



**Ahmed v Mohiddin & another (Environment & Land Case  
470 of 2011) [2025] KEELC 642 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 642 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 470 OF 2011  
SM KIBUNJA, J  
FEBRUARY 19, 2025**

**BETWEEN**

**AHMED MOHAMED AHMED ..... PLAINTIFF**

**AND**

**AHMED MOHIDDIN ..... 1<sup>ST</sup> DEFENDANT**

**KENYA UNITED STEEL COMPANY (2006) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> defendant filed the notice of preliminary objection dated 19<sup>th</sup> December 2024, to the 1<sup>st</sup> defendant's notice of motion dated 22<sup>nd</sup> November 2024, raising two grounds that:
  - a. The court has no jurisdiction to entertain the application as it is functus officio, having delivered its judgement that is a subject matter of an active appeal before the Court of Appeal.
  - b. That the application is incompetent, bad in law, an abuse of the court process and a legal non-starter meant to waste the court's valuable time and resource.

On the 20<sup>th</sup> January 2025, the court directed counsel to file and exchange written submissions within the seven days. The learned counsel for the 2<sup>nd</sup> defendant filed their submissions dated 28<sup>th</sup> January 2025 on the 29<sup>th</sup> January 2025, which the court has considered. I have perused the physical court record and the CTS, today the 13<sup>th</sup> February 2025, and noted no other party/counsel has filed submissions.
2. The issues for the determinations by the court are as follows:
  - a. Whether the preliminary objection raises any pure points of law that can be decided without calling for evidence and if upheld could determine the pending application.
  - b. Who pays the costs.



3. The court has carefully considered the grounds on the preliminary objection dated 19<sup>th</sup> December 2024, the application dated 22<sup>nd</sup> November 2024, submissions by the 2<sup>nd</sup> defendant's counsel, the superior courts decisions cited thereon, the record and come to the following conclusions:

a. As the preliminary objection is on the 1<sup>st</sup> defendant's application dated 22<sup>nd</sup> November 2024, it is only prudent to set down the prayers thereon before proceeding further. The prayers are as follows:

1. "Spent
2. That pending the hearing and determination of this application inter-partes, the 2<sup>nd</sup> defendant by themselves, their servants and/or assignees or agents be restrained by way of temporary injunction from construction of illegal steel structures, permanent buildings, concrete walls/gates and any other construction activities or restrain 3<sup>rd</sup> parties carrying out unauthorized wastage activities on the parcel of land known as plot number 780/VI/MN C.R 2155 measuring 20.5 acres and registered in the name of ASILA BINTI MWIJABU.
3. That the stay pending appeal orders granted on the 20<sup>th</sup> July 2018 by the Honourable Lady Justice A. Omollo be discharged, and/or varied by this court.
4. That costs be provided for."

From the supporting affidavit sworn by the 1<sup>st</sup> defendant it is deposed that judgement in this suit was delivered 31<sup>st</sup> October 2017 by Omollo J. in favour of the plaintiff. The said judgment was appealed by the 2<sup>nd</sup> defendant, who also filed an application for stay of execution of the decree that was granted vide the ruling dated 20<sup>th</sup> July 2018. However, the appeal has never taken off for the last seven years yet the 2<sup>nd</sup> defendant has allegedly been carrying out heavy construction and wastage on the suit property allegedly on the strength of stay of execution order.

b. In the case of Mukisa Biscuit Manufacturing Co Ltd versus West End Distributors Ltd [1969] EA 696, Newbold VP, stated that:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is usually 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...."

In the case of Oraro versus Mbaja (2005) 1KLR 141, it was held that:

"Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence".

The preliminary objection raised by the 2<sup>nd</sup> defendant has to be considered against the principles enunciated in the foregoing superior courts decisions.

c. The 2<sup>nd</sup> defendant counsel argued that this court cannot proceed with determining the application as it has become functus officio. The functus officio principle was addressed by the Court of Appeal in the case of Telkom Kenya Limited versus John Ochanda (suing on his



own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR, where it held that;

“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.”

The application of the functus officio principle is undoubtedly well meaning and protects the court and parties from the abuse of the court process.

- d. My reading of Order 42 Rule 6 (6) of the Civil Procedure Rules, is that where a court has rendered a final decision, parties may apply for injunctions orders pending appeal before the appellate court. This court can therefore consider applications for injunctions pending appeal only as an appellate court not as a trial court. This is a position held by most superior courts such as *Kembe versus Sule* [2023] KEELC 15724 (KLR) and *Hunkar Trading Company Limited & another versus Family Bank Limited* [2024] KEHC 2951 (KLR). In light of the above and under the principles for injunctions pending appeal in *Patricia Njeri & 3 Others versus. National Museum of Kenya* [2004] eKLR, it is apparent the authors of Order 42 Rule 6 (6) of Civil Procedure Rules placed the power to consider applications for injunctions pending appeal upon the appellate court and not the trial court. There being no express provisions of law bestowing upon the trial court with powers to determine such an application, the doctrine of functus officio comes into effect as the court has already pronounced itself on the matter before it with finality.
- e. The foregoing notwithstanding, the court under section 3A of the *Civil Procedure Act* is bestowed with the inherent powers to make such orders as to prevent the abuse of the process of the court. Prayer 2 in the 2<sup>nd</sup> defendant’s application dated 22<sup>nd</sup> November 2024 seeks for “stay pending appeal orders granted on the 20<sup>th</sup> July 2018 by the Honourable Lady Justice A. Omollo be discharged, and/or varied by this court”. I understand the 1<sup>st</sup> defendant to be saying that the 2<sup>nd</sup> defendant has taken no steps to prosecute the appeal for the last seven (7) years, and should therefore not be allowed to continue enjoying the stay of execution orders. In the case of *Ngaine versus District Land Adjudication and Settlement Officer, Igembe District and others & 2 others* [2024] KEELC 13412 (KLR) the court held that:

“The inherent power of the court means that courts are there to administer justice by balancing between the rights and interests of different parties, but within the confines of the law to ensure that the ends of justice are met. See *Equity Bank Ltd vs West Link MBO Ltd* (2013) eKLR and *Board of Governors; Moi High School Kabarak & another vs Malcolm Bell* (2013) eKLR”

That as the power to prevent injustice is inherent to this court, I would have favourably considered prayer 2 of the said application, but having made a finding that the court is functus officio, then the forum where the parties may seek intervention remains the appellate court.

- f. That as the 2<sup>nd</sup> defendant successfully prosecuted the preliminary objection against the 1<sup>st</sup> defendant’s application, the latter will pay the former costs as provided under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
2. From the foregoing conclusions, the court finds and orders as follows:
- a. The 2<sup>nd</sup> defendant’s preliminary objection has merit and is allowed.
- b. The 1<sup>st</sup> defendant’s application dated the 22<sup>nd</sup> November 2024 is hereby struck out.



c. The 1<sup>st</sup> defendant to bear the 2<sup>nd</sup> defendant's cost in the preliminary objection.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19<sup>TH</sup> DAY OF FEBRUARY 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff : No Appearance

Defendants : Mr Tindi for 1<sup>st</sup> Defendant and Mr Waseba for Simiyu for 2<sup>nd</sup> Defendant.

Court Assistant– Shitemi.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

