



**Jituka Investments Limited v Lathia & 2 others (Civil Appeal
E840 of 2022) [2025] KEHC 11588 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11588 (KLR)

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

CIVIL

CIVIL APPEAL E840 OF 2022

REA OUGO, J

JULY 31, 2025

BETWEEN

JITUKA INVESTMENTS LIMITED APPELLANT

AND

VINAD LATHIA 1ST RESPONDENT

PRAFUL LATHIA 2ND RESPONDENT

I&M BANK LIMITED 3RD RESPONDENT

(Being an Appeal from the Ruling at the Milimani Chief Magistrate's Court in MCOMM Suit No. E12059 of 2021 delivered by Hon. S.O. Opande, Principal Magistrate on 3rd October 2022)

JUDGMENT

1. The Appellant filed this Appeal against the Ruling of the subordinate court vide Memorandum of Appeal dated 19th October 2022, seeking to set aside the Ruling by the trial court in its entirety, that the Appellant's Application against the Respondents dated 12th July 2022 be allowed with costs borne by the 1st and 2nd Respondents.
2. The Appellant raised the following grounds of appeal: -
 1. That the Learned Magistrate having struck out the Appellant's previous Application dated 25th March 2022 (hereinafter "Previous Application") erred in law and in fact by finding that the Appellant's subsequent Application dated 12th July 2022 was Res Judicata.
 2. That the Learned Magistrate erred in law and fact by failing to appreciate that the previous Application had not been determined on merit and/or dismissed and thus did not infringe Section 7 of the Civil Procedure Rules.



3. That the Learned Magistrate erred in law and fact by failing to consider the grounds and the evidence in support of the Appellant's Application dated 12th July 2022.
 4. That the Learned Magistrate erred in law and fact by failing to make a finding on the Appellant's prayer Orders, Supporting Affidavit and submissions in support of the Application and in particular, the following points: -
 - i. That the ex-parte decree passed against the Appellant in the lower court on the 9th December 2021 and the subsequent warrants of attachment and sale were irregular.
 - ii. That thus, the ex-parte judgment and decree passed against the Appellant in the sum of Kshs. 11,801,429/= condemned the Appellant unheard and was in contravention of the rules of natural justice.
 - iii. That the 1st and 2nd Respondent did not properly effect service of summons upon the Appellant.
 - iv. That contrary to the law, the Appellant was not served at all with the ten (10) days Statutory Notice.
 - v. Whether the Appellant had an arguable defence and/or a defence that raised any triable issues against the 1st and 2nd Respondent's suit/claim.
 5. That the Learned Magistrate erred in fact and in law by disregarding the numerous binding authorities cited and relied on by the Appellant's counsel and thereby arriving at a wrong conclusion.
 6. That the Learned Magistrate erred in law and fact by failing to do justice by fettering its discretion and/or failing to exercise its wide discretion with a view of achieving the ends of justice.
3. The background of this case is that the Respondents, who are the Plaintiffs in the trial court, instituted a suit vide Plaint dated 10th October 2021 seeking judgment against the Defendant/Appellant as follows: -
- a. An Order directing the Defendants themselves, their agents, servants and/or any other person acting under them to immediately pay the sum of Kenya Shillings Eleven Million (Kshs. 11,000,000/=) being the outstanding amount owed to the Plaintiffs.
 - b. Interest on (a) above at court rates from the date of filing the suit until judgment is entered.
 - c. Costs of the suit.
 - d. Any other relief(s) this Honourable Court may deem fit to grant in the circumstances.
4. The Plaintiffs/Respondents' case was that, upon request by the Defendant/Appellant, they facilitated the Defendant's acquisition of a parcel of land in Syokimau and subsequently deposited Kshs. 30,000,000/= into the Defendant's company to assist with the purchase of the said property. However, the purchase did not proceed as planned due to various factors, necessitating the refund of the deposit. The Plaintiffs claimed that the Appellant also acknowledged its debt to them in a letter dated 21st September 2020, in which they proposed to refund Kshs. 12,000,000/= within the same week, and the remaining Kshs. 18,000,000/= by 20th October 2020. Furthermore, the letter confirmed that their agreed interest payment was Kshs. 11,000,000/=, to be paid from January 2021 to December 2021. The Plaintiffs contended that this interest amount of 11 million shillings formed the basis of their



claim before the trial court since the Defendant's letter was clear and unambiguous. They believed that, since the Defendant/Appellant had undertaken to settle all outstanding amounts, the same would be paid; however, despite issuing a demand and a Notice of Intention to Sue, the Defendant/Appellant declined, refused, and/or ignored making any payments towards settling the said monies.

5. The Plaintiffs made a request for judgment in default of appearance, and the lower court entered judgment in their favour as prayed on 9th December 2021.
6. The Defendants subsequently filed a Notice of Motion Application dated 10th March 2022 under Certificate of Urgency, seeking, among other things, a stay of the lower court's Decree issued on 9th December 2021, along with the Warrants of Attachment and Sale issued on 1st March 2022 and the Proclamation Notice dated 4th March 2022. They also requested a temporary injunction to prevent the attachment and sale of their property, as well as an order from the subordinate court to set aside its judgment and decree made against them. The application was later formally amended, and the Applicant/Defendant submitted an amended Application dated 25th March 2022, supported by the sworn affidavit of Shyam Wadia, sworn on 10th March 2022.
7. In response to the above Application, the Plaintiffs/Respondents filed a Replying Affidavit sworn by the 2nd Plaintiff, and a further affidavit sworn by Shyam Wadia, dated 6th May 2022, was also filed. Alongside its Replying Affidavit, the Plaintiffs submitted an Application dated 31st May 2022, seeking to have the affidavit supporting the Defendant's Application struck out on the grounds that it was commissioned by an advocate who was conflicted and lacked a valid practising licence. The Defendant subsequently submitted the affidavit of Cosmas Chaenza, sworn on 15th June 2022, in which he averred that he had since regularised his current practising licence.
8. The parties took directions to canvass the Application through written submissions, and a Ruling was then delivered on 12th July 2022, in which the court struck out the impugned affidavit sworn in support of the Application dated 25th March 2022, on the basis that it was commissioned by an advocate from the same firm that had filed it.
9. Subsequently, the Defendants filed a fresh application dated 12th July 2022, supported by a sworn and commissioned affidavit also dated 12th July 2022, seeking the same reliefs as the earlier application of 25th March 2022. In response, through their legal counsel, the Plaintiffs/Respondents filed a notice of preliminary objection dated 1st August 2022, requesting the court to strike out the application in limine as an abuse of the court's process. The Plaintiffs questioned the court's jurisdiction, asserting that the matter was Res Judicata, having been heard and decided on its merits on 12th July 2022. They stated that the subject matter and issues in the current application, along with the parties involved, were similar to those in the amended notice of motion of 25th March 2022, and the orders sought were also similar. They argued that the said application was frivolous and intended to frustrate the swift and fair resolution of the dispute.
10. In its Ruling dated 3rd October 2022, the subordinate court dismissed the Defendant's Application dated 12th July 2022 with costs to the Plaintiff, on the basis that the application was not in any way different from the application of 25th March 2022, stating that the same had already been adjudicated upon and determined.
11. The above chronology of events and the impugned Ruling prompted the present Appeal, which was admitted for hearing, and the parties were directed to present their arguments through written submissions.



Appellant's Submissions

12. Counsel for the Appellant submitted on two issues: whether the subordinate court erred in law by striking out the application dated 12th July 2022 and whether the Appellant's application dated 12th July 2023 should be heard on the merits.
13. On the first issue, counsel submitted that the doctrine of Res Judicata is set out in Section 7 of the Civil Procedure Act and cited its definition from Black's Law Dictionary, 10th Edition. Counsel also outlined the requirements for proving the same and cited the case of George W.M. Omondi & Another vs. National Bank of Kenya Ltd & 2 Others (2001) eKLR, where Ringera J. held that a suit was not Res Judicata if it was merely withdrawn rather than decided on its merits; the case of Uhuru Highway Development Ltd vs. Central Bank of Kenya (1999) eKLR, where the court set out the elements that would demonstrate a matter was Res Judicata; and Margaret Mumbi Kagiri vs. Kagiri Wamairwe (2012) eKLR, where the court defined when a matter could be said to have been heard and finally determined. It was argued that the trial court erred in dismissing the said application dated 12th July 2022 because it was neither heard nor decided on its merits, and that the appellant was not granted their constitutional right to be heard.
14. Regarding the second issue, it was submitted that the right to be heard is protected under Article 50 (1) of the Constitution, and failing to grant the Appellant this right would undermine the pursuit of justice; it was also argued that the Appellant had submitted a draft defence raising triable issues that should have been considered by the lower court when reaching its decision. Counsel relied on the case of James Kanyiita Nderite & Another vs. Marios Philotas Ghikas & Another (2016) eKLR, as well as the Court of Appeal case of Richard Nchapi Leiyagu, to support their claim of the right to be heard. They urged the Court to allow the Appeal and to award costs in accordance with Section 27 (1) of the Civil Procedure Act.
15. There were no submissions on Record for the Respondent/Plaintiff.

Analysis and Determination

16. This being a first appellate court, I am mindful of the duty of a first appellate court, which is to re-examine the trial court proceedings and arrive at its own conclusions.
17. I have considered the grounds of appeal and the submissions of the Appellant against the law. The only issue for my determination is whether the Appeal is merited. In determining so, I will consider whether the Application dated 12th July 2022 was Res Judicata.
18. The doctrine of Res Judicata is anchored in Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya in the following terms: -
 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.
19. The Supreme Court in the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, outlined the elements that must be conjunctively satisfied for the doctrine to be invoked. The court outlined the following: -
 - a. The suit or issue was directly and substantially in issue in the former suit.



- b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
20. I have reviewed the Application dated 25th March 2022 (hereinafter referred to as ‘the original Application’) and the current Application dated 12th July 2022 (hereinafter referred to as ‘the present Application’). I note that the Applicant/Defendant duplicated these Applications and, as the trial court observed, there was no difference between them apart from the fact that the affidavit sworn in support was commissioned by a different Commissioner for Oaths to rectify the earlier irregularity.
21. Having outlined the above, I note that the Ruling dated 12th July 2022 regarding the original Application addressed the issue of the impugned affidavit sworn in support of the Application and found it to be irregular. On this basis, the same was struck out, rendering the Application wholly inadmissible before the court. For these reasons, the Applicant/Defendant filed the present Application seeking to have the substantive issues of setting aside the judgment of 9th December 2021, among other prayers, heard and determined. I observe that these issues had not yet been ventilated or determined on their merits by the subordinate court due to the absence of a properly filed Application. Therefore, the question the Court must decide is whether the subordinate court did indeed hear and determine the Application of 25th March 2025 on its merits, in order to establish whether the present Application is Res Judicata.
22. In making this determination, I find guidance on the decision rendered by the Supreme Court in the case of John Florence Maritime Services Limited & another vs. Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), when it delved into an in-depth discussion of the concept of res judicata thus:-

“This court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another, Motion No. 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata: -

“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. 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....

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): -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.” The essence of the *res judicata* doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:... 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 parties to open the same subject of litigation in respect of 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. The 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 supplied]. 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:

- (i) the matter in issue is identical in both suits;
- (ii) the parties in the suit are the same;
- (iii) sameness of the title/claim;
- (iv) concurrence of jurisdiction; and



- (v) finality of the previous decision.

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: 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.’ (emphasis mine)

23. From the above decision, it is clear that Res Judicata will only apply where the rights and interests of the parties have been heard and determined to finality. In the present appeal, the matter before the trial court was struck out for lack of a properly commissioned Supportive Affidavit, and therefore, it cannot be concluded that the Defendant/Applicant’s issues were heard and determined on their merits. There was no ruling issued regarding the prayers sought, simply because the basis of the said ruling, namely the original application and its supporting affidavit, were found to be improper and hence were struck out.
24. It is well established that when a suit is dismissed, the parties are prevented from re-litigating the same issues under the doctrine of res judicata unless the matter is taken to an appeal. Conversely, when a suit is struck out, as in the present case, nothing stops the aggrieved party from rectifying their pleadings and approaching the court properly. I am guided by the ruling of the Supreme Court of Nigeria in the case of *Abayomi Babatunde Vs Pan Atlantic Shipping and Transport Agencies Ltd*; Supreme Court of Nigeria NO. 154/2002, where Niki Tobi, JSC, stated thus:
- “The enabling rule, that is Order 23 rule 1, uses the words "struck out" twice and a court is bound by the words. Striking out of a suit is quite different from dismissing the suit and this can be gathered from the words "and such discontinuance or withdrawal as the case may be, shall not be a defence to any subsequent action." In other words, an action struck out cannot be the basis- of the plea of res judicata. But an action dismissed can give rise to a plea of res judicata.”
25. I have carefully reviewed the matters heard and decided by the subordinate court, which resulted in the Ruling delivered on 12th July 2022 and the subsequent application filed on the same date. I find that the current application does not constitute Res Judicata simply because, in the impugned Ruling, the court addressed the issue of the improper affidavit and, upon deeming it irregular, struck it out, along with the accompanying application dated 25th March 2022. However, the issues concerning setting aside the judgement delivered in default of appearance, which were substantive, alongside other prayers for stay, were never fully examined. These issues formed the basis of the Defendant/Applicant’s application initiated by the notice of motion supported by a properly sworn and commissioned affidavit.



26. Based on the foregoing, I conclude that the application dated 12th July 2022 was neither Res Judicata nor an abuse of the court's process, solely because it had yet to be heard and determined on the merits. For these reasons, the appeal herein succeeds.
27. I therefore set aside the Ruling of the subordinate court dated 3rd October 2022 and direct that the subordinate court hear and determine the application dated 12th July 2022 on its merits. The defendant/appellant shall bear the costs of this appeal. Orders accordingly.

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

R.E. OUGO

JUDGE

In the presence of:

Mr. Akumu h/b for Miss Mwaniki - For the Appellant

Respondents -Absent

Wilkister C/A

