



REPUBLIC OF KENYA



**Sudi v Nawal Forex Bureau Limited (Civil Appeal 214 of 2019)  
[2023] KEHC 21363 (KLR) (Civ) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21363 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL 214 OF 2019**

**CW MEOLI, J  
AUGUST 3, 2023**

**BETWEEN**

**EUNICE CHERUGUT KIBULE SUDI ..... APPELLANT**

**AND**

**NAWAL FOREX BUREAU LIMITED ..... RESPONDENT**

**RULING**

1. Before the court for determination is the motion brought by Eunice Cherugut Kibule Sudi (hereafter the Applicant) dated November 9, 2021. The substantive prayers therein are:
  - i. Spent.
  - ii. That leave be granted to the firm of Ham and Hamsley Advocates in place for S Ndege and Company Advocates to come on record for the Applicant (Appellant) in the above appeal.
  - iii. Spent.
  - iv. Spent.
  - v. That pending hearing and determination of the Appeal already lodged, the Court be pleased to stay the further proceedings of the lower court in file reference no CMCC no 6132 of 2015-*Nawal Forex Bureau Ltd v Eunice Cherugut Kibule Sudi*.
  - vi. That the notice to show cause leading to warrant of arrest, issued in CMCC no 6132 of 2015-*Nawal Forex Bureau Ltd v Eunice Cherugut Kibule Sudi* be suspended.
  - vii. In the alternative and for the avoidance of doubt, the Title to land situated in Kitale otherwise known as Transzoia/Milimani 1556 registered in the name of the Appellant, be and is hereby transferred to the joint names of the Applicant and Respondent and immediately deposited



in court as security for the due performance of the Judgment and Decree issued in Milimani CMCC no 6132 of 2015-*Nawal Forex Bureau Ltd v Eunice Cherugut Kibule Sudi* it is further ordered that the said security to satisfy the condition for stay of execution pending the appeal already lodged.

- viii. That this Honourable Court be pleased to call the file referenced in Milimani CMCC no 6132 of 2015-*Nawal Forex Bureau Ltd v Eunice Cherugut Kibule Sudi* for purposes of satisfying itself as to the correctness of the orders and proceedings before the subordinate court for perusal and further directions and for the avoidance of doubt, the Deputy Registrar of this Court is hereby directed in liaison with the executive officer of the Milimani Chief Magistrates Court-Commercial Division to avail file the subordinate Court file stated above.
  - ix. That costs of the application be provided for.” sic.
2. The motion is supported by the grounds on its face and the affidavit of the Applicant. To the effect that having instituted CMCC no 6132 of 2015, in the lower court, Nawal Forex Bureau Limited (hereafter the Respondent) sought and obtained an interlocutory judgment against her on March 22, 2019 and a decree was issued. The Applicant stated that her attempts at setting aside the interlocutory judgment to enable her to defend the suit were unsuccessful and hence the present appeal.
  3. That the Respondent had commenced execution by way of warrants of arrest and committal to civil jail pursuant to a notice to show cause. Which the Applicant claims was not served upon her to enable her to appear before the lower court to show cause why she should not be arrested and committed to civil jail. The Applicant therefore urged the court to grant the stay orders sought both in respect to the proceedings and execution of the warrants of arrest, pending the hearing and determination of the appeal, further indicating willingness to deposit the title document in respect of the land parcel situated in Kitale known as Transzoia/Milimani 1556 (the Property) as security for the due performance of the decree. The Applicant also pleaded with the court to call for the lower court file to ascertain the correctness of the proceedings, in view of alleged glaring errors which are apparent therein.
  4. The Motion was opposed by the Respondent who through Grounds of Opposition dated November 22, 2021 which are to the effect that:
    - “ 1. The Application is misconceived and untenable in law on the face of it.
    2. The Notice of Motion Application dated November 9, 2021 is fatally and incurably defective as the Court is functus officio.
    3. The Notice of Motion Application dated November 9, 2021 is patently Res Judicata in view of the Honourable Court’s ruling of October 24, 2019.
    4. At any rate, execution through Arrest and Committal in Civil jail is a lawful process as provided by statute specifically section 38 (d) & 40 of the [Civil Procedure Act](#) and Order 22, Rule 31 of the [Civil Procedure Rules, 2010](#)
    5. Accordingly, the Respondent seeks the striking out of the Application dated November 9, 2021 with costs”. sic
  5. The parties, through their respective counsels, orally argued the Motion. Counsel for the Applicant electing to rely on the averments made in support of the Motion seeking an order for a stay of the warrants of arrest, save to add that the Applicant has so far deposited the sum of Kshs 200,000/- in court and was willing to execute a personal bond to attend court. The advocate further argued that



the Applicant is therefore willing to provide security by way of part payment and through availing the title to her property.

6. The Respondent's counsel submitted that the instant Motion is *res judicata* and the court is *functus officio* in the matter, by virtue of the ruling delivered on October 24, 2019. He further submitted that even after the Applicant was granted a conditional stay of execution, she did not take the requisite steps in complying with the conditions on the provision of security and hence the stay orders automatically lapsed. It was argued that in the foresaid ruling, the offer of security by way of a title to the Property was rejected by this Court. Concerning the order seeking substitution of advocates, counsel contended that the firm of Ham and Hamsley Advocates is not properly on record as leave to come on record had not been obtained in the first instance.
7. In response, counsel for the Applicant asserted that the court was not *functus officio* as alleged by the Respondent, since the Applicant was by her appeal seeking to challenge the recent orders made by the lower court.
8. The Court has considered the material canvassed in respect of the Motion. At this stage, the court is not concerned with the merits of the impugned decision rendered by the trial court which constitutes the subject matter of the appeal and will be considered at the appropriate time. The court will therefore restrict itself to the relevant matters placed before it for consideration at this stage.
9. Before considering the merits of the Motion, however, the court will deal with key preliminary issues of law raised by the Respondent.
10. The first key preliminary issue relates to the plea of *functus officio*. In discussing the essence of the *functus officio* principle, Court of Appeal in the case of [\*Telkom Kenya limited v John Ochanda \(suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited\)\*](#) [2014] eKLR held 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 a 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...”

11. Additionally, the Supreme Court of Kenya in [\*Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others\*](#) [2013] eKLR offered the following insights:

“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.”

12. It is clear from the foregoing that the doctrine becomes applicable upon a court rendering a decision in a matter. In the present instance, the Respondent's argument is that by virtue of the ruling delivered by this court (Githua J) on October 24, 2019 concerning an application previously filed by the Applicant and seeking similar orders, the *functus officio* doctrine applies. Upon perusing the record and studying



the said ruling, the court agrees with the Respondent. The key prayer in the motion before Githua J was stay of execution of the judgment and decree in the lower court suit.

13. That the mode of execution employed in the lower court involves the issuance of a warrant of arrest and committal to civil jail does not transform the essential nature of the present motion, which is seeking to stay the execution proceedings in the lower court, into a different kind of application. Both the past and present application are essentially the same i.e they seek to stay execution, in the lower court decree, notwithstanding the mode of execution elected by the Respondent.
14. The Applicant was in the former application granted conditional stay, of execution but she apparently failed to abide with the condition leading to her present troubles. On October 7, 2020she filed an application dated October 5, 2020seeking review of the conditions of stay. The motion was never prosecuted. Instead, the Applicant filed the instant motion indirectly incorporating some of the prayers in that motion. By the present application, she is inviting the court to deal with a second similar application for stay of execution while surreptitiously pressing the unprosecuted application. The question of stay having been determined in the ruling of Githua J who a Judge of this Court is, this court is functus officio.
15. As pertains to the second key preliminary issue on whether the Motion is res judicata, the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR offered the following interpretation on the term in the manner hereunder:

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;

“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 the 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.”

Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

16. For the same reasons earlier given, and the history of this matter the Applicant’s instant motion is caught up by the principle of res judicata. The Applicant’s argument that the stay order sought at present relates to the warrants of arrest is to no avail. The Applicant having failed to comply with the conditions previously imposed by the court in granting the earlier application, the stay orders lapsed, and the Applicant cannot now purport to bring a fresh application seeking similar orders simply because warrants of arrest were issued against her. Besides, the lower court is the appropriate forum



in which to canvass issues concerning the propriety of the procedure pertaining to the notice to show cause that gave rise to the warrants of arrest and this court cannot entertain the said issues here. In view of all the foregoing circumstances, the court is convinced that the instant motion is *res judicata* in so far as it seeks to stay execution of the judgment of the lower court.

17. This leaves prayer (ii) which was seeking leave for the firm of Ham and Hamsley Advocates (the current advocates) to come on record in place for S Ndege & Company Advocates (the former advocates) in the appeal. On the record is a notice of change of advocates dated November 11, 2021 by the current advocates indicating their intention to take over from the former advocates. The notice of change of advocate is premised on Order 9 of the [Civil Procedure Rules](#). The relevant rules state that:

“Rule 5:

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal...

Rule 6:

The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it)...”

18. It is evident from the record that the Applicant had all along been represented by the firm of S Ndege & Company Advocates in this appeal. The said notice was indicated as having been served on the firm of Oyugi & Co Advocates who act for the Respondent. Nevertheless, there is no proof that the notice of change of advocates was similarly served upon the Applicant’s former advocates pursuant to the requirements in Order 9, Rules 5 and 6 (*supra*). These provisions are couched in mandatory terms and cannot therefore be brushed off as mere technicality.
19. Besides, even if the above notice had been served, it was invalid for want of prior leave of the Court. This being a change of advocates coming after judgment, the current advocates were required to comply with the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#), by either filing a consent between the erstwhile advocates and the proposed incoming advocates, or through an application for leave to come on record, with notice to all parties. It seems that the Applicant’s present advocate subsequently realized that he needed leave of the court to come on record, hence the prayer in the present motion. There is no evidence that the erstwhile advocates were served with the current motion to give notice to them of the intended change. The mischief intended to be cured by Order 9 Rule 9 of the [Civil Procedure Rules](#) is self-evident; it is to protect advocates from cunning clients who, upon judgment being entered, purport to abandon their advocates without notice and to act in person or instruct new counsel.
20. In view of all the foregoing circumstances, the court finds that the motion dated November 9, 2021 is not only caught up by the twin principles of *functus officio* and *res judicata*, but is also incompetent because leave to the current firm of advocates cannot be granted in the current circumstances. The motion is hereby struck out with costs to the Respondent.



**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF AUGUST 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of**

For the Applicant: N/A

For the Respondent: Mr. Manyara

C/A: Carol

