nd Respondent herein, sought to stay the execution of the judgment delivered in Nairobi Chief Magistrate Civil Case No. 9396 of 2019 [hereinafter referred to as ‘the suit’] on 27th September 2021. The application also sought a review, variation or discharge of the orders in the Ruling of 17th January 2023 and a substitution thereof with the order that the application by way of a Notice of Motion dated 9th September 2022, which sought stay and set aside the Appellant’s *ex-parte* judgment be allowed.
2. In the impugned ruling delivered on 30th November 2023, the learned Magistrate allowed the application dated 24th March 2023 as prayed, effectively setting aside the *ex-parte* judgment.
3. It is that decision that prompted the instant appeal.



The Appeal:

4. Disgruntled, JC, the Appellant herein, a minor suing through her father, lodged the Memorandum of Appeal dated 5th December 2023. She asserted the following grounds of appeal:
 1. The learned magistrate erred by varying Court orders issued on 17th February 2023 dismissing the Application dated 9th September 2022.
 2. The Court erred by allowing the Respondent's application dated 24th March 2023 which application was *res-judicata*.
 3. The Court erred by failing to apply the conditions prerequisite for review.
 4. The Court erred by making orders for the case to start de-novo, a prayer not prayed for in the Respondent's application.
 5. The trial Court erred by sitting on appeal under the guise of review.
5. On the foregoing grounds, the Appellant sought that this Court sets aside the order allowing the Notice of Motion dated 24th March 2023 and dismissing the one dated 9th September 2022. It urged that the Orders of 17th February 2023 be reinstated.

The Submissions:

6. In her written submissions dated 10th June 2024, the Appellant argued that the learned trial Magistrate failed to take note that the Notice of Motion dated 24th March 2023 was *res-judicata* since the Court had already pronounced itself on it. The Appellant relied on section 7 of the [Civil Procedure Act](#) and various decisions, among them, the one in [Kennedy Mokuu Ongiri - v- John Nyasende Mosioma Nyamoita Nyasende](#) (2022) eKLR where the Court overturned the ruling of the subordinate Court on the basis of being *res-judicata*.
7. On the issue regarding the trial Court's review of orders, the Appellant submitted that the conditions set in section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#) were not met. It was the Appellants position that there was no discovery of new and important matter or evidence and neither was there any mistake apparent on the record. The Appellate drew support from the case of [Republic - v- Advocates Disciplinary Tribunal ex-parte Apollo Mboya](#) (2019) eKLR.
8. Finally, the Appellant submitted that the Court erred in making the order that the suit starts de-novo yet no such prayer was made in the application. To that end, the Appellant cited the decision in [Malawi Railways Limited - v- Nyasulu](#) (1998) MWSC 3, where it was observed: -

.... It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon specific matters in dispute which parties themselves have raised by the pleadings.

The Respondents' cases:

9. Whereas the 1st Respondent did not appear in this appeal, the 2nd Respondent's Counsel was present in Court on 25th March 2025 when it was granted leave to file and serve written submissions. It, however, failed to file any such submissions.



Analysis:

10. The main issue that falls for determination in this appeal is whether trial Court had jurisdiction on the basis of the bar of *res-judicata* to deal with the Notice of Motion dated 24th March 2023 which was argued that it had already been adjudicated upon when the Court dismissed the 2nd Respondent's Notice of Motion dated 9th September 2022.

11. Section 7 of the [Civil Procedure Act](#) prohibits a Court of concurrent jurisdiction from trying any issue which was substantially in issue in an earlier suit. It provides thus:

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.

12. To establish whether the claim of *res-judicata* is merited, this Court will juxtapose the parties in the two applications, the prayers sought therein and the resultant orders. First off, the parties in the application dated 9th September 2022 are the same as the ones in the Application dated 24th March 2023. In the former, the 2nd Respondent sought the following orders: -

That the honourable court be pleased to set aside the *ex-parte* judgment entered on 9th May 2022 and all consequential orders against the 2nd Defendant in default of appearance and filing of defence and that the 2nd defendant be granted leave to file its defence upon payment of the requisite fees.

13. Upon analysing the evidence, the trial Court was of the finding that the 2nd Respondent was served and there was an Affidavit of service to that end. It observed that the place and identity of the person served were not denied and that the 2nd Respondent did not challenge service by seeking to cross-examine the process server. As regards the issue whether the 2nd Respondent defence raised triable issues, the Court observed that the motor vehicle, subject of the execution, was registered in its name and as such was there was no triable issue. It thus dismissed the application.

14. On the application dated 24th March 2023, the Applicant was the 2nd Respondent herein who sought the following reliefs: -

2. (the) honourable court be pleased to order a stay of execution of the Judgment delivered on 27th September 2021 and all consequential orders emanating therefrom.

3. ...the court be pleased to review discharge and or vary the Ruling it delivered on the 17th January (sic) 2023 and all consequential orders and substitute the same with the order that;

The 2nd Defendants Notice of Motion Application dated 9th September 2022 be allowed as prayed.

15. It is readily discernible that the 2nd Respondent disguised the application dated 24th March 2023 as a 'Review application lodged under Order 45 of the [Civil Procedure Rules](#)', whereas in fact it was a second bite at the cherry. It pursued the very orders that were denied in the application dated 9th September 2022. For clarity, I will refer to Order 45 Rule 1 of the [Civil Procedure Rules](#) which provides as follows: -

1. Any person considering himself aggrieved: -



- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or order made or made the order without unreasonable delay.
16. Before the eyes of this Court, the application dated 24th March 2023 was essentially a ‘veiled appeal’. There was no discovery of new material or a mistake in the Ruling of 17th February 2023 or any other sufficient reason to allow the Applicant approach the court under Review. Therefore, the learned trial Magistrate ought not to have purported to exercise her discretionary powers under Order 45. There was nothing new on the record as to warrant a review. I say so because, the issue that the vehicle was registered in the name of the 1st Respondent was no new information since the Court had in the first instance satisfied itself that it was in the name of the 2nd Respondent.
17. The Supreme Court in *Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR discussed the operation of the doctrine as hereunder: -
- (317) The concept of *res judicata* operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on “issue estoppel”, to bar the 1st, 2nd and 3rd respondents’ claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes
18. In *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR, the Court of Appeal also discussed the doctrine of *res judicata* at length. It observed: -
- The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence.
19. From the foregoing, it is evident that the trial Court was caught up by the doctrine of *res-judicata*. It had no jurisdiction to reopen the issue which had been conclusively adjudicated upon by a Court of concurrent jurisdiction.



20. In the premises, this Court finds merit in the appeal and the following final Orders hereby issue: -
- (a) The appeal is hereby allowed and the ruling of the trial Court dated 30th November 2023 is hereby set aside.
 - (b) For avoidance of doubt, the Orders of the trial Court contained in the Ruling of 17th February 2023 are hereby reinstated.
 - (c) Costs of the appeal to be borne by the 2nd Respondent.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for Respondent.

Mr. Kaburu, Learned counsel for Appellant.

Amina/Michael – Court Assistants.

