

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. E146 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

MILTON OSORO OMACHE PETITIONER

VERSUS

NATIONAL BANK OF KENYA LTD..... RESPONDENT

RULING

The Petitioner commenced the instant suit on 23rd July, 2025 vide a petition dated 22nd July, 2025 which was subsequently amended on 17th December, 2025.

The Petitioner sought a declaration that the Respondent's actions, including misappropriation of judgment award, allowing preferential treatment of the auction purchaser of the mortgaged house who was in default amounted to discrimination and breach of the constitution, disclosure of suit to a third party and subsequent threats by the 3rd party breached the Constitution, Constitutional damages, contempt of court for disobeying orders made on 17th January 2025 in ELRC No. E792 of 2021, purging of contempt by the Respondent aggravated and exemplary damages, all monetary awards be paid into the Petitioner's account as per the demand letter, costs and interest.

When the matter came up on 30th October, 2025, none of the parties was present and a further mention was slated for 24th November, 2025 when both parties were present. Counsel for the Respondent sought 21 days to respond to the Petition, while the Petitioner sought leave to amend the Petition and a further mention was slated for 27th January 2026 when counsel for the Respondent informed that court that the Respondent had filed a Notice of Preliminary Objection and prayed that the file be placed before the Honourable judge for further directions and directions were given on 25th February, 2026. Directions on the filing and exchange of submissions were issued on 9th March, 2026 and a ruling scheduled for 13th April, 2026.

The Respondent's Notice of Preliminary Objection dated 26th January, 2026 is grounded on the contention that the Petition herein was seeking the enforcement of orders arising from existing proceedings in Nairobi ELRC Cause No. E792 of 2021

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By a response dated 5th March, 2025, the Petitioner contended that the Notice of Preliminary Objection was misconceived as the reliefs sought included declarations, breach of privacy and unlawful disclosure of court proceedings, and only the order of contempt related to the earlier case.

That the Notice of Preliminary Objection did not meet the threshold in **Mukisa Bisuit Manufacturing Co. Ltd V. West End Distributors Ltd** and the Petition was not execution proceedings.

Respondents Submissions

Counsel for the Respondent submitted that the Petitioner and the Respondents were parties to ELRC No.E792 of 2021 and the dispute was determined vide a judgment delivered on 17th January, 2025 and the Respondent paid the decretal sum to the Petitioner in his bank account at the Respondent bank but the petitioner was challenging the manner of payment.

Reliance was placed on the provisions of section 13 of the Employment and Labour Relations Court Act on enforcement of decrees and section 34 of the Civil Procedure Act on matters arising between parties after a decree had been issued.

Reliance was placed on the Court of Appeal decision in **Kuronya Auctioneers V. Maurice O. Odhoch & another (2003) KECA 2(KLR)**, to submit that any challenge regarding payment of the decretal sum lay within ELRCNo. E792 of 2021 where the decree arose from.

That the current suit was a duplication of proceedings and unnecessary and no constitutional questions had been raised that could not be raised within ELRC No. E792 of 2021.

Reliance was also placed on section 6 of the Civil Procedure Act on stay of proceedings. Counsel submitted that since the gravamen of the instant suit was the execution of the decree, it fell within the provisions of section 34 of the Civil Procedure Act and the Petitioner admitted that no evidential inquiry was required and the Notice of Preliminary Objection met the threshold in **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd (1969) E.A. 696**. Counsel urged the court to find that the Petition was defective and strike it out.

Petitioner submissions

The Petitioner submitted that the Respondent secretly deposited the decretal funds into a mortgage loan repayment account on 13th March, 2025 and notified him on 1st April, 2025 after he enquired on the status of the appeal.

That the mortgage repayment account was tainted by unilateral and illegal sale of the mortgaged property by the Respondent after 20th February, 2026.

The petitioner argued that the Respondent being a licensed bank, owed fiduciary duties towards him to act good faith and exercise reasonable care and skill. That the Respondent acted in a fraudulent and reckless manner.

Reliance was placed on **Civicon Ltd V. Mulji Devraj & 2 others (2021) eKLR** on the duty of auctioneers under the Auctioneers Act to urge that the aggrieved party is

entitled to recover damages from the person deemed responsible for unlawful execution.

As regards ELRC E792 of 2021, the Petitioner placed reliance on **DT Dobie & Co (K) Ltd V Muchina** on amendment of pleadings and sustenance of cases despite procedural defects notwithstanding.

The Petitioner submitted that should the court find prayers (d) and (e) procedurally misplaced, it could strike them out or grant leave for the petition to be amended and direct that the severed pleadings be pursued within ELRC No. E792 of 2021.

According to the Petitioner, the Petition was based on a distinct tort of wrongful execution and constitutional violations and thus a different cause of action.

Concerning *res judicata* and section 34 of the Civil Procedure Act, the Petitioner submitted that the issues raised in the instant suit could not be litigated under ELRC No. E792 of 2021 because the suit was *functus officio* and no constitutional remedies were available.

Reliance was placed on **Civicon Ltd V. Mulji Devraj & 2 others** (Supra) to urge that wrongful execution or trespass were not execution issues but substantive torts requiring evidence and full trial and section 34 of the Civil Procedure Act did not contemplate a claim for compensation.

The petitioner maintained that whereas ELRC E792 of 2021 was an ordinary employment dispute, the instant petition was a distinct post judgment Constitutional violations and fell outside the Civil Procedure Act. That *res judicata* and *res subjudice* were not a bar to the petition since the petition was different.

As to whether the Respondent's Notice of Preliminary Objection met the threshold to dispose of the Petition, the Petitioner submitted that, it consisted of four sentences only, lacked precision and revealed substantial ambiguity, became clearer from the submissions did not meet the threshold in **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd (1969) EA 696** (Supra.)

The Petitioner urged the court to dismiss the Preliminary Objection with costs and allow the petition to be heard on merits.

The singular issue for determination is whether the Respondent's Notice of Preliminary Objection dated 26th January, 2026 is merited.

Before delving into the issue, it is equally important to determine whether the Respondent's notice meets the threshold in **Mukisa Biscuit Manufacturing Col Ltd V. West End Distributors Ltd (Supra)** where the Law JA;

“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 may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”

According to Sir Charles Newbold P. ;

“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.”

According to the Petitioner, the Respondent’s Notice of Preliminary Objection did not meet the threshold in **Mukisa’s case** (Supra) because the number of reliefs sought is different from an execution process, and the Respondent’s conduct post-judgment could only be determined by pleadings.

It is common ground that the petitioner was the claimant in Nairobi ELRC No. E792 of 2025 and judgment was delivered in his favour, the Respondent was accorded 30 days stay of execution and file a notice of appeal. An inquiry by the Petitioner

revealed that the award had been applied towards another account in the claimant's name.

The Petitioner made several averments in relation to an alleged auction held on 22nd November, 2024 contending that, the Respondent had demonstrated a pattern of disregard for judicial proceedings and had allegedly disclosed confidential details before delivery of the judgment.

Stripped off the legal jargon, the Petitioner is using the instant Petition to challenge the Respondent's alleged conduct in Nairobi ELRC No. E792 of 2021 before judgment on 17th January, 2025 and after judgment and in particular, application of the amount awarded by the court as compensation, and the Notice of Appeal, which according to the petitioner ought to have been pursued to its logical conclusion, otherwise it amounted to contempt of court.

Needless to be labour, Notices of Appeal are routinely filed to accord the Respondent time to determine the next course of action and cannot attract penalties.

Significantly, none of the matters raised by the Petitioner fall beyond Nairobi ELRC No. E792 of 2021. For instance, the alleged disclosure of confidential information by the Respondent took place before the judgment was delivered and nothing

prevented the petitioner from bringing the same to the court's attention through an application under certificate of urgency.

The issue, in the court's view, ought not to be litigated under a new suit, which amounts to multiplicity of suit from the same cause of action which is frowned upon by law.

It is unclear to the court whether the petitioner's indebtedness to the Respondent was canvassed during the hearing to contextualize the instant dispute and only the court that heard and determined the suit had the benefit of the evidence before it.

The crux of the matter is whether questions arising in a suit before or after judgment are litigated by way of a new suit or by the trial court. The trial court is arguably the proper court to deal with all questions arising.

The court is satisfied that the Respondents notice of Preliminary Objection meets the threshold enunciated in **Mukisa Biscuit Manufacturing Co. Ltd Case (Supra)**.

From the foregoing, it is discernible that the instant petition is an attempt by the petitioner to relitigate Nairobi ELRC No. E792 of 2025 and/or enforce the decision of the court.

As adverted to elsewhere in this ruling, while the alleged unilateral disclosure of court proceeding occurred during the pendency of the judgment, the alleged misappropriation of the Respondent by the court and disobeying t orders of the court are matters germane to enforcement of the court’s judgment as opposed to a new cause of action. The petitioner was at liberty to move the trial court as appropriated but failed to do so. The submission that the suit was *functus officio* cannot avail the Petitioner.

The foregoing is fortified by the sentiments of the Court of Appeal in **Telkom Kenya Ltd V. Ochanda (suing on His own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Ltd (2014) KECA 600 (KLR)**, on the doctrine of *functos officio*;

“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit based decisional re-engagement with the case once find judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd V. Ai Thani (2002) JLR 542 at 550 also cited and applied by the Supreme Court.”

Significantly, the petitioner tendered no evidence to demonstrate that he attempted execution of the decree dated 17th January, 2025 or what transpired. The petitioner’s demand dated 3rd June, 2025 and the Respondent’s counsel’s letter dated 17th June,

2025, evidence the dispute between the parties which would have been avoided by acting in accord with the provisions of section 34 of the Civil Procedure Act which provides;

- (1) **All questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge, or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.**
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

It follows that the trial court has jurisdiction to hear and determine all questions arising from NAIROBI ELRC NO. E792 of 2021.

The upshot of the foregoing is that the Respondent's Notice of Preliminary Objection is meritorious.

Consequently, the Petitioner's Amended Petition dated 17th December, 2025 is unsustainable and it is struck out with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS
13TH DAY OF APRIL, 2026.**

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI
JUDGE**

