



**Appollos v Banda Homes Limited & another (Environment & Land  
Case E055 of 2023) [2025] KEELC 3672 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3672 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E055 OF 2023**

**JM ONYANGO, J**

**MAY 8, 2025**

**BETWEEN**

**JANE AGNES WANJIRA APPOLLOS ..... PLAINTIFF**

**AND**

**BANDA HOMES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**NDEHO ALPHONCE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff/Respondent initiated this suit against the 1st Defendant through a plaint dated 27th October 2023. Together with the plaint, the Plaintiff/Respondent filed a chamber summons application of even date seeking a temporary injunctive order restraining the 1st Defendant from repossessing or selling the suit property pending hearing and determination of intended arbitral proceedings. The application was unopposed.
2. On 17th January 2024, upon considering the application, the court [Eboso J] granted the Plaintiff/Respondent the interim injunctive relief. The court further ordered that the file be marked as closed upon extraction of the order granted, given that jurisdiction over the dispute was vested in the arbitral tribunal. The said order was extracted and issued on 18th January 2024.
3. About a year later, the 2nd Defendant/Applicant filed a Notice of Motion dated 12th February, 2025, seeking the following orders:
  1. Spent.
  2. Spent.
  3. Spent.



4. That upon issuing Prayer No. 4 above (sic), this honourable court be pleased to make an order joining the Applicant as a fully-fledged 2nd Defendant for purposes of actively participating in this suit and defending its interest in all that Bungalow No.91 which bungalow is erected on property Land Reference Number 6944/351 (Original Number 6944/145, 154, 155, 220, 227-236, 240-246).
  5. That upon issuing prayer no.4 above, this honourable court be pleased to issue an order of injunction prohibiting both the Plaintiff/Respondent and Defendant/Respondent from evicting the Applicant from all that Bungalow No.91 which bungalow is erected on property Land Reference Number 6944/351 (Original Number 6944/145, 154, 155, 220, 227-236, 240-246) pending hearing and determination of this suit.
  6. That costs for this Application be awarded to the Applicant.
4. The grounds upon which the application is based are contained in the notice of motion and the Applicant's supporting affidavit and supplementary affidavit sworn on 12th February 2025 and 21st March 2025, respectively. In the said affidavit the Applicant avers that he is the registered proprietor of Bungalow No.91 erected on property Land Reference Number 6944/351 (Original Number 6944/145, 154, 155, 220, 227-236, 240-246) (suit property) having purchased the same from the 1st Defendant/Respondent at Kshs 4,500,000. He further avers that he had been in quiet possession of the suit property since 25th September 2023 until 10th February 2025 when the Plaintiff/Respondent invaded it with help from others, while he was out of the country.
  5. He states that the Plaintiff/Respondent sought and obtained orders issued on 18th January 2024 barring the 1st Defendant/Respondent from repossessing the suit property, which belongs to him. He faults the Plaintiff/Respondent for maliciously failing to inform this court of his presence on the suit property, and for deliberately failing to include him as a party in the suit.
  6. It is his claim that the orders issued on 18th January 2024 had been overtaken by events, given that he had already been registered as the proprietor of the suit property as at 25th September 2023. He contends that the Plaintiff/Respondent deliberately sat on the orders issued on 18th January 2024 until 10th February 2025 when she instructed her two sons to violently invade the suit property and change the door locks. He adds that the Plaintiff/Respondent caused the arrest of his house manager, who was present during the invasion, for false charges of malicious destruction of property.
  7. He further avers that he and his family have been rendered homeless as a result of the Plaintiff/Respondent relying on the orders of 18th January 2024 to evict them from the suit property. He urged this court to stay the said orders.
  8. It is his position that this court ought to grant him a mandatory injunction, being that he has demonstrated that he is the registered proprietor of the suit property, which he has been in occupation of since 25th September 2023.
  9. Through the supplementary affidavit, the Applicant contends that this court is not functus officio because the court issued the orders of 18th January 2024 based on the misleading information given by the Plaintiff/Respondent at the time. The Applicant further contends that this court was given the impression that the 1st Defendant/Respondent was in the process of repossessing the suit property while it was in the Plaintiff/Respondent's possession, when in fact the suit property had been in his possession since 25th September 2023.
  10. He stated that the arbitration agreement could only be enforced between the Plaintiff/Respondent and the 1st Defendant/Respondent and not him, because he was not a party to the sale agreement



- between the two. He adds that he is entitled to the occupation of the suit property while the Plaintiff/ Respondent pursues her remedies against the 1st Defendant/Respondent.
11. The application is resisted by the Plaintiff/Respondent through a replying affidavit and a further replying affidavit sworn by her on 24th February 2025 and on 24th March 2025, respectively. She depones that the Applicant is a stranger to her and that she was not aware of any transaction between the 1st Defendant/Respondent and any third party regarding the suit property.
  12. It is her position that the Applicant is not entitled to any of the orders sought, because the court is functus officio, having terminated the proceedings in this suit vide the order given on 17th January 2024. She adds that this suit should not remain active, given that the determination of the dispute has been vested in the arbitral tribunal.
  13. She contends that, should the Applicant intend to seek any reliefs in relation to the suit property, he can only do so through a fresh cause of action in a separate suit, and not through the instant suit, whose proceedings have been concluded and whose file has been closed.
  14. She further contends that the Applicant has not sought an order for the reopening of this suit and proceedings. She adds that the Application ought to be struck out with costs due to the doctrine of functus officio.
  15. It is her position that no basis has been established by the Applicant to warrant the setting aside of the order given on 17th January 2024. She deposes that such an order amounts to an order for review of the said ruling and order. She adds that the Applicant has not met the requisite threshold for a review order to issue.
  16. The Plaintiff/Respondent contends that the ruling and order given on 17th January 2024 do not affect the Applicant, hence he lacks the capacity to challenge the same or seek to have it set aside.
  17. It is her claim that the Order given on 17th January 2024 only applied to her and the 1st Defendant/ Respondent, and it has no connection with, and does not affect the Applicant. She further avers that there has been an unreasonable delay in the filing of the Application, which has been brought more than a year after the Order of 17th January 2024 was delivered. She adds that the Applicant has not produced any evidence to prove the allegation that he only became aware of the existence of the Order on 10th February 2025.
  18. She contends that the Applicant cannot obtain an Order for joinder through the instant Application, which is a Notice of Motion application. She further contends that the Applicant must file a separate Chamber Summons application to pursue the Order. She adds that the Applicant is barred by provisions of the civil procedure rules from simultaneously seeking an order for joinder, together with orders for review and temporary injunction in a notice of motion application. She deposes that the error is fatal and incurable under Article 159 of *the Constitution* of Kenya, 2010.
  19. It is her position that neither the Applicant nor his family were in occupation of the suit property prior to the filing of the suit. She states that the Applicant's prayer for an injunction prohibiting his eviction from the suit property is untenable given that he is not in possession of the suit property.
  20. She argues that the Applicant has not satisfied the threshold for the grant of the order of injunction. She further argues that the dispute in the suit arose as a result of breach of the Sale Agreement between the 1st Defendant/Respondent and herself, consequently, she had no obligation to join the Applicant as a defendant at the time of filing this suit.
  21. The 1st Defendant/Respondent filed a replying affidavit sworn by Andrew Kamau Muhia (an agent of the 1st Defendant) on 24th February 2025. He confirms that the 1st Defendant/Respondent entered



into a Sale Agreement with the Plaintiff/Respondent on 1st February 2018 for the sale and purchase of all that property known as Bungalow Number 91 at Pinewood Estate in Thika, constructed on a portion of Property Land Reference Number 9644/2 (sic) at Kshs.3,990,000.00.

22. He avers that the Plaintiff/Respondent only paid 90% of the agreed purchase price, leaving the sum of Kshs.399,000.00 due and owing. He adds that despite numerous Completion Notices on various dates, specifically on 9th June 2021, 29th June 2022 and 11th August 2023, including a WhatsApp Group communication requiring the Plaintiff/Respondent to rectify her default to avoid the refund of monies paid to the 1st Defendant less 10% and the suit property being sold to another person willing to clear the purchase price, the Plaintiff/Respondent failed to comply. As a result, the Sale Agreement between the Plaintiff/Applicant and the 1st Defendant was rescinded, and the suit property was sold to the Applicant herein. He states that the suit property was transferred to the Applicant vide a Transfer of Lease on 25th September 2023. He adds that the Applicant immediately took possession thereof and even proceeded to renovate the said premises.
23. He deposes that the Plaintiff/Respondent took advantage of the Applicant's absence from the country to orchestrate a takeover of the suit property in early February 2025 and masterminded the arrest of the Applicant's house manager, who attempted to resist the illegal eviction.
24. It is his position that the dispute between the 1st Defendant/Respondent and the Plaintiff/Respondent is for the refund of the purchase price paid by the Plaintiff/Respondent, less 10%, given that the suit property belongs to the Applicant.
25. In response to the averments made by the 1st Defendant/Respondent, the Plaintiff/Respondent deposes that the 1st Defendant/Applicant was liquidated vide the Judgment and Decree of the High Court (Hon. Justice Peter M. Mulwa) delivered on 13th March 2025 in Milimani High Court Case No. HCCOMMIP/E044 of 2021.
26. She adds that consequently, the 1st Defendant/Respondent ought to obtain leave from the liquidator to continue participating in the suit. He adds that in the absence of the said leave, the 1st Defendant/Respondent should not be granted audience by this court.
27. She faults the 1st Defendant/Respondent for failing to adduce evidence to support the allegation that the Applicant is the owner of the suit property or that he is in possession of the same.
28. She adds that this dispute has been referred to arbitration vide the ruling issued on 18th January 2024, hence any dispute between her and the Defendant can only be canvassed at the arbitral tribunal.
29. Parties were ordered to canvass the application by way of written submissions. However, only the Plaintiff/Respondent filed her submissions dated 24th March 2025, which I have carefully considered.

### **Analysis and Determination**

30. Prayers 1, 2, 3 and 5 are spent. The Applicant was made a party to the suit vide an order of the court given on 18th February 2025. Having considered the application, the affidavits filed by the parties, the submissions and the relevant legal provisions, I find that the only issues for determination are:
  - i. Whether the Applicant has met the conditions for setting aside the orders given on 17th January 2024 and issued on 18th January 2024.
  - ii. Whether leave of the court is needed to proceed with this application against the 1st Defendant.
  - iii. Whether the Applicant has met the conditions for the grant of a temporary injunction.



### **Whether leave of the court is needed to proceed with this application against the 1st Defendant.**

31. The Plaintiff/Respondent contends that the 1st Defendant has been liquidated pursuant to the judgment delivered on 13th March 2025 in HCCOMMIP/E044 of 2021: Susan Obuya vs Banda Homes Limited. The Plaintiff/Respondent annexed a copy of the said judgment in her replying affidavit sworn on 24th March 2025. Furthermore, the 1st Defendant did not rebut the allegation.
32. Section 560 (1) (d) of the *Insolvency Act* (Cap 53 of the Laws of Kenya) provides as follows:

“ A person may begin or continue legal proceedings (including execution and distress) against the company or the company’s property only with the consent of the administrator or with the approval of the court.”
33. It therefore goes without saying that the Applicant needs to obtain either consent of the administrator or leave of court to proceed with any claim against the 1st Defendant.

### **Whether the Applicant has met the conditions for setting aside the orders given on 17th January 2024 and issued on 18th January 2024**

34. As earlier mentioned, the court record reveals that the Plaintiff/Respondent filed this suit against the 1st Defendant on 9th November 2023 through a plaint dated 27th October 2023. Together with the plaint, the Plaintiff/Respondent filed a chamber summons application of even date seeking a temporary injunctive order restraining the 1st Defendant from repossessing or selling the suit property pending hearing and determination of intended arbitral proceedings.
35. Her claim was that she was the bonafide purchaser of the suit property, which was still under construction as at the date of the application. However, the 1st Defendant had threatened to repossess and sale the same vide a letter dated 11th August 2023. The application was heard *ex parte* and interim injunction was issued pending hearing of the application *inter partes* on 13th November 2023. Given that 13th November 2023 was a holiday the hearing was rescheduled to 17th January 2024 and the interim orders were extended.
36. On 17th January 2024, upon the court being satisfied that service had been effected upon the 1st Defendant and that the application dated 27th October 2023 was not opposed, the court granted the Plaintiff/Respondent an injunction pending hearing and determination of the intended arbitral proceedings.
37. The court further ordered that the suit shall be marked as closed upon the aforementioned order being extracted given that the arbitral tribunal was vested with the jurisdiction to handle the dispute.
38. Subsequently, the Applicant filed this application. On 18th February 2025, the court granted the Applicant prayer 5 of his application by making him a party to the suit. The Applicant contends that the Plaintiff/Respondent maliciously failed to include him as a party to the suit and inform the court that he was in possession of the suit property.
39. The fundamental principles of non-disclosure of material facts were summarised in the case of *Unicom Limited vs Diamond Trust Bank Ltd & Another* [2020] eKLR as follows:
  - a. The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
  - b. The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.



- c. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.
  - d. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application.
  - e. The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
  - f. Finally, it is not every omission that the injunction will be automatically discharged.
40. In *Samuel Njoroge (suing on behalf of the Estate of the Late Geoffrey Gikaru Njoroge) vs Wanje Holding Limited* [2018] eKLR, the Court of Appeal held that:

“.....the importance of a litigant who wishes for the court to exercise its discretion in its favour to disclose all material facts cannot be gainsaid. The non-disclosure could warrant a court to not only decline to issue orders sought but also set aside any orders granted simply to protect the dignity of the court. This much was restated in *Tiwi Beach Hotel Ltd vs. Stamp* [1991] KLR 658, where this Court had this to say about the effect of non-disclosure:

“It matters not upon a point of this nature being taken whether the applicant was entitled to or that the Court would have granted relief sought in any event, that is to say, leaving aside the non-disclosure for it is the affront to the dignity and credulity of the Court that is in point.”

41. I find that the Applicant has not demonstrated that the Plaintiff /Respondent was cognizant of the fact that he was the registered owner of the suit property at the time of filing the suit. Therefore, it is not clear whether the Plaintiff/Respondent deliberately failed to disclose to the court that the suit property was registered in the Applicant’s name or that it was in his possession. The 1st Defendant is the one that had dealt with both the Plaintiff and the Applicant and by failing to respond to the Application dated 27.10.23 it exposed the Applicant to the risk of being evicted yet it was aware that the Applicant had fully paid the purchase price and it had transferred the suit property to him. This court will give the Plaintiff/Respondent the benefit of doubt and assume that she was not aware of the said information. I therefore find that the Applicant has not met the threshold for the grant of an order setting aside the order given on 17th January 2024 and issued on 18th January 2024.

**Whether the Applicant is entitled to an order of temporary injunction.**

42. Given that I have not set aside the orders of the court given on 17th February 2024, the effect is that the said orders are still in place. The court having referred the matter to the arbitral tribunal and having ordered that the file be closed, has been rendered functus officio.



43. The doctrine of *functus officio* was considered by the Court of Appeal in *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 that -

“*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 of *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.

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

The doctrine is not to be understood to bar any engagement by a court with a case that has already decided or pronounced itself on. What it does bar it is a merit based decisional re-engagement with the case once final judgment had been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd vs AI Thani* [200] JLR 542 at 550, also cited and applied by the Supreme Court;

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical error nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to higher court if that right is available.”

44. The court, having determined that the arbitral tribunal was the forum with jurisdiction to handle the dispute and having further ordered the closing of the file in this suit, it became *functus officio*. Even though the court sympathizes with the Applicant’s predicament, its hands are tied. Perhaps the Applicant could explore the possibility of filing a fresh suit against the Respondents to have his grievance resolved.

45. Consequently, I find that the Applicant’s application lacks merit. I therefore make the following orders:

- a. The application dated 12th February 2025 is hereby dismissed.
- b. The order given on 18th February 2025, making the Applicant a party to this suit, is hereby vacated.
- c. The Applicant shall bear the costs of the application.



**DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF MAY 2025.**

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**J. M ONYANGO**

**JUDGE**

In the presence of:

Mr Wambua for the Applicant

Mr Wakhisi for the Plaintiff/Respondent

Court Assistant: Hinga

