



REPUBLIC OF KENYA



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Joystar Cereals Commodities Limited v Grofin SGB Kenya Limited (Civil Case 12 of 2018) [2025] KEHC 6696 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 6696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL CASE 12 OF 2018
A. ONG'INJO, J
FEBRUARY 13, 2025**

BETWEEN

JOYSTAR CEREALS COMMODITIES LIMITED PLAINTIFF

AND

GROFIN SGB KENYA LIMITED DEFENDANT

RULING

1. By a Notice of motion dated 2nd October 2024, the Plaintiff/Judgment Debtor moved this court pursuant to the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 9 rule 9 (a) and Order 51 rule 1 of the Civil Procedure Rules, 2010 seeking the following orders that: -
 - i. Spent
 - ii. The firm of Odhiambo Kanyangi & Company advocates be granted leave to come on record for the Plaintiff, in place of Maosa & Company advocates.
 - iii. There be an interim stay of the Public Auction of land parcel No. Bukira/Buhirimonono/1109 which is due on 3rd October 2024.
 - iv. There be a valuation of land parcel No. Bukira/Buhirimonono/1109.
 - v. Costs of the Application be provided for.
2. The application is predicted on the grounds on its face and supported by the sworn affidavit of Anne Wangechi Michael of even date. In the said supporting affidavit, the deponent deposes that she is a Co-Director of the Plaintiff and has authority from the Co-Director to swear the affidavit. She avers that on 18th September 2024, the Decree holder through Keysian Auctioneers advertised their land parcel No. Bukira/Buhirimonono/1109 for auction on 3rd October, 2024 for recovery of the debt of Kshs. 41, 850, 753/= . At the point of issuance of the loan facility, the property was valued at Kshs. 37, 000,000/= which led them being granted a total loan of Kshs. 40,000,000/=.



3. She deposes that they came to know of the advertisement on 1st October 2024 and it came to their knowledge that the property was undervalued to the tune of Kshs. 7,000,000/=. She also deposed that the sale of the land parcel together with the interests developed thereof, shall jeopardize the true market value of the said property.
4. It is in the interest of justice that the imminent public auction be stayed in an effort to ascertain the true market value of their property. The said public auction if proceeds, shall be detrimental to them in so far as the balance of Kshs. 41,850,753/= is concerned.
5. She avers that they have engaged the firm of Odhiambo Kanyangi & Company advocates to replace the firm of Maosa & Company Advocates and in view of the judgment herein, it is necessary for the incoming advocates to seek leave to come on record pursuant to Order 9 rule 9 of the Civil Procedure Rules, 2010.
6. In opposition to the application, the Respondent filed a Replying affidavit dated 4th November, 2024 sworn by Martha Esiromo. In the said affidavit, she deposes that she is the Legal Collections Manager of the Defendant/Respondent and the application by the Applicant has no merit, it is misconceived, incompetent and an abuse of the process of court and only meant to scuttle the Respondent's efforts in realizing the security provided to it by the applicant.
7. She avers that Odhiambo Kanyangi & Company Advocates are not properly on record for the Applicant as no leave has been granted for them to come on record. The pleadings are therefore incompetent and should be struck out.
8. She deposes that judgment was delivered on 25th February 2021, dismissing the Applicant's suit which sought an injunction against sale of the property. The application is seeking the same order instituted as stay and the court has no jurisdiction to grant the orders as the court is functus officio. The application dated 2nd October 2024 is overtaken by events bearing in mind that the property has already been sold and an order of stay would be an order in vain.
9. The Respondent deposes that prior to the sale by public auction they carried out a valuation in accordance with the judgment and that the applicant has come to court with unclean hands as it has defaulted in repayment of its loan to the Respondent which loan arrears stand at Kshs. 67, 487, 521.49 as at 29th October, 2024. That the Applicant had not made any effort since 2020 to clear the loan and cannot seek protection of this court.
10. She avers that the Respondent has the right to exercise its statutory power of sale where the Applicant has defaulted in repayment of the loan. She further states that the application has no merit and is aimed at depriving the Respondent the right to exercise its statutory power of sale.
11. This application was canvassed by way of written submissions. Both parties complied and filed their respective written submissions. The applicant's submissions are dated 30th October 2024 whereas the Respondent's submissions re dated 6th November 2024.

Applicant's submissions

12. The applicant in its submissions has reiterated the averments made in the application and supporting affidavit and there is no need to rehearse them again here.



Respondent's submissions

13. The Respondent has submitted that the application is not properly on record on grounds that Odhiambo Kanyangi & Company advocates are not properly on record as no leave or consent to come on record was granted.
14. According to the Respondent this court is functus officio. The Respondent cited the case of Telkom Kenya Limited vs John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) (2014) KECA 600(KLR) where the court held that;

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”
15. It was submitted for the Respondent that the Applicant seeks an interim stay of the sale by public auction of Bukira/Buhirimono/1109 due on 3rd October, 2024. The Applicant in the plaint sought a permanent injunction to prevent the sale of Bukira/Buhirimono/1109. The court delivered a judgment on the issue and dismissed the application for injunction. The Applicant also filed an appeal against the judgment and subsequently sought stay pending appeal but the application for stay was dismissed. The Applicant is now seeking a third bite of the cherry.
16. The Respondent submitted that in dismissing the Plaintiff's suit, the court allowed the Respondent to sell the suit property provided it carried out a valuation prior to the sale. In accord with the Judgment, the Respondent carried out valuation of the property and sold it in a public auction held on 3rd October, 2024. The court having pronounced itself on the issue, this court cannot re-open the matter as such would end up with a retrial. The court has no jurisdiction to grant stay as the court is functus officio.
17. It was urged by the Respondent that the application for stay has been overtaken by events bearing in mind that the property has already been sold and thus an order of stay would be in vain. The Respondent relied on Dakianga Distributors (K) Ltd vs Kenya Seed Company Limited [2015] eKLR and Independent Electoral and Boundaries Commission & another vs Mule & 3 others (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR) (31 January 2014) (Judgment).
18. The Respondent submitted that Prayer 3 of the application seeks for an order that valuation of the suit property be carried out. The Respondent carried out valuation in accordance with the judgment of the Court prior to the sale by public auction. Finally, the Respondent submitted that the court is functus officio, the application has no merit and should be dismissed with costs.

Analysis and Determination

19. I have considered the application, the response thereto and the submissions by both parties as well as the authorities cited. I find the following issues arising for determination;
 - i. Whether the firm of Odhiambo Kanyangi & Company advocates should be granted leave to come on record?
 - ii. Whether the application is merited?



- iii. Who bears the costs of this application?
20. On the issue of whether the firm of Odhiambo Kanyangi & Company advocates should be granted leave to come on record, the Applicant sought to come on record pursuant to the provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010 which provides as follows;
- “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
21. It is thus clear that a change of advocate after judgment shall not be effected without an order of the court upon application with notice to all parties or upon consent between the outgoing and the proposed incoming advocate and in both instances, the approval of the court is required. In the case of James Ndonyu Njogu vs Muriuki Macharia [2020] KEELC 1311 (KLR);
- “It must be remembered that the provisions of Order 9 Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the Court and other parties.
22. In the instant case, the Applicant’s counsel filed an application seeking leave of this court to come on record in compliance with Order 9 rule 9 of the Civil Procedure Rules. The Applicant has therefore satisfied the requirements under Order 9 rule 9 of the Civil Procedure Rules.
23. The next issue for determination is whether the application is merited. The Applicant in the application has sought orders seeking to stay the public auction and a valuation of the suit premises. It was submitted that the suit premises parcel No. Bukira/Buhirimono/1109 were advertised for sale on 18th September 2024 for auction on 3rd October, 2024. The Applicant became aware of the advertisement on 1st October 2024 and it came to their knowledge that the property was undervalued to the tune of KShs. 7,000,000/=. The Respondent on the other hand submitted that judgment was delivered on 25th February 2021, dismissing the applicant’s suit which sought an injunction against sale of the property. The application is seeking the same order instituted as stay and the court has no jurisdiction to grant the orders as the court is functus officio. The application dated 2nd October 2024 is overtaken by events bearing in mind that the property has already been sold and an order of stay would be an order in vain.
24. In the case of Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR the Supreme Court cited with approval an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads as follows:
- “The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has



been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

25. I have considered the arguments by both parties and also perused the record. I note that the Applicant in its plaint dated 27th August 2018 sought for an order of injunction restraining the Respondent jointly and severally from carrying out the intended auction on LR No. Bukira/Buhirimonono/1109. The court upon considering the pleadings dismissed the suit for lack of merit. Again, the applicant brought before court another application dated 12th March 2021 sought for orders of stay of execution of the judgment and decree dated 25th February 2021. The court made a determination dismissing the motion. This court having already determined an application of similar manner, it cannot entertain the present application.
26. This court having discharged its duty on a similar application, it is therefore functus officio and the applicant’s application dated 2nd October 2024 is without merit and it is hereby dismissed with costs to the applicant.

Orders accordingly

DELIVERED DATED AND SIGNED IN MIGORI THIS 13TH DAY OF FEBRUARY, 2025.

A. ONGINJO

JUDGE

