



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyaki v Nyaki & another (Civil Appeal 44 of 2012)  
[2022] KEHC 3100 (KLR) (26 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3100 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 44 OF 2012  
LM NJUGUNA, J  
APRIL 26, 2022**

**BETWEEN**

**ISAACK MUTURI NYAKI ..... APPLICANT**

**AND**

**SIMON NJAGI NYAKI ..... 1<sup>ST</sup> RESPONDENT**

**THE REGISTERED TRUSTEES CHURCH OF ALL KENYA . 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court is a notice of motion dated 12.08.2012 pursuant to Order 51 Rule 1, Order 50 Rule 6, Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, Sections 95 and 3A of the civil Procedure Act Cap. 21 and all enabling provisions of the law and wherein the applicant seeks for orders that:
  - i. The Honourable Court be pleased to grant extension of time within which to file and serve the record of appeal.
  - ii. The record of appeal annexed to this application be deemed duly filed upon payment of requisite fees.
  - iii. The Honourable Court be pleased to stay the taxation of costs proceedings pending hearing and determination of the appeal
  - iv. Costs of this application be provided for.
2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant herein. The applicant's case is that this Honourable Court delivered a ruling on 03.03.2021 *inter alia* directing the appellant/applicant herein to file and serve the record but the time within which to file the same has since lapsed. It was his case that the counsel on record on appeal was not representing the appellant/applicant in the lower court matter being SPMCC No. 160 of 2010 as he was acting in person and that upon restatement of the appeal, counsel for the appellant sent her



court clerk severally to the court registry to obtain the pleadings and proceedings to enable her prepare the record of appeal without any success until on or about 17.06.2021 when a concern letter dated 14.06.2021 was raised and by the time, the pleadings and proceedings were received, time had already lapsed.

3. It was further the applicant's case that he is still desirous of prosecuting the appeal and that the act of not complying with the Honourable Court's orders was not intentional as he could not have filed the record of appeal without the necessary pleadings. That the respondent would not suffer any prejudice given that the record of appeal is now ready and further that, the application has merit and has been brought without undue delay.
4. 1<sup>st</sup> respondent opposed the application via a replying affidavit dated 22.11.2020 deponing that the application herein and the orders sought have been overtaken by events given that taxation had already been done and further, that this court was very categorical that the applicant/appellant had sixty (60) days from the date of the Ruling to file and serve the record of appeal and failure to which, the appeal stood automatically dismissed. He proceeded to state that this court was functus officio since it had pronounced itself in restating this matter. It was further deponed that litigation must come to an end in that the respondents stood to suffer from repeated litigation.
5. Directions were given that the application be canvassed by way of written submissions wherein both parties complied. The applicant submitted that he is still interested in prosecuting his appeal and given that the record of appeal is now ready and once the Orders are granted, he will file the same forthwith. Reliance was made on articles 50 and 159 (1) (d) of *the constitution* and further, section 95 and 3A of the Civil Procedure Act and further, the case of *Benard Muthee & Another v Anita Kamba Mwiti* [2021] eKLR in which the court reiterated that: an order reinstating appeal would be of the same effect as an order extending the time within which they were required to file the record of appeal.
6. It was the applicant's prayer thus that this court grants extension of time within which to file and serve the record of appeal and stay the taxation proceedings which includes but not limited to execution arising therein pending hearing and determination of the appeal.
7. The respondents on the other hand submitted that the orders sought by the applicant have been overtaken by events as taxation had already been done and further that, the court had previously pronounced itself in regard to the orders currently sought via a ruling dated 03.03.2021 and as such, this court was functus officio. They further submitted that ignorance of the law is not a defence and has no remedy and the applicant is using crafty methods to circumvent justice. That it is a cardinal principle of law that litigation must come to an end. In the end, he prayed that the court should return a finding that this application is frivolous, vexatious and an abuse of the court process.
8. I have considered the application, rival responses and the submissions filed herein. As I have already noted, the applicant in his application herein sought for a stay of the taxation of costs proceedings pending the hearing and determination of the appeal and further an order for extension of time within which to file and serve the record of appeal. It is my considered view that the main issue for determination is whether the said orders can be granted.
9. The applicant has moved this court for extension of time within which to file and serve the record of appeal and from the court's record, it is quite evident that the applicant/appellant filed an undated memorandum of appeal against the judgment of Hon. Nyutu which was received in court on 30.03.2011. The appeal remained unprosecuted for a period running five (5) years and this court suo moto dismissed the suit on 25.10.2018. Later, the applicant/appellant file an application dated 22.07.2019 wherein he sought orders inter alia that this Honourable Court be pleased to reinstate the appeal and order that it be heard expeditiously and on priority basis. Having exercised its discretion,



this court via a ruling dated 03.03.2021 reinstated the appeal and further ordered that the applicant/appellant file and serve the record of appeal within sixty (60) days of the Ruling and failure to which, the appeal would automatically stand dismissed.

10. In the current application, this court has been moved for orders that it be pleased to grant extension of time within which to file and serve the record of appeal. In my considered view, the orders this court has been moved to grant are akin to the ones the court previously issued in a ruling dated 03.03.2021. In response to the application, the respondent submitted that this court is *functus officio*. The [Civil Procedure Rules](#) under Order 21 Rule 3 (3) provides that:

“A judgment [ruling] once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review.”

11. In [Raila Odinga v IEBC & 3 Others](#) Petition No. 5 of 2013 the Supreme Court of Kenya cited with approval the following passage from “The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law” by Daniel Malan Pretorius :-

“...“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.”

12. In addition, the Supreme court also referred to the case of [Jersey Evening Post Limited v A. Thani](#) [2002] JLR 542 at pg. 550 where the Court stated: -

“A court is *functus* when it has performed all its duties in a particular case...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.”

13. In light of the above, does the current court have jurisdiction over this matter? Jurisdiction goes into the heart and soul of any proceeding. In the celebrated Court of Appeal decision in [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR, Nyarangi JA famously held that jurisdiction is everything and without it, a court has no power to make one more step.

14. The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under Section 7 of the Civil Procedure Act. In the case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.



- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
15. Expounding further on the essence of the doctrine the Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR pronounced itself as follows:
- “The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”
16. The court went further to highlight that the essence of the principles of res-judicata is to not only protect the courts from disrepute, but also to protect litigants from unending litigation, that this principle is so classic in that it includes points or issues that ought to have been brought before the court but which did not find their way there due to the inadvertence of the parties or their counsel.
17. The application before the court is seeking for prayers that this court grants extension of time within which to file and serve the record of appeal and further, a stay of the taxation of costs proceedings pending the hearing and determination of the appeal. The applicant has submitted that the counsel on record in the appeal did not represent the applicant herein in the lower court and was only instructed on appeal by Kituo Cha Sheria on a pro bono basis and therefore did not have all the lower court proceedings that ought to be contained in the record and so by the time the pleadings and proceedings were being received, time had lapsed. From the record, this application and the record herein was filed on 16.08.2021, almost two months out of the sixty (60) days that had been granted by this court. It is clear that the applicant has not demonstrated due diligence in the observance of timelines set in the order of the court for filing the record of appeal. [See *Imperial Bank Limited (In Receivership) & Another v Alnashir Popat & 18 Others* [2018] eKLR and *Jimcab Services Limited v Bartholomew Benard Osodo & Another* [2018] eKLR].
18. In light of the constitutional imperative under Article 159 of *the constitution* on expedition in the resolution of disputes, there must be expeditious disposal of the administration of proceedings for the good of all parties, relying on the evidence and the law and using just means to achieve just ends.
19. The court vide a ruling dated 03.03.2021 did pronounce itself that the applicant/appellant had sixty (60) days from the date of the ruling to file and serve the record of appeal and failure to which, the appeal stood automatically dismissed. It therefore points out that the same matter was dealt with effectively by a court of competent jurisdiction and the same brought to a finality. As can be noted from the record, the appeal had been dismissed and upon reinstatement the applicant was given time to file the record of appeal which orders he failed to comply with. The appeal has been pending in court for ten years now and as rightly submitted by the respondent, litigation must, at some point, come to an end!
20. In the premises aforesaid, I find that:
- i) The application herein is a clear abuse of the court process



ii) I dismiss it with costs to the respondents.

21. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF APRIL, 2022.**

**L. NJUGUNA**

**JUDGE**

.....**for the Appellant**

.....**for the Respondents**

