



Kahumbu & another (Suing as Personal Representatives of the Estate of Roseline Kahumbu) v National Bank of Kenya Limited (Commercial Case 1336 of 2001) [2022] KEHC 12166 (KLR) (Commercial and Tax) (22 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 1336 OF 2001
DAS MAJANJA, J
AUGUST 22, 2022**

BETWEEN

**DOMINIC KAHUMBU 1ST PLAINTIFF
PAULA KAHUMBU 2ND PLAINTIFF
SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ROSELINE
KAHUMBU**

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. This ruling is in respect to the plaintiffs' Notice of Motion dated February 10, 2021 which seeks the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That an order for injunction do issue restraining the defendant/respondent by itself, its servants, agents or any one of them from interfering with the property known as L R no 7583/41 and L R no 7583/19 either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever pending the settlement of the terms of the decree;
 - e. That, the honourable court be pleased to issue terms upon which the decree is to be settled.



- f. That the honourable court do issue directions on the settlement of the terms of the decree, such directions to include time lines and the amounts due and owing under the mortgage and further mortgage.
 - g. That the honourable court do direct the defendant/respondent do supply the decree holder/applicant with requisite statements of accounts for the mortgage and further mortgage to facilitate the settlement of the decree.
 - h. That the honourable court be pleased to make such further orders or other orders as justice of the matter may require.
 - i. That costs of and occasioned by the application be in the cause.
2. The application is supported by the affidavit of Dominic Kahumbu in his capacity as one of the administrators of the estate of Roseline Mary Kahumbu (“the deceased”). The bank opposes the application through the replying affidavit of Edna Omangi its senior manager, remedial & recoveries sworn on February 16, 2022. The parties filed written submissions in support of their respective positions.
 3. The deceased filed this suit claiming a matrimonial interest in the properties known as LR no 7583/41 and LR no 7583/19 (“the suit properties”). These properties were charged to the defendant (“the bank”) to secure loan facilities to schemes limited and its director, the late John Francis Kahumbu, the deceased’s husband. There was a default in loan repayments which necessitated the bank to issue statutory notices to recover the sums which culminated to this suit.
 4. Ochieng’ J, delivered judgment on March 23, 2017 (“the judgment”) on the terms that the mortgage and further mortgage on the suit properties were valid. At paragraph 64 the learned judge held that: ‘In effect the defendant holds a valid security, in the form of the mortgage and further mortgage, but it cannot ignore nor override the plaintiff’s prevailing equitable rights in the suit property. To that extent the plaintiff’s suit is successful.’
 5. After delivery of the judgment, the bank moved to issue statutory notices which led to the plaintiffs filing the application dated December 19, 2019 seeking an injunction restraining the bank from exercising its statutory power of sale over the suit properties, directions on settlement of the decree, provision of statement accounts of the mortgage and further mortgage accounts amongst other orders.
 6. This court delivered its ruling on January 21, 2021 and stated as follows, ‘A reading of the order 21 rule 8 aforesaid shows that the process of preparing the decree in the High Court is entirely in the hands of the parties. It is only upon disagreement between the parties that the draft is forwarded to the judge by the registrar for settlement. In this case, there is nothing on record to show that the applicants’ counsel prepared a draft decree for approval by their counterpart. In short, the plea for settlement of the decree in the application is premature. 16. The result of this finding is that there is no basis for to grant an injunction. It is therefore not necessary to deal with the other issues raised by the parties. The Notice of Motion dated December 19, 2019 (erroneously referred to as June 18 2020) is now dismissed with costs to the defendant. The interim orders in place are discharged forthwith.’
 7. The plaintiffs have now filed another application dated February 10, 2021 seeking similar orders as those in the application dated December 19, 2019. This time the plaintiffs have annexed the decree which was the sole reason why the court dismissed the initial application.
 8. It is the plaintiffs’ case that the decree requires to be settled to determine the amount due and owing to the bank, whether the sale of a portion of the matrimonial property after the issuance of the judgment



in HCCC no 3773 of 1981 extinguished the bank's right to sell the property by auction and if by virtue of the decree, the bank has the right to auction more than half of the matrimonial property.

9. The plaintiffs state that the kes 220,000,000.00 demanded by the bank is unlawful and contrary to the provisions of the in duplum rule. They aver that the bank ought to recover the sums owed from other directors who had executed personal guarantees to secure the monies advanced. The plaintiffs state that the bank's move to instruct Garam auctioneers is in breach of the decree. The plaintiffs aver that they together with other family members are in actual possession of the suit properties and they will suffer irreparable loss if the court does not grant the injunction.
10. The bank's position is that the judgment was to the effect that it still held valid securities over the suit properties and that the deceased had an equitable right over the property. The bank contends that this meant it could still realize the security after notifying the plaintiffs and after giving them the option to redeem the same or to repay the amount owed to the bank following the court's declaration that the deceased had equitable interest in the property.
11. The bank contends that the amount owed to it continues to accrue interest and is now over kes 220,000,000.00 hence it has a legal right to recover the amount owed to it and thus exercise its statutory power of sale. The bank's position is that the deceased's equitable rights declared in HCCC no 3772 of 1981 do not supersede its statutory right to sell the suit properties. It confirms that though some of the properties were sold in order to recover the sums owed, the entire amount was not recovered and this has necessitated the sale of the remaining properties offered as security. The bank contends that the plaintiffs have not denied the debt owed to it.
12. The bank further submits that this court is *functus officio* and that the orders sought by the plaintiffs would require this court to reevaluate evidence which it cannot as judgment has already been rendered in the matter. The bank also submits that it cannot pursue the amount owed from other directors since it is the late John Francis Kahumbu who was the mortgagor and the registered owner of the suit properties and in this instance, he executed the mortgage and further mortgage and a guarantee to repay the amount with interest to the bank.
13. The bank rejects the plaintiffs' argument that they will suffer irreparable loss and damage. It avers that it continues to suffer irreparable loss as it has not been able to realize its security for over 30 years. It submits that the plaintiffs have not made out a case for the grant of the orders sought in their application.
14. From the respective positions taken by the parties, the main issue is contention is whether the court can issue the orders sought on the ground that it is *functus officio*. I say this because this suit has already been determined and there is a judgment whose terms are set out in the Decree as follows:
 1. That there is no illegality in the mortgage, if anything, the mortgage is valid. The mortgage and further mortgage are not null and void.
 2. That the said mortgage and further mortgage are subject to the plaintiff's equitable rights, which were declared by Justice E Owuor in HCCC no 3772 of 1981.
 3. That the defendant holds a valid security, in the form of the mortgage and further mortgage, but it cannot ignore nor override the plaintiff's prevailing equitable rights in the suit property.
 4. That costs of this suit are awarded to the plaintiff.
15. All the issues in the suit have now been determined and merged into the judgment. In this respect therefore, the court is *functus officio* as regards re-opening of the suit. In [Telkom Kenya Limited v John Ochanda \(Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited\)](#)



NRB CA Civil Appeal no 60 of 2013 [2014] eKLR, the Court of Appeal explained the meaning of the *functus officio* principle as follows:

Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.

The court must however examine whether the orders sought after the Judgment are consequential or supplemental to the judgment in order to determine whether the application seeks to re-open the issue merged into the judgment and is therefore *functus officio*.

16. On the same issue, the court in *Bellevue Development Company Limited v Vinayak Builders Limited & Another* ML HCCC no 571 of 2011 [2014] eKLR, observed as follows:

[C]are should be taken not to inadvertently or otherwise overstretch the application of the concept of *functus officio*; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court.

17. Whether the application is a natural consequence of the judgment giving this court supplemental jurisdiction or not is a question of substance. What the plaintiffs seek in the application is for the court to determine how much is due under the mortgages and how the monies due to the bank should be paid and pending determination of these issues, an injunction restraining the bank from exercising its statutory power of sale.
18. The issues now raised by the plaintiffs' constitute a new claim outside the scope of the judgment which was limited to declaring that the mortgages over the suit properties were valid but the bank would exercise its power of subject to the deceased's declared equitable interest. In order to resolve such a claim, the court would have to call on the bank to make its defence, direct the parties to call evidence, evaluate the evidence and determine the amount due to the bank including the interest rates and whether the bank is in violation of the in duplum rule. In the end, the court would have to conclude the matter by writing another judgment settling the rights of the parties. Further, it would be impossible to determine these issue without joinder of the chargor, as proprietor of the suit properties.
19. In order to achieve this end, the court would have to reopen the case, direct parties to amend their pleadings, join a new party to the suit and proceed as if the matter were a fresh suit. I therefore hold that that in so far as the issues raised are concerned, this case has been concluded and the court is *functus officio* there being nothing further to decide. The decree has already declared the right of the parties hence there is nothing further to settle or determine and as such, an injunction cannot be issued in this matter that has now been concluded by a decree. The only option available is for the plaintiffs to file a fresh suit against the bank.
20. I dismiss the application dated February 10, 2021 with costs to the defendant.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2022.



D S MAJANJA

JUDGE

Court of assistant: Mr M Onyango

Mr Oluoch Olunya instructed by Oluoch-Olunya and Associates Advocates for the Plaintiffs.

Ms Waititu instructed by Michael Daud and Associates Advocates for the Defendant.

