



REPUBLIC OF KENYA



**Odungo v Kukam Limited & another (Environment and Land Case 693 of 2016) [2025] KEELC 4531 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 4531 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE 693 OF 2016**

**JG KEMEI, J  
MARCH 27, 2025**

**BETWEEN**

**ANTHONY ADHIAMBO ODUNDO ..... PLAINTIFF**

**AND**

**KUKAM LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**METRA INVESTMENTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

(In respect of the Defendants' application dated 10/1/2025 and the Plaintiff's Preliminary Objection dated 22/1/2025)

1. Before this Court for determination is the Defendants' Notice of Motion dated 10/1/2025 and the Plaintiff's Preliminary Objection dated 22/1/2025. The Defendants' application is brought under the provisions of Articles 48 and 50(1) of the [Constitution](#), Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 9 Rule 9 (a) and Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#). Seeking orders that;
  - a. The Court be pleased to grant leave to the firm of Mutunga Justus & Associates Advocates to come on record for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants.
  - b. Pending the hearing and determination of the COA Civil App. No. E539/2024 *Kukam Limited v Anthony Odhiambo Odundo* the Court be pleased to stay the execution of the Judgment and orders of this court delivered on 15/4/24 and any subsequent Decree extracted thereon and all consequential orders.
  - c. The Court be pleased to set aside the proclamation notices dated 9/1/24 issued by Phillips International Auctioneers.
  - d. Costs of the application be provided for.



2. The application is premised on the grounds on the face of it and reiterated in the Supporting Affidavit of Rahab Karei Mukiyama deponed on even date. In summary, the deponent avers that the Plaintiff obtained warrants of attachment for the decretal sum of Kshs. 12,116,772/= as well as assessed costs of Kshs. 483,713/=. Thereafter, he instructed Phillips International Auctioneers who have issued proclamation notices dated /1/2025. She argues that the said auction is illegal as the Plaintiff has unlawfully proclaimed her household items, without her physically seeing them as required in law and/or lifting the Defendants' corporate veil of incorporation.
3. The deponent further avers that the Defendants have filed an application for stay of execution orders being CoA Civil Application No. E539/2024. That the Appellate Court has since issued directions for the hearing of the said application. The deponent argues that the proclamation issued by the Plaintiff is therefore a reactionary measure intended to defeat the application pending before the Court of Appeal and render it an academic exercise.
4. The deponent further avers that she is apprehensive that without the Orders sought in this application being granted, the Auctioneers will proceed to unlawfully to attach and sell her personal proclaimed goods hence occasioning her substantial loss and irreparable harm.

### **The Plaintiff's Replying Affidavit**

5. The Plaintiff vehemently opposed the application through a Replying affidavit sworn on 22/1/2025. He contends that the application is res judicata as the court declined to issue the stay on 15/4/2024 after delivering the Judgment. Further, that in view of a similar application for stay filed and pending before the Court of Appeal, the instant application is sub judice. He argues that it will therefore be unprocedural for this Court to grant the stay orders sought in the application while a similar application is pending at the Court of Appeal. As such, the application herein should be disallowed so as to safeguard the sanctity of judicial process and avoid an embarrassment that could be caused in the event of conflicting decisions.
6. On a without prejudice basis, the Plaintiff avers that the intended auction of the proclaimed assets is being conducted legally and in line with the legal requirements. He states that indeed the auctioneer visited the Defendant's premises and duly proclaimed their goods listed in the Proclamation Notice. He avers that although household items were indeed proclaimed, the Defendants have not adduced evidence proving that the said items individually belonged to them. He argues that considering the stage of the proceedings, it will be of no use to pierce the Defendants' corporate veil.
7. The Plaintiff further deposes that it has taken more than 15 years to get justice in the instant case and in the event that the Defendants' application is allowed, they are likely to dispose the proclaimed assets thus delaying justice further. That allowing the application will expose him to untold prejudice as he will continue wallowing in despair while the fruits of his Judgment remain unrealized. The Plaintiff maintains that the Proclamation Notices were legally issued as there were no stay orders and the timing of its service is immaterial. He therefore prays that the application be dismissed with costs.

### **The Plaintiff's Preliminary Objection**

8. In further response thereof, the Plaintiff filed a Preliminary Objection dated 22/1/ 2025 contending that that the application is an abuse of the court process and ought to be struck-out with costs on the grounds that;
  - a. The present application is res judicata since a similar application for stay of execution was made on 15/04/2024 and declined by this Court (differently constituted) on the same date.



- b. The present application offends the doctrine of sub judice by dint of the pending application filed at the Court of Appeal in COACIVAPP. E539/2024 Kukam Limited –vs- Anthony Odhiambo Odundo which seeks the same reliefs as those sought vide the present application.

### **The Defendants' Further Affidavit**

9. The Defendant/Applicants filed a Further Affidavit deponed by Rahab Karei Mukiyama sworn on 22/1/2025. She avers that the application is not res judicata as it is anchored on distinct and separate grounds from the oral application that was made at the time of delivery of the Judgment. That the instant application challenges the unlawful and unprocedural proclamation and threatened attachment of their personal assets by the Auctioneer without lifting the veil of incorporation of the Applicants.
10. The deponent denies the claim that the instant application for stay is sub judice to the application pending before the Court of Appeal. That whereas the application before the Court of Appeal seeks stay of execution pending appeal, the instant application on the other hand inter alia seeks stay of execution as well as to set aside the illegal proclamation made by the Plaintiff's Auctioneers. Further, that this Court has jurisdiction to determine whether or not the execution is being conducted within the confines of the law having issued warrants of attachment. This court is therefore not functus officio.
11. The deponent avers that the Auctioneer had reached out to her asking her to allow him access her home so as to properly proclaim the assets listed in the Proclamation Notice dated 9/1/2025. That it is therefore just and reasonable that the Court stamps its authority by issuing the orders sought.

### **The Plaintiff's Supplementary Affidavit**

12. The Plaintiff filed a Supplementary Affidavit sworn by Richard Nyarori, an Auctioneer working with Phillips International Auctioneer, dated 5/3/25. He avers that the Law Firm of Mutunga Justus & Associates Advocates is improperly on record having not served the previous firm on record; Onyango Ndolo & Co. Advocates or secured their consent as required under Order 9 Rule 9 of the [CPR rules](#). Consequently, the documents filed by the said firm should therefore be expunged from the record.
13. The deponent argues that the Defendants' Directors have not proved that the assets so proclaimed belongs to them in their personal capacities. That the deponent has not proved that the assets proclaimed are hers as they have not adduced any logbooks or receipts to that effect. He further asserts that he indeed visited the Defendants' premises and that the items he proclaimed were shown to him by the Security Guard thereof. In addition, it has not been denied that premises from which the goods were proclaimed are not the Defendants business premises.
14. He further denies the claim that he reached out to the Deponent and that the Telephone Number exhibited in the Further Affidavit is not his. He urges the court to dismiss the application with costs for want of proof that the proclamation levied is unlawful.

### **Directions**

15. The parties elected to canvass the application and the Objection by way of written submissions. Both parties complied. The Plaintiff's submissions are dated 7/03/2025 whereas the Defendants' submissions are dated 29/1/2025. The Court has had the opportunity to read through and considered the said submissions which now form part of the record of this court.



## Analysis and Determination

16. The Court has read and considered the Application, the Preliminary Objection, the rival affidavits and the annexures thereto as well as the submissions. The issues that commend themselves for determination are as follows;
  - a. Whether the Plaintiff's Preliminary Objection is merited.
  - b. Whether the law firm of Mutunga & Company Advocates should be granted leave to come on record for the Defendants/ Applicants;
  - c. Whether the Defendants are entitled to the relief for stay as sought.

### A. Whether the Plaintiff's Preliminary Objection is merited.

17. The starting point is to define what a preliminary objection is. On what constitutes a Preliminary Objection, in the case of *Hassan Ali Jobo & Another -vs- Suleiman Said Shabal & 2 Others* SCK Petition No. 12013[2014] eKLR, the Supreme Court restated the definition in the case *Mukisa Biscuit Manufacturers Ltd -vs- West End Distributors Ltd* (1969) E.A where the Court of Appeal said that:

“...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 need to be ascertained or if what is sought is the exercise of judicial discretion.”
18. The law relating to what a Preliminary Objection entails is now settled. In the case of *Equity Bank Limited vs. Bryan Yongo & Another* [2014] eKLR the court held that:

“Any true Preliminary Objection should not be entangled with factual issues.”
19. The first ground in the Preliminary Objection is that the application is res judicata since a similar application for stay of execution was made on 15/04/2024 and declined by the Court.
20. Section 7 *Civil Procedure Act* which provides for the doctrine of res judicata and states 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 can 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.”
21. In essence, therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction.
22. The Defendants on the other hand contend that the application is not res judicata as it is anchored on distinct and separate grounds from the oral application that was made at the time of delivery of the Judgment. That the instant application challenges the unlawful and unprocedural proclamation and threatened attachment of their personal assets by the Auctioneer.
23. To determine whether the matters raised in the instant application were already determined by the Court, material evidence has to be examined and interrogated. That puts the said ground outside the ambit of a Preliminary Objection.



24. The other basis of the Plaintiff's objection is that the application for stay is sub judice. Section 6 of the Civil Procedure Act provides that: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

25. Just like the doctrine of res judicata, to determine whether the application is sub judice, the court will have to analyze and determine whether the issues raised in the instant application are the same as those raised in the application pending before the Court of Appeal.

26. I agree with the decision of the Court in Oraro -vs- Mbaja (2005) eKLR, when it held that: -

“I think the principle is abundantly clear. A Preliminary Objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

27. Equally persuasive is the decision in Henry Wanyama Khaemba -vs- Standard Chartered Bank Ltd & Another (2014) eKLR, where the court pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

28. In this case a clear perusal of the record shows that on delivery of the judgement, the court declined to grant stay of execution but added that the applicant can however file a formal application if they so wish. It is on this account that the preliminary objection is ousted as it calls for the court to look at the record and assess evidence.

29. All in all, on evaluation, I find that the Preliminary objection does not raise a crisp point of law as it is clouded by facts, hence it is unmerited.

**B. Whether the law firm of Mutunga & Company Advocates should be granted leave to come on record for the Defendants/Applicants;**

30. The guiding provisions of law with regards to granting of leave for an Advocate to come on record after entry of Judgment is found in the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 (CPR) which provides that:

“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.”
31. Clearly the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) make it mandatory that for any change of Advocates after judgment has been entered to be affected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.
32. The reasoning behind the provision was well articulated in the case of [S. K. Tarwadi -vs- Veronica Mueblemann](#) [2019] eKLR where the judge observed as follows:
- “...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”
33. In the case of [Lalji Bhimji Shangani Builders & Contractors -vs- City Council of Nairobi](#) [2012] eKLR the Court held as follows:
- “A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”
34. Having considered the Motion, there is no indication, nor indeed assertion that the firm of Mutunga Justus & Associates Advocates herein served the firm of Onyango Ndolo & Co. Advocates. Neither has any consent been sought. This is in direct contravention of the provisions of Order 9 Rule 9 aforesaid.
35. The Courts have been categorical that the requirements of Order 9 Rule 9 are mandatory and the failure to comply with the same has fatal consequences. This Court agrees. The Court declines to grant the firm of Mutunga Justus & Associates Advocates leave to come on record having not served the same on the “former” advocate on record.
36. Consequently, having found the motion incompetent on account of noncompliance of the provisions of Order 9 Rule 9 of the [CPR](#), I find no necessity to determine the remaining prayers to wit; stay of execution and setting aside the proclamation notices dated 9/1/24 issued by Phillips International Auctioneers.

### **Final orders for disposal**

37. In the upshot I make the following orders;
- a. The Preliminary Objection 22/1/2025 is devoid of merit, it is dismissed entirely.
  - b. The Defendants’ Notice of Motion application dated 10/1/2025 is found to be incompetent. It is hereby struck out.
  - c. Both parties have failed in their applications before court and consequently I order each to bear their own costs.
39. Orders accordingly



**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MARCH 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

Coram

Githua HB for Karuti

Ms Mwangi HB Mutunga

C/A- Ms Yvette Njoroge

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