Macharia & another v Oceanfreight Transport Co Limited & another (Bankruptcy Cause 25 & 26 of 2009) [2023] KEHC 24902 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24902 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

BANKRUPTCY CAUSE 25 & 26 OF 2009

MN MWANGI, J

JULY 28, 2023

BETWEEN

SAMUEL KAMAU MACHARIA ..... 1ST APPLICANT

PURITY GATHONI GITHAE ..... 2ND APPLICANT

AND

OCEANFREIGHT TRANSPORT CO LIMITED ..... 1ST RESPONDENT

OFFICIAL RECEIVER ..... 2ND RESPONDENT

RULING

1. The applicants filed a Notice of Motion application dated October 5, 2020 brought under the provisions of sections 258, 262, 272 & 273 of the *Insolvency Act, 2015* and the Rules made thereunder, and all other enabling provisions of the law. The applicants seek the following orders -

    i. Spent;

    ii. Spent;

    iii. That pending the hearing and determination of this application the Receiving order issued herein dated February 9, 2020 be stayed;

    iv. That the monies securing payment of the debt deposited in the fixed joint account No 11xx29xxxx in the names of Kamau Kuria & Co Advocates and Maina Murage & Co Advocates be released either to the Official Receiver or the firm of M/s Maina Murage & Co Advocates to the extent of satisfying payment of the decretal sum/debt;

    v. That the Bankruptcy and Receiving order against the applicants/debtors be lifted and/or be set aside;

vi. That the publication and gazettement of the Receiving Order on October 2, 2020 in the Kenya Gazette No 7678 be declared illegal and a nullity; and

vii. Such other further orders as the Honourable Court may deem fit to grant.

2. The application is anchored on the grounds on the face of the Motion and is supported by an Affidavit sworn on the same day by Dr. Samuel Kamau Macharia, the 1st applicant herein. In opposition thereto, the 1st respondent filed a Notice of Preliminary Objection dated November 30, 2020 raising the following grounds –

i. That the Application is incompetent, bad in law and incurably defective for the following, among other reasons –

a. The issues raised by the debtors' application are res judicata and cannot therefore be re-opened or retried in this Court because they were raised, tried and then finally decided upon and determined by many judgments delivered by various Courts as follows –

1. By the High Court (Rawal J., as she then was) on 23rd October 2001,

2. By the bankruptcy Court (Kimaru J.) on 27th May, 2009,

3. By the bankruptcy Court (Koome J., as she then was) on 28th January, 2011,

4. By the bankruptcy Court (Mabeya J.) on 31st July, 2012,

5. By the ELC Court (Nyamweya J.) on 10th June, 2013 and thereafter in two judgments delivered by the Court of Appeal in the debtors' appeals in –

i. Nbi Civil Appeal No. 85 of 2011-judgment delivered on 29th September, 2017.

ii. Nbi Civil Appeal No. 62 of 2011-judgment delivered on 22nd February, 2019.

b. That reopening for retrial and regurgitating issues which have already been decided upon by various Courts (and not just at the High Court level, but also on appeal) is a gross and flagrant abuse of the process of this Court.

ii. The debtors' application is an egregious and extremely dishonest pleading because it is peddling shameless lies and falsehoods with regard to among others, the issues of the (a) judgment debt amount due and owing by the debtors to the petitioner, (b) the letter of allotment allegedly given to Mr. Waithaka, the late MD of the petitioner, (c) whether Mr. Waithaka used that letter of allotment to obtain the title for the suit property in the name of his alleged company, Excello Structures Limited (d) whether the petitioner was awarded any interest by the judgment of Rawal J., of 23rd October, 2001, (e) whether the petitioner fraudulently obtained a decree from the Court purporting to contain interest that had not been awarded by the judgment of Rawal J.

iii. With intent to deceive and mislead the Court, the debtors have for example given false information, claiming that at the time the Receiving Orders were issued, the judgment debt stood at Kshs.34,854,510.00, this is an inexcusable and deliberate deception of the Court because the debtors have dishonestly chosen to ignore the words providing for interest in the decree "together with interest at the rate of 19% p.a. compounded monthly from..." which correctly reflects the amounts due from time to time.

iv. As can be confirmed from the pleadings and numerous judgments delivered by various Courts over a period of almost 20 years, when the Bankruptcy Notices were issued on 4th August, 2008, the judgment debt stood at Kshs.29,334,170/= together with interest at the rate of 19% per annum compounded monthly from 4th August, 2008 until full payment, further, on 31st May, 2009 when the petitions were filed, the debt stood at Kshs.34,854,510/= (together with the same monthly compounded interest rate 19% p.a).

v. More importantly, on 28th January, 2011 when the Bankruptcy Court issued the Receiving Orders, the debt had gone up to Kshs.47,721,561.80, and because of the interest that was accruing every month, this debt had escalated to a sum of Kshs.211,921,975/= eight years later as at 31st December, 2018. Today (30th November, 2020). the debt now stands at Kshs.304,075,069/85. The debtors are therefore playing games and trifling with this Court when they pretend that the amount of the judgment debt today stands at Kshs.34,854,510/=.

vi. Following the issue of Receiving Orders by the Bankruptcy Court on 28th January, 2011, the debtors filed their appeal against that judgment in Nbi Civil Appeal No. 65/2011 on 29th March, 2011 and two months later on 6th May, 2011 they also filed another appeal against the Rawal J. judgment of 2001 in Nbi Civil Appeal No. 85/2011, which after a ten years' delay, was hopelessly out of time. And as stated in paragraphs 1(a) vi and vii above, the appeal against the judgment of Rawal J., (as she then was) struck out by the Court of Appeal on 29th September, 2017, and then on 22nd February, 2019 the same Court of Appeal also dismissed the appeal against the Bankruptcy judgment of Koome J., (as she then was).

vii. Consequently, as matters stand today, all the issues raised by the debtors in their present application have been determined and finally decided upon by the Court of Appeal...subject only to their applications for leave to appeal to the Supreme Court against the dismissal of their appeal challenging the Bankruptcy judgment of Koome J. It is therefore the Court of Appeal (or the Supreme Court depending on whether leave to appeal to that Court is granted or not), which is seized of any outstanding matters in these proceedings. Accordingly, the Bankruptcy Court is now functus officio and has no jurisdiction at all in any proceedings related to this matter.

3. The instant application was canvassed by way of written submissions that were highlighted on 23rd May, 2023. The applicant's submissions were filed by the law firm of Orenge J. & Associates on 12th April, 2021. The 1st respondent's submissions were filed on 25th May, 2022 by the law firm of Maina Murage & Co Advocates, whereas the 2nd respondent's submissions were filed on 13th April, 2021 by Cyrus Njenga, Senior Assistant Official Receiver. When this matter came up for highlighting of submissions, the applicant's Counsel indicated that he had filed supplementary submissions dated 21st September, 2022 however, on perusal of the Court file and the documents uploaded by parties on the Case Tracking System (CTS portal), I did not see the said submissions hence they were not considered when writing this ruling.

4. Mr. Orenge, learned Counsel for the applicants submitted that on 2nd October, 2020, the Official Receiver caused to be published in the Kenya Gazette (Issue No. 7678) a Receiving Order that was issued against the debtors on 9th February, 2020. He further submitted that the publication/ gazettement of the said Receiving Order was done maliciously and did not take into account the fact that the monies securing payment of the debt were held in an interest earning account between the Advocates for the applicants and the 1st respondent. It was stated by Counsel that the affidavit in

support of the instant application raises new issues that have never been raised in any Court of law, tried, decided upon and/or determined as alleged in the Preliminary Objection by the 1st respondent.

5. He stated that the instant application only seeks to pay the 1st respondent out of monies held in the joint account through the Official Receiver and for the applicants to be discharged from bankruptcy thus it does not raise any previous issues or seek reopening/retrial of this matter. Counsel asserted that the 1st respondent's Preliminary Objection is amorphous and founded on wrong/false assumption of facts and the law with regard to the application herein.

6. It was stated by Counsel that no decision exists either in the High Court or Court of Appeal in which issues in the instant application have been raised, heard and determined and that in any event, such evidence is required as a matter of law for the plea of res judicata to be raised. He added that in order to prove res judicata, a party must adduce material evidence. He further stated that the decisions referred to in ground (1) of the Preliminary Objection dealt with issues touching on legality of the primary judgment in HCC No. 3958 of 1991, award of interest and a subsequent decree that was extracted, and as such, the Preliminary Objection on the ground of res judicata must fail. Mr. Orenge relied on the decisions in Kartar Singh Dhupar & Co Ltd v Lianard Holdings Limited [2017] eKLR and Leisure Lodges Limited vs Dr. Lalit D. Kotak [2003] eKLR and contended that grounds (ii), (iii), (iv), (v), (vi) and (vii) of the 1st respondent's Preliminary Objection cannot be termed as preliminary points of law since they do not fall in the realm/or ambit of a Preliminary Objection.

7. Mr. Orenge contended that given the said circumstances, the instant application is unopposed as no reasons have been given by the respondents as to why the money held in the joint interest earning account should not be released to the respondents hence the orders being sought in the application herein, ought to be granted. He submitted that as evidenced by the affidavit in support of the application herein, monies securing payment of the debt are held in a joint interest earning account in the names of Advocates for the parties. He stated that the Bankruptcy/Receiving orders were issued pursuant to the provisions of the Bankruptcy Act, Cap 53 Laws of Kenya (Now Repealed). He submitted that Section 70 of the said Act which was applicable at the time the Receiving Order in this matter was issued, provided that once a Receiving Order was passed, interest shall be calculated and pegged at 6%. He further submitted that this matter is now under the jurisdiction of the 2nd respondent and not the 1st respondent.

8. Counsel for the applicants stated that on the issue of the High Court being functus officio, an application similar to the present one has never been litigated before so that the doctrine of finality can be said to be applicable. He asserted that on whether the instant application is an abuse of the Court process, evidence adduced by way of an affidavit is required to prove this allegation. Mr. Orenge relied inter alia on the Supreme Court case of Gideon Konchellah v Simon Sunkuli [2018] eKLR and the case of Faustina Njeru Njoka v Kimunye [2022] eKLR and submitted that the 2nd respondent has never filed a replying affidavit or grounds of opposition but has instead attempted to adduce evidence through submissions, which is irregular hence the 2nd respondent's submissions should be struck out.

9. It was stated by the applicants' Counsel that publishing of the Receiving Order was malicious since the 2nd respondent knew that the money was in a bank account held by the 1st respondent's Advocates and the applicants' former Advocates on record. He further stated that the 2nd respondent's allegation that the instant application has not been brought under the proper provisions of the law is a technicality that can be cured under the provisions of Article 159(2) (d) of *the Constitution* of Kenya, 2010.

10. Mr. Murage, learned Counsel for the 1st respondent cited the decisions in the Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] KLR 1, Mcfoy v United Africa Co Limited [1961] 3 ALL ER 1169 and Phoenix E.A. Assurance Company Ltd v S.M. Thiga [2019] eKLR, where Courts

extensively discussed the importance of a Court acting within its jurisdiction. He submitted that Kenya Gazette Notice No. 7678 of 2nd October, 2010 does not exist in relation to this Bankruptcy Cause and there was no Receiving Order issued in this cause on 7th February, 2020 hence the application herein is incompetent.

11. Counsel contended that on 28th January, 2011, Martha Koome J. (as she then was), delivered a consolidated judgment in this case issuing Receiving Orders against the applicants and directing that their estates be placed in the hands of the Official Receiver. He stated that the said judgment was delivered as part of an execution process of an earlier judgment by Rawal J., (as she then was), in Nairobi HCCC No. 3958 of 1991 on 23rd October, 2001, and that the said judgment was in favour of the 1st respondent granting it Kshs.500,000/= together with interest thereon at the rate of 19% per annum compounded monthly from the 6th day of December, 1986, until payment in full. It was stated by Counsel that on 5th May, 2011, the applicants attempted to appeal against the judgment of Rawal J., (as she then was), vide Nbi Civil Appeal No. 85 of 2011 but through a ruling dated 29th September, 2017, the Court of Appeal struck out the said appeal with costs.

12. Mr. Orenge further stated that the applicants lodged an appeal against the judgment of Martha Koome J., (as she then was), being Nbi Civil Appeal No. 62 of 2011 and sought for an order for stay of execution pending appeal and that on 31st July, 2012, Mabeya J., granted them an order for stay of execution on condition that they deposit Kshs.45,000,000/= in a joint interest earning account in the name of the Advocates for the applicants and the 1st respondent to be held as security. He stated that on 22nd February, 2019, the Court of Appeal dismissed the said appeal hence the orders for stay of execution issued on 31st July, 2021 lapsed. That subsequently, vide an application dated 27th February, 2019, the applicants applied to the Court of Appeal for an order for leave to appeal to the Supreme Court and an order for stay or suspension of the Receiving Orders issued by Martha Koome J., (as she then was), pending the hearing of their intended appeal.

13. Mr. Murage contended that the instant application should be dismissed on the ground that this Court is functus officio. He cited the Court of Appeal case of Telkom Kenya Limited v Ochanda [2014] eKLR and the Supreme Court holding in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR and submitted that in view of the fact that the final judgment in this case was delivered by Martha Koome J., (as she then was) and the appeal against the said judgment was dismissed by the Court of Appeal, this Court is functus officio and has no jurisdiction to consider the application herein. He also submitted that the issues raised in the application herein are the same matters that are supposed to be determined by the Supreme Court and if the said Court finds that the money held in the joint interest earning account should go back to the applicants herein, it will be a legal absurdity if this Court will have made an order for release of the said money.

14. He cited Section 7 of the *Civil Procedure Act* the case of ET v Attorney General & others [2012] eKLR and Satya Bhama Gandhi v DPP & 3 others [2018] eKLR, where it was held that the High Court has jurisdiction to discipline and punish lawyers who are found guilty of abusing the Court process. He stated that the issues raised in the instant application have already been decided by the Courts in Nbi HCCC No. 3958 of 1991, Nairobi Bankruptcy Notices No. 3 & 4 of 2008, by the judgment delivered by Martha Koome J., (as she then was), in this case, by the Court of Appeal in Nbi. Civil Appeal No. 62 of 2011 and by the ELC Court in Nbi ELC No. 406 of 2008.

15. It was submitted by Mr. Murage that the application herein should be dismissed for being a gross and flagrant abuse of the Court process. He further submitted that the applicants are guilty of extensive and deliberate deception of the Court through a scheme of lies and falsehoods, suppression, non-disclosure

and dishonest concealment of relevant facts which are not minor or simple indiscretions that could be waived away as an oversight or forgetfulness, but a willful, systematic and calculated campaign to deliberately deceive and mislead the Court into giving them orders which they do not deserve.

16. He stated that despite being in possession of the Receiving Order issued on 9th February, 2011 which shows that as at 1st July, 2008 the judgment debt stood at Kshs.29,334,170.00 together with interest at 19% p.a. compounded monthly from 1st July, 2008 until payment in full, the applicants have thrown figures to this Court on the amount of the judgment debt without any regard to the correctness and accuracy of those amounts. To this end, he referred this Court to the decisions in Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & Others [2009] eKLR, Samuel Ndungu Mukunya v Nation Media Group & another [2012] eKLR and Solomon M'rura Mthiu v Stanley M'Kiugu M'Ikiara [2009] eKLR.

17. Mr. Njenga, learned Counsel for the Official Receiver submitted that after Martha Koome J., (as she then was), delivered her judgment in this matter on 28th January, 2011 issuing a Receiving Order against the applicants, they sought a stay against execution of the said Receiving Order pending the hearing and determination of Civil Appeal No. 62 of 2011 in the Court of Appeal. That thereafter, the applicants were granted the said stay on 2nd February, 2011 on condition that they deposited a sum of Kshs. 34,854,510.00 being the decretal sum, in a joint interest earning account in the name of the applicants and the 1st respondent's Advocates and subsequently, the said appeal to the Court of Appeal was heard and dismissed vide a judgment dated 22nd February, 2019.

18. He submitted that the applicants then proceeded to the Supreme Court seeking an order for stay of execution of the Court of Appeal decision but the same has not been granted, hence the Receiving Order appointing the Official Receiver as the Receiver of the debtors' estate is still in force. He stated that for the said reason, the Official Receiver gazetted the said Receiving Order on 2nd October, 2020 as required by law. Counsel contended that the application herein has been brought pursuant to the wrong provisions of the law, as the said provisions relate only to Bankruptcy Orders made under the provisions of the *Insolvency Act* but in this case, a Bankruptcy Order has not been made and the applicants have not been declared bankrupt.

19. It was submitted by Counsel that the application herein relates to the gazettement of a Receiving Order made under the provisions of the Bankruptcy Act, Cap 53 Laws of Kenya (repealed). He further submitted that matters commenced under the repealed Bankruptcy Act such as this one, have been saved by the provisions of Section 733(2) of the *Insolvency Act*, 2015. He argued that based on the foregoing, the application herein should be dismissed in toto. Mr. Njenga submitted that a Receiving Order is very different from a Bankruptcy Order. That once Martha Koome J., (as she then was), issued a Receiving Order vesting the applicant's estate and/or assets on the Official Receiver, the next step is public examination of the debtor and thereafter the debtors may be adjudged bankrupt.

20. Mr. Njenga stated that the issues being raised in the application herein have already been raised and settled by the High Court and the Court of Appeal thus the application herein is res judicata. To support his argument, he relied on the case of Satya Bhama Gandhi v DPP & 3 others (supra). He contended that the present application is another attempt by the applicants to reopen issues already litigated on, before the High Court and the Court of Appeal, thus amounting to an abuse of the Court process.

21. Mr. Njenga cited the provisions of Section 13 of the Bankruptcy Act (repealed), which are couched in mandatory terms and Rule 145 of the Bankruptcy Rules and submitted that the Official Receiver after receipt of the Receiving Order is required to publish it in the Kenya Gazette and in one local newspaper calling upon the creditors to file their proof of debt forms. That since the Court orders

suspending and/or staying the gazettement of the Receiving Orders prior to the filing of the instant application lapsed by operation of the law when Civil Appeal No. 62 of 2011 was dismissed by the Court of Appeal on 22nd February, 2019, the 2nd respondent acted within his mandate when gazetting the said Receiving Order.

22. It was stated by the 2nd respondent's Counsel that the applicants are guilty of material non-disclosure for failing to disclose that they had filed Notice of Motion application dated 27th February, 2019 before the Court of Appeal seeking similar orders pending an appeal to the Supreme Court, which means that the issues raised herein ought to be canvassed before the Court of Appeal if indeed the applicants are aggrieved by the 2nd respondent's actions. Counsel asserted that the 2nd respondent believes that the applicants are forum shopping and commencing multiple similar suits with an intention of delaying the suit, thereby robbing the creditor(s) of the fruits of their litigation. For this reason, he stated that the applicants' actions amount to an abuse of the Court process.

23. He submitted that the proceedings in this matter and Nairobi Civil Appeal No. 62 of 2011 relate to the same subject matter hence any adverse orders from either of the proceedings will affect the outcome of the other proceedings. He argued that dismissal of the application herein is necessary to avoid confusion and the Court acting in vain and exposing itself to ridicule. Mr. Njenga urged for the monies deposited in the joint names of the Advocates together with the accrued interest be released to either the 2nd respondent or the 1st respondent's Advocate in as much as the money satisfies the entire debt.

24. In a rejoinder, Mr. Orenge contended that the applicants are not seeking the setting aside of any order or ruling. He submitted that this case was heard under the Bankruptcy Act (now repealed) which provided that interest cannot go above 6% per annum.

Analysis And Determination.

25. I have considered the instant application, the affidavit filed in support thereof, the Preliminary Objection raised by the 1st respondent and the written as well as oral submissions made by Counsel for the parties. The issues that arise for determination by are –

    i. Whether the Preliminary Objection raised by the 1st respondent should be sustained;

    ii. Whether the instant application has been brought pursuant to the correct provisions of the law;

    iii. Whether the Receiving Order made against the applicants should be lifted and/or be set aside;

    iv. Whether publication and gazettement of the Receiving Order on 2nd October, 2020 in the Kenya Gazette Notice No. 7678 should be declared illegal and a nullity; and

    v. Whether the monies held in the fixed joint account No. 1136296220 in the names of Kamau Kuria & Co. Advocates and Maina Murage & Co. Advocates should be released either to the Official Receiver or the firm of M/s Maina Murage & Co. Advocates to the extent of satisfying payment of the decretal sum/debt.

26. In the affidavit in support of the instant application, the applicants deposed that they agreed to sell to the 1st respondent herein, Mr. Waithaka's company, land measuring 5 acres along Mombasa Road allocated to the 2nd applicant vide a letter of allotment No.91993/11/204 dated 13/9/1982. They averred that the 1st respondent paid Kshs.500,000/= as deposit towards the purchase price and took the original allotment letter for purposes of paying standard premium and processing the title. That thereafter, Mr. Waithaka registered another company to be issued with the allotment letter.

27. The applicants averred that subsequently, Mr. Waithaka through the 1st respondent sued them on grounds that they had shown him the wrong parcel of land in Industrial area, whereas the allotment letter was for another land at Biashara Street. They deposed that thereafter, judgment was entered against them to refund the 1st respondent the sum of Kshs.500,000/=. That the 1st respondent extracted a decree for the principal sum of Kshs.500,000/= and interest at 19% compounded monthly,

28. It was stated by the applicants that the 1st respondent then filed bankruptcy proceedings against the applicants and they deposited Kshs.500,000/= in Court in case they lost the case. They averred that the Bankruptcy proceedings proceeded and a Receiving Order was issued against them and they appealed against the Receiving Order and applied for stay of execution of the same, pending the hearing and determination of their appeal.

29. They stated that they were granted stay of execution by the High Court on condition that they deposited Kshs. 34,854,510.00 into Court as security. That they complied with this condition but they were later ordered to make a further deposit making the total deposit in terms of security for the due performance of the decree to be Kshs. 45,000,000/=.

30. The applicants averred that their former Advocates on record and the 1st respondent's Advocates agreed to withdraw the said Kshs. 45,000,000/= from Court and have it deposited in a joint interest earning account in their names. They stated that as at 10th February, 2020, the monies in the joint interest earning account had accumulated to Kshs. 76,095,003.40.

31. It was stated by the applicants that with such security which is at the respondent's disposal, the question of inability by the applicants to pay their debt does not arise.

32. They contended that the 2nd respondent maliciously caused to be published in the Kenya Gazette of 2nd October, 2020 the Receiving Order declaring them bankrupt.

33. They asserted that the 2nd respondent has never invited them to his office to find out whether or not they are able to pay their debt as provided for, in the Receiving Order, thus the 2nd respondent is in contempt of Court for violating the terms of the Receiving Order. They averred that they stand to suffer irreparable loss and damages in the event the orders sought in the instant application are not granted, since they are prominent business people whose investment, trade and business will be irreparably damaged.

Whether the preliminary Objection herein should be sustained.

34. In Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, the Court considered what constitutes a Preliminary Objection and stated thus-

> " ----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".
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> In the same case Sir Charles Newbold, P. stated as follows-
>
> > " a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising

of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

35. The applicants submitted that the Preliminary Objection herein is amorphous and founded on a wrong/false assumption of facts and the law. They averred that material evidence is required as a matter of law for the plea of res judicata to be raised, yet no decision exists either in the High Court or the Court of Appeal in which issues similar to those raised in the instant application have been raised, heard and determined, therefore the Preliminary Objection is res judicata and must fail. They further submitted that grounds (ii), (iii), (iv), (v), (vi) and (vii) of the 1st respondent's Preliminary Objection cannot be termed as preliminary points of law since they do not fall in the realm/or ambit of a Preliminary Objection.

36. This Court therefore has to determine if the Preliminary Objection raised by the 1st respondent can be sustained. It is evident that the said Preliminary Objection raises three main grounds of objection that is –

    i. Whether this Court is functus officio;

    ii. Whether the application herein is res judicata; and

    iii. Whether the application herein is an abuse of the Court process.

37. As correctly submitted by Counsel for the 1st respondent, the doctrine of functus officio and the doctrine of res judicata are closely related. The doctrine of functus officio is one of the mechanisms by which the law gives expression to the principle of finality as was stated by the Supreme Court of Kenya Raila Odinga & others vs. IEBC & others (supra). In order for this doctrine to be successfully invoked, it has to be established and/or demonstrated that a Court has performed all its duties in a particular case. The doctrine of res judicata on the other hand is provided for under Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya. In order for the said doctrine to be successfully invoked, the matters in issue must be similar to those which were previously in dispute between the same parties, with the same having been determined on merits by a Court of competent jurisdiction. See the English case of Henderson vs Henderson (1843-60) ALL ER 378.

38. Based on the above preceding paragraph, in order to for this Court to determine whether it is functus officio with regard to the application herein and whether the instant application is res judicata or not, it has to ascertain facts and probe evidence. Therefore, the proper way to raise these two grounds of objection, is by way of a Notice of Motion application where pleadings are annexed to affidavits to enable the Court to appreciate the facts. The two doctrines of law cannot be properly raised in a Preliminary Objection.

39. On the issue of whether the application herein is an abuse of the Court process, my finding is that the same cannot be properly raised in a Preliminary Objection since it is not a pure point of law and it cannot be argued on the assumption that all the facts pleaded by the other side are correct. Evidence has to be called to demonstrate how the Court process is being put into abuse.

40. Having considered the points raised by the 1st respondent in its Preliminary Objection, it is my finding that they can be argued in the usual manner since they call for rebuttal of evidence by way of affidavit. In addition, addressing these issues fully calls for hearing and determination of the instant application on merit since they are not pure points of law. In view of the above, it is evident that the Preliminary Objection herein raises factual issues that need to be ascertained.As a result, I hold that the Preliminary Objection herein is not merited and I hereby dismiss it.

Whether the instant application has been brought pursuant to the correct provisions of the law.

41. The instant application has been brought under the provisions of Sections 258, 262, 272 & 273 of the *Insolvency Act*, 2015 and the Rules made thereunder. The 2nd respondent submitted that these provisions relate only to Bankruptcy Orders made under the provisions of the *Insolvency Act* but in this case, a Bankruptcy Order has not been made and the applicants have not been declared bankrupt. It was stated by the 2nd respondent that the instant application relates to the gazettement of a Receiving Order made under the provisions of the Bankruptcy Act, Cap 53 Laws of Kenya (repealed), and since these matters have been saved by the provisions of Section 733(2) of the *Insolvency Act*, 2015, the application herein should be dismissed. The applicants on the other hand submitted that the allegation that the instant application has not been brought under the proper provisions of the law is a technicality that can be cured under the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010.

42. It is not disputed that the Bankruptcy proceedings which culminated in a Receiving Order against the applicant were all conducted and the order issued under the provisions of the Bankruptcy Act, Cap 53 Laws of Kenya (now repealed).

43. In order to save the provisions of the Bankruptcy Act (now repealed) and proceedings instituted under the said Act, Parliament enacted the provisions of Section 733(2) of the *Insolvency Act*, 2015 which provide as follows –

> " Despite their repeal, the Bankruptcy Act (Cap. 53) and section 89 of the *Law of Succession Act* continue to apply, to the exclusion of this Act, to any past event and to any step or proceeding preceding, following, or relating to that past event, even if it is a step or proceeding that is taken after the commencement." (emphasis added).

44. From the wording of the above provisions, it is evidently clear that the instant application has been brought under the wrong provisions of the law. This Court now has to determine whether the instant application is fatally defective. Courts are called upon to do substantive justice to the parties in a suit by giving effect to the overriding objective of Sections 1A and 1B of the *Civil Procedure Act*, in the interpretation of its provisions and Rules which include; the just determination of the proceedings; efficient disposal of the dispute; efficient use of available judicial and administrative resources and the timely disposal of the proceedings at a cost affordable to the respective parties. The Court of Appeal in the case of Stephen Boro Gitiha v Family Finance Building Society & 3 Others [2009] eKLR, expressed itself on the need by Courts to give effect to the overriding objective by holding that -

> " The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way... I must warn litigants and counsel that the courts are now on the driving seat of justice and the courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as it is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible."

45. On the issue of this application having been brought under the wrong provisions of the law, this Court's finding is that the fact that the application herein has been filed pursuant to the wrong provisions of the law affects the form rather than the substance of the application. This is because,

even if the applicants were to cite the correct provisions of the law, the information contained in the application would remain the same. Accordingly, I agree with Counsel for the applicants that this issue falls within the ambit of a procedural technicality that can be cured under Article the provisions of 159(2)(d) of *the Constitution* of Kenya, 2010.

Whether the Receiving Order made against the applicants should be lifted and/or be set aside.

46. The 1st respondent filed Nairobi HCCC No. 3958 of 1991 against the applicants seeking a refund of Kshs.500,000/=. On 23rd October, 2001, Rawal J., (as she then was), delivered a judgment in favour of the 1st respondent granting it Kshs.500,000/= together with interest thereon at the rate of 19% per annum compounded monthly from the 6th day of December, 1986 until payment in full. In execution of the said judgment, the 1st respondent instituted Bankruptcy proceedings against the applicants. On 28th January, 2011, Martha Koome J., (as she then was), delivered a consolidated judgment in this case where she issued a Receiving Order against the applicants and directed that the applicants' estates be placed in the hands of the Official Receiver.

47. Dissatisfied by the judgment by Martha Koome J., (as she then was), the applicants lodged an appeal against the said decision in Nbi Civil Appeal No. 62 of 2011. The said appeal was dismissed on 22nd February, 2019 by the Court of Appeal. The applicants then filed an application dated 27th February, 2019 at the Court of Appeal seeking leave to appeal to the Supreme Court.

48. Based on the foregoing, it is evident that the Receiving Order that the applicants seek to have lifted and/or set aside was issued by a Court of competent and concurrent jurisdiction, and for the said reason, this Court is functus officio with regard to the issuance of the Receiving Order. The said Order has not been set aside and/or vacated by the Court of Appeal since the appeal lodged against it was dismissed by the Court of Appeal on 22nd February, 2019. Accordingly, if this Court proceeds to determine this issue and/or issue an order setting aside and/or lifting the Receiving Order issued by Martha Koome J. (as she then was), it will be tantamount to sitting on appeal of its own decision and the decision by the Court of Appeal, which is unlawful.

Whether publication and gazettement of the Receiving Order on 2nd October, 2020 in the Kenya Gazette Notice No. 7678 should be declared illegal and a nullity.

49. A Receiving Order against the applicants was issued by Martha Koome J., (as she then was), vide a judgment delivered on 28th January, 2011. The applicants lodged an appeal against the said judgment but the said appeal was dismissed by the Court of Appeal vide a judgment dated 22nd February, 2019. This leads to the logical conclusion that there is a legal and valid Receiving Order issued against the applicants that has not been varied and/or set aside by any Court with competent jurisdiction to do so.

50. It was submitted by the 2nd respondent that pursuant to the provisions of Section 13 of the Bankruptcy Act (repealed), after receipt of the Receiving Order, the Official Receiver is required to publish it in the Kenya Gazette and in one local newspaper, calling upon the creditors to file their proof of debt forms.

51. Section 13 of the Bankruptcy Act, Cap 53 Laws of Kenya (now repealed) provides that –

> "Notice of every receiving order, stating the name, residential and business addresses and description of the debtor, the date of the order, the court by which the order is made and the date of the petition, shall be published in the Gazette in the prescribed manner."

52. The applicants were granted conditional stay of execution of the judgment dated 28th January, 2011, pending the hearing and determination of Nairobi Civil Appeal No. 62 of 2011. As stated before, the

said appeal was dismissed on 22nd February, 2019. It is noteworthy that the Receiving Order issued by Martha Koome J., (as she then was), in this case vide a judgment delivered on 28th January, 2011 was published and/or gazzetted in Kenya Gazette Notice No. 7678 on 2nd October, 2020, approximately nineteen (19) months after the appeal against the said Order was dismissed. As a result, I agree with Counsel for the 2nd respondent that the Official Receiver acted within its mandate when gazetting the said Receiving Order. Consequently, publication and gazettement of the Receiving Order is not illegal and/or a nullity.

53. This Court therefore holds that since the Court orders suspending and/or staying the gazettement of the Receiving Orders prior to the filing of the instant application elapsed by operation of the law when Civil Appeal No. 62 of 2011 was dismissed by the Court of Appeal on 22nd February, 2019, the 2nd respondent acted within its mandate when it gazetted the said Receiving Order.

Whether the monies held in the fixed joint account No. 1136296220 in the names of Kamau Kuria & Co. Advocates and Maina Murage & Co. Advocates should be released either to the Official Receiver or the firm of M/s Maina Murage & Co. Advocates to the extent of satisfying payment of the decretal sum/debt

54. It is not disputed that the monies held in the joint interest earning account in the name of the applicants' former Advocates on record and the 1st respondent's Advocate was as a result of the conditional stay orders issued by Mabeya J., on 31st July, 2012. The learned Judge granted the applicants an order for stay of execution pending the hearing and determination of Nairobi Civil Appeal No. 62 of 2011, on condition that they deposit Kshs. 45,000,000/= in a joint interest earning account in the name of Advocates for the applicants and the 1st respondent to be held as security for the due performance of the decree.

55. Notably, Nairobi Civil Appeal No. 62 of 2011 was dismissed by the Court of Appeal on 22nd February, 2019 thus the orders for stay of execution issued by Mabeya J., also elapsed on the said date. The 1st respondent submitted that vide an application dated 27th February, 2019, the applicants applied to the Court of Appeal for an order for leave to appeal to the Supreme Court and for an order for stay or suspension of the Receiving Order issued by Martha Koome J., (as she then was), pending the hearing of their intended appeal but the said application is yet to be determined. The applicants' Advocates did not inform this Court that an order for stay of execution of the decision of the Court of Appeal was granted. There is therefore nothing that stops this Court from making a decision pertaining to the monies held in the joint bank account.

56. I note that despite the fact that the 2nd respondent opposes the instant application, in its submissions it sought for an order that the monies deposited in the joint names of the Advocates together with the accrued interest be released to either the 2nd respondent or the 1st respondent's Advocate in as much as the money satisfies the entire debt

57. Having perused the Court file and having considered the application before me and the responses made, I find that the prayer by the applicants for the release of the money is neither res judicata nor is this Court functus officio in regard to the same, as the issue has never been raised, litigated on and/or determined before, by any Court of competent jurisdiction between the parties herein. It is also my finding that the said monies held in a joint interest earning account in the name of the applicants' former Advocates on record and the 1st respondent's Advocate should have been released to the 1st respondent upon dismissal of Nairobi Civil Appeal No. 62 of 2011 on 22nd February, 2019 since the 1st respondent was the successful litigant in the said appeal and there were no further orders stopping the 1st respondent from accessing the said monies, in so far as it satisfies the judgment of the Court.

58. The issue brought up by the applicants' Counsel that interest under the provisions of Section 70 of the Bankruptcy Act (now repealed), could not be above 6% per annum, was not for determination before me as that is a matter that should have been raised on appeal, when the applicants appealed to the Court of Appeal.

59. In the result, I find that the instant application is partly merited and I proceed to allow it in the following terms –

    i. That the monies securing payment of the debt deposited in the fixed joint account No. 1136296220 in the names of Kamau Kuria & Co. Advocates and Maina Murage & Co. Advocates be released to the law firm of M/s Maina Murage & Co. Advocates to the extent of satisfying payment of the decretal sum/debt as per the judgment of the Court made by Rawal J., (as she then was), on 23rd October, 2001; and

    ii. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JULY, 2023.RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE