

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELC CASE NO. 14 OF 2013
CONSOLIDATED WITH ELC CASE NO. 92 OF 2009

JANE ACHIENG MUGA.....
.....PLAINTIFF

VERSUS

ENGEN KENYA LIMITED.....1ST
DEFENDANT

SAMUEL GACHUHI MWANGI.....2ND
DEFENDANT

SHADRACK KOSKEI CHEROGOE.....3RD
DEFENDANT

GARAM INVESTMENTS.....4TH
DEFENDANT

AMIT SHAH.....5TH
DEFENDANT

KEROMATT LIMITED.....6TH
DEFENDANT

AND

HEGEONS ACTIONEERS.....INTERESTED
PARTY

RULING.

Introduction.

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 25th July, 2025. The application is expressed to be brought under **Articles 40, 50 & 159 (2) (d)** of the Constitution of Kenya, **Sections 3A & 63 (e)** of the **Civil Procedure Act** and **Order 9 Rule 9, Order 20 Rule 1 & 20, Order 40 Rules 1, 2 & 3** and **Order 51 Rule 1** of the **Civil Procedure Rules**.

2. The application seeks the following orders:
 - a. Spent*
 - b. That this Honourable Court be pleased to grant leave to the Plaintiff to act in person in place of the firm of Njau, Kayai & Co. Advocates.*
 - c. Spent*
 - d. That this Honourable Court be pleased to issue an injunction to restrain the 1st Defendant and Interested Party by themselves, servants, agents and/or legal*

representatives from auctioning, selling, transferring, alienating, interfering with possession or occupation or dealing in any other manner with the Plaintiff's property namely title No. Kericho/Kipchimchim/2722 situate in Kericho County pending the rendering of a proper and accurate account of the loan the 1st Defendant allegedly gave the 2nd and 3rd Defendants.

e. That this Honourable Court be pleased to issue an order compelling the 1st Defendant to render a proper and accurate account of the overdraft facility of Kshs. 2,150,000/= allegedly advanced to the 2nd and 3rd Defendants.

f. That the costs of this application be in the cause.

3. The application is based on the grounds on its face and the supporting affidavit of **Jane Achieng Muga** that is sworn on 25th July, 2025.

Factual Background.

4. The Plaintiff/Applicant filed the present suit vide the Plaint dated 9th July, 2013 where she sought the following prayers;

a. An order declaring the charge if any, entered into by the 1st, 2nd and 3rd Defendants over LR No. Kericho/Kipchimchim/2722 fraudulent, null and void.

b. An order declaring the title deed presented over LR No. Kericho/Kipchimchim/2722 as security and forming any charge thereof by the 1st, 2nd and 3rd Defendants as fraudulent, a forgery and fake and therefore null and void.

c. An order declaring the purported auction held on 31st May, 2013 by the 4th Defendant, an agent of the 1st Defendant over LR No.

Kericho/Kipchimchim/2722 sold to the 5th and 6th Defendants as fraudulent, null and void and that the same be set aside and in the alternative, declare it an act in contempt of the Court order in Kericho HCCC No. 92 of 2009.

d. An order of permanent injunction restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants and their agents, servants and employees from advertising, offering for sale by private treaty or public auction, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with land reference no. Kericho/Kipchimchim/2722.

e. A permanent order of injunction restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants by themselves, their agents, servants and/or employees from entering into, remaining on, evicting, transferring, dealing or in any manner interfering with land parcel number Kericho/Kipchimchim/2722.

5. The 1st Defendant/Respondent filed a Statement of Defence dated 18th July, 2014 where it denied the averments in the Plaintiff and sought that the Plaintiff's suit be dismissed with costs.
6. The 3rd Defendant/Respondent filed a Statement of Defence dated 3rd February, 2015 where he denied the averments in the Plaintiff but sought that the Plaintiff's suit be allowed against the 1st, 2nd, 4th, 5th and 6th Defendants/Respondents.
7. On 24th July, 2014, the present suit was consolidated with ELC Case No. 92 of 2009 that was instituted by the 3rd Defendant/Respondent.
8. The 3rd Defendant/Respondent vide the Plaintiff dated 12th June, 2008 sought the following prayers;

a. A declaration that the charge registered against the Plaintiffs parcel number Kericho/Kipchimchim/2722 in favour of the 2nd Defendant is fraudulent, unlawful, illegal null and void and the

Land Registrar be ordered to cancel the same.

b. A perpetual injunction restraining the Defendants from selling by way of public auction or howsoever advertising for sale or in any other manner interfering (sic) with the Plaintiffs ownership, possession and/or enjoyment of his parcel number Kericho/Kipchimchim/2722.

c. Costs and interests.

- 9.** The 1st Defendant/Respondent filed a Statement of Defence dated 24th June, 2008 wherein it denied the averments in the Plaintiff and sought that the 3rd Defendant/Respondent's suit be dismissed with costs.
- 10.** The suits were heard and judgement delivered on 9th May, 2018. The Court dismissed Kericho ELC Case No. 92 of 2009 and allowed the Plaintiff's suit in the following terms;

a. A declaration is hereby issued that the purported public auction held on 31st May, 2013 by the 4th Defendant,

an agent of the 1st Defendant over LR No. Kericho/Kipchimchim/2722 sold to the 5th and 6th Defendant is unlawful, null and void and that the same is hereby set aside.

b. A permanent order of injunction is hereby issued only to the extent that the 1st Defendant is restrained from transferring the suit property to the 5th and 6th Defendants.

c. The sale of LR No. Kericho/Kipchimchim/2722 is hereby cancelled and the 1st Defendant is ordered to refund the purchase price paid by the 5th and 6th Defendants without interest.

d. It is hereby ordered that unless the amount outstanding to the 1st Defendant is fully paid by the 2nd and 3rd Defendants, the 1st Defendant is at liberty to exercise its statutory power of sale in respect of the suit property in strict conformity with the law.

e. Considering the circumstances of this case, each party shall bear its own costs.

- 11.** The application under consideration first came up for hearing on 29th July, 2025 when the Court directed that it be served upon the Respondents. Subsequently, the 1st Defendant/Respondent filed a Notice of Appointment of Advocates dated 7th October, 2025.
- 12.** The application came up for hearing on 8th October, 2025 when the Court directed that it be canvassed by way of written submissions.
- 13.** The application was mentioned severally to confirm filing of submissions and on 21st January, 2026. it was reserved for ruling.

The Plaintiff/Applicant's Contention.

- 14.** The Plaintiff/Applicant contends that she is the wife of the 3rd Defendant/Respondent who is the registered owner of land parcel No. **Kericho/Kipchimchim/2722.**

- 15.** The Plaintiff/Applicant also contends that her matrimonial home is located on the said parcel of land.
- 16.** The Plaintiff/Applicant further contends that on 14th July, 2025, the 1st Defendant/Respondent and the Interested Party/Respondent advertised the suit property for sale.
- 17.** It is the Plaintiff/Applicant's contention that the intended sale was to take place on 28th July, 2025.
- 18.** It is also the Plaintiff/Applicant's contention that she was not able to trace one **Benson Kayai** who was her previous Counsel on record in order to defend her claim. She goes on to state that she wrote a letter dated 22nd July, 2025 that was addressed to the Law Society of Kenya and the Law Society of Kenya responded vide a letter dated 22nd July, 2025 where it stated that it was unaware of his whereabouts.

- 19.** It is further the Plaintiff/Applicant's contention that in the year 2001, the 2nd and 3rd Defendants/Respondents charged the suit parcel of land to the 1st Defendant/Respondent to secure a credit facility of Kshs. 2,150,000/= for the purchase of fuel and fuel products from the 1st Defendant/Respondent.
- 20.** It is the Plaintiff/Applicant's contention that the suit parcel of land was later auctioned and the Court set aside the said sale in the judgement that was delivered in this suit.
- 21.** She contends that the 1st Defendant/Respondent has not complied with the directions issued in the judgement of giving notices prior to the sale.
- 22.** She also contends that the 1st Defendant/Respondent has refused to render a proper account of the 2nd and 3rd Defendants/Respondents credit facility of Kshs, 2,150,000/=.
- She goes on to state that this is meant to clog her ability to repay the loan.

- 23.** She further contends that the Interested Party intends to sell the suit parcel of land without issuing the relevant notices under the **Auctioneers Act**, 1996 and the **Auctioneers Rules**, 1997. She goes on to state that she has not been served with the ninety-days' notice as provided for under **Section 90(1) and (3)** of the **Land Act**, the forty-days' notice as provided for under **Section 96(2)** of the **Land Act** and forty-five days' notice as provided for under **Rule 15 (d)** of the **Auctioneers Rules**.
- 24.** It is her contention that even though she is not a party to the loan taken by the 2nd and 3rd Defendants/Respondents, she is ready and willing to deposit in Court kshs. 2,150,000/= within fourteen days of the Court issuing such an order.
- 25.** It is also her contention that she is also willing to deposit the balance within forty-five days once the proper and accurate account has been rendered. She goes on to state that this is as per **Order 20 Rule 20** of the Civil Procedure Rules.

26. She ends her deposition by stating that the property has not been valued since the year 2018 as provided for under the Auctioneers Act, 1996 and the Auctioneers Rules, 1997.

The 1st Defendant/Respondent's Response.

27. In response to the Plaintiff/Applicant's application, the 1st Defendant/Respondent filed a Replying Affidavit sworn by **Stanley Njiru** its treasurer.

28. He deposes that the Court already delivered judgement in this matter and therefore the application under consideration is *res judicata* and the Court is *functus officio*.

29. He also deposes that the Court in its judgement held that the Chargor had been served by way of registered post through the address provided on the charge.

30. He further deposes that the Court also found that the 1st Defendant/Respondent was not a banking institution and therefore the *in duplam* rule did not apply to it.

- 31.** It is his deposition that the Court ordered that unless the outstanding sum is paid in full, the 1st Defendant/Respondent is at liberty to exercise its statutory power of sale in conformity with the law.
- 32.** It is also his deposition that after the delivery of judgement, the 1st Defendant/Respondent served the ninety-days' notice and the forty days' notice upon the Chargor and the Plaintiff/Applicant.
- 33.** It is further his deposition that after the said notices were not complied with, the 1st Defendant/Respondent instructed the auctioneers who issued the forty-five days' redemption notice.
- 34.** He deposes that the Plaintiff/Applicant and the 3rd Defendant/Respondent failed to comply and therefore the 1st Defendant/Respondent commenced the process of realization of the security.

- 35.** He also deposes that once the 1st Defendant/Respondent commenced the process, the Plaintiff/Applicant filed Kericho ELC Case No. 11 of 2023 raising the same issues.
- 36.** He further deposes that the Court delivered a ruling on 20th February, 2025 and struck out the suit.
- 37.** It is his deposition that the Plaintiff/Applicant is forum shopping while the debt continues to accrue.
- 38.** It is also his deposition that the 1st Defendant/Respondent conducted a valuation of the suit parcel of land in compliance with **Section 97** of the Land Act.
- 39.** It is further his deposition that the Plaintiff/Applicant's contention that she does not know the outstanding loan amount is not true as this issue was subject of two previous proceedings where the Plaintiff/Applicant was a party. He goes on to state that despite the Plaintiff/Applicant having the said knowledge, she has failed to redeem the said loan.

- 40.** He deposes that the Plaintiff/Applicant has not established a *prima facie* case as there is no dispute to indebtedness arising from the breach and default.
- 41.** He also deposes that an injunction cannot issue where there is a debt due and all the statutory processes leading to the realization of the security have been complied with.
- 42.** He ends his deposition by urging the Court to dismiss the Plaintiff/Applicant's application.

The Plaintiff/Applicant's Response to the 1st Defendant/Respondent's Replying Affidavit.

- 43.** The Plaintiff/Applicant filed a Supplementary Affidavit sworn on 24th November, 2025 in response to the 1st Defendant/Respondent's Replying Affidavit.

- 44.** She reiterates that she was not party to the fuel delivery contract between the 1st, 2nd and 3rd Defendants/Respondents.
- 45.** She also reiterates that she is the wife of the 3rd Defendant/Respondent and she intends to settle the pending loan facility with the 1st Defendant/Respondent in order to salvage her matrimonial home.
- 46.** She deposes that in the application under consideration, she is seeking for an order to compel the 1st Defendant/Respondent to render accounts of the money that is allegedly outstanding from the credit facility.
- 47.** She also deposes that the loan facility was alleged to be Kshs. 2,150,000/= while the outstanding loan facility is said to be Kshs. 39,547,780/=.

48. She further deposes that the 1st Defendant/Respondent should supply the said accounts so that she can compute and verify the amount due before paying.

49. It is her deposition that she seeks to know the following things;

a. The petrol stations from which the fuel was collected for delivery.

b. The details of the motor vehicles that delivered the fuel.

c. The number of liters of fuel that was delivered.

d. The place of delivery of the said fuel.

e. The cost per litre of the fuel at the time of each delivery.

f. Delivery receipts for the said fuel.

g. Dates when the delivery was made.

h. The date when the last delivery was made.

50. It is also her deposition that the Court should compel the 1st Defendant/Respondent to provide her with the evidence that

they delivered fuel products amounting to Kshs. 2,150,000/=.

- 51.** It is further her deposition that the 1st Defendant/Respondent attached a table at pages 138 and 139 of its Replying Affidavit which it alleged to be the accounts for the credit facility extended to the 2nd and 3rd Defendants/Respondents together with the interest accrued.
- 52.** She deposes that in the said statement of accounts, the principal amount changes from Kshs. 2,150,000/= in the month of July, 2007 to Kshs. 5,674,000/=. She goes on to state that the at page 139 the amount owing is said to be Kshs. 5,674,000/= while at page 138 the total amount due is Kshs. 39,547,780/=.
- 53.** She also deposes that no explanation has been given for the said changes and it is not clear how much money is due and owing.

- 54.** She further deposes that she does not have access to the terms of the credit facility and the 1st Defendant/Respondent has not afforded the same to her.
- 55.** It is her deposition that even if the 1st Defendant/Respondent rendered the accounts of the loan facility and the value of the petroleum facilities delivered is confirmed to be Kshs. 2,150,000/=, the amount payable cannot be Kshs. 39,547,780/=.
- 56.** It is also her deposition that the 1st Defendant/Respondent has failed to avail the documents that relate to the loan facility for her to verify the amount owed.
- 57.** It is further her deposition that she procured the services of the Interest Rates Advisory Center who generated a report on the loan facility of kshs. 2,150,000/=. She goes on to state that in their report they found that the amount recoverable by the 1st Defendant/Respondent should not exceed Kshs. 4,300,000/=.

58. She deposes that the Interest Rates Advisory Center stated that the loan facility stopped accruing interest in September, 2006 after hitting the *in duplam* point. She goes on to state that the Interest Rates Advisory Center is ready to attend Court and defend its report.

59. She also deposes that the Court should make the finding that the correct amount payable is as per the report prepared by the Interest Rates Advisory Center.

60. She ends her deposition by reiterating that the 1st Defendant/Respondent should render accounts so that she can know how much money is owed under the loan facility.

Issues for Determination

61. The Plaintiff/Applicant filed submissions on 1st December, 2025, the 1st Defendant/Respondent filed its submissions on 4th November, 2025 and supplementary submissions on 15th December, 2025.

62. The Plaintiff/Applicant submits on the following issues;

a. Whether she should be heard.

b. Whether the 1st Defendant/Respondent should render accounts.

c. What accounts should be rendered.

63. On the first issue, the Plaintiff/Applicant relies on **Articles 25, 50(1) and 159 (1)(d)** of the Constitution of Kenya, the judicial decision of **Evans Odhiambo Kidero & 4 Others vs Ferdinand Ndungu Waititu & 4 Others [2014] eKLR** and submits that the Court should accord her the right to a fair hearing.

64. On the second issue, the Plaintiff/Applicant relies on the judicial decision of **Margaret Njeri Muiruri vs Bank of Baroda [2014] eKLR** reiterates her averments in the affidavit in support of the application and urges the Court to compel the 1st Defendant/Respondent to supply the account records for her to verify the outstanding loan amount.

65. The Plaintiff/Applicant also submits that the 1st Defendant/Respondent has not availed any evidence to show that the value of the fuel that was supplied amounted to Kshs. 2,150,000/=.
66. The Plaintiff/Applicant reiterates the averments in her supplementary affidavit and relies on the judicial decisions of **Kenya Akiba Micro Financing Limited vs Ezekiel Chebi & 14 Others [2012] eKLR**, **Stanley Mombo Amuti vs Kenya Anti-Corruption Commission [2019]eKLR** as was cited in **Kim Jong Kyu vs Housing Finance Company Limited & 2 Others [2015] eKLR**.
67. It is the Plaintiff/Applicant's submissions that the law shuns unjust enrichment and that the 1st Defendant/Respondent contends that the amount owed is Kshs. 39,547,780/=.

68. It is also the Plaintiff/Applicant's submissions that the said amount claimed by the 1st Defendant/Respondent is not supported by any evidence.

69. It is further the Plaintiff/Applicant's submissions that even though the Court delivered judgement, it is not *functus officio* as the application flows from the judgement of the Court.

70. The Plaintiff/Applicant also submits that the application under consideration is not *res judicata* as it only seeks to ensure compliance with the judgement of the Court.

71. The Plaintiff/Applicant further submits that the various judgements of the Court that the 1st Defendant/Respondent refers to did not declare the loan facility owed.

72. It is the Plaintiff/Applicant's submissions that the 1st Defendant/Respondent has relied on the judicial decisions of

Raila Odinga & Others vs Independent Electoral &

Boundaries Commission & 3 Others [2013] eKLR and V. Chokaa & Co. Advocates vs Francis Thoya, County Secretary, Mombasa County Government and 4 Others [2021] KEHC 260 (KLR) where it was held that a Court only exercises power over a particular issue once.

- 73.** It is also the Plaintiff/Applicant's submissions the said authorities are distinguishable from the present suit as the Court has not made a determination on the issue of rendering accounts.
- 74.** It is further the Plaintiff/Applicant's submissions that the 1st Defendant/Respondent has also relied on the judicial decisions of **Mumbu Holdings Ltd vs Spire Bank Ltd & 5 Others [2021] eKLR, V. Chokaa & Co. Advocates vs Francis Thoya, County Secretary, Mombasa County Government & 4 Others [2021] eKLR.** The Plaintiff/Applicant reiterates that the Court has not made a determination on the issue of rendering of accounts.

75. On the third issue, the Plaintiff/Applicant reiterates that the 1st Defendant/Respondent should render accounts to show how the sum of Kshs. 2, 150,000/= escalated to Kshs. 39, 547, 780/=.
76. The Plaintiff/Applicant reiterates the averments in her Supplementary Affidavit and while relying on **Section 27** of the Civil Procedure Act and the judicial decision of **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2013] eKLR** urges the Court to allow her application with costs.
77. The 1st Defendant/Respondent submits on the following issues;
- a. Whether the instant application is barred by the doctrine of res judicata and the Court is functus officio.***
 - b. Whether the requisite statutory notices were issued.***
 - c. Whether the suit property was valued.***

d. Whether the Plaintiff has satisfied the conditions for granting an order of temporary injunction.

- 78.** The 1st Defendant/Respondent relies on **Section 7** of the **Civil Procedure Act**, the judicial decision of **V. Chokaa & Co. Advocates vs Francis Thoya, County Secretary, Mombasa County Government & 4 Others [2021] eKLR** and submits that the application under consideration is *res judicata* as the Court already delivered judgement on the issues that the Plaintiff/Applicant is reintroducing in the application under consideration.
- 79.** It is the 1st Defendant/Respondent's submissions that the parties are the same save for the Interested Party/Respondent.
- 80.** It is also the 1st Defendant/Respondent's submissions that the Plaintiff/Applicant is re-litigating on issues that have already been determined by the Court.

- 81.** The 1st Defendant/Respondent relies on the judicial decisions of **Mumbu Holdings Ltd vs Spire Bank Ltd & 5 Others [2021] KEHC 15 (KLR), Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** and submits that the Court is *functus officio*.
- 82.** The 1st Defendant/Respondent also submits that the Court cannot therefore hear and determine the Plaintiff/Applicant's application.
- 83.** The 1st Defendant/Respondent reiterates its averments in the Replying Affidavit and urges the Court to dismiss the Plaintiff/Applicant's application with costs.
- 84.** On the second issue, the 1st Defendant/Respondent submits that it has attached a Statement of Accounts to its Replying Affidavit and while relying on **Section 131** of the Land Act submits that the Plaintiff/Applicant was served with the 45

days' redemption notice and a notification of sale dated 19th September, 2023.

85. The 1st Defendant/Respondent relies on the judicial decision of **Nyagilo Ochieng & another vs Kenya Commercial bank Limited [1996] eKLR** and submits that it has attached to its Replying Affidavit certificates of posting of the respective statutory notices that were served upon the Plaintiff/Applicant.

86. The 1st Defendant/Respondent also relies on the judicial decision of **Faulu Microfinance Bank Limited vs Wanyaga & another [2022] eKLR** and submits that the statutory notices were issued to the Plaintiff/Applicant vide P.O Box No. 840 Kericho which address was provided by the 3rd Defendant/Respondent.

87. On the third issue, the 1st Defendant/Respondent submits that Dominion Valuers Limited valued the suit property and prepared a report dated 14th August, 2023.

88. The 1st Defendant/Respondent also submits that the Plaintiff/Applicant's contention that the intended sale is being undertaken without a forced sale valuation is without merit.
89. On the fourth issue, the 1st Defendant/Respondent relies on the judicial decision of **Mrao Ltd vs First American Bank of Kenya Limited and 2 Others [2003] eKLR** and submits that the Plaintiff/Applicant has not demonstrated a *prima facie* case.
90. It is the 1st Defendant/Respondent's submissions that the borrower defaulted in repaying the loan and therefore its right to sell the charged property automatically crystalized.
91. The 1st Defendant/Respondent relies on the judicial decisions of **Ambient Construction v National Bank of Kenya Limited**

[2019] eKLR, Kiplagat & another vs Consolidated Bank

[2022] eKLR and submits that the Plaintiff/Applicant has come to Court with unclean hands.

- 92.** The 1st Defendant/Respondent also submits that the loan facility was advanced in the year 2001 and despite the Court according the Plaintiff/Applicant and her spouse an opportunity to redeem the property, they failed to do so.
- 93.** The 1st Defendant/Respondent further submits that the Plaintiff/Applicant has been in possession of the charged property without discharging the debt.
- 94.** It is the 1st Defendant/Respondent's submissions that their conduct amounts to an abuse of the Court process and is a deliberate attempt to frustrate its rights while the debt continues to accrue interest.
- 95.** The 1st Defendant/Respondent relies on the judicial decisions of **Amina Karama vs Njagi Gachangua & 3 Others**

[2020] eKLR, Tengeri N. Osoro vs Standard Chartered Bank & another HCC No. 120 of 2022 (unreported) as was cited in **Access Bank Kenya PLC vs Mengich & another [2014] KEHC 5682 (KLR)** and submits that the issue of whether it has overcharged interest was already dealt with and addressed by the Court and the issue is therefore *res judicata*.

- 96.** The 1st Defendant/Respondent submits that the outstanding loan facility stands at Kshs. 39,547,780/= and it has followed due process for the intended auction.
- 97.** The 1st Defendant/Respondent relies on the judicial decision of **Highgrove Holdings Limited vs I & M Bank Limited & Garam Investment Limited [2019] KEHC 12145 (KLR)** and submits that the Plaintiff/Applicant has not demonstrated that she will suffer harm that cannot be adequately compensated by an award of damages.

98. It is the 1st Defendant/Respondent's submissions that the once an Applicant fails to establish a *prima facie* case, the Court need not to consider the other aspects of determining whether an injunction should issue.

99. The 1st Defendant/Respondent concludes its submissions by urging the Court to dismiss the Plaintiff/Applicant's application with costs.

100. In its supplementary submissions, the 1st Defendant/Respondent submits that the Plaintiff/Applicant's supplementary affidavit ought to be struck out as it has introduced new issues which were not raised during the hearing and determination of the present suit.

101. The 1st Defendant/Respondent also submits that the Court is *functus officio* and it cannot therefore consider issues that were not pleaded.

102. The 1st Defendant/Respondent further submits that the said issues include the documentation on the liters of fuel that were supplied.

103. It is the 1st Defendant/Respondent's submissions that the Plaintiff/Applicant has annexed a report prepared by IRAC to dispute the amount due while relying on the *in duplam* rule.

104. The 1st Defendant/Respondent reiterates that the Court addressed the issue of the *in duplam* rule in its judgement and therefore the said issue is *res judicata*.

105. The 1st Defendant/Respondent reiterates that the Plaintiff/Applicant filed ELC Case No. 11 of 2023 which suit raised among other issues the loan amount due.

106. The 1st Defendant/Respondent also reiterates that the said suit was struck out on 20th February, 2025 and the Plaintiff/Applicant has filed an appeal.

107. The 1st Defendant/Respondent submits that the said issue of accounts is before the Court of Appeal and it cannot therefore be subject of the present proceedings.

108. The 1st Defendant/Respondent also submits that the IRAC Report constitutes fresh evidence whose veracity ought to be tested by way of cross examination.

109. The 1st Defendant/Respondent relies on the judicial decision of **Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 Others [2016] KECA 432 (KLR)** in support of its submissions.

110. The 1st Defendant/Respondent further submits that it has supplied the Plaintiff/Applicant with up to date statements in each of the suits she has filed that include the outstanding loan balance and interest computations.

111.The 1st Defendant/Respondent submits that the contractual loan agreement provided the interest rate to be 3% per month subject to variation.

112.The 1st Defendant/Respondent also submits that the loan facility has remained unpaid since the year 2001 and therefore arrears have accumulated.

113.It is the 1st Defendant/Respondent's submissions that the Plaintiff/Applicant concedes that a loan facility was extended to her husband and expresses willingness to pay the loan.

114.It is also the 1st Defendant/Respondent's submissions the request for documentation on fuel delivery is irrelevant and is an attempt to further litigate on issues post judgement.

115.The 1st Defendant/Respondent concludes its submissions by urging the Court to dismiss the Plaintiff/Applicant's application with costs.

Analysis and Determination.

116. I have considered the Plaintiff/Applicant's application, the response thereto, the Plaintiff/Applicant's Supplementary Affidavit and the rival submissions and it is my view that the following issues arise for determination;

a. Whether the Plaintiff/Applicant should be granted leave to act in person.

b. Whether this Court is functus officio.

c. Whether the application dated 25th July, 2025 is res judicata.

d. Whether the application dated 25th July, 2025 has merit.

e. Who should bear costs of the application.

A. Whether the Plaintiff/Applicant should be granted leave to act in person.

117. The Plaintiff/Applicant contends that she is unable to trace her former advocates on record and she therefore seeks for leave to act in person.

118. Order 9 Rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

119. It is not disputed that the Plaintiff/Applicant was previously represented by Counsel.

120. Consequently, the Plaintiff/Applicant is hereby granted leave to act in person and in any case, the said prayer is not opposed by the 1st Defendant/Respondent.

B. Whether this Court is functus officio.

121. The Plaintiff/Applicant is seeking that the Court issues an order of injunction to restrain the 1st Defendant/Respondent and the Interested Party/Respondent from selling land parcel No. **Kericho/Kipchimchim/2722** pending the rendering of accounts by the 1st Defendant/Respondent.

122. The Plaintiff/Applicant also seeks that the Court issues an order compelling the 1st Defendant/Respondent to render a proper and accurate account of the loan facility of Kshs. 2,150,000/= that was advanced to the 2nd and 3rd Defendants/Respondents.

123. The Plaintiff/Applicant contends that the 2nd and 3rd Defendants/Respondents were given a loan facility by the 1st

Defendant/Respondent of kshs. 2, 150,000/= in the year 2001.

124.The Plaintiff/Applicant also contends that the arrears of the said loan facility now stands at Kshs. 39,547,780.

125.The Plaintiff/Applicant further contends that the 1st Defendant/Respondent ought to render accounts as to how the said figure was arrived at.

126.It is the Plaintiff/Applicant's contention that she has procured the services of the Interest Rates Advisory Center who have prepared a report which states that the amount recoverable is Kshs. 4,300,000/=.

127.It is also the Plaintiff/Applicant's submissions that she was not served with the requisite statutory notices and neither was the suit property valued.

128. In response, the 1st Defendant/Respondent contends that the Court is *functus officio* as it delivered judgement on 9th May, 2018 and it cannot therefore address the issues raised in the Plaintiff/Applicant's application.

129. The Supreme Court in **Odinga v Independent Electoral & Boundaries Commission & 3 others [2013] KESC 8 (KLR)** stated as follows on the doctrine of *functus officio*;

“18. We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“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."

19. This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550:

"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 supplied]."

130.The Court of Appeal in **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of**

996 Former Employees of Telkom Kenya Limited)

[2014] KECA 600 (KLR) 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.”

(Emphasis mine)

131.As was held in the above cited judicial decisions, the doctrine of *functus officio* prevents the re-opening of a matter before a Court after it has rendered the final decision.

132.In the judgement delivered on 9th May, 2018 the Court held as follows;

“d. It is hereby ordered that unless the amount outstanding to the 1st Defendant is fully paid by the 2nd and 3rd Defendants, the 1st Defendant is at liberty to exercise its statutory power of sale in respect of the suit

***property in strict conformity with
the law.”***

133. It is trite law that once a Court has determined a suit on merit it becomes *functus officio*.

134. The Court issued an order that if the outstanding amount is not repaid, the 1st Defendant/Respondent was at liberty to exercise its statutory power of sale.

135. It is not disputed that the 2nd and 3rd Defendants/Respondents have not repaid the outstanding amount.

136. It follows that the 1st Defendant/Respondent is well within its rights to exercise its statutory power of sale.

137. It is not disputed that the 1st Defendant/Respondent has attached to its Replying Affidavit a copy of the said Statement of Accounts.

138.After the said statements of accounts were availed, the Plaintiff/Applicant now challenges how the figure of Kshs. 39,547,780/= was arrived at.

139.It is my view that since the Court already delivered judgement in this matter, it cannot interrogate the issue of the exact loan amount that is outstanding.

140.In any event, this Court does not have jurisdiction to do so as the issue of the amount due or owing after a property has been charged is a commercial dispute which issue can only be determined by the High Court. See the Court of Appeal judicial decision in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR.**

141.Taking the foregoing into consideration, it is my finding that this Court is *functus officio*.

C. Whether the application dated 25th July, 2025 is res judicata.

142. Given my finding on issue (b) above, it shall not be necessary for me to address this issue.

D. Whether the application dated 25th July, 2025 has merit.

143. Given my finding on issue (b) above, it shall not be necessary for me to address this issue.

E. Who should bear costs of the application.

144. The general rule is that costs shall follow the event in accordance with the Provisions of **Section 27** of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

145. Taking the foregoing and my finding on prayer (b) on the face of the application into consideration, I find that the other prayers sought in the Plaintiff/Applicant's Notice of Motion application dated 25th July, 2025 lack merit and are hereby dismissed with costs.

146. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 16TH DAY OF APRIL, 2026.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

**Mr. Nyongesa for Mr. Maondo for 1st
Defendant/Respondent.**

Mr. Ondabu for the Plaintiff/Applicant.

Court Assistant; Mr. Joseph Makori.

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