



REPUBLIC OF KENYA



KENYA LAW
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**Ndiga v Said; Isbrecht (Interested Party) (Civil Case
E009 of 2021) [2025] KEHC 8222 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL CASE E009 OF 2021
DK KEMEL, J
JUNE 13, 2025**

BETWEEN

CHARLES OCHIENG NDIGA PLAINTIFF

AND

NEREAH MICHAEL SAID DEFENDANT

AND

HEINZ ISBRECHT INTERESTED PARTY

RULING

1. The interested party herein has filed the present application dated 7/8/2023 (which ought to be 7/8/2024) seeking the following reliefs:
 - i. Spent.
 - ii. That this Honourable Court be pleased to enjoin Heinz Isbrecht as an interested party in this matter.
 - iii. That this Honourable court be pleased to issue an order that the Plaintiff's decreed 50% share in LR No. Uholo/Ugunja/1623 and LR No. Uholo/Ugunja/1726 together with all developments thereon or proceeds thereof be forthwith attached to answer to the decree in favour of the Interested Party in High Court Civil Case No. 320/1997 Mombasa and that the same should not be released to the Plaintiff until further orders of the court.
 - iv. That this Honourable court be pleased to issue an order that the Plaintiff's decreed 50% share in LR Uholo/Ugunja/1623 and in LR No. Uholo/Ugunja/1726 together with all developments therein be forthwith sold and the same be strictly utilized towards partial payment of the decree in favour of the Interested Party in High Court Civil Case No. 320/1997, Mombasa which currently stand at Kshs 12,874,510/80.



- v. That this Honourable court be pleased to issue a further order that upon the sale of the Plaintiff's decreed 50 % share in LR No. Uholo/Ugunja/1623 and LR No. Uholo/Ugunja/1726 together with all developments thereon the amount recovered therefrom be paid to M/s Tindika & Company Advocates on behalf of the Interested Party in partial payment of the decree in favour of the Interested Party in High Court Civil Case No. 320/1997, Mombasa.
- vi. That costs of the application be awarded to the Interested Party against the Plaintiff herein.
2. The application is supported by the grounds set out thereunder and by the affidavit of Randolph M. Tindika, learned counsel for the Interested Party sworn on even date. The Interested Party's gravamen is inter alia; that the Interested Party obtained judgment against the Plaintiff herein in High Court Civil Case No. 320/1997, Mombasa; that the Plaintiff has failed to settle the claim despite entering into a consent and that he has fled from the jurisdiction of court to another country to avoid service of Notice to Show Cause for his arrest and committed to civil jail; that the Interested party has learnt that the Plaintiff has filed the present suit where judgment has been partially entered in his favour with regard to the two suit properties together with developments thereon and which this court declared as matrimonial properties; that the Plaintiff is highly likely to dispose the said properties; that the Interested Party stands to suffer prejudice; that the Plaintiff had earlier sold his properties namely Kwale/Diani Complex/249 despite the existence of a caution thereon; that the Plaintiff's share in the two suit properties and developments thereon should be attached to answer to the decree in Mombasa High Court Civil Case No. 320 of 1997.
3. The Defendant did not oppose the application.
4. The Plaintiff filed a replying affidavit sworn on 7/3/2025 wherein he averred inter alia; that the application and purported execution is being brought 25 years later; that the purported decree has been overtaken by events; that the Interested Party should move the court in Mombasa High Court over the issue of non-execution of the decree; that the Applicant has not demonstrated any identifiable stake he has in a matrimonial cause yet he is not one of the spouses interested in sharing of the said matrimonial properties; that the execution of the decree is something the Applicant can do outside the scope of this case; that the Applicant has not shown how the judgment delivered herein is likely to affect him; that the Applicant has not shown how he intends to assist the court settle the question involved in this suit; that the application for joinder is misplaced; that the Applicant has not sworn an affidavit in support of his application; that the purported judgment and decree in the Mombasa case has not been availed by the Applicant.
5. The Plaintiff further filed grounds of opposition dated 11/3/2025 which are inter alia; that the application is an abuse of the court process; that the Applicant has a remedy against the Plaintiff if aggrieved outside the scope of this suit.
6. The application was canvassed by way of written submissions. The Applicant filed his submissions dated 22/4/2023 (which ought to be 22/4/2025). The Plaintiff relied on his replying affidavit and grounds of opposition. As earlier pointed out, the Defendant indicated that she did not oppose the application.
7. I have given due consideration to the application and the rival affidavits plus the submissions filed. It is not in dispute that the Interested Party had sued the Plaintiff herein vide Mombasa HCCC No. 320/1997 which was concluded in November 1999 wherein judgment was entered in favour of the Interested Party against the Plaintiff herein. It is also not in dispute that the Plaintiff and the Defendant had litigated over this matter regarding the division of matrimonial properties which was determined vide the judgment of this court dated 4/4/2022 wherein the two suit properties namely



Uholo/Ugunja/1623 and Uholo/Ugunja/1726 were declared as matrimonial properties and were to be shared equally in the ratio of 50% each. I find the issue for determination is whether the application has merit.

8. The Applicant has described himself as an Interested Party and seeks to be enjoined in this suit so as to enable him enforce judgment and decree that was entered in his favour vide Mombasa HCCC No. 320/1997 against the Plaintiff herein and to attach the Plaintiff's share of 50% in the two suit properties. It has been held that an Interested Party is a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings either directly or indirectly. Such a person or entity must demonstrate that he/she/it has a legal interest or stake capable of being protected in law and that unless an order for joinder is made, there is a likelihood of prejudice or loss to be suffered by such an Applicant. In the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* [2014] eKLR the Supreme Court of Kenya stated as follows:

“(18) ...an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

9. Similarly, in *Francis Karioko Muruatetu & Another v Republic & 5 others* [2017] eKLR, the Supreme Court reiterated the applicable elements thus:- “(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party; One must move the Court by way of a formal application; joinder is not as of right, but is at the discretion of the court; sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court...”

10. In the instant case, the Applicant has moved this court formally through the present application seeking to be enjoined in the present suit in order to enable him enforce a judgement/decree that was made by the High Court in Mombasa vide HCCC No. 320/1997 wherein the Plaintiff herein was ordered to pay a certain amount to the Interested Party herein. The Applicant maintains that the Plaintiff left the jurisdiction of the court in Mombasa and he disappeared into a neighbouring country with a view to avoid complying with the judgment of the court. The Applicant further maintains that the Plaintiff secretly filed the present suit in Siaya without his knowledge and that upon the determination of this particular case, the Plaintiff was awarded 50% share of the two suit properties herein namely Uholo/Ugunja/1623 and Uholo/Ugunja/1726 between himself and the Defendant. The Applicant now is interested in the aforesaid judgment as he intends to attach the share due to the



Plaintiff pursuant to that judgment so as to satisfy the decree issued in Mombasa vide HCCC No. 320/1997. That is the stake that the Applicant herein is pursuing against the Plaintiff herein.

11. The Plaintiff has vehemently opposed the application on one main reason namely that the present suit is one involving the Plaintiff and the Defendant who were once married but have dissolved their marriage and that they were pursuing division of matrimonial property under the Matrimonial Properties Act 2013. This court on the 4/4/2022 determined the dispute and ordered the two suit properties namely Uholo/Ugunja/1623 and Uholo/Ugunja/1726 and developments thereon be shared in the ratio of 50% each. The determination of the matter therefore has made this court become *functus officio* as regards the Plaintiff and the Defendant. That being the position, the Interested Party/Applicant has an uphill task in convincing this court to re-open this matter that has been concluded. It is also instructive that the suit herein was one involving a couple and therefore the introduction of a 3rd party into the mix creates confusion in the matter. It is also instructive that the interested party herein did not have or does not have an interest in the suit involving the Plaintiff and the Defendant. The Interested Party's interest seems to be that he is out to pursue the Plaintiff alone and thereafter seek to attach properties or assets that have been awarded to him in the judgment dated 4th April 2022. To that extent therefore, it is advisable for the Interested Party to pursue the Plaintiff outside this suit. Nothing prevented the Interested Party from obtaining the requisite orders from the Court in Mombasa and proceed to attach assets belonging to the Plaintiff outside this suit since this court has already become *functus officio*. The Interested Party ought to be patient and wait for the Plaintiff to acquire his 50% share of the suit properties before he can pursue him. As this court is already *functus officio*, the door to fresh litigation as sought by the Interested Party appears to have been closed. In any event, the Interested Party has not demonstrated that he had a stake in the initial dispute between the Plaintiff and Defendant who were then couples seeking for division of matrimonial property. It is also instructive that the Interested Party has not demonstrated how he intends to assist the court settle the question in controversy between the Plaintiff and the Defendant. It is also instructive that the Applicant has not sought for re-opening of the case herein between the Plaintiff and the Defendant. I wish to point out that even if the Applicant would have sought to re-open the case, the same would have come a cropper as the court is already *functus officio*. The only recourse for the Applicant is to pursue the Plaintiff outside the scope of this suit. Allowing the Applicant to come on board would otherwise muddle an otherwise concluded case in which he has no interest.
12. In *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto* (Petition 5,4 and 3 of 2013) (Ruling), KESC 8 (KLR) (Civ) (24 October 2013) (Ruling), the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius, in the *Origins of the functus Officio Doctrine*, with specific Reference to its Application in Administrative Law, "(2005) 122 SAL J 832 stating:

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 to this doctrine, a person who 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."

Similarly, in *Telkom Kenya Limited v John Ochanda* (suing on His own Behalf and on behalf of 996 Former Employees of Telkom Kenya Limited. The Court of Appeal held as follows on the *functus officio* doctrine;

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. It is a doctrine that has been recognized



in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case *Chandler v Alberta Association of Architects* [1989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrines as follows (at P 860);

“The general rule that a 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. D. 88. The basis for it was that the power to rehear was transferred by the judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.

- i. Where there had been a slip in drawing it up, and
- ii. Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd v. J.O. Rose Engineering Corp.* [1934] S.C.R. 186”

13. Being guided by the foregoing authorities, I find that the stake/interest that the Applicant is pursuing would best be pursued outside these proceedings in view of the fact that this court has already made a final determination in the matter of division of matrimonial property between the Plaintiff and the Defendant and that the remaining task is for the Plaintiff and the Defendant to comply with the order dated 4/4/2022. The Applicant has therefore come to the court quite late in the day and therefore, he should wait for the Plaintiff to acquire his 50 % share of the properties and thereafter go after him. The Applicant’s request to seek for an order to attach the Plaintiff’s properties is misplaced in view of the fact that the Plaintiff is yet to acquire the same. It is also noted that the Applicant should approach the court in Mombasa where he had obtained the judgment for redress against the Plaintiff if need be.
14. In the final analysis, it is my finding that the Applicant’s application dated 7/8/2023(which ought to be 7/8/2024) lacks merit. The same is dismissed with costs to the Plaintiff.

DATED AND DELIVERED AT SIAYA THIS 13TH DAY OF JUNE, 2025.

D. KEMEI

JUDGE.

In the presence of:

Otieno.....for Plaintiff

Miss Mutua.....for Defendant

Tindika.....for Interested Party

Okumu.....Court Assistant.

