



**Clesoi Holdings Limited v Prime Bank Limited & 2 others (Civil Suit E090 of 2021)  
[2022] KEHC 13275 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13275 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E090 OF 2021  
A MSHILA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**CLESOI HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**PRIME BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOHN GIKONYO T/A GARAM INVESTMENT AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**JOHN MBUGUA KARIUKI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Background**

1. It was the plaintiff's case that in January 19, 2021 the 2nd defendant conducted a sham auction and purported to sell the suit premises LR No 209/10830/5 to the 3rd defendant. It filed a suit in this court seeking an injunction on the same. In a decision dated January 11, 2021 this court held that the statutory power of sale was lawfully conducted and the allegation of fraud, illegality and/or irregularity with regard to the statutory power of sale are not borne out of the evidence on record. A prima facie case was not established to warrant grant of interim injunction and the application was consequently dismissed.
2. On October 21, 2021 the plaintiffs filed an appeal in the Court of Appeal and proceeded to approach that court once more through a motion dated October 26, 2021 seeking extension of preservative orders issued on September 28, 2021 over LR. No 209/10839/5.



## Preliminary Objection

3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a preliminary objection to the application dated October 26, 2021 on the following grounds;
  - a. That the court lacks jurisdiction to grant the orders sought being an injunction pending determination of an application by the Court of Appeal under rule 5(2) (b) of the [Court of Appeal Rules](#).
  - b. That the present application is res judicata by virtue of the oral application that granted 30 days stay upon delivery of the ruling on September 28, 2021.
  - c. That the High Court is now *functus officio* and cannot purport to exercise jurisdiction contemporaneously with the Court of Appeal by virtue of the existence of Civil Appeal (Application) No E605 of 2021, [Clesoi Holdings Limited v John Gikonyo & Prime Bank Limited](#).
  - d. That in view of the above the application cannot be maintained and should be dismissed with costs.
4. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted that the court lacked jurisdiction to hear and determine the present application as the plaintiff had filed the present application together with the one at the Court of Appeal dated October 25, 2021 seeking the same reliefs; the actions of the plaintiff in filing this application is manifestly irregular and contrary to the provisions of order 42 rule 6 of the [Civil Procedure Rules](#) which provides:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

  - (a) the court is satisfied that substantial loss may result to the applicants unless the order is made, and that the application has been made without unreasonable delay; and
  - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicants”.
5. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendant further submitted that this court is functus officio as the plaintiff/ applicant plainly admits that they had filed an application dated October 25, 2021 pursuant to rules 5 (2) (b) of the [Court of Appeal rules](#) rendering this present application an utter abuse of the court process



and in support cited *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR where the court held;

“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.”

6. That section 99 of the *Civil Procedure Act* provides for exceptions to the doctrine of functus officio in the following terms;

“Clerical or arithmetical mistakes in judgements, decrees or orders or errors arising therein from any accidental slip or omission may be at any time be corrected by the court either of its own motion or on the application of any of the parties”

7. It was further argued that the present application is res judicata as a similar application was heard by this court on September 20, 2021 where the court dismissed the application. In support they cited *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR where it was held;

“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

8. The present application is therefore frivolous vexatious, bad in law and an abuse of court process.

### **Plaintiff/applicant’s Response**

9. The plaintiff/applicant opposed the preliminary objection and argued in its submissions that this court has jurisdiction to entertain an injunction pending the hearing and determination of an appeal. in a matter like this where the applicant has already filed an application for injunction pending appeal in the Court of appeal, Civil Appeal (Application) No E604 of 2021, this court has jurisdiction and has previously consistently granted injunction pending the hearing and determination of such an application.
10. On *functus officio* and res judicata it was argued that the application herein seeks extension of the orders issued on September 20, 2021 for a limited period or until Civil Appeal (Application) No E604 of 2021 is heard and determined. The court has jurisdiction to extend its orders of stay or injunction pending appeal as was held in *Serab Wanjiru Kung’u v Peter Munyua Kimani* [2021] eKLR. An Application for extension of orders cannot be said to be *sub judice* or *res judicata* under section 6 and 7 of the *Civil Procedure Rules*. The court is also not *functus officio* to consider an application for extension of its own orders.



11. On the allegation that the application is an abuse of court process it was argued that this ground has not been established as it was premised on other grounds that have not been demonstrated.

### Issues for Determination

12. Upon reading the written submissions this court has framed one issue for determination which is whether the preliminary objection is merited.

### Analysis

13. The definition of what constitutes a preliminary objection was given in the celebrated case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* (1969) EA 696 the court had the following to say: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....”

14. In the case of; *R v Karisa Chengo* [2017] eKLR, the court held that that;

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

15. Also in *John Musakali v Speaker County of Bungoma & 4 others* (2015) eKLR it was held that: -

“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”

16. On examination of the preliminary objection, this court needs to determine the sub-issues that have arisen so as to satisfy itself that the objection raised, if successful, is capable of finally disposing of the whole matter; the sub issues that have arisen for determination are;
  - a. Whether the application dated October 26, 2021 is *res judicata*
  - b. Whether this court is *functus officio*?



17. On *res judicata*: section 7 of the [Civil Procedure Act](#) cap 21 laws of Kenya defines the doctrine of *res judicata* in the following terms:-

“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.”

18. It is common ground that the applicant/plaintiff's application approached this through a notice of motion dated February 11, 2021 seeking among others a temporary injunction pending the hearing and determination of the suit. In a ruling dated September 28, 2021 this court in its ruling found that the plaintiff/applicant had not proved *prima facie* case and dismissed the application with costs. The counsel for the Plaintiff/applicant requested for a stay of transfer of title pending appeal which the court granted for 30 days.

19. The plaintiff/applicants thereafter filed a motion dated October 26, 2021 seeking an extension of the stay order granted. This court is satisfied as it is very clear, that the matter in issue in the application herein was different from that which was determined and consequently cannot be said to be *Res Judicata*.

20. On the second issue the doctrine of ‘*functus officio*’ was stated by the Court of Appeal in the case of [Telcom Kenya Ltd –v- John Ochanda](#) [2014] eKLR 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 general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in *re-St Nazaire Co*, (1879), 12 Ch D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”

21. This court having granted a stay order pending appeal has inherent powers to extend the same and therefore is not *functus officio*. In the circumstances this court finds that the preliminary objection is devoid of merit.

### **Findings and Determination**

22. In the light of the forgoing reasons the court makes the following findings and determinations;

- i. The preliminary objection dated October 26, 2021 is found lacking in merit and it is hereby overruled.
- ii. Each party to bear its own costs.
- iii. The interim order is hereby extended.
- iv. Mention on October 19, 2022 for directions.

Orders accordingly

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**HON.A.MSHILA**



**JUDGE**

In the presence of;

Mirie for the Plaintiff/Applicant

Mwangi for 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents

Mutual for 3<sup>rd</sup> Defendant/Respondent

Lucy-----Court Assistant

