



Sumac Microfinance Bank v Clegane Horizontes Ltd & 2 others (Miscellaneous Civil Application E235 of 2024) [2025] KEHC 16120 (KLR) (Civ) (6 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E235 OF 2024
JN MULWA, J
NOVEMBER 6, 2025**

BETWEEN

SUMAC MICROFINANCE BANK APPLICANT

AND

CLEGANE HORIZONES LTD 1ST RESPONDENT

DAKAR EXPORTERS (K) LTD 2ND RESPONDENT

MAZEL INVESTMENT CO LTD 3RD RESPONDENT

RULING

1. For determination is Sumac Microfinance Bank (hereafter the Applicant) Preliminary Objection (PO) dated 19/03/2025. However, it necessitates setting out the history of the matter leading hereto the institution of the Miscellaneous Civil Application.
2. At inception by way of a motion dated 19/03/2024, the Applicant sought as against Clegane Horizontes Ltd, Dakar Exporters (K) Ltd and Mazel Investment Co. Ltd (1st, 2nd & 3rd Respondents) inter alia the following orders-;
 - a. that pending inter partes hearing and determination of this motion the Court be pleased to grant an interim stay of execution of the default judgment entered against the Applicant on 21/02/2024 as well as the resultant decree issued thereon and notice of entry of default judgment both dated 11/03/2024 issued in Nairobi Milimani CMCC E3649 of 2023; and
 - b. that pending the hearing and determination of the notice of motion application dated 13/03/2024 filed in the lower Court suit, this Court be pleased to exercise its supervisory jurisdiction and grant a stay of execution of the default judgment entered against the Applicant on 21/02/2024 and resultant decree dated 11/03/2024.



3. When the aforesaid motion came up for inter partes hearing on 02/05/2024, Ongeri, J, proceeded to dismiss the same for want of prosecution. The dismissal prompted the Applicant to file another motion dated 15/05/2024 seeking inter alia orders that-;
 - a. The honorable Court be pleased to vary and set aside the orders of 02/05/2024 and reinstate the Applicant's notice of motion application dated 19/03/2024 to be heard on merit.
4. Upon presentation of the latter motion ex parte, Ongeri, J. on 17/05/2024 granted the Applicant interim stay of execution orders on condition that the entire decretal sum be deposited in Court within thirty (30) days of the said order.
5. The Applicant thereafter moved the Court vide another motion dated 19/06/2024 seeking inter alia;
 - a. That in the alternative, the honorable Court be pleased to extend the time within which the order issued by this Court on 17/05/2024 and upon such extension, the sum of Kshs. 7,341,106/- deposited by the Applicant with the Court on 18/06/2024 be deemed as deposited in time.
6. The 1st Respondent thereafter on its part moved the Court vide a motion dated 20/09/2024 seeking orders that -;
 - a. The honorable Court be pleased to issue an order to the effect that Mr. Ian Nyangau Nyanhoga lied under oath through his supporting affidavit dated 15/05/2024.
 - b. The honorable Court be pleased to vacate/discharge the stay of execution order dated 17/05/2024 and the temporary stay of execution order issued on 19/06/2024.
 - c. Upon issuance of the latter order, the Court be pleased to issue an order releasing the Kshs. 7,341,106/- deposited in Court as security to the 1st Respondent and or its advocates in satisfaction of the decree dated 11/03/2024.
7. Shortly, thereafter the Applicant again moved the Court via a motion dated 24/09/2024 seeking inter alia that-;
 - a. The honorable Court be pleased to issue an order directing that the decretal sum of Kshs. 7,341,106/- deposited by the Applicant with this Court on 18/06/2024 pursuant to judiciary invoice dated 27/05/2024 be released back the Applicant's bank.
8. When parties appeared before this Court on 25/09/2024, the Applicant withdrew its motions dated 15/05/2024 and 19/06/2024 meanwhile the Court proceeded to issue directions on disposal of the 1st Respondent's motion dated 20/09/2024 and the Applicant's motion dated 24/09/2024.
9. In response to the 1st Respondent's motion, the Applicant filed a Preliminary Objection (PO) dated 19/03/2025 that is presently for consideration, objecting to the 1st Respondent motion dated 20/09/2024 on grounds that-;
 - a. The honorable Court lacks jurisdiction to entertain the motion dated 20/09/2024; and
 - b. The honorable Court is functus officio following the withdrawal of the Applicants motion dated 15/05/2024.
10. The 2nd & 3rd Respondent did not participate in the instant proceedings.
11. Directions were taken on disposal of the Applicant's, PO by way of written submissions, of which, respective counsel had an opportunity to highlight.



12. Having set out the above, the Court has considered the pleadings, the PO and submissions filed by the respective parties and thus postulates that the issue for determination concerns -:
 - a. Whether the Applicant's Preliminary Objection is merited?
 - b. Who ought to bear costs?

Whether the Applicant's Preliminary Objection is merited?

13. As to the nature of a preliminary objection, the same has since been settled within our jurisdiction in the celebrated decision of Mukisa Biscuits Manufacturing Company Ltd. It was held therein that -;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasions, confuse the issues, and this improper practice should stop.”

14. In the case of Oraro v Mbaja (2005) KLR 141, Ojwang J (as he then was) reiterated the above by stating that-;

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

15. Meanwhile, the Court of Appeal in Kigwor Company Limited v Samedy Trading Company Limited [2021] KECA 810 (KLR) cited with approval the decision of the Supreme Court in Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR) where the latter court emphasized that:-

“(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR).”



16. Ordinarily in a proper case, an objection appertaining to jurisdiction appertaining to jurisdiction constitutes a pure point of law that ought to be determined in limine. The words of Nyarangi, JA, in the locus classicus decision in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 require no restatement save for the exhortation, which still endures that "Jurisdiction is everything. Without it, a court has no power to make one more step."
17. It has since been settled within our jurisdiction that the principle and or doctrine known as *functus officio* goes to the jurisdiction of this Court to entertain proceedings before it and as such cannot be overlooked and or seen as technicality to defeat a party's right to be heard.
18. The Supreme Court of Kenya while expounding on the doctrine of *functus officio* in *Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others* [2013] eKLR 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 SALJ 832:

"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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.

The Supreme Court also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that;

"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 errors, 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 on adjudication must be taken to a higher court if that right is available." (Emphasis added).

19. While the Applicant's PO as presented challenges this Court's jurisdiction to entertain the 1st Respondent's motion dated 20/09/2024, it does not anchor on any provision of statute towards ousting this Court's jurisdiction.
20. Interestingly, by the Applicant's submissions it appears to argue that the purport of the motions dated 20/09/2024 and by extension the motion dated 15/05/2024 were extinguished by proceedings before lower Court when the *ex parte* judgment and subject of the latter motion was set aside compounded by the fact that the said motion had since been withdrawn.
21. While calling to aid the decisions in *Gachu & Anor v Manyeki & another* [2024] KEHC 5621 (KLR), *Simiyu v Nyakongo & Anor* [2023] KECA 66 (KLR) and *Dhanjal v Habib* [2022] KEHC 13980 (KLR) it was further submitted that this Court's supervisory jurisdiction was equally extinguished upon the lower Court setting aside its *ex parte* judgment of which was the subject of the Applicant's reason in approach to this Court vide the initial motion dated 19/03/2024, wherein it sought stay of execution orders pending determination of its application before the lower Court.
22. It was argued that if this Court were to proceed to finally determine the motion dated 20/09/2024, equally seeking release of the decretal sum, the Court will contemporaneously be presiding and or



- sitting as a trial Court over a matter that is pending before the lower Court. That the trial Court's ruling setting aside the ex parte judgment before it, was the subject of the Applicant's motions before this Court, wherein it sought stay of execution pending determination of its motion before the lower Court, essentially extinguished this Court supervisory jurisdiction.
23. While calling to aid, the decisions in *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] KEHC 13341 (KLR), *Charles Kiptarbei Birech v Paul Waweru Mbugua & another* [2021] eKLR and *Ochieng & 2 others v Onyango (Civil Appeal 158 of 2019)* [2024] KECA 201 (KLR) it was further posited that once an application has been withdrawn, it no longer exists as a live issue before the Court for consideration or determination. Therefore, the purport of the 1st Respondent's motion dated 20/09/2024 in respect of the Applicant's withdrawn motion dated 15/05/2024 ousted this Court of jurisdiction.
 24. In summation, the Court was urged to allow the PO as lodged.
 25. In riposte, the 1st Respondent argues that the real question of fraud, perjury, misrepresentation and forgery are pending notwithstanding the withdrawal of the Applicant's motion dated 15/05/2024 therefore it cannot be stated that this Court is ousted of jurisdiction and or is functus officio in the matter. While citing the provisions of Section 3A of the *Civil Procedure Act* (CPA), the decisions in *Narok County Government v Nyutu & 2 Others* [2018] eKLR, *Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd* [2014] eKLR, *Lakeview Development Ltd v Belgo Holdings Ltd & Another* [2023] eKLR, *Charles Koigi Wamwere & 2 Others v Republic* [1992] eKLR, *Kenya Anti-Corruption Commission v James Mwathathe Mulewa & 5 Others* [2021] eKLR and *Hassan & 2 others v Mohamood & 5 Others* [2017] eKLR it was submitted that this Court has inherent powers to entertain the 1st Respondent's motion dated 20/09/2024 whereas the latter motion was partially provoked by the fact that counsel who deposed the affidavit in support of the Applicant's motion dated 15/05/2024, lied under oath, to wit, this Court must address itself on.
 26. As concerns whether the Court is functus officio, counsel iterated that question of fraud, perjury, misrepresentation and forgery as confirmed by the DCI report are live issues whereas the argument by the Applicant that this Court will be usurping the trial Court by entertaining the 1st Respondent's motion is misplaced. The decisions in *Uneeco Paper Products Ltd v Kenya Railways Corporation Ltd & 2 Others* [2015] eKLR, *Raila Odinga & Others (supra)*, *Jersey Evening Post Limited (supra)*, *Telkom Kenya Ltd v John Ochanda* [2014] eKLR, *Wachira Karani v Bildad Wachira* [2016] eKLR, *Republic v Director of Public Prosecution & 2 Others ex parte Edwin Harold Dayan Dande & 3 Others* [2018] eKLR and *Timothy Rintari v Madison Insurance Co. Ltd* [2015] eKLR were cited in the fore stated regard.
 27. With the above in reserve, it is well trodden that a preliminary objection is a point of law, which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence.
 28. The gist of the 1st Respondent's motion dated 20/09/2024 had earlier been captured in this ruling. Further, by its PO, the 1st Respondent appears to conflate the question of jurisdiction and mootness (futility). At this juncture, I would propose to tread lightly so as not to embarrass future proceedings in the matter.
 29. While the Applicant may have withdrawn its motion dated 15/05/2024, which seems to be the purport of prayer (1) and (2) in the 1st Respondent's motion, I reasonably believe the same does not ouster this Court of jurisdiction to entertain the motion but rather goes towards mootness and futility. Given the fact that there exists a live possibility that the issues may have been overtaken by events. To the



foregoing end, I am not convinced that the Court lacks jurisdiction to entertain the 1st Respondent's motion on the supposition that the Applicant had since withdrawn the motions dated 15/05/2024 and 19/06/2024.

30. As to the question of *functus officio*, I do not intend to re-invent the wheel on the matter as the doctrine is long settled. By its submissions, the Applicant has asked this Court to interrogate factual issues concerning proceedings before the lower Court and the resultant ruling rendered on 12/09/2024, pertaining to an *ex parte* judgment set aside on 12/09/2024 and tacitly relevant to prayer (3) of the 1st Respondent's motion.
31. Such an interrogation would automatically remove the Applicant's PO from the strict definition and realms of PO as settled in the celebrated decision of *Mukisa Biscuits (supra)* and *Oraro v Mbaja (supra)*. The purport of the lower Court ruling rendered on 12/09/2024, that has since not been availed before this Court is a factual question, that cannot be stated to arise from the implication of pleadings and thus determine the 1st Respondent's motion dated 20/09/2024 in limine.
32. While I agree that this Court's supervisory jurisdiction may have been rendered moot by whatever ruling that emanated from the lower Court on 12/09/2024/-, concerning the sums deposited in this Court to the tune of Kshs. 7,341,106/-, the same still remains a live issue that this Court has yet to pronounce itself on or perfect thereby ousting this Court of jurisdiction to entertain the 1st Respondent's motion dated 20/09/2024.
33. Penultimately, I reasonably believe the Applicant's objection does not strictly meet the test and or confines of a PO as exhorted in earlier decisions cited by this Court given the factual aspects relied on to ouster or limit this Court's jurisdiction. Whereas the question of withdrawal of the Applicant's motion does not necessarily oust this Court of jurisdiction however concerns mootness or futility of subsequent proceedings relating to the said motion in question.
34. Consequently, without having to belabor further on the issue, it is the Court's logical conclusion that the Applicant's preliminary objection dated 19/3/2025 lacks merit and is dismissed with costs to the 1st Respondent.
35. On the 1st Defendant's application dated 20/9/2024 in view of the dismissal of the Preliminary objection to the said application, and having noted that responses to the motion have been filed by some of the Respondents, the following directions are hereby issued;
 - a. Respondents who have not filed responses to do so within 21 days and serve;
 - b. Upon service, the Applicant to file supplementary affidavit if need arises together with its submissions within 21 days, and exchange;
 - c. The Respondents to file their submissions also within 21 days and exchange.
 - d. Highlighting submissions on 5/2/2026.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2025.

.....
JANET MULWA.
JUDGE

