



REPUBLIC OF KENYA



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Goodison Sixty-One School Limited v Symbion Kenya Limited (Miscellaneous Application 131 of 2016) [2026] KEHC 4741 (KLR) (Commercial and Tax) (9 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 131 OF 2016**

F GIKONYO, J

APRIL 9, 2026

BETWEEN

GOODISON SIXTY-ONE SCHOOL LIMITED APPLICANT

AND

SYMBION KENYA LIMITED RESPONDENT

RULING

1. The notice of motion dated 25.3.2025 is mainly brought under Order 22 Rules 1(1) and (2), 49, 59 (3) and 75, Order 40 Rules 1 (a) and 4 and Order 45 of the Civil Procedure Rules.
2. The applicant seeks setting aside of the purported sale by public auction by Regent Auctioneers of the applicant's property known as Land Reference 9118/11 (Now Nairobi/ Block 192/607) (subject property). It also seeks certification that the decree, costs and all charges and expenses relating to the attachment of the property have been fully settled.
3. The applicant also seeks review, nullification and setting aside of the interest awarded in the arbitral award for it has no legal basis. It further seeks an order of account be taken of the sums awarded in the decree and sums paid on the applicant's behalf to establish the status of satisfaction of the decree and if there is any overpayment and refund due.
4. The application is supported by the affidavits sworn by the applicant's director, Zainab Jaffer on 25.3.2025, 19.5.2025, 15.7.2025 and 18.8.2025.

Grounds

5. On 6.3.2024, the court issued a decree for Kshs. 282,738,087.09 in favour of the respondent and against the applicant in the enforcement of an arbitral award dated 25.2.2016.



6. The applicant received a letter dated 9.4.2024 from Regent Auctioneers notifying it of an intended sale by public auction of the applicant's principal property known as Land Reference 9118/11 (Now Nairobi/ Block 192/607). Annexed to the letter was a Notification of Sale issued by the court on 7.8.2024 and a Valuation report by Tysons Limited dated 9.9.2025.
7. The applicant's gravamen is that the purported sale of the property by public auction on 19.3.2025 is fraudulent, irregular, unlawful, unjustified, malicious and void for illegality. It faulted the respondent for failure to acknowledge receipt of sums paid by its director in settlement of the decretal sum and the advocate's and auctioneer's costs.
8. The applicant asserted that its director paid the decretal sum in full through two installments of Kshs. 146,238,135.40 and Kshs. 140,503,307/-, totaling Kshs. 286,741,442.40/-, on 27.11.2024 and 28.2.2025 respectively. It also asserted that its director paid the advocates costs of Kshs. 2,105,643/- and auctioneer's costs of Kshs. 2,827,381/- on 28.2.2025.

Response

9. The respondent opposed the application through a preliminary objection (PO) dated 5.5.2025 and replying affidavits sworn by its director, Oscar Ogunde on 5.5.2025 and by Benjamin Gathiru Mburu on 29.7.2025.
10. The PO raises three grounds, being: -
 1. that the applicant has committed a fraud by pretending to tender a bank guarantee but which the applicant arrested and sequestered before the bank guarantee reached the court disentitling it to any audience before the court.
 2. The applicant is guilty of non-disclosure of material facts.
 3. The matters raised through the application are res judicata, having been determined on merit and in full by this court and in appeals preferred against the said determination to the Court of Appeal and to the Supreme Court and cannot be reopened.
11. The respondent's core averments are: -
 1. The auction of the subject property took place on 19.3.2025 as per its instructions.
 2. The applicant has not shown full payment and acknowledges that it did not settle the amount on the face value of the bank guarantee.
 3. The applicant cannot alter the negotiated terms of settlement that gave rise to the stay of execution agreed to by the respondent and the applicant and the cancellation of the auction of 30.1.2025.
 4. Abuse of process; the applicant conduct is such that it must be denied audience before this court.

Submissions

12. The applicant filed initial and supplementary written submissions dated 3.6.2025 and 20.8.2025. It urged the court to allow the application as prayed. It relied on: -
 1. Musk Deer Limited v Benjamin K. Kipkurui & Another [2018] eKLR



2. Karanja v Equity Bank Limited & 2 others (Environment and Land Case 625 of 2016) [2024] eKLR
 3. Maingi v Mwongera & Another (Civil Appeal E146 of 2023) [2024] KEHC 16724 (KLR) (20th December 2024) (Judgment)
 4. Sitienei & another v Lang'at t/a Kaloto Auctioneers KEELRC 2815 (KLR) (9 November 2023) (Ruling)
 5. Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] KLR 828
 6. Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited [2005] KLR 97
13. The respondent filed written submissions dated 25.7.2025. The respondent urged that the application should be dismissed with costs. It relied on: -
1. Nakuru Civil Appeal No. E051 of 2022; Estate of Mathias Lnagat v Cove Investments Limited
 2. Paramount Bank Limited v First National Bank Limited & 2 others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR)
 3. D & C Builders v Sidney Rees (1966) 2 QB 617
 4. Kyangaro v Kenya Commercial Bank Ltd & Another (2004) 1 KLR 126
 5. Charles Kiptarbei Birech v Paul Waweru Mbugua and another [2021] KEELC 394 (KLR)
 6. Stephen Mwallyo Mbondo v County Government of Kilifi [2021] KEELRC 4717 (KLR)
 7. South Nyanza Sugar Co Ltd v Ezekiel Oduk (Civil Appeal 80 of 2017) [2019] KEHC 4717 (KLR)
 8. National Bank of Kenya Ltd v Joly Family Stores & another [2005] KEHC 2955 (KLR)
 9. Ola Energy Kenya Limited v Nyiro & 5 others [2023] KEELC 20140 (KLR)
 10. Synergy Industrial Credit Limited v Cape Holdings Limited [2019] KESC 12 (KLR)

Analysis and Determination

Threshold of a PO

14. The first issue is whether the respondent's PO is merited.
15. In *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Ltd* [1969] EA 696 the court stated that a PO: -

“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 may dispose of the suit.
16. From a reading of the respondent's PO, it is my considered view that the grounds raised are not pure points of law. Grounds 1 and 3 are factual while ground 2 on res judicata requires the probing of facts and evidence. Thus, the threshold of a PO has not been met. The PO therefore stands to be dismissed.



Res judicata

17. The respondent contended that the issues raised through the application are res judicata, having been determined on merit and in full by this court and in appeals preferred against the said determination to the Court of Appeal and to the Supreme Court and cannot be reopened.
18. The applicant submitted that res judicata is not applicable. It asserted that the issue of compound interest at a rate of 23% per annum was never heard and determined on its merits in the arbitration proceedings and the subsequent proceedings.
19. The doctrine of res judicata is codified in section 7 of the *Civil Procedure Act*. It provides that: -

“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 them 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.”
20. Explanation. — (4) states: -

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”
21. In my considered view, the applicant already had an opportunity to challenge the compound interest at a rate of 23% per annum. It is therefore barred by res judicata to raise the issue at the post-execution stage.

Functus officio

22. The applicant seeks setting aside of the purported sale by public auction by Regent Auctioneers of the applicant’s property known as Land Reference 9118/11 (Now Nairobi/ Block 192/607) (subject property). It also seeks certification that the decree, costs and all charges and expenses relating to the attachment of the property have been fully settled.
23. On the other hand, the respondent asserted that the auction of the subject property took place on 19.3.2025 as per its instructions. It also asserted that the applicant cannot alter the negotiated terms of settlement that gave rise to the stay of execution agreed to by the respondent and the applicant and the cancellation of the auction of 30.1.2025.
24. The respondent exhibited a certificate of sale dated 19.3.2025. This confirms that the property was sold.
25. As per the bank guarantee of 29.1.2025, the bank undertook to pay the respondent Kshs. 187,416,982.49/-. The guarantee would remain in force up to and including the closure of business on 28.2.2025.
26. By a letter dated 27.2.2025, the respondents advocates informed the Deputy Registrar that the applicant failed to settle the decretal sum and that the bank guarantee had become payable. The letter reads “not in out records/ possession court admin”.
27. By letter dated 4.3.2025, the respondent’s advocate wrote to Equity bank that the Deputy Registrar informed him that the bank guarantee was not delivered to the High Court.



28. On the other hand, the applicant produced a copy of an Absa Bank remittance advice dated 28.2.2025 for payment of Kshs. 140,503,307.00/- to Symbion Kenya Limited. It also produced a remittance advice for 27.11.2024 for Kshs. 146,238,135/-.
29. To my mind, the court became functus officio after the respondent enforced the decree. The only outstanding assignment is making a return on execution of the warrants of execution to the DR which is interrogated thereto to confirm full or partial satisfaction of the decree as well as any payments made by the applicant and or through execution of the decree.
30. Thus, issues regarding the claims for payments made by the applicant should be settled before the DR.
31. Fraud claimed ought to be addressed in a separate claim so that a trial is conducted and a determination made.

Disposal

32. In conclusion, whereas the notice of motion dated 25.3.2025 is dismissed with costs, I however order the auctioneer to make a return on execution of the warrants to the court and parties to appear before the DR to interrogate the return and submit proof of payment of the debt -by the applicant and through execution-or any sums due.
33. I do note that the respondents claim that the property in question was sold in a public auction. However, I do note also that the applicants holds the view that the property was never sold. The applicant, however seeks, inter alia the setting aside of the purported sale and taking of accounts. It is precisely because of the averments and the revelations from the record that I will not determine the substantive issues raised in the application until certain defined actions in law have been undertake as shall be clear below.
34. Quite foundational yet relevant materials. The Decretal sum was Kshs. 282,738,087.09/-. According to the applicants, the following payments were made: -
 - a. On 27.11.2024 Kshs. 146,238,135.40/- (about 50% of the decretal sum)
 - b. On 28.2.2025 Kshs. 140,503,307/- (balance of the decretal sum) Kshs. 2,105,643/- (taxed costs to the advocates) Kshs. 2,827,381/- (auctioneer's fees)
35. Regent auctioneers advertised the property for sale by public auction on 30.9.2024 and 7.10.2024
36. The applicant had filed an application for stay. The court issued interim orders on 15.10.2024 staying all proceedings. (execution and auction sale).
37. On 29.1.2025, the interim orders of stay were vacated. Auction was to proceed on 30.1.2025
38. The applicant sought 30 days stay.
39. In Settlement terms – consent; Parties agreed to 30 days stay. Applicant to pay the balance of Kshs. 187,416,982.49 made up of Balance of the decretal sum Kshs. 146,499,952.09, Legal fees Kshs. 18,756,040, Auctioneers charges Kshs. 16,894,010.40, Valuation fees kshs. 5,266,980.00, and Supported by an unequivocal bank guarantee which guarantee would be called in the event that the agreed balance was not received on or before the expiry date. Bank guarantee to be deposited with the court.
40. It bears repeating that, the respondents stated that the property was auctioned and provided a certificate of sale. The Applicant states the property was not sold and wants the purported auction to be reversed.



41. All these making return on execution necessary where accounts on payments made or received or realized towards satisfaction of the decree should be settled as a relevant aspect for consideration in the application before the court.
42. Therefore, a return on execution be made to the DR and served upon the parties within 7 days. Parties to file and serve supporting or accountable documents within 7 days. The DR to file a report thereto. Ruling on the application shall be determined after the report by the DR.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 9TH DAY OF APRIL, 2026

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F. GIKONYO M

JUDGE

In the presence of: -

Amin for Applicant

Obuya for Ouma for Respondent

CA – Ivan/Aggrey

