



**Chumbe v National Bank of Kenya Limited (Cause 1791 of 2016)
[2023] KEELRC 1350 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1350 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1791 OF 2016
SC RUTTO, J
MAY 31, 2023**

BETWEEN

DENNIS ODUOR CHUMBE CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

RULING

1. On April 28, 2022, the Court delivered its Judgment in the matter thereby allowing the claim in the following manner: -
 - a. A declaration that the claimant's termination by the respondent was unfair and unlawful.
 - b. The claimant is awarded compensatory damages in the sum of Kshs 2,700,000 being equivalent to 6 months gross salary.
 - c. Interest on the amount in (b) at Court rates from the date of Judgement till payment in full.
 - d. A certificate of service to issue to the claimant.
 - e. The claimant shall have the costs of the suit.
2. The matter did not settle at that juncture as the Applicant/Respondent filed an Application dated February 1, 2023 seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That the claimant/ decree holder be permanently restrained from executing the decree herein pursuant to the doctrine of lien available to the respondent/judgment debtor.
 - d. That a permanent stay of execution be issued.



- e. That any other reliefs be granted to meet the ends of justice.
 - f. That costs be provided for against the claimant's lawyers personally.
3. The Application which is expressed to be brought under Order 22 Rule 22 (1) and order 51, Rule 1 of the *Civil Procedure Rules, 2010*, Sections 1A, 1B, 3A of the *Civil Procedure Act*, is premised on the grounds appearing on its face and the Supporting Affidavit of Chrispus N. Maithya. Briefly, Mr Maithya avers that ICON auctioneers proclaimed the Applicant/Respondent's goods and property on October 27, 2022. He further avers that the decretal sums owing to the Claimant is Kshs 3,048,945/= whilst the Claimant owes the Applicant the sum of Kshs 13,056,380.61 thus the variance of Kshs 10,007,435.61 is in favour of the Applicant/Respondent. Mr Maithya further states that the Applicant has exercised its inherent right under the common law doctrine of lien to credit the said decretal sums of the Claimant's outstanding loan accounts. He avers that the Claimant's lawyers were duly notified of the said outstanding loans but chose to ignore it. Consequently, Mr Maithya has termed the execution by the Claimant as unlawful, irregular and illegal.
 4. The Claimant opposed the Application, through its Notice of Preliminary Objection premised on the following grounds: -
 - a. This Honourable Court is functus and has no jurisdiction to entertain the instant application.
 - b. There is no prayer pending appeal and the court's jurisdiction has been irregularly and unlawfully invoked.
 - c. No security for the decretal sum and costs have been provided by the respondent.
 5. As the Preliminary Objection raises a jurisdictional question, it is only prudent that the same be determined in limine.
 6. The Objection was canvassed by way of written submissions. The Claimant submitted that this Court's jurisdiction has been irregularly and unlawfully invoked. It was submitted that the attempt by the Applicant to set off the decretal amount against the dues allegedly owed to them as a result of a facility they advanced to him is tantamount to reinstating the dispute afresh. The Claimant urged the Court to be guided by the decision by the Supreme Court in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission* (Petition 5,4 & 3 of 2013) KESC 8(KLR) (civ) (24 October 2013) (Ruling).
 7. The Claimant further argued that the jurisdiction of the Court has been irregularly invoked by improper and misguided use of the doctrine of lien. That the purported right of legal lien by contract as claimed by the bank has been irregularly brought up because the bank has no legal authority to purport to set off a secured debt which it has its own recovery channel. It was thus submitted that in the absence of a counterclaim, the right of a lien is legally unsustainable and unsupported in law. In support of this argument, the Claimant placed reliance on the case of *Elizabeth Osiche Apwora v National Bank of Kenya Limited* [2018] eKLR.
 8. The Claimant thus submitted that the matter herein has been fully concluded and it is untenable for the Applicant to foist a new claim for a set off for the decretal sum in respect of an alleged credit facility which issue is not part of the proceedings leading to this Court's Judgment. The Claimant further submitted that in absence of a prayer seeking stay of execution pending appeal in the matter, the court ought not to allow execution to be effected against the Applicant and Judgement debtor herein. To support this argument, the Claimant sought to rely on the cases of *Secretary General of ANC Party & another v Jackline Mwakha Okaya* [2019] eKLR and *Re Estate of Modkayo Oguta (deceased)* [2020]eKLR.



9. It was further submitted that a party seeking stay must provide security of costs with a view to prevent further litigation in the recovery of the judgment or decretal sum.
10. Citing the case of *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* [1969], the Applicant submitted that the Claimant's Preliminary Objection save for jurisdiction, fails to raise pure points of law therefore rendering it defective, null and void in law.
11. The Applicant further submitted that the background of the orders sought in its Motion Application dated February 1, 2023 is pegged on the employment relationship between the parties herein therefore conferring jurisdiction to this Honourable Court.
12. With regards to the doctrine of lien, the Applicant submitted that the decretal sums owing to the Claimant is Kshs 3,048,945.00 whilst the Claimant owes it the sum of Kshs 13,056,380.61 thus the variance of Kshs 10,007,435.61 is in favour of the Applicant. It thus contends that in reliance on the Appellate Court's rationale on the doctrine of lien, it is within the law to exercise their inherent right under common law.

Analysis and determination

13. The following issues stand out for determination: -
 - a. Whether the Preliminary Objection by the Claimant is competent.
 - b. Whether this Court is *functus officio* hence lacks jurisdiction to determine the Application.

Competency of the Preliminary Objection

14. It is now settled law that a preliminary objection must be on a pure point of law. Such was the determination by the Court of Appeal in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors ltd* [1969] EA 696, thus: -

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
15. Essentially, for a preliminary objection to succeed the following elements ought to be satisfied: -
 - a. It should raise a pure point of law;
 - b. It is argued on the assumption that all the facts pleaded by the other side are correct; and
 - c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
16. Applying the threshold established in the Mukisa Biscuit case to the instant Preliminary Objection, it is evident that the same raises pure points of law and is based on uncontested facts that are part of the court's record. The argument by the Applicant to this extent is therefore unsustainable.



The question of functus

17. As stated herein, the Applicant's Application was filed pursuant to the Court's Judgment of April 28, 2022. Therefore, this Application having been filed after delivery of the final Judgment, raises a fundamental issue as to whether the Court is functus officio. As it is, the Application by the Applicant stands or falls on this issue.
18. It is trite that once a Court has rendered Judgment, it ordinarily becomes *functus officio*. In interrogating the principle of *functus officio* the Court of Appeal in the case of [Telkom Kenya Ltd v John Ochanda](#) 2014] eKLR, stated as follows:

“Funtus 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 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 final judgment has been entered and a decree thereon issued.”
19. Still on the same issue, the Supreme Court of Kenya in the case of [Raila Odinga v IEBC & 3 others](#) Petition No 5 of 2013, cited with approval a paragraph from, ‘The origins of the functus officio Doctrine with Specific Reference to its Application in Administrative Law’ by ‘Daniel Malan Pretorious’ thus: -

“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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”
20. Back to the case herein, it is clear that through the instant Application, the Applicant seeks to have the Court issue a permanent injunction restraining the Claimant from executing the decree herein pursuant to the doctrine of lien which it says is available to it as the Judgment debtor. In support of its argument, the Applicant has cited an outstanding credit facility owed by the Claimant to the tune of Kshs 13,056,380.61. It thus argues that in withholding payment of the decretal sums to the Claimant, it is exercising its inherent right of lien.
21. On the other hand, the Claimant argues that the attempt by the Applicant to set off the decretal amounts against the dues allegedly owing is tantamount to reinstating the dispute afresh.
22. Having considered the Application by the Applicant and the grounds in support thereof, it is evident that in order to conclusively determine the same and specifically the question as to whether it has a right of lien in light of the credit facility owing by the Claimant, the Court will have to proceed on a merit based reengagement on the issue. Essentially, this is a fresh dispute that requires evaluation of evidence. As it is, this issue was never raised in the initial claim and was not part of the proceedings that yielded the Judgment delivered on April 28, 2022. Over and above, the same was not introduced through a counterclaim and set off. It may very well be said that the issue with regards to the credit facility owing by the Claimant is a new claim that has been introduced at the execution stage as it was not pleaded and placed before the Court for determination at the hearing of the main claim.



23. If indeed, the Applicant was desirous of recovering the credit facility advanced to the Claimant, it was only prudent that it files a counterclaim within the main claim or better still, commence debt recovery proceedings in a different suit altogether.
24. As the Court already pronounced itself with regards to the issues raised in the main Claim, it is now functus officio with regards to any extraneous issue as the one raised in the Application dated February 1, 2023.
25. What the Applicant is essentially doing through the instant Application, is to invite the court to a merit based decisional re-engagement with the case after final Judgment has been entered and final orders made. In this case, I must state that the Court's jurisdiction terminated upon issuing the final Judgment.
26. Against this background, I have no doubt in my mind that this court being functus officio, lacks the jurisdiction to entertain and determine the Applicant's Application dated February 1, 2023. Therefore, the Preliminary objection raised by the Claimant is hereby sustained.
27. The Application dated February 1, 2023 is hereby struck out with no orders as to costs. It thus follows that the interim orders in place are hereby discharged.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

No appearance for the Applicant/ Respondent

No appearance for the Claimant

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

