



Omole v Wachira; Communist Party of Kenya & another (Interested Parties) (Civil Appeal (Application) E298 of 2022) [2022] KEHC 12443 (KLR) (Civ) (30 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL (APPLICATION) E298 OF 2022

JN MULWA, J

JUNE 30, 2022

BETWEEN

BOOKER NGESA OMOLE APPLICANT

AND

BENEDICT WACHIRA RESPONDENT

AND

COMMUNIST PARTY OF KENYA (CPK) INTERESTED PARTY

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION INTERESTED PARTY

RULING

1. On 7th June 2022, this court delivered a judgment wherein it allowed the Applicant's appeal in the following terms:

- “ 1. That the judgment delivered by PPDT on 8th May 2022 in PPDT Complaint No. E051 of 2022 be and is hereby set aside.
2. That this Complaint is referred back to the 1st Respondent, Communist Party of Kenya (CPK) for appropriate action in terms of the Parties Constitution and Rules on Nominations, and the Court's observations, noting to observe the necessary timelines as provided by the IEBC.
3. That parties bears their own costs.”

2. Subsequently, the Applicant filed a Notice of Motion dated 9th June 2022 seeking the following orders:-



1. Spent.
 2. That the Respondent be compelled to follow and comply with orders of court issued on 7th June 2022 before close of business today and to act within his Constitutional mandate specifically to forward and/or submit the name of the applicant to the IEBC as a candidate for Gem Constituency Member of Parliament.
 3. That in the alternative to prayer two above, the letter by Applicant dated 8th June 2022 forwarding his details to the 2nd Interested Party be deemed as sufficient in the circumstances.
 4. That the contemnor be denied audience in this matter before this Honourable Court in light of their willful and deliberate disobedience of the orders issued on 7th June 2022 until such time that they will have purged the contempt.
 5. Costs of the Application.
3. In response, the 1st Interested Party lodged a Notice of Preliminary Objection dated 10th June 2022 on the following grounds: -
1. That this Honourable Court having determined the main appeal herein with finality by its judgment delivered on 7th June 2022, is therefore *functus officio* and accordingly, can neither consider the Applicant's Notice of Motion dated 9th June 2022 nor grant the orders sought therein as the same seeks to re-litigate issues that were already heard and determined by this Court.
 2. That the said application purports to be premised under several provisions of the [Contempt of Court Act](#) No. 46 of 2016 whereas the entire piece of legislation was found to be Unconstitutional by the High Court of Kenya.
 4. The parties agreed by consent to first dispose of the Preliminary Objection by way of written submissions. This Ruling is therefore in respect to the preliminary objection.
 5. The issues that arise for determination are:
 1. Whether the Applicant's Notice of Motion dated 9th June 2022 is incompetent for being based on wrong provisions of law?
 2. Whether the court is *functus officio*?

Whether the Applicant's Notice of Motion dated 9th June 2022 is incompetent for being based on wrong provisions of law?

6. The Applicant's contempt application is brought under Section 5, 27(B) and 28 of the [Contempt of Court Act](#) No. 46 of 2016, Order 51 Rule 1 of the [Civil Procedure Rules](#) and Articles 50 and 159 of the [Constitution](#).
7. The 1st Interested Party submitted that the application is a non-starter as it is predicated on the [Contempt of Court Act](#), 2016 which no longer has force of law having been declared unconstitutional in [Kenya Human Rights Commission v Attorney General & Another](#) [2018] eKLR. Further, the 1st Interested Party contended that the Applicant did not comply with the procedure for instituting contempt proceedings and faulted the Applicant for bringing the same through a Notice of Motion. In addition, it took issue with the manner in which prayer (4) thereof was drafted and asserted that the prayer seeks orders against a contemnor who is neither defined nor specified in the Application



and therefore cannot stand. In its view, these mistakes are not mere technicalities that can be cured by Article 159 (2) (d) of the Constitution.

8. On the other hand, the Applicant submitted that the procedural technicality is curable under Article 159(2) (d) of the Constitution as it does not affect the substance of the application. He urged the court to dismiss the preliminary objection with costs and invoke its inherent powers under Section 3A of the Civil Procedure Act to make such orders as will ensure that the ends of justice are met.
9. The entire Contempt of Court Act, No. 46 of 2016 was declared unconstitutional on 9th November 2018 in Kenya Human Rights Commission v Attorney General & Another [*supra*]. Once a statute is declared unconstitutional, it becomes invalid and ceases to have any legal consequences or force of law. However, the court takes the view that since the law governing contempt of court in Kenya reverted to the position before the enactment of the Act thereafter, the Applicant's application can still be entertained and considered within the old framework, in case the preliminary objection fails. The court will not elevate lapses in form and procedure above substance as the provisions of Article 159(2) (d) of the Constitution enjoins the court to administer justice without undue regard to procedural technicalities.
10. Accordingly, ground 2 of the preliminary objection fails.

Whether the court is functus officio?

11. The 1st Interested Party submitted that this court has no jurisdiction to determine the Applicant's application as the same essentially seeks to alter and/or vary the orders of this Court when the Court is *functus officio*. It contended that the Court clearly rendered itself on 7th June 2022 with finality and thus the Applicant cannot indirectly seek to re-litigate the matter by seeking fresh orders to compel the Respondent to submit his name to the IEBC. According to the 1st Interested Party, the orders sought only seek to embarrass this Court. Reliance was placed on the decisions in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR and John Gilbert Ouma v Kenya Ferry Services Limited [2021] eKLR where the courts discussed the applicability of the doctrine of *functus officio*.
12. On the other hand, the Applicant submitted that the doctrine of *functus officio* cannot be invoked in this instant as he does not seek to re-litigate issues that have already been determined through the impugned application. Rather, it's a contempt application seeking to enforce this court's orders of 7th June 2022 and will not require a reengagement with the finalized appeal on merit. The Applicant relied on the case of Telkom Kenya Ltd v John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya) [2014] eKLR, where the Court of Appeal observed that *functus officio* only bars a merit-based re-engagement with the case once a final judgment has been entered and a decree thereon issued. He also relied on Bellevue Development Company Limited v Vinayak Builders Limited & Another [2014] eKLR where the court held that the concept of *functus officio* does not bar proceedings which are incidental to the final decision of the court.
13. The Black's Law Dictionary, 9th Edition defines *functus officio* as:

“ [having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
14. In Petition 5, 4 & 3 of 2013 (Consolidated): Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others [2013], the Supreme Court while expounding on the doctrine of *functus officio* cited an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus



officio Doctrine, with Specific Reference to its Application in Administrative Law.” [2005] 122 SALJ 832 that:

“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.”

15. The court also cited the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 where it was held that:

“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.”

16. Is the court *functus officio* with regard to the orders sought in the Applicant’s Notice of Motion dated 9th October 2022? In the said application, the Applicant wants the court to either compel the 1st Respondent to submit his name to the IEBC or allow him to do so by himself. These are essentially the same orders that the Applicant sought in his appeal herein and the court pronounced itself with finality on the same in its judgment of 7th June 2022. Entertaining the Applicant’s application as drafted would require this court to reopen its decision and reconsider the issues afresh. From the authorities highlighted above as well those cited by both parties in their submissions, it is clear that the law does not allow a merit-based re-engagement by a court in a matter in which it has rendered a final judgment and issued a decree. See also *Telkom Kenya Limited v John Ochanda* (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) (*supra*).

17. If the Applicant is dissatisfied by the orders of 7th June 2022, the only avenues available to him are to either prefer an appeal or pursue an application for review as it would be absurd for this court to issue contradictory orders. Accordingly, the court finds that the first ground of the 1st Interested Party’s preliminary objection succeeds as this court is indeed *functus officio* with regard to the orders sought in the Applicant’s Notice of Motion dated 9th October 2022.

18. For the foregoing, the 1st Interested Party’s Notice of Preliminary Objection dated 10th June 2022 is hereby allowed. As a consequence, the Applicant’s Notice of Motion dated 9th June 2022 is dismissed. However, as one of the grounds of the preliminary objection failed, there shall be no order as to costs.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JUNE 2022.

J. N. MULWA

JUDGE.

