



**Macharia & another v Oceanfreight Transport Co. Limited &  
another (Bankruptcy Cause 25 & 26 of 2009 (Consolidated))  
[2025] KEHC 13472 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13472 (KLR)

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

**BANKRUPTCY CAUSE 25 & 26 OF 2009 (CONSOLIDATED)**

**MN MWANGI, J**

**SEPTEMBER 18, 2025**

**IN THE MATTER OF CAP 53 LAWS OF KENYA (REPEALED)**

**-AND-**

**IN THE MATTER OF THE INSOLVENCY ACT, 2015**

**-AND-**

**IN THE MATTER OF SAMUEL KAMAU MACHARIA  
& PURITY GATHONI GITHAE (DEBTORS)**

**BETWEEN**

**SAMUEL KAMAU MACHARIA ..... 1<sup>ST</sup> DEBTOR**

**PURITY GATHONI GITHAE ..... 2<sup>ND</sup> DEBTOR**

**AND**

**OCEANFREIGHT TRANSPORT CO. LIMITED ..... CREDITOR**

**AND**

**OFFICIAL RECEIVER ..... APPLICANT**

**RULING**

1. The Official Receiver filed a Notice of Motion application dated 23<sup>rd</sup> August 2023 pursuant to the provisions of Sections 100(1) & 103(1) of the Bankruptcy Act (Repealed), Rule 15 of the Bankruptcy Rules (Repealed), Sections 733(2) of the *Insolvency Act*, 2015, Regulation 10 of the Insolvency Regulations, 2016 and all other enabling provisions of the law. The Official Receiver prays for orders that this Court rescinds the Receiving Order issued against the joint estates of Samuel Kamau Macharia



- & Purity Gathoni Githae on 28<sup>th</sup> January 2011 and discharges it (Official Receiver) from further conduct of this matter.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Mark Gakuru, the Official Receiver. He averred that the creditor filed two creditor petitions against the debtors herein on 11<sup>th</sup> June 2009, based on a Judgment in HCCC No. 3958 of 1991 for Kshs.34,854,510.00, which petitions were consolidated and heard by Lady Justice Koome (as she then was), resulting in issuance of Receiving Orders against the debtors' estates on 28<sup>th</sup> January 2011, when the Official Receiver was appointed. It was deposed that later, the debtors secured an order for stay of execution on 2<sup>nd</sup> February 2011 that required them to deposit the decretal sum in a fixed joint account pending an Appeal lodged at the Court of Appeal being Civil Appeal No. 62 of 2011.
  3. Mr. Gakuru stated that the said Appeal was dismissed on 22<sup>nd</sup> February 2019 after which the Official Receiver gazetted the Receiving Order on 2<sup>nd</sup> October 2020, and that the debtors challenged the Gazette Notice in Court, seeking to have it nullified and in a Ruling delivered on 28<sup>th</sup> July 2023, I held that the funds deposited in the joint account be released to the creditors to settle the debt. He deposed that on 21<sup>st</sup> August 2023, the debtors confirmed that the debt was fully settled and no other creditors exist. Mr. Gakuru asserted that he no longer has a role in this matter.
  4. In opposition to the application, the creditor filed a replying affidavit sworn on 30<sup>th</sup> April 2024 by Ms Margaret Muthoni Ndungu, the creditor's Managing Director. She averred that the debt remains unpaid and that the Court is functus officio, thus it cannot revisit the matter which has been previously adjudicated. She claimed that despite a Court-ordered payment of Kshs.93,012,492.00, the debt had grown to over Kshs.502 Million by August 2023 and was expected to reach Kshs.541 Million by the end of 2024. Mrs. Ndungu contended that the Official Receiver acted negligently in accepting the debtors' claim without verification and emphasized that previous Court Rulings including those from the Court of Appeal, upheld the legitimacy of the interest charged on the debt. She maintained that the issue of rescinding the Receiving Order is res judicata and can only be appealed at the Supreme Court.
  5. The debtors filed a replying affidavit in support of the instant application, sworn on 31<sup>st</sup> July 2024 by Dr. Samuel Kamau Macharia, the 2<sup>nd</sup> debtor herein. He stated that the issues in the creditor's replying affidavit were previously dismissed in a Ruling delivered on 28<sup>th</sup> July 2023, and that the petitioner being aggrieved by the said Ruling, filed a Notice of Appeal on the claimed interest which is pending determination.
  6. He contended that this Court lacks jurisdiction over matters already before the Court of Appeal and that the Judgment from 23<sup>rd</sup> October 1991 is unenforceable under the *Limitation of Actions Act*. Dr. Macharia asserted that despite the original claim being Kshs.500,000/=, the creditor insisted on the debtors depositing Kshs.34,854,510.00 in a joint account pending the Appeal, and Kshs.93,012,492.00 was released on 25<sup>th</sup> October 2023. He averred that the creditor's claim for Kshs.541,061,391.00 in interest is excessive, unfair, and unsanctioned, and urged this Court to prevent unjust claims.
  7. The instant application was canvassed by way of written submissions. The Official Receiver's submissions were filed by the Official Receiver on 12<sup>th</sup> August 2024, the debtors' submissions were filed on 31<sup>st</sup> October 2024 & 20<sup>th</sup> January 2025 by the law firm of Orange J. & Associates. The creditor's submissions were filed on 23<sup>rd</sup> December 2024 by the law firm of Maina Murage & Company Advocates.



8. Mr. Njenga, learned Counsel for the Official Receiver cited Section 34(1) of the *Civil Procedure Act*, Section 103 of the repealed Bankruptcy Act, and the case of John Silas Lenana Ole Puleiy v Housing Finance Company of Kenya and Cooperative Bank of Kenya [2020] eKLR, and submitted that no prior application for rescission has been made, which renders the creditor's claim that this Court is functus officio baseless. He referred to the case of Center for Mathematics Science and Technology Education in Africa (CEMESTEVA) v Apex Security Services Limited [2021] eKLR and argued that the debtors fulfilled their obligations by depositing Kshs.34,854,51.00 in a joint Advocates' account, causing the decretal interest rate to cease. He stated that since the funds, including accrued interest, were released to the creditor, no further execution proceedings can be pursued, leaving only the taxed costs at the Court of Appeal.
9. He asserted that upon deposit, bank interest rates applied instead of decretal interest, thereby discharging the debtors from further liability. Mr. Njenga stated that the issues raised in the instant application have not been previously addressed by this Court and that no prior application has been made regarding this matter. He referred to Sections 3A of the *Civil Procedure Act* and asserted that the application for rescinding the Receiving Order is not res judicata.
10. Mr. Orege, learned Counsel for the debtors submitted that the issue of interest is now before the Court of Appeal, and that this Court lacks jurisdiction to address it. He further submitted that the application herein is not a request for review or reconsideration of a prior Court decision, and since no similar application had been filed or determined before, the doctrines of functus officio and res judicata do not apply as claimed by the creditor.
11. Mr. Murage, learned Counsel for the creditor cited Section 7 of the *Civil Procedure Act* and the Court of Appeal case of IEBC v Maina Kiai & 5 others [2017] eKLR, and submitted that this Court in a Ruling delivered on 28<sup>th</sup> July 2023 dealt with the issue of whether or not the Receiving Order issued by Lady Justice Koome (as she then was) should be lifted or set aside, thus the order seeking this Court to rescind the said Receiving Order though worded differently is res judicata and cannot be granted by this Court. Counsel relied on the case of Telkom Kenya Ltd v John Ochanda & 996 others [2014] eKLR and stated that this Court already made a final decision in a Ruling delivered on 28<sup>th</sup> July 2023, regarding rescinding, lifting, or setting aside the Receiving Order, which makes it functus officio as revisiting this issue would amount to sitting on Appeal over that decision and the Court of Appeal.
12. In a rejoinder, Mr. Orege submitted that the instant application does not seek to set aside or vacate this Court's Ruling delivered on 28<sup>th</sup> July 2023 but rather, to rescind the Receiving Order and discharge it, as they have verified that the debt due has been settled. He further submitted that the creditor filed a Notice of Appeal challenging the said Ruling and seeking clarification on whether the debt due to the creditor has been fully paid and if interest is payable, and as such, this Court lacks jurisdiction to determine the said issues as they are now before the Court of Appeal

### **Analysis and Determination.**

13. I have considered the instant application, the affidavit filed in support thereof, the replying affidavit and the written submissions by Counsel for the parties. The issues that arise for determination are –
  - i. Whether the application herein is res judicata and/or this Court is functus officio; and
  - ii. Whether the instant application is merited.



**Whether the application herein is res judicata and/or this Court is functus officio.**

14. The doctrines of functus officio and res judicata are closely related, both ensure finality in judicial decisions. Functus officio applies when a Court has fully performed its duties in a case, as stated in the Supreme Court of Kenya case in Raila Odinga & others v IEBC & others [2013] eKLR. Res judicata on the other hand is provided for under Section 7 of the Civil Procedure Act and applies to instances where a dispute involving the same parties and issues have been determined on merits by a Court of competent jurisdiction as was held by the Court in Kamunye & others v Pioneer General Assurance Society Ltd [1971] EA 263.
15. The creditor herein claims that the instant application is res judicata and that this Court is functus officio, hence it cannot grant the orders being sought herein on grounds that the debtors in their application dated 5<sup>th</sup> October 2020 sought to lift the Receiving Order issued by Hon. Koome. J (as she then was). The creditor argued that this Court in a Ruling delivered on 28<sup>th</sup> July 2023 held that since the Receiving Order was made by a Court of competent and concurrent jurisdiction, revisiting the matter would amount to unlawfully sitting on Appeal over its decision and the Court of Appeal's decision.
16. It is however noteworthy that by the time the Ruling of 28<sup>th</sup> July 2023 was delivered, the debtors were still indebted to the creditor as the decretal sum that led to the issuance of the Receiving Order remained unpaid. However, in the instant application, the debtors and the Official Receiver assert that the said decretal sum has been fully paid to the creditor, with no outstanding amount, and that the Official Receiver should be discharged from this matter.
17. In view of the change in circumstances as to the status of the debt due to the creditor by the debtors, this Court finds that the orders being sought in the instant application are neither res judicata nor is this Court functus officio in regard to the same.

**Whether the Receiving Order should be rescinded and the Official Receiver discharged from these proceedings.**

18. The instant application is premised on the fact that the decretal sum that led to the issuance of the Receiving Order has been fully paid to the creditor. The creditor on the other hand contends that despite a Court-ordered payment of Kshs.93,012,492.00, the debt had grown to over Kshs.502 Million by August 2023 and was expected to reach Kshs.541 Million by the end of 2024 on account of interest.
19. It is worthy of note that vide a Ruling delivered on 1<sup>st</sup> February 2011, the Court directed the debtors to deposit Kshs.34,854,510.00 in Court within four days as condition for being granted an order of temporary stay. In arriving at the said sum, the Court acknowledged that in as much as the decretal sum was Kshs.500,000/=, Hon. Koome. J, (as she then was) had found that the decretal sum had risen to Kshs.34,854,510.00 as at 31<sup>st</sup> May 2009. It is not in contest that the aforesaid Ruling was rendered pending the hearing and determination of the substantive application which sought an order for stay of Hon. Koome. J's (as she then was) decision issuing a Receiving Order against the debtors. Later, in a Ruling delivered by Hon. Mabeya J. on 31<sup>st</sup> July 2012, the Court he directed that the sum of Kshs.34,854,510.00 deposited as security in Court be increased to Kshs.45,000,000/= and be transferred into a joint interest earning account in the names of Counsel for the parties and be held therein pending the hearing and determination of Civil Appeal No. 62 of 2011.



20. This Court notes that at paragraphs 57 & 58 of its Ruling delivered on 28<sup>th</sup> July 2023 it held that –

It is also my finding that the said monies held in a joint interest earning account in the name of the applicants' former Advocates on record and the 1<sup>st</sup> respondent's Advocate should have been released to the 1<sup>st</sup> respondent upon dismissal of Nairobi Civil Appeal No. 62 of 2011 on 22<sup>nd</sup> February 2019 since the 1<sup>st</sup> respondent was the successful litigant in the said appeal and there were no further orders stopping the 1<sup>st</sup> respondent from accessing the said monies, in so far as it satisfies the judgment of the Court.

The issue brought up by the applicant's Counsel that interest under the provisions of Section 70 of the Bankruptcy Act (now repealed), could not be above 6% per annum, was not for determination before me as that is a matter that should have been raised on appeal when the appellants appealed to the Court of Appeal.”

21. From the foregoing excerpt of my Ruling, it is evident that this Court already found that the funds in the joint interest-earning account were sufficient to satisfy the judgment of the Court and should have been released to the creditor. This Court also found that any issue regarding interest should have been raised at the Court of Appeal. In the premise, and since the debtors have already released Kshs.93,012,492.00 from the joint interest-earning account, a fact which is not disputed by the creditor, it is my considered view that they are no longer indebted to the creditor in respect to the Judgment delivered by Hon. Rawal J. (as she then was), on 23<sup>rd</sup> October 2001 in favour of the creditor as against the debtors.

22. I agree with the Official Receiver that the debt leading to the bankruptcy and Receiving Orders has been fully settled by the debtor thus the Official Receiver ought to be discharged from its conduct of this matter. I therefore discharge the Official Receiver from further proceedings in this case.

23. In the end, I am persuaded that the instant application is merited. It is hereby allowed with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Njenga for the Official Receiver/applicant

Mr. Maina Murage for the creditor/respondent

Ms Momanyi holding brief for Mr. Orange for the debtors/respondents

Ms B. Wokabi – Court Assistant.

