Before the Supreme Court sitting as the High Court of Justice

HCJ 9060/08

Before:	Hon. President A. Grunis Hon. Justice S. Jubran Hon. Justice U. Fogelman
The Petitioners:	Khaled Abdullah Abd al-Ghani Yassin Ibrahim Mustafa Mustafa Harbi Abd al-Rahim Abdullah Abd al-Ghani Dar Yassin
	Versus
The Respondents:	1. The Minister of Defense, Ehud Barak 2. The Commander of IDF Forces in the West Bank 3. The Head of the Civil Administration 4. Commander of SJ District Police – Commander Shlomo Katabi 5. Beit El Local Council 6. Beit El Yeshiva Center
Applicants requesting joinder:	1. MK Zehava Galon 2. Meretz faction 3. Arab Movement for Renewal faction 4. MK Dr. Ahmad Tibi 5. Guy Sagiv 6. David Abudraham 7. Hannah Yifat Abudraham
	Application of Respondents 1-4 dated April 27, 2012
Date of session:	14 Iyar 5772 (May 6, 2012)
For the Petitioners:	Attorney Michael Sfard; Attorney Shlomi Zacharia; Attorney Avisar Lev
For Respondents 1-4:	Attorney Ori Keidar; Attorney Osnat Mandel
For Respondent 5:	Attorney Netanel Katz
For Respondent 6:	Attorney Yaron Kostlitz
For Applicants requesting joinder 1-2:	Attorney Omer Schatz

For Applicants requesting joinder 3-4: Attorney Osama Sa'adi; Attorney Amer Yassin

For Applicants requesting joinder 5-7: Attorney Ehud Yelink

Decision

President A. Grunis

1. The proceeding before us focuses on five permanent buildings and five prefabricated buildings erected adjacent to the community of Beit El, on a site known as "Givat ha-Ulpana." In the petition that is the subject of the present proceeding, which was submitted on October 29, 2008, the court was asked to order the execution of demolition orders and stop-work orders issued against these buildings. The court held four hearings in the presence of the parties, and a judgment was ultimately rendered on September 21, 2011.

During the clarification of the petition, a long series of notifications were submitted to the court on behalf of the parties, and response depositions were submitted on the Respondents' behalf following the issuing of an order nisi in the petition (on September 15, 2010). The responses of Respondents 1-4 (hereinafter: the State) consistently claimed that the land on which the buildings were constructed or placed is land owned privately by Palestinians. Accordingly, the Civil Administration issued stop-work orders and demolition orders for the buildings. The claims raised by Respondent 6, Beit El Yeshiva Center, regarding the purchase of the land through the Amana settlement movement were examined and rejected by the State. According to the State's position, as presented to the court during the course of the hearings in the petition, since the buildings were established on regulated land registered in the Tabu ledgers, claims of acquisition are invalid unless the registration has been changed. The State further noted that no transaction license had been requested for the alleged acquisition, and, in the absence of a license as stated, the transaction – if it indeed took place – is invalid (Notification submitted by the State dated January 10, 2010).

2. On May 1, 2011, the State submitted a response to the order nisi noting that on February 28, 2011, the Prime Minister convened a meeting attended by senior ministers, the Attorney General, and other relevant officials. At the meeting, "the infrastructure was laid for an integrated policy regarding the demolition of illegal construction on private land and regarding the regulation of construction on state land, so that, as a general rule, illegal construction established on private land will be removed." At the same meeting, it was further decided to remove the buildings discussed in the petition within one year (State's Reply dated May 1, 2011, pp. 4-5).

3. Following the State's notification, a judgment was rendered in the petition at the end of a hearing held on September 21, 2011 (President D. Beinish and Justices S. Jubran and U. Fogelman). The judgment adopted the State's notification to the court dated May 1, 2011, and established as follows:

> "We have noted the State's notification dated May 1, 2011 and the notification delivered today before the court, that, following the decision adopted at the meeting headed by the Prime Minister and additional government ministers, as well as the Attorney General, that construction on private land will be removed, as distinct from construction on state land; it has been decided that the construction that is the subject of this petition will be removed within one year from the date of submission of the said notification…, so long as the buildings are not demolished prior thereto by those who hold them in possession.
>
> With this notification, the petition has been exhausted and the proceeding has been completed."

Thus, in accordance with the State's notification to the court, as included in the ruling, the State was required to demolish the buildings by May 1, 2012.

4. A year has passed since the State's notification was delivered, but the demolition orders have not been executed. Instead, on April 27, 2012, just a few days before the expiration of the deadline for the demolition of the buildings, the State submitted a notification and requested "the renewal of the discussion of the petition." The notification stated that "the prime minister and the Forum of Ministers wish to reconsider the manner of implementation of the policy on which they decided, and, accordingly, their specific position as notified to the honorable court in this petition" (State's notification dated April 27, 2012, p. 2). The State further noted that the buildings intended for demolition are inhabited, and some thirty families are living in them, and that an Israeli body claims that it purchased the area on which most of the buildings were established in 2000, and a complaint has even been submitted to the District Court on this matter (it should be noted that the complaint was submitted on September 19, 2011, viz. two days before the granting of the judgment in the present proceeding). The State acknowledged that the claims regarding the purchase of the land were raised in the past and rejected by the relevant bodies in the Civil Administration; however, it claims that it is impossible to ignore the fact that the proceeding in the District Court is pending. The State further claimed that the examination in the matter of the buildings discussed in the petition cannot be divorced from other construction in the community of Beit El – construction most of which was undertaken on private Palestinian land, and outside the border of the existing seizure order in the area. Accordingly, it was argued that any decision made regarding the buildings discussed in the petition is liable to influence other construction in Beit El and in other communities that were also constructed on private Palestinian land. In

this context, counsel for the State argued that, in a series of petitions, either an undertaking had been given to remove buildings in the Judea and Samaria area, or the State had been obliged to do so in the court's ruling. This commitment, it was claimed, has broad ramifications. Accordingly, "it has been decided to engage in a reconsideration regarding the priorities of law enforcement in the Area, including – alongside the planning and property aspects – political, public and operational considerations (ibid., p. 5)." In the framework of the reconsideration, the prioritization of attention to construction on private land will be retained, but the future of each specific building will be examined not from a "narrow perspective," but in the overall context, and with attention to "the context of removal events" (ibid., p. 6). It was further decided that any enforcement action on the ground will be suspended pending the exhaustion of the legal clarification proceeding being undertaken on the question of the ownership of the land. In order to enable this reconsideration, the State asked the court to renew the hearing of the petition and to enable a delay of 90 days for the consolidation of an updated policy, during which time the buildings would not be removed. It should be noted that during the course of the hearing, counsel for the State spoke of a period of 60 days.

5. The Petitioners objected to the State's application. In their response, the Petitioners noted the difficulty of opening a proceeding that has ended in a judgment, and argued that the non-execution of the State's commitment, as included in the judgment, constitutes contempt of court. According to the Petitioners' position, not only is there no procedural arrangement permitting the reopening of a proceeding that has been concluded, but the State also failed to present any grounds for the opening of such a proceeding. The Petitioners argue that the motive for the change in position is political, and is not supported by legal grounds justifying the opening of a proceeding in which a judgment has been rendered.

6. On May 6, 2012, following the State's application to open the proceeding, we held a hearing in the presence of the parties in which they reiterated their written pleadings. We examined the claims and did not see fit to grant the application to open the proceeding. As is well known, "the principled starting point is that once a judgment has been delivered, the judgment constitutes the end of the road for further litigation on the matter that is the subject of the judgment. This is the principle of *res judicata*. This principle is founded on the public interest, and the similar interest of the parties in the proceeding, that court hearings should have an end, and that justice will be served for the individual by not subjecting him to additional proceedings on the same grounds or dispute" (HCJ 3267/97 *Rubinstein v. Minister of Defense*, *Piskei Din* 55(2) 241, 244 (1999); *see also*: HCJ 7713/05 *Noah – Israel Association of Organization for the Protection of Animals v. Attorney General* (unpublished, February 22, 2006); hereinafter: *Noah*). Once a final judgment has been rendered in litigation, the parties cannot raise claims, and certainly not on matters resolved in the judgment (*see*: Nina Saltzman *Res Judicata in the Civil Proceeding* 3-12 (1991); hereinafter: Saltzman). The judgment clarifies to all those involved that the legal

proceeding has been completed and, subject to unique exceptions, the relevant bodies must act to implement the judgment and to execute the operative outcome determined therein.

7. The principle of *res judicata* is based on a series of public interests. This principle enables the delineation of the legal proceeding; it assists in the clarification of the legal situation; it prevents a litigant from being inconvenienced on the same issue and duplicate litigation; and it ensures the proper functioning of the judicial system (Saltzman, pp. 12-15). In constitutional terms, the principle of *res judicata* also reflects the separation of the branches of government, in the sense that it marks the completion of the processing by the judicial branch of a matter brought before it. The execution of the judgment no longer rests with the judicial branch, but passes to the executive branch, whether through the mechanism of the Executor's Office, or through the various government ministries, in the case of a ruling of the High Court of Justice directed against an authority of central government.

8. While a number of exceptions may be found to the principle of *res judicata*, they are highly limited in scope. Thus, for example, in 1952 Justice M. Landau established, in HCJ 29/52 *S.A. Shachupek v. Tel Aviv – Jaffa City Council*, *Piskei Din* 7 603, 604-605 (1953), that:

> Nothing comes after the judgment of the High Court of Justice on a matter subject to its authority, and the argument cannot be heard that a judgment of this court is to be vacated because it was mistaken in its interpretation of the law, or in determining the facts, or in the procedural courses it adopted. The possibility of reviewing a judgment of this court is restricted to very narrow limitations. In accordance with general principles, a judgment may be vacated that was granted as the result of deception by one of the parties. This court will also vacate a judgment at the request of a party that was not present during the hearing, if it has been convinced that this party was not liable for its absence.

See also the position of Justice A. Procaccia in CA 9085/00 *Shetrit v. Sherbet Brothers Construction Company Ltd.*, *Piskei Din* 57(5) 462, 475 (2003):

> The principle of *functus officio* is intended to ensure that hearings and disputes between parties will have an end, in order to secure the value of certainty, legal security, and the prevention of the harassment of parties after the completion of their trial. It was also intended to ensure the propriety of the operations of the judicial system, and to prevent its preoccupation with repeated matters in a dispute that has already been resolved, while many as-yet unresolved disputes await… Against the background of these tendencies, the narrow and pedantic framework established in law for opening a completed judicial determination and for granting a later decision in its framework may be understood.

9. In addition to the considerations of *res judicata* and protection of the interest of the individual litigant that his case will not once again be brought to a hearing by the court, there is also a basic principle of observing judgments. This fundamental principle ensures that the judicial proceeding will not be a futile one, but its outcome will actually be realized, and within the period of time set by the court. Without this fundamental component, the legal proceeding will be rendered pointless. This is particularly true when the State is responsible for executing the judgment (in this context, *see* the comments of Justice A. Procaccia in *Noah*, para. 17 of the judgment).

10. A review of the State's claims in its application to reopen the proceeding, the judgment that was granted some eight months ago, shows that they cannot justify deviation from the principle of *res judicata*. The State's arguments do not raise any exceptional and unique grounds sufficient to order the unusual relief of the "resumption of the hearing." The State's principal claim is that the political echelon wishes to reconsider the manner of implementation of the policy the State declared in the proceeding before us, and in a series of additional proceedings (including HCJ 9669/10 *Abd al-Rahman Qassam Abd al-Rahman v. Minister of Defense* and HCJ 7891/07 *Peace Now Sha'al Educational Enterprises v. Minister of Defense*). Counsel for the State did not indicate any legal precedent supporting the State's application to reopen the proceeding. Nor did the State indicate any new facts supporting the application. The fact that a legal proceeding is pending for the clarification of the settlers' acquisition claims was known prior to the rendering of the judgment (on September 21, 2011). What, then, is the reason on account of which we might grant the exceptional relief of reopening a legal proceeding that was heard over the course of several years; the central facts in which were not denied by the State; and in which an order nisi was issued and the State's undertaking to act in a particular manner was recorded?!

In proceedings before the High Court of Justice, the maintenance of the undertaking by the State and the protection of the principle of *res judicata* are of particular importance. Accepting the State's position that the desire to reconsider a policy constitutes grounds for opening a concluded proceeding could have grave consequences. By its nature, policy is not static. Will the State ask to open proceedings that ended in a judgment every time any policy is reconsidered?! A policy change, *per se*, surely does not constitute grounds for deviating from *res judicata*. As mentioned above, the authority to reopen a completed legal proceeding, assuming this exists, is reserved for exceptional situations and extraordinary circumstances. Such circumstances were not presented in the case before us, even if this raises complex political, public and social questions.

11. It should be emphasized that the fact that the judgment in the petition before us was granted by way of the recording of the State's undertaking, and that an order absolute was not issued therein, has no consequence in terms of *res judicata* and the

clear and fundamental obligation to observe judgments. Indeed, in cases in which the State accepts an undertaking to execute a particular action or to refrain from an action, the court, on occasion, declines to issue an operative order, on the basis of the mutual respect between the branches. However, once the undertaking is included in a judgment, the obligation to observe the judgment applies for any purpose and matter. The fact that no operative order was issued may influence the possibility of submitting a proceeding for contempt of court, in the event that the judgment was not observed (regarding the possibility of instigating proceedings for contempt of court due to the non-observance of a declarative order, *see*: HCJ 306/85 *Kahane v. Knesset Speaker*, *Piskei Din* 39(4) 485 (1985)). This question was not placed before us and, accordingly, we do not address it.

12. For these reasons, we have not found grounds to grant the State's application to reopen the proceeding after a judgment has been rendered therein. Notwithstanding this decision, and in order to enable the State to meet the undertaking it delivered, and which was enshrined in the court's judgment, we are extending the deadline established in the judgment for the execution of the demolition orders by 60 additional days (regarding the inherent authority granted to the court to extend deadlines established in a judgment, *see*: HCJ 8887/06 *Yusuf Musa Abd al-Razeq al-Nabut v. Minister of Defense* (unpublished, March 25, 2012), para. 11 of the decision of Justice M. Naor). An extension is thus granted through July 1, 2012, for the execution of the demolition orders in accordance with the undertaking made by the State in the written response to the court dated May 1, 2011 and during the course of the oral hearing on September 21, 2011.

13. Peripheral to this matter, it should be noted that, after the submission of the State's notification regarding its application to resume the proceeding, several applications were submitted to join the petition, on behalf of Member of Knesset Zehava Galon and the Meretz faction; Member of Knesset Dr. Ahmad Tibi and the Arab Movement for Renewal – Ta'al; and on behalf of Guy Sagiv and Hannah and David Abudraham, three of the tenants in the buildings that are the subject of the petition. We did not see fit to grant the applications to join the petition. The arguments of the Members of Knesset and their factions have already been presented clearly and exhaustively by the Petitioners, and we were not convinced that the joining of the applicants would add anything to the discussion. As for the settlers: no grounds at all were given for their application to join the petition, nor was any affidavit attached. For this reason alone, the application could have been rejected. However, even substantively, the applicants requesting to join the petition did not explain why they were appealing to the court only at this stage, and not over the years in which the petition was pursued. It would appear that their arguments, insofar as these were mentioned in the brief application, were represented in the hearing both by the State and by Respondent 5.

14. Accordingly, the application is rejected, subject to the content of paragraph 12 above. The State will bear the Petitioners' fees in the sum of NIS 15,000.

Delivered today, 15 Iyar 5772 (May 7, 2012).

President Justice Justice