



**Ndwiga v Big Two Limited & another (Winding Up Cause
1 of 2015) [2026] KEHC 3973 (KLR) (24 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
WINDING UP CAUSE 1 OF 2015
GL NZIOKA, J
MARCH 24, 2026**

BETWEEN

MARY NJAMBI NDWIGA PETITIONER

AND

THE BIG TWO LIMITED 1ST RESPONDENT

DAVID NDWIGA GATHENDU 2ND RESPONDENT

RULING

1. By a notice of motion application dated 28th March 2025 brought under the provisions of section 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, the applicant is seeking for the following orders: -
 - a. That the Honourable Court is functus officio having delivered its judgment on 18th of July 2024.
 - b. That the Honourable Court do order that the winding up cause be dismissed with cost if the petitioner is unwilling to withdraw it.
 - c. That the costs of this application be provided for.
2. The application is based on the following grounds: -
 - a. That on 18th July 2024 this Honourable Court delivered a judgment in which it found that the only reasonable cause of action the petitioner could take was to withdraw the cause pending the hearing and determination of the appeal on the ground that it is premature and/or not tenable in view of the pending appeal.
 - b. That while the Court found that the only option for the petitioner is to withdraw this suit, the petitioner has to date failed and/or refused to withdraw the suit.



- c. That in offering the petitioner the option of withdrawing the suit, the Honourable Court intended to give the petitioner some lifeline in case she wanted to pursue the dispute after the appeal had been determined.
 - d. The petitioner having failed to exercise the option of withdrawing the matter as directed by the Honourable Court, the only remedy is for this court to dismiss the suit with costs to the respondent.
 - e. While the Honourable Court has since the delivery of the judgment scheduled the suit for several mentions to confirm if the appeal has been heard, the same could be as a result of an oversight on the part of the Honourable court as there is already a judgment that addresses the plight of this suit in the light of pending appeal.
 - f. And as to how this matter should be dealt with in the light of pending appeal, the issue was settled in the judgment in which the court found that this suit is premature and/or not tenable in the light of the pending appeal.
 - g. The Honourable Court having delivered this judgment is functus officio, save for orders of dismissal with costs to be made so that this matter can be removed from the list of matters currently pending before court.
 - h. That it is just and in the interest of justice that the order sought for here be granted.
3. However, the application was opposed by the respondent based on the grounds of opposition dated 9th April 2025, which state as follows:
- a. That the application is without any basis in law whatsoever.
 - b. That this Honourable Court is yet to deliver its judgment on the petition for winding up.
 - c. That this Honourable Court did not deliver judgment on the petition on 18th July 2024, but instead the court acknowledged the existence of a matter before the Court of Appeal involving the respondent herein and which the court thought would impact any orders issued in this matter.
 - d. That the court then withheld making the determination on the issues in the petition to await further directions from this court or the Court of Appeal.
 - e. That it is on that basis that the court asked, the parties to the petition to address it on the possible consequences of the pending appeal on judgment in this matter. That is yet to happen.
 - f. That the petitioner is nonetheless of the view that this Honourable Court is within its mandate in law to render judgment in a matter in view of the provisions of sections 427, 428 and 447 of the *Insolvency Act* (cap 53) of the Laws of Kenya.
 - g. That the doctrine of functus officio holds that once a court renders a decision regarding issues submitted they lack the power to re-examine that decision.
 - h. That in this particular case the court is yet to render its decision for functus officio to kick in. No wonder the applicant in the notice of motion dated 28th March 2025 is urging the court to dismiss the petition if the petitioner is unwilling to withdraw it.
 - i. That this application is thus misconceived and without any merit in law and we urge the court to dismiss it.



4. In considering the application herein, I find that two issues arise for consideration; whether this court is functus officio and/or whether there is any live matter that should be dismissed.
5. The doctrine of functus officio is a legal doctrine holding that once a court or tribunal delivers a final judgment or order, it exhausts its jurisdiction and cannot review, vary, or revisit the merits of that decision. It promotes finality, prevents courts from hearing appeals against themselves, and requires parties to seek redress via higher courts.
6. The key aspects of functus officio in law are: -
 - a. Finality of Jurisdiction: The court has performed its duty and its authority over the matter is exhausted.
 - b. Final Decision Requirement: It applies only when a matter is fully adjudicated upon, not during interlocutory (temporary) stages.
 - c. Exceptions: The doctrine does not prevent a court from correcting clerical errors or handling matters arising from execution or implementation of the judgment.
 - d. Distinction from Res Judicata: While res judicata prevents re-litigating a case in a different court, functus officio relates to the specific judge/body that made the ruling being unable to change it.
 - e. Application: In *Raila Odinga & 2 Others vs IEBC & 3 Others* [2013] eKLR, the Supreme Court confirmed that a perfected judgment cannot be altered.
7. Consequently, to challenge a decision after a court is functus officio, parties must generally file an appeal or a formal review application if new evidence or errors of law exist.
8. +herein on 18th July 2024 and expressly stated at paragraph 18 thereof that it would hold this matter in abeyance due to the pending appeal in the Court of Appeal, as it did not want to prejudice the appeal.
9. In view of the aforesaid, the court did not delve into the merit of the matter and to that extent it is not functus officio. And if the court is functus officio as argued by the applicant then there is no live matter before this court that can be dismissed as prayed for by the applicant and neither would the court have the jurisdiction once it becomes functus officio to dismiss any matter.
10. Pursuant to the aforesaid the application herein becomes untenable. However, having declined to hear this matter on merit for reasons stated in the judgment, the respondent cannot come back to this court and seek to have this court sit on appeal on that judgment and/or review that judgment, without the respondent complying with the orders given in that judgment or seeking for review.
11. The option available to the respondent herein is to appeal against the judgment delivered herein where the court declined to hear the matter on merits on the reasons stated.
12. However, it is not in vain that the applicant has filed this application. This is a matter that has been in court for over 15 years and is yet to be concluded.
13. Pursuant to the aforesaid, the provisions of the *Companies Act* cited in the grounds of opposition are not available for consideration.
14. Be that as it may, I hold the view that if there is no stay orders the applicant can execute the judgment and that may kick start the matter or create urgency in its disposal.



15. The upshot of the aforesaid is that the application is dismissed with orders that each party met its own costs.

DELIVERED, DATED AND SIGNED ON THIS 24TH DAY OF MARCH 2026.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Ndungu for the applicant

Mr. Akongo for the respondent

Ms. Hannah: court assistant

