



**Intercessory Deliverance and Counseling Ministry v Tack Holdings Limited & another  
(Civil Appeal 265 of 2020) [2024] KEHC 4874 (KLR) (Civ) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 4874 (KLR)

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

**CIVIL**

**CIVIL APPEAL 265 OF 2020**

**JN MULWA, J**

**MARCH 22, 2024**

**BETWEEN**

**INTERCESSORY DELIVERANCE AND COUNSELING  
MINISTRY ..... APPELLANT**

**AND**

**TACK HOLDINGS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of Honourable Principal  
Magistrate M.W Njagi in Civil Case No.17 of 2008 on 29/05/2020)*

**JUDGMENT**

1. The trial Court's Ruling dated 29/5/2020 is the subject of this Appeal. The genesis of the impugned ruling is that the Appellant by an Application dated 19/9/2019 sought orders of review of the court's ruling dated 22/7/2019 allowing the 1<sup>st</sup> Respondent's Application dated 7/12/2011 seeking for the lifting of prohibitory orders issued against it to be heard together with Appellant's Application dated 22/12/2011. The Appellant's application also challenged the trial court's orders allowing the process server to be cross examined on his service of court summons. The appellant also filed a Notice of Preliminary Objection challenging the 1st Respondent's application on grounds of it being res judicata. Upon hearing the Appellant's application, the trial magistrate dismissed it together with the Preliminary objection.
2. The Appellant aggrieved by the ruling lodged this Appeal vide a Memorandum of Appeal dated 25/06/2020 upon grounds that the Trial Magistrate erred in failing to consider relevant factors, failing to address her mind to Section 7 of the *Civil Procedure Act*, failing to consider the case of *Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* [1990] eKLR and finally that the Honourable Magistrate



erred in not considering that the orders for cross-examination of the process server were in regard to service of summons that had been done 11 years ago.

The parties did not file written submissions.

### **Analysis and Determination**

3. I have considered the Memorandum of Appeal filed before this Court and the evidence adduced before me. Two issues fall for determination in my view:
  - i. Whether the Application dated 7/12/2011 was res judicata?
  - ii. Whether the trial magistrate erred in directing the cross examination of the process server?
4. The *Civil Procedure Act* under section 7 provides as follows;
  7. Res judicata  
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.
5. The *Civil Procedure Rules* under Order 42 Rule 13(4) provides for documents that ought to form a record of appeal. Of relevance to this Court to determine the issue of res judicata is the application dated 22/12/2011 and the ruling to the application which according to the Appellant was delivered on 11/06/2018. The court has perused the Record of Appeal and the Index. It is missing. Being a primary document it ought to have been filed with the Record of Appeal and therefore the appeal is incomplete.
6. In the circumstances the Court is unable to interrogate the Appeal in the absence of this primary document. The Court of Appeal in the case of *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others* [2016] eKLR while addressing the issue of incompleteness of the Record of Appeal held as follows;

“However, in light of the provisions of Sections 3A and 3B of the *Appellate Jurisdiction Act*, this Court is emboldened to facilitate the just, expeditious, proportionate and affordable resolution of the appeals before it. In doing so, it cannot turn a blind eye to material omissions that *prima facie* are apparent on the record of appeal, but rather, shall facilitate their remedy by the parties where such omissions are curable.” [Emphasis mine]
7. The Court of Appeal in the case of *Mohamed Aden Abdi v Abdi Nuru Omar & 2 others* [2007] eKLR reiterated the Court’s inherent power to strike out an appeal where a record of appeal fails to contain one or more of the primary documents. The Ruling to the Application is one such document.
8. For the above reasons, I find and hold that the Appellant’s Appeal does not comply with the provisions of the law and is dismissed with no orders as to costs.

**DATED DELIVERED AND SIGNED IN NAIROBI THIS 22<sup>ND</sup> DAY OF MARCH, 2024.**

**J. N. MULWA**

**JUDGE**

