



Crown Paints (Kenya) Limited v Dry Associates Limited (Commercial Case 289 of 2013) [2025] KEHC 5884 (KLR) (Commercial and Tax) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 289 OF 2013**

AA VISRAM, J

MAY 8, 2025

BETWEEN

CROWN PAINTS (KENYA) LIMITED PLAINTIFF

AND

DRY ASSOCIATES LIMITED DEFENDANT

RULING

1. By an Application dated 30th July, 2024 (“the Application”), the Plaintiff seeks to vary and set aside parts of the ruling and order of the court (Kariuki J.,) as issued on 30th October, 2015.
2. For context, the court allowed the Defendant’s application dated 15th June, 2015, that required the Plaintiff to furnish it with certain documents to enable taking of accounts as prayed in its Defence and Counterclaim, as follows:-
 1. The Plaintiff do provide copies of the following documents for purposes of taking accounts and reconciliations by the Defendant which accounts and reconciliations are to be filed in court:
 - (a) The Plaintiff’s register of investors in relation to the Commercial Paper Programme.
 - (b) The Plaintiff do provide copies of the print out of all payments (including withholding taxes deducted) by bankers cheque, company cheque or electronic transfer with regard to the following accounts:-
 - i. Investment Advice Line
 - ii. Sirius Solutions Ltd [Imperial Bank a/c no. [...]]
 - iii. Meridias Capital Ltd [Bank of Africa a/c no.[...]]



- iv. Bluecrest Holdings Ltd [Family Bank a/c o.[...]]
- v. Diefel Investments Ltd
- vi. Gray Properties [Bank of Africa a/c no.[...]]
- vii. DAL Wealth Management Ltd [K-Rep Bank a/c no.[...]]
- viii. Daraja Retreat Centre [Equity Bank a/c no.[...]]

- (c) Evidence of payment for the aforementioned transactions be availed to the Defendant for purposes of carrying out a forensic audit.
- (d) The Plaintiff releases “Crown Berger CP Programme Diversions” reconciliation sheet.
- (e) The Plaintiff releases the Catholic Church receipts and payments (Including withholding taxes deducted) reconciliation sheet.
- (f) The Plaintiff allows the Defendant to review documentation regarding the following Crown RTGS (Real Time Gross Settlement) payments into Sirius Solutions Ltd bank:-

Date Amount (Kenya Shillings)

- i. 26-Feb-09 1,811,384.20
- ii. 27-Apr-10 4,825,115.15
- iii. 12-Feb-10 3,056,285.00
- iv. 23-Aug-10 1,026,797.35
- v. 1-Mar-11 1,510,989.00

- (g) The Plaintiff releases documentation and bank statements regarding following payment from Sirius Solutions made on 17-March 2009 for Kshs.188,244.20.
- (h) The Plaintiff releases to the Defendant copies of withholding tax certificates for the following Sirius Solutions Ltd deposits:-

Principal Amount (KES) Deposit Date (on or about)

- i. 4,867,126 19-Mar-09
- ii. 1,028,970 15-Apr-10
- iii. 1,555,218 07-Jan-11

- 3. By way of the present Application, the Plaintiff seeks the intervention of the Court to vary and set aside the orders in respect of the following items: Investment Advice Line; Meridias Capital Ltd Bank of Africa a/c no. [...]; Bluecrest Holdings Ltd Family Bank a/c no. [...]; Diefel Investments Ltd; Gray Properties Bank of Africa a/c no. [...]; DAL Wealth Management Ltd K-Rep Bank a/c no. [...]; and Daraja Retreat Centre Equity Bank a/c no.[...]; payments into Sirius Solutions Ltd bank in so far as they relate to payments relating to 26 Feb-09 - 1,811,384.20; and; documentation and bank statements regarding payment from Sirius Solutions made on 17-March 2009 for Kshs.188,244.20 and release of copies of withholding tax certificates for Sirius Solutions Ltd deposits.



4. The Plaintiff, through its Chief Accountant in charge of Financial Records, Mr. David Muriithi, deposed on 30th July, 2024, that the Plaintiff does not have, and has never had the said documents aforementioned in its possession, and it is therefore incapable of producing the same. He swore that the Plaintiff is unable to comply with the terms of the said order to the extent that the Plaintiff is required to produce documents, it does not know of, and has never been in possession of. He averred that the Plaintiff is apprehensive that its Managing Director may be punished for failure to comply with the court order, and that in view of the foregoing, there is good and sufficient cause for varying of the said orders as prayed.
5. The Application is opposed by the Defendant through a Notice of Preliminary Objection dated 30th August, 2024, and was responded to by the deposition of its Finance Manager, George Kenya, sworn on even date. The Defendant deposed that the present application does not meet the threshold for review, and that it is an expression of discontentment with the court's order of 30th October, 2015. Further, that the grounds set out herein are strikingly identical to the grounds raised in its appeal to the Court of Appeal, where the Plaintiff had stated that the said orders were unactionable, and that the Court of Appeal has since concluded the issue with finality, and held the Managing Director in contempt. Accordingly, the Defendant urged this Court to find that the Plaintiff may not seek a review of orders because it has already exhausted the legal process available by lodging an appeal in the Court of Appeal.
6. The Defendant further contended that the present Court is functus officio; that the Application lacks bona fides; and that the same is an outright affront to justice and an abuse of the court process. In the premises, the Defendant prayed that the Court dismiss the Application.

Analysis and Determination

7. I have considered the grounds on the face of the Application together with the responses filed in opposition to the same, the submission of the parties, and the applicable law. Because the Defendant has raised technical and Preliminary Objection to the Application, I intend to deal with the same first, prior to considering the merits of the Application.
8. I reiterate, the Defendant submitted that the present issues are not new, and that the same issues have been heard and concluded in the High Court and the Court of Appeal. I take judicial notice that this submission is accurate. There are two reported decisions involving the same parties in relation to the issues at hand, namely, Crown Paints (Kenya) Limited v Dry Associates Limited [2018] KEHC 10034 (KLR) where a ruling was delivered by Tuiyott J., (as he was then) on 13th April, 2018 and; Crown Paints (Kenya) Limited v Dry Associates Limited [2023] KECA 1383 (KLR), the decision by the Court of Appeal issued on 24th November, 2023, in respect of the former's ruling.
9. In the High Court matter before Tuiyott, J. (as he then was), the Plaintiff's deponent similarly stated that it had difficulties complying with the court order for the reason that:-

“we do not have the said documents, we have never had them and we have no control over them neither do we know if such documents exist; as a result we have been placed at a tremendous disadvantage as we have been ordered to do that which we have no means or capacity to do whatsoever”.
10. Having heard the above argument, Tuiyott, J. found that the occasion for arguing that the Plaintiff was not in possession of certain documents, passed when the Plaintiff chose not to raise the said issue in response to the Defendant's initial application for production of the documents. Instead, on that occasion, the Plaintiff responded to the said Application by filing five grounds in opposition, and none



of the grounds expressed that it was not in possession of any of the documents sought. The Learned Judge went on to state that the Plaintiff's argument was more of an afterthought as it never sought to vary or appeal against the order of 30th October, 2015. In the end, the court reiterated that the Plaintiff bound to comply with the orders of 30th October, 2015.

11. Aggrieved by the above decision, the Plaintiff moved to the Court of Appeal which rendered its decision on the same issue. Looking at the said decision, it is evident that the Court of Appeal agreed with the decision of the High Court as stated above. The Court of Appeal in its judgment further observed that the Applicant herein had proper knowledge of the terms of the Court Order dated 30th October, 2015, and that nothing stopped the Applicant seeking for variation. The Court of Appeal in fact affirmed the decision of the trial court which found the Managing Director of the Applicant as being in Contempt of the said Court Order. The court expressed itself in the following terms:-

“once the order for production of the documents was given, and the Plaintiff realized its inability to produce the same, then it behooved it to move the court as appropriate and explain its difficulty in complying with the court's orders but that this was not attempted by the Plaintiff.”

12. It went on to conclude the by stating following:-

“We therefore cannot fault the finding by the trial court that on the face of it, its orders were disobeyed, and requiring the appellant's official to appear before it for further engagement. We thus hold that the trial court did not err in law or fact, nor was there an error in principle as to require our interference, as it is clear from the record that the appellant was indeed aware of the orders of 30th October 2015, the appellant having partially complied with said order. The appellant should therefore appear before court and show cause why it should not be punished for failure to obey court orders.”

13. It is evident from the above, that in the present matter, the High Court and the Court of Appeal, together have performed all their duties in this particular case. The issue is *res judicata*, and further, in my view, this Court is *functus officio*. I do not think that a litigant may reopen matters which have been settled, and a final decision made thereon. See *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR.
14. Additionally, in my view, Section 80(a) and (b) of the *Civil Procedure Act* and Order 45 are not intended, nor do the same contemplate a review of orders in relation to which an appeal has already been concluded. Such a situation would embarrass the Court of Appeal and is contrary to the logic that a challenge to a ruling or adjudication must be taken to a higher court if such a right is available.
15. Finally, in *Outa v Okello & 3 others (Petition 6 of 2014)* [2017] KESC 25 (KLR), the Supreme Court affirmed that an application for review may not be couched as an appeal. In the present matter, not only has it been couched as an appeal, but the appeal on this issue has already been determined and the Application has been made more than nine years after the original orders which are the subject of review were made.
16. Based on the reasons set out above, I am satisfied that the issues raised in the present Application have already been determined by a court of concurrent jurisdiction and the appellate court. This Court may not re-litigate the said issues.



Conclusion and Disposition

17. The upshot is that the Application is struck out with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 8TH DAY OF MAY, 2025.

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.....Court Assistant

.....Plaintiff

.....Defendant

