**Kioko v WGK (Suing as the uncle next friend of FM –A minor) (Civil Appeal E016 of 2021) [2023] KEHC 19600 (KLR) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19600 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KITUI**

**CIVIL APPEAL E016 OF 2021**

**RK LIMO, J**

**JUNE 26, 2023**

**BETWEEN**

**DOMINIC MULINGE KIOKO ..... APPELLANT**

**AND**

**WGK (SUING AS THE UNCLE NEXT FRIEND OF FM –A MINOR) ..... RESPONDENT**

***(An Appeal is in respect to a ruling delivered by Hon. S. Mbungi –CM on 10th March, 2021 vide Kitui CMCC No. 1 of 2017.)***

**JUDGMENT**

1. This appeal is in respect to a ruling delivered by Hon. S. Mbungi –Chief Magistrate on March 10, 2021 vide Kitui CMCC No. 1 of 2017.

2. In that ruling the trial magistrate upheld a preliminary objection raised by the Respondent which was to the effect that the trial court was functus officio in respect to an application made by the applicant for enlargement of time. The application for enlargement of time was dated August 1, 2019.

3. To put this matter into a clear perspective, it is necessary to lay down background of the case at the trial Court which for all intents and purposes, and due to some inadvertence or misdirection the trial court boxed itself into a corner with no legal avenue to get out, leaving both parties in an unprecedented quagmire with no winner or loser at the end of it all. So how did the trial court arrive there?

4. The Court Proceedings from the lower court shows that the Respondent filed a suit against the Appellant on 5th January, 2017. The cause of action was based on a tort of negligence with the Respondent blaming the Appellants for causing a road traffic accident on May 4, 2014 while in control of motor vehicle Registration KBW 973N.

5. On 27th June 2017, the Respondent applied for interlocutory judgement after the Appellant defaulted in entering appearance or defence and the trial court obliged try entering interlocutory judgement. The matter was then fixed for formal proof on 3/10/2017 when it proceeded for hearing and the case concluded. The matter was then fixed for submissions on 17/10/2017.

6. Before the trial court fixed the matter for judgement, the appellants moved the court vide an application dated November 30, 2017 seeking inter-alia to set aside interlocutory judgement.

7. The trial court entertained the application on March 13, 2018 through written submissions by both sides and delivered a ruling on April 24, 2018 where it allowed the application and set aside the interlocutory judgement and granted the appellants 14 days to file defence. However, there was a condition for setting aside which was payment of thrown away costs of Kshs. 10,000 to be paid within 30 days from April 24, 2018.

8. The Appellant failed to meet the condition and the Respondent moved the trial court on 14/08.2018 to proceed with the matter by fixing the case for judgement for non-compliance and the trial court presided over by Hon. Murage-CM fixed the matter for judgment on 18/09/2018.

9. Before the date for delivery of judgement, the trial magistrate was transferred and the record shows that she sent a written judgment which was placed on record but was unsigned and besides that there is no record showing when, if at all, the judgement was ever delivered.

10. The record of proceedings is also unclear as to when the Respondent moved the court for a decree but going by a letter dated 23/11/2018, it is apparent that he moved the court on November 23, 2018 and the court issued a decree and a certificate of costs dated November 27, 2018 on the basis of unsigned and undelivered judgment which however was on record.

11. The Appellant sensing a loophole moved the court *vide* an application dated January 8, 2019 to have the decree set aside on grounds of *inter alia* irregularity.

12. The trial court, then presided over by Hon. S. Mbungi entertained the application and vide his ruling dated June 25, 2019, he agreed with the appellant that the decree issued was irregular null and void and set it aside.

13. In so doing, the trial court effectively boxed itself into a corner leaving both the appellant and the Respondent high and dry.

14. On July 9, 2019, the Respondent moved the trial court to have the judgement on record placed before Hon. Murage who had by then been transferred with a view to having the judgement signed.

15. That Oral application appeared to have jolted the appellant who then vide an application dated August 1, 2019 moved the trial court to extend time within which to comply with the ruling delivered on April 24, 2018 that had set aside the exparte exported judgement albeit with conditions which were later not complied with.

16. The Respondent raised a preliminary objection to the application for extension of time arguing that the trial court was *functus officio* in view of judgement he claimed was delivered on September 18, 2018. The trial court entertained the preliminary objection through written submissions and in its ruling dated March 10, 2021 upheld the preliminary objection by finding that the court was *functus officio* in light of a judgement it had itself impugned on grounds that it was unsigned. In effect the trial court threw the matter into a spin because the Respondent could not move because there was no decree and the appellant could not move either with his defence because the court had rendered itself functus officio and boxed itself into a corner.

17. The Appellant aggrieved by the ruling then moved to this court through this appeal and raised the following grounds namely: -

    i. That the learned trial magistrate erred by holding that it was *functus officio* when the suit was still pending for determination before it.

    ii. That the trial magistrate erred by holding that there was judgement on record when the same was not recognized in law.

    iii. That the trial court erred by basing its decision on non-existed judgment.

    iv. That the trial court failed to consider the issues raised and arrived at the wrong decision.

    v. That the trial court erred in failing to find that the application placed before it had merit.

18. In his written submissions through Counsel, the appellant insists that the judgement on record was not signed and therefore, invalid. He cites the provisions of order 21 rule 3(1) of the *Criminal Procedure Rules* to back up his contention.

19. It is the appellant's case that, the finding by the trial court that it was functus officio was based on error and the error pointed out is that the judgement being null and void, could not have rendered the trial court functus officio.

20. He submits that the trial court ought to have considered the application dated August 1, 2019 on merit rather than finding that it was functus officio.

21. The Respondent has opposed this appeal insisting that the judgement in the lower court was delivered on September 18, 2018 in the open court and on that basis, there was a valid judgement which had not been set aside and which judgement rendered the trial court *functus officio*. He cites the decision in *Telkom Kenya Ltd v John Ochanda (Suing on his behalf and on behalf of 996 former employees of Telkom (K) Ltd* [2014] eKLR to support his contention. In that decision, the court laid out the principle behind the doctrine of *functus officio*.

22. He further contends that the validity of the judgement on record has not been challenged. He however concedes that the Judicial Officer who wrote the judgement has since retired but insists that the judgement was delivered by the said magistrate in the open court.

23. This court has considered this appeal and the response made. The issue before me is fairly straight-forward and that is whether the trial court was correct in its finding that it was *functus officio* in regard to the appellant's application for extension of time dated August 1, 2018.

24. In determining the above issue this court has to look at the doctrine of *functus officio* and whether the judgement in the lower court in respect to this appeal is regular or valid.

25. The Respondent herein has done well in expounding the principle of functus officio. The principle is aimed at bringing matters to rest. Once a determination is done by a court or tribunal seized with requisite jurisdiction on an issue contested by parties, it becomes functus officio and the matter may not be re-opened in the same court/tribunal again save through a review where that window is available. The issue can also be escalated to an appellate court. Having rendered itself fully on an issue, a court or tribunal is rendered functus officio and cannot re-open the matter.

26. The principle was well expounded in the case cited by the Respondent in *Raila Odinga & others v Independent Electoral and Boundaries Commission and others* [2023] eKLR, where the Court inter alia noted as follows: -

> 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 vested with adjudicative or decision making power, 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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker....." (emphasis added).

27. The big question posed is whether the case in the trial court has concluded with finality that rendered that court *functus officio*.

28. The above question can be reviewed from two perspectives namely;

    1. Is there a valid judgement?
    2. What issue(s) was or were placed before the trial court in the 1st place before it found that it was functus officio.

29. To begin with the first perspective, the answer as to what constitutes a valid judgement is provided for under order 21 rules 1,2 & 3 of the *Civil Procedure Rules*. My reading of the above rules indicates that for a judgement to be valid, it must contain the following ingredients;

    1. It must be pronounced in an open court with notice to parties/advocates concerned. In this era of technology, it may also be pronounced physically in court or via virtual platform.
    2. It must be read or pronounced by the Judge (or magistrate) who wrote it or his/her predecessor.
    3. It must be dated and signed by the Judge or Magistrate at the time of delivering it in the open court. In situations where the Judge/Magistrate is not the one who wrote it, he/she must countersign at the time he/she is pronouncing it.

30. A perusal of the judgement on record shows that it does not comply with the above conditions. In the first place, the judgement is unsigned by Hon. Murage-CM who is indicated as the author.

    Secondly, the proceedings from the lower court does not indicate when judgement was delivered. The proceedings indicate that Hon. Murage was to deliver the judgement on 18/09/2018 but the proceedings show that the next date the file went to court was on 9/1/2019 before Hon. Nekesa. So while the unsigned judgement indicates that it was delivered in court on 18/9/2018, the proceedings do not support the same.

31. This Court in the premises finds that the judgement placed on record in the subordinate court is invalid and irregular for want of signature of the Judicial Officer who wrote it and lack of date when it was pronounced.

32. This Court further finds that for good measure, Hon. Mbungi was spot on when it found that the decree issued on the basis of the impugned judgement was irregular and void because it was unsigned. It was on the basis of that finding that the Respondent's Counsel applied that the Judgement be

taken to Hon. Murage for signature. By then, Hon. Murage was on transfer. For unknown reasons the respondent's plea was not followed up until the judicial officer retired from service.

33. Having found that the judgement on the record was invalid and therefore, a decree could not issue, the trial court fell into error when it found that the matter had been determined with finality and that, on that ground, it was functus officio. In the absence of a valid judgement, the matter remains undetermined.

34. As I have observed above, there was no finality on the matter due to the aforesaid technicality/ inadvertence on the part of the judicial officer who heard the case and wrote the judgement. The trial court presided over by Hon. Mbungi, having found that the judgement was irregular, could not have again rendered itself functus officio because by doing so, it boxed itself into a rather tight corner leaving the parties dumbfounded. The Respondent could not move despite a judgement on record. A decree could not issue because the judgement was not valid. So even if the appellant had simply sat there and waited, the respondent could not possibly enjoy fruits of judgement because he could not execute without a valid decree.

35. The second perspective relates to the issue placed before the trial court in the first place which was inter alia extension of time. Of course, the appellant never did himself, favours because it should have sought a substantive relief to set aside the judgement on grounds of validity or any other reason but he never did. The trial court never got to entertain the application on extension of time but instead misdirected itself by delving on an invalid judgement and ended up, as I have noted above, in a corner.

36. The long and shot of this is that, this court finds merit in this appeal. This is one of those rare instances where allowing the appeal effectively favour both parties. The ruling of the trial court dated March 10, 2021 and delivered on March 12, 2021 is hereby, set aside. The preliminary objection raised is over ruled. The application dated August 1, 2019 may proceed for hearing and/or in light of the finding of this court, the appellant can move the court appropriately. Costs of this appeal shall be in the suit pending at the trial court.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF JUNE, 2023**.

**HON. JUSTICE R. K. LIMO**

**JUDGE**