



REPUBLIC OF KENYA



Muigwa v Kiiru (Civil Appeal 133 of 2014) [2023] KEHC 1789 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KEHC 1789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 133 OF 2014
OA SEWE, J
JANUARY 20, 2023**

BETWEEN

CHARLES GITHINJI MUIGWA APPELLANT

AND

CHARLES KARANJA KIIRU RESPONDENT

RULING

1. The Notice of Motion dated 23rd November 2021 was filed herein by the applicant, Mr. Charles Githinji Muigwa, under Article 50(1) of *the Constitution* of Kenya, Sections 1A, 1B, 3A and 63(c) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 10 Rule 11 and Order 11 Rule 3, as well as Order 45 of the *Civil Procedure Rules*. It seeks orders that:
 - (a) Spent
 - (b) Spent
 - (c) Spent
 - (d) The Court be pleased to review its orders of 28th September 2021 and substitute the security of a deposit of Kshs. 1,000,000/= with a deposit of the Title Deed to Land Title No. Mweiga Block 5 Muthui-ini/1133 as a condition for setting aside the ex parte judgment in Mombasa CMCC No. 1222 of 2013.
 - (e) The costs of the application be provided for.
2. The application was premised on the grounds that, in spite of all efforts and due to various hardships, including the subdued economy and health-related expenses, the appellant has been unable to raise the amount of security required as a condition for setting aside the judgment of the lower court. It was further averred that the property known as Title No. Mweiga Block 5 Muthui-ini/1133 (hereinafter, “the suit property”) has been found by this Court as well as the Court of Appeal to be sufficient security



- for the setting aside of the impugned ex parte judgment; and that the said property cannot be sold to raise the security as the same has a Prohibition entered against the title at the instance of the respondent.
3. The application was supported by the affidavit of the applicant, sworn on 23rd November 2021 in which he explained the challenges that have beset him since the order for security was made. In particular, the applicant deposed that his spouse, one Jane Wambui Githinji, has been sick with diabetes-related complications and he had to single-handedly meet all her medical expenses at Naromoru Medical Services. He annexed several documents in proof thereof which were marked Annexures CGM-1, CGM-2, CGM-3 and CGM-4 to his affidavit.
 4. The appellant also averred that the suit property is the only asset he has at hand, but that he is unable to sell it because of a Prohibition placed by the lower court against the title at the instance of the respondent. He added that the suit property was valued in 2013 at a forced Sale value of Kshs. 3,900,000/= as per the valuation report dated 13th August 2013, marked Annexure CGM-7. The appellant believes that its current value could be in excess of Kshs. 10,000,000/=. In this regard, the appellant made reference to the ruling of the Court dated 19th February 2016 in which the Court (Hon. Chepkwony, J.) had expressed the view that the subject property was sufficient security to afford the respondent comfort pending the hearing and determination of the appeal.
 5. Further to the foregoing, the appellant urged the Court to note that the Court of Appeal in its judgment in *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR between him and the respondent, agreed with the conclusion reached by the High Court. Thus, the appellant prayed that his application be allowed and the orders prayed for be granted.
 6. The respondent opposed the application vide his Replying Affidavit sworn on 15th December 2021. His contention was that the Court is functus officio as far as the condition for setting aside judgment is concerned. He added that the appellant erroneously assumed that the order of 28th September 2021 imposed the condition for the deposit of Kshs. 1,000,000/= when, in fact, the order merely extended time for compliance with the judgment of 4th February 2021. Thus the respondent averred that, without setting aside the orders of 4th February 2021, a review of the orders of 28th September 2021 would be of no consequence.
 7. The respondent further deposed that it was a blatant falsehood for the appellant to say that he was unaware of the delivery of the ruling of 28th September 2021. He proceeded to demonstrate, per paragraph 7 of his Replying Affidavit, that the ruling was reserved on 14th June 2021 in the presence of Mr. Wameyo, the Advocate for the appellant; and that the ruling was delivered as scheduled; and further that his advocates thereafter notified Mr. Wameyo of the outcome via email. Thus, the respondent averred that there was a deliberate twisting of facts by the appellant with a view to peppering over the inordinate delay in making the application.
 8. In response to the appellant's contention that his spouse was unwell and that he had to divert funds intended for security towards her treatment, the respondent averred that there is nothing to show that the alleged Jane Wambui Githinji is the appellant's spouse; or that the appellant had to expend Kshs. 828,475/= on her treatment. He added that, in any case, since the appellant confirmed that diabetes is a chronic medical condition, it was a fact known to him when he filed his Notice of Motion dated 19th March 2021; and cannot therefore be a new fact warranting a review of the earlier decision. The respondent also pointed out that the decretal amount now stands at Kshs. 7,131,466.55 and it is therefore unwise to suppose that the suit property would be sufficient security without a current valuation. Consequently, the respondent prayed that the appellant's application be dismissed to enable him realize the fruits of his 8-year-old decree.



9. The appellant filed a Further Affidavit on 9th February 2022 to explain that, due to several communication lapses between him and his erstwhile advocates, he had no option but to change advocates. He annexed additional documents, including Birth Certificates of their children, to show that Jane Wambui Githinji is indeed his spouse. The appellant also exhibited additional documents to support his assertion that his spouse was taken ill during the period in question; as well as invoices to prove the expenses incurred. The appellant pointed out that since the Court has already set aside the lower court judgment the only pending question is as to security and whether a review is warranted in the circumstances.
10. Directions were thereafter given herein on 30th November 2021 that the application be canvassed by way of written submissions. Accordingly, Mr. Kongere filed his written submissions on 16th June 2022. He posed the question whether this Court, being a Court of concurrent jurisdiction, can entertain another application challenging the conditions set by Hon. Okwany, J. vide the judgment dated 4th February 2021. He relied on *Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & Another v City Council of Nairobi* [2015] eKLR and *Telkom Kenya Limited v John Ochanda* [2014] eKLR to augment the argument that the Court is now functus officio.
11. It was further the submission of Mr. Kongere that, in any event, the application targeted the wrong decision in so far as the appellant seeks review of the ruling of Hon. Chepkwony, J. dated 28th September 2021 instead of the judgment dated 4th February 2021. Thus, counsel posited that to grant the orders sought would be an exercise in futility. He also mentioned that the sickness of the appellant's wife does not qualify as new information that was not available when the ruling of 28th September 2021 was delivered. He relied on *Violet Merab Songa & 2 Others v Stanley Mugacha t/a Galaxy Auctioneers & Another* [2020] eKLR.
12. Lastly, Mr. Kongere submitted that, instead of seeking review of the conditions set by Hon. Okwany, J. in respect of his first application, the appellant sought extension of time to comply; which was granted by Hon. Chepkwony, J. on 28th September 2021. According to him, the avenue of review is now closed to the appellant. He relied on *Ereri Company Limited v Simon Kamau Gitau & 7 Others* [2012] eKLR in urging the Court to find that the appellant is not entitled to the exercise of the discretion of the Court in his favour by way of review. The applicant's written submissions, if any, do not appear to be on the file.
13. In the light of the foregoing, the two issues arising for determination herein are:
 - (a) Whether the Court is functus officio; and if not,
 - (b) Whether the appellant has made out a valid case for review of the ruling and orders dated 28th September 2021.
14. A perusal of the court record confirms that the instant appeal was filed on the 7th May, 2018; and that it was heard and a Judgment delivered on the 4th February, 2021 by Hon. Okwany, J. whereupon the appeal was allowed in the following terms: -
 - (a) That the judgment and order of the Lower Court be and is hereby set aside on the following conditions: -
 - (i) That the appellant deposits the sum of Kshs. 1,000,000 in an interest earning account in a banking institution of repute to be held in the joint names of Counsel for both parties within 45 days from the date of this judgment.



- (ii) In the event of failure to comply with order in i) above, the setting aside order shall be vacated/ reversed in which case, the respondent will be at liberty to proceed with the execution process.
- (b) The costs of the appeal are awarded to the respondent.
15. On the 19th March, 2021, the appellant filed an application seeking for extension of time to comply with the orders issued on 4th February, 2021. The said application was similarly heard and a ruling delivered on 28th September, 2021 in which the following orders were issued: -
- (a) An order do and is hereby issued extending the period for depositing Kshs. 1,000,000/= by the Appellant/Applicant in a joint interest earning account as ordered in the Judgment delivered on 4th February, 2021 by 30 days from the date hereof.
- (b) Failure to comply with order (a) above the order setting aside the lower court judgment shall be vacated and the Respondent will be at liberty to proceed with execution.
- (c) The Appellant will have no other chance to seek further extension of time in the event of failure to comply with order (a) above.
- (d) Each party to bear their own costs.
16. In the premises, it is plain that the Court is functus officio in so far as the appellant now seeks to re-open a matter that a Court of concurrent jurisdiction issued final orders in. In *Telkom Kenya Limited v John Ochanda* [2014] eKLR, it was held: -
- “...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 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...”
17. It is my finding that due to the existence of the judgment delivered on 4th February, 2021, this court is functus officio and thus has no basis for reviewing the Ruling of 28th September, 2021. Indeed, in *Pancras T. Swai vs. Kenya Breweries Limited* [2014] eKLR, the Court of Appeal restated its viewpoint thus:
- “...If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts...”
18. The foregoing being my view of the matter, it would be pointless going into a merit consideration of the appellant’s application dated 23rd November 2021. The same is accordingly hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF JANUARY 2023



OLGA SEWE
JUDGE

