Jelani & 5 others v Attorney General & 4 others (Constitutional Petition 10 of 2014) [2023] KEELC 17695 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17695 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CONSTITUTIONAL PETITION 10 OF 2014

EK MAKORI, J

MAY 31, 2023

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 10, 27, 28, 30, 31, 32, 35, 40, 47, 60, AND 62 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE BILL OF RIGHTS UNDER CHAPTER FOUR OF THE CONSTITUTION OF KENYA 2010, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), AND AFRICAN CHARTER ON HUMAN RIGHTS

AND

IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS (SUPERVISORY JURISDICTION) PRACTICE AND PROCEDURE RULES 2006 AND PART 5 RULE 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

BETWEEN

OMAR ABDALLA JELANI ..... 1ST PETITIONER

KASSIM SHAHALI ALI ..... 2ND PETITIONER

SHUMI BAMKUU ..... 3RD PETITIONER

KHAIRU OMAR ..... 4TH PETITIONER

SWALEH MOHAMED ATIK ..... 5TH PETITIONER

MOHAMED RAJAB ..... 6TH PETITIONER

AND

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

MINISTRY OF LANDS AND HOUSING AND URBAN DEVELOPMENT ..... 2ND RESPONDENT

KENYA PORTS AUTHORITY ..... 3RD RESPONDENT

LAPSSET CORRIDOR DEV. AUTHORITY ..... 4TH RESPONDENT

NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

RULING

1. Application dated 8th November 2022 seeks the following Orders:

   a. Spent.

   b. this court be pleased to review its ruling delivered on 8th October 2019 and a fresh order to issue in terms that this matter be marked as compromised and fully settled subject to payment of costs and payment of the sum of Kshs 12,469,038.50/- to the firm of George Wakahiu & Njenga Advocates for the Applicant Mohamed Sizi Famau

   c. Provide for the costs of this application.

2. The application is opposed there are grounds in opposition by the Respondents and as directed by the court, the Applicant has filed written submissions and significantly the 3rd and 5th Respondents have also filed written submissions in opposition to the current application.

3. This court - *vide* its ruling delivered on 8th October 2019 - Olola *J.* in Omar *Abdalla Jelani & 5 others v Attorney General & 4 others* [2019] eKLR), the court rendered itself as follows:

   > " This matter is hereby marked as compromised and fully settled subject to payment of costs."

4. The compromise arose from the Consent entered by the parties dated 8th December 2014 whereby the Petitioners undertook to join the project-affected persons within 14 days from 1st December 2014. However, the Petitioners' Counsel never confirmed to this court that they had been successful in joining all the 146 affected persons to the suit. Mohamed Suzi Famau, the Applicant herein was never joined as a party to the suit and has now brought the current application to be joined and be compensated as if he was in the current petition from the start.

5. The Applicant submitted that this court has jurisdiction to order for review and that it is not *functus officio* under the slip rule as enunciated in the case of *Telkom Kenya Limited v John Ochanda (Suing on his behalf and behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR and it will serve the interest of justice that review be allowed.

6. The Applicant further argued that if the matter is not decided by this court in review as prayed, he will suffer significant harm because the compensation was made covertly to remove his name, and that several authorities cited pronounce that this court has wide discretion to order for review for instance - *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR, *Sarder Mohamed v. Charan Singh Nand Sing and Another* [1959] EA 793, *Shanzu Investments Limited v. Commissioner for Lands* (Civil Appeal No. 100 of 1993) and *Wangechi Kimata & Another v Charan Singh* (C.A. No. 80 of 1985).

7. The Respondents submitted that the instant application is an afterthought, bad in law, and should be dismissed. The Respondents averred that the Applicant is not properly joined in this suit. He is not one of the parties the court allowed to be joined in this suit. Having rendered itself that way, the court became functus officio and that the orders sought cannot be granted since the threshold for review

has not been met and the issue of joinder cannot be addressed in review at this stage of the trial in the manner as suggested by the Applicant.

8. On the doctrine of *functus officio*, the Respondents have quoted the case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling), where the Supreme Court held that once a court has rendered itself on a matter, its decision becomes final and only meant for appeal and the court can only rectify errors or omissions on the face of the record under the slip principle. The case of *Telkom Kenya Limited v John Ochanda (Suing on his behalf and behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR, has also been cited as enunciating the same principles on functus officio.

9. On capacity to sustain this suit, the Respondents have quoted the case of *Mayfair Holdings Ltd v Municipal Council of Kisumu; Pauline Mauwa Akwacha (Interested Party/Applicant)* [2020] eKLR, where the court held that where a matter has been concluded it is futile to join a party at that level because the issues for determination have long been decided.

10. The Respondents submitted that review orders are not available at this stage because no sufficient reasons have been adduced to warrant the same. Besides, the threshold for review as set in Section 80 of the *Civil Procedure Act* and Order 45 Rule (1) of the *Civil Procedure Rules* has not been achieved. The Respondents have also quoted the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, where Mativo J. set the parameters to achieve in a review application and found that review is not tailored for purposes of reopening a case.

11. In this application, the issues, which fall for determination, are whether the Applicant has been properly joined in the proceedings, whether the application offends the doctrine of *functus officio*, whether the application has achieved the threshold for grant of review orders, and, who should bear costs of the application.

12. The principles and the law applicable for joinder of a party in a normal civil suit is as held in the case of *Mayfair Holdings Ltd v Municipal Council of Kisumu; Pauline Mauwa Akwacha (Interested Party/Applicant)* [2020] eKLR where the Court held thus:

> " Nyamweya J in *Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another* [2014] eKLR also held that:
>
> > " The provisions of Order 1 Rule 10(2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in Black's Law Dictionary Ninth Edition at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for a joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.
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> Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the *Civil Procedure Rules* is to claim some relief from the said party, and therefore such a joinder can only be made during the pendency of a suit. As this court has declined to set

aside the judgment herein, there is no suit pending before this court, and the Applicants cannot, therefore, be joined as parties at this stage."

13. I have perused the record, in this Petition; the Applicant was not a party to the proceedings from the beginning leading to the ruling dated 8th October 2019 against which he now seeks review. The six Petitioners listed on the face of the Petition are: Omar Abdalla Jelani, Kassim Shahali Ali, Shumi Bamkuu, Khairu Omar, Swaleh Mohamed Atik, and Mohamed Rajab. The initial Petition before the court was styled as a representative suit; at no point did the Applicant apply by himself or counsel to be joined in these proceedings as one of the Petitioners. The Consent Order issued on 8th December 2014 stated at order No. 4 that the Petitioner's Advocate joins all project-affected persons to the suit within 14 days of 1st December 2014. Not being among the six Petitioners, the Applicant herein, Mohamed Sizi, is a stranger to these proceedings and cannot be joined on a matter that has already been concluded in 2015. It is my humble view then that the joinder of the Applicant at this stage will convolute issues and attempt to have a second bite on the matter, which has already been determined.

14. On the doctrine of functus officio or finality in litigation, I find consolation in the decisions quoted by both the Applicant and the Respondents because the ultimate conclusion is the same in for example *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) the Supreme Court held thus:

> " Thus, the real contention made as to the Court's jurisdiction is hinged on the supposition that because Petition No. 5 of 2013 has been heard and determined, the Court has become functus officio, and so has no further authority to hear or determine any matter attendant on any proceeding in the said Petition.
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> (18) We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept:
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> > " 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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."
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> (19) This principle has been aptly summarized further in *Jersey Evening Post Limited v. A1 Thani* [2002] JLR 542 at 550:
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> > " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court

cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available" [emphasis supplied].

15. Further, in *Telkom Kenya Limited v John Ochanda (Suing on his behalf and behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR the Court of Appeal held thus:

> " *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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler vs Alberta Association Of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
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> > " The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
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> > 1. Where there had been a slip in drawing it up, and,
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> > 2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"

16. Olola *J*. delivered a ruling dated 8th October 2019, which emanated from consent by parties to have this suit compromised. This court rendered itself conclusively that the dispute before it was determined subject to the taxation of costs. The Petitioners moved the court to have the matter closed in that manner. Further, the Applicant herein has not demonstrated that the present application falls within the exceptions to the functus officio doctrine. Specifically, the Applicant has not demonstrated that there was a slip in the drawing of this court's ruling dated 8th October 2019 and that there was an error in expressing the evident intention of the court and the parties to the suit. The tenor of the application is to have the matter reopened – yet having been finalized – then close it after the said revision, without subjecting the new materials tendered before me to pass through cross-examination or known trial procedure. It cannot happen at this stage; the train already left the station and cannot be recalled due to the doctrine of *functus officio*.

17. On whether the current application has met the threshold for grant of review orders, this court was referred to several authorities whose net effect was that a review application cannot be a panacea for reopening a concluded matter afresh see for example in the works of Mativo J. in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR where he held thus:

> " i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
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> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1."

18. There is no new evidence or material presented before this court to warrant the orders of review. The material presented to me is for a fresh suit. To reopen this matter in the style and terms proposed, would change the entire substratum of the current litigation, with obvious consequences that this suit has to start *de novo*. The orders pursued evidently cannot be issued in a review application before subjecting it to a full trial.

19. In the end I am not persuaded that this is one of those matters where Orders of review can be granted, the application dated 8th November 2022 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 31ST DAY OF MAY 2023.

E. K. MAKORI

Judge

In the Presence of: -

Mr. Atema for the 5th Respondent

Mr. Kyandi for the 3rd Respondent.

Ms. Bwanaadi holding brief for Wakahiu for the Applicant

In the Absence of:-

A-G for the 1st Respondent