



Muvokanza Limited v Muri Mwaniki Thige & Kageni LLP & another (Environment & Land Case E120 of 2021) [2023] KEELC 18072 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E120 OF 2021**

JA MOGENI, J

MAY 11, 2023

BETWEEN

MUVOKANZA LIMITED PLAINTIFF

AND

MURI MWANIKI THIGE & KAGENI LLP 1ST DEFENDANT

ZIMELE ASSET MANAGEMENT COMPANY LIMITED 2ND DEFENDANT

RULING

1. I have before me an application and a Notice of Preliminary Objection for determination. The Plaintiff filed a Notice of Motion Application dated 14/12/2022 which was brought pursuant to Order 51 Rules 1 & 3 of the Civil Procedure Rules 2010 and Sections 1A (1), 1B 1 (a & b) and 3A of the Civil Procedure Act. The Applicant is seeking for the following orders: -
 1. Spent.
 2. That this Honourable Court do stay the delivery of the Taxing Master's determination of the Defendant's Party to Party Bill of Costs dated 28 July 2022 pending the Hearing and Determination of this Application.
 3. That this Honourable Court do set aside the proceedings of this Court before the Taxing Master of the 5th December 2022.
 4. That this Honourable Court do strike out the Defendant's Party to Party Bill of Costs dated 28 July 2022 for want of jurisdiction.
 5. That this Honourable Court do strike out the Defendants Counter - Claim dated 5th October 2021 for lack of Jurisdiction.



6. That costs of the Application and suit be provided for.
2. The Application is premised on the grounds cited at the foot of the application and it is further grounded on the Supporting Affidavit of Mumo Mwendwa, a director of the Plaintiff Company sworn on 14/12/2022.
3. Before the Application could be heard, the 1st and 2nd Defendants instituted a Notice of Preliminary Objection dated 1/02/23 objecting to the application on the following points of law:-
 1. Having rendered its Ruling dismissing the Plaintiff's suit on 16/ 5/2022, the Honourable Court is functus officio and cannot sit on appeal of its own Ruling.
 2. The Honourable Court lacks jurisdiction under Sections 2 and 13A of the Advocates (Remuneration) Order, 1962 to interfere with the taxation of a party and party Bill of Costs.
 3. The Application by the Plaintiff dated 14/ 12/2022 is not a Reference under the Advocates (Remuneration) Order, 1962.
 4. The Application is incompetent, an abuse of this Honorable Court's process and ought to be struck out with costs.
4. Aside from the 1st and 2nd Defendants' Notice of Preliminary Objection dated 1/02/2023 in opposition to the Plaintiff's Application dated 14/12/2022, the 1st and 2nd Defendants filed a Replying Affidavit of Njuguna Muri, a partner at the 1st Defendant, sworn on 1/02/2023.
5. The Preliminary Objection is opposed. The Plaintiff filed a Replying Affidavit of Mumo Mwendwa, a director of the Plaintiff Company, sworn on 22/02/2023.
6. On 8/02/2023, the Court directed that both the Preliminary Objection dated 1/02/2023 and the Application dated 14/12/2022 be canvassed together through written submissions. By the time of writing this Ruling, it is only the Plaintiff who had filed its submissions for both the Application dated 14/12/2022 and the Preliminary Objection dated 1/02/2023, which I have considered. A ruling date was thereafter reserved.

Issues for Determination

7. I have given full consideration to the application before me as well as the Notice of Preliminary Objection. I have equally perused and considered the submissions as filed by the Plaintiff in regard thereto. I find the following issues arise for determination: -
 - i. Whether the Preliminary Objection raises pure points of law.
 - ii. Whether the Court has jurisdiction to hear and determine this suit.
 - iii. Whether the Application dated 14/12/2022 is merited.



Analysis and Determination

Whether the Preliminary Objection raises pure points of law.

8. I need to dispose of the preliminary objection first before considering the application on merit should it become necessary. In the case of *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 others* [2014] eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors* [1969] EA 696.

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.’”

9. In the case of *Oraro v Mbaja* [2005] 1KLR141, it was held that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court’s discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised.”

10. In the instant suit the 1st and 2nd defendant has based their Preliminary Objection on the ground that this court lacks jurisdiction on various points of law. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Plaintiff’s case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. See the Supreme Court’s decision *in the Matter of Interim Independent Electoral Commission* [2011] eKLR.
11. The issue of jurisdiction is key since without jurisdiction a court has no powers to proceed to entertain the matter and it has to down its tools. I am of the considered view that since this matter is yet to be heard, the 1st and 2nd defendants are within the law to raise Preliminary Objection challenging the jurisdiction of this court. It is my finding that the Preliminary Objection raised by the 1st and 2nd defendants is one on pure points of law that that this court needs to determine.

Whether this court has jurisdiction to hear and determine this suit

12. Having determined that the Preliminary Objection by the 1st and 2nd Defendants is based on pure points of law, it will be important to determine whether this court lacks jurisdiction to hear and



determine this suit. Counsel for the 1st and 2nd Defendants asserts that having rendered its Ruling dismissing the Plaintiff's suit on 16/05/2022, this Court is functus officio and cannot sit on appeal of its own ruling.

13. It is the Plaintiff's case that this court cannot be functus officio as the Defendants have a counterclaim that is yet to be determined. That among the prayers sought in the motion application dated 14/12/2022 is that the defendant's counterclaim be dismissed as this Court has ruled that it has no jurisdiction to entertain the claim. That the Defendants have not withdrawn their counterclaim and thus under Order 7 Rule 13 of the Civil Procedure Rules, the Defendants' counterclaim continues to exist. That the court cannot determine that it lacks jurisdiction to determine their Plaintiff but has jurisdiction to entertain the Defendants' counterclaim.

14. The doctrine of 'Functus Officio' was stated by the Court of Appeal in the case of *Telcom Kenya Ltd v John Ochanda* [2014] eKLR as follows:-

“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 general rule that 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. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”

15. Similarly 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.”

16. 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 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.” [Own emphasis].

17. The Plaintiff submits that in this instance, it is not seeking to have the subject matter of the Court's ruling of 16/05/2022 reheard. That the Defendants' counterclaim is still alive by virtue of Order 7 Rule 12 and so the suit is still alive and the Court cannot be said to be functus officio. Counsel further submitted that with the existence of the counterclaim, the Court cannot be said to have finally determined the suit. That the Defendants' bill of costs has been filed under the same suit and so this Court cannot claim that it has no jurisdiction and then proceed to Tax the Bill of costs which task is conducted by an Officer of the same Court that states it has no jurisdiction.



18. It is not in dispute that this Court dismissed the Plaintiff's suit in its Ruling of 16/05/2022 as it was determined that the Court did not have the Jurisdiction to entertain the Plaintiff's suit.
19. I note that the 1st and 2nd Defendants raised a preliminary objection dated 5/10/2021 seeking to strike out the Plaintiff's Plaint dated 7/04/2021 with costs on grounds that the Court lacked jurisdiction to hear and determine the suit herein. This Preliminary Objection is the one that led to the impugned Ruling delivered on 16/05/2022 which dismissed the suit. The Disposal orders read as follows:

“The upshot is that I find that this Court lacks jurisdiction to entertain this suit. I can do no more than down my tools. The suit is hereby dismissed with costs awarded to the Defendants.”
20. The Court appreciates that the Defendants' counterclaim is a separate suit from that of the Plaintiff and that the Defendants may prove their counterclaim so far as the burden of proof lies on them.
21. I am also alive to the provision of Order 7 Rule 13 of the *Civil Procedure* as has been heavily relied on by the Plaintiff's counsel. The same provides as follows:

“Discontinuance, stay or dismissal of suit [Order 7, rule 13.]

If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.” [Emphasis mine].
22. A search for the meaning of the word “may” in the *Black's Law Dictionary* 11th Edition explains it to mean “to be permitted to or to be a possibility or loosely required to” . The word “may” is directory. I opine that the provisions under Order 7 Rule 13 is enabling, discretionary and permissive and it is neither mandatory nor is it preemptory since the word “may” has been used.
23. It is true that the Court is now functus officio with regard to the Plaintiff's suit. The Court made an order dismissing the suit on the 16/05/2022, and the said order has not been varied to date, and so this means that the Court is obviously functus officio. To hold otherwise would amount to reviewing the Ruling of 16/05/2022 which has not been prayed for. However, it can be said that the Court is not functus on the part of the Counterclaim or it was not but the Defendants' subsequent conduct of filing the Bill of Costs dated 28/07/2022 which under items 1, 2 and 23 includes payments for drawing and filing their counterclaim, this demonstrated that they took the claims in the entire suit to have been finalized.
24. I agree with the Plaintiff that the 1st and 2nd Defendant's did not withdraw their counterclaim but it is evident from the aforementioned conduct meant that they understood the Court's ruling of 16/05/2022 to mean that the entire suit was finalized in that the Court lacked jurisdiction to entertain the same. Further to the above conduct, the Defendants decided to file a bill of costs and went on to request a date for taxation of the same, which was scheduled for 27/02/2023. They opted not to proceed with the counterclaim as per the provisions of Order 7 Rule 13.
25. It is trite law that unless the court directs the immediate taxation and payment of costs in an interlocutory application, there should only be one taxation of costs at the tail end of a suit. See *Homi Dara Adrinwalla –vs- Jeanne Hogan & Another* [1966] E.A.290.
26. Without delving into the realm of the taxing master as per the *Advocate's (Remuneration) Order*, 1962, I am guided by *Duhaime's Law Dictionary* wherein it explains a bill of cost as follows: “a bill of costs is a



formal itemized memorandum presented by the successful party to concluded litigation, to the other, as a proposal of costs and disbursements that the issuing party claims”.

27. So even though the suit was still alive, the said conduct meant that the Defendants understood that the suit was dismissed. I think that the Defendants’ conduct of applying for the Plaintiff’s plaint to be dismissed, praying for costs, filing a party and party bill of costs dated 28/07/2022 for the entire suit until 27/02/2022, filing and serving a notice of taxation dated 12/10/2022 and lastly proceeding to get a date for taxation of the bill of costs reasonably implied that the entire matter had been finalized meaning the Court did not have jurisdiction to determine the entire matter.
28. There is no evidence that demonstrates that the Defendants attempted to prosecute the counterclaim, for example by preparing documents for trial. The Defendants have not shown any such attempt.
29. The power to dismiss suits and for that matter counterclaims are derived from the inherent powers of the court. Like the plaintiff, a defendant with a counterclaim is also obliged to be vigilant. From the Defendants’ conduct, it was reasonably implied that the entire matter had been finalized. Ordinarily, a bill of costs is drawn, filed for taxation upon finalization of a suit. It would be erroneous to find that the counterclaim was also not dismissed by the Ruling of 16/05/2022. In a nutshell, I find and hold that this Court is functus officio and therefore the Court does not have jurisdiction.
30. In the end, I find that the 1st and 2nd Defendants’ preliminary objection dated 1/02/2023 succeeds in terms of point (1).

Whether the Application dated 14/12/2022 is merited.

31. The disposal of the preliminary objection takes me back to the plaintiff/applicant’s application. The Court having made an order dismissing the suit on 16/05/2022, and the said order having not been varied to date, then the Court is obviously functus officio with no locus to hear the Plaintiff’s Application dated 14/12/2022. The Defendants do not treat their counterclaim to be alive and so there was no need for the Plaintiff to file this Application. Flowing from the foregoing, the Application dated 14/12/2022 is dismissed as it was premised on a non-existent suit.
32. Consequently, the preliminary objection succeeds in part. The Application dated 14/12/2022 is struck out but with no order as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2023.

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MOGENI J

JUDGE

In the presence of

Mr Thige for the Defendants

Mr Khaminwa for the Plaintiff

Ms. Caroline Sagina : Court Assistant

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MOGENI J

JUDGE

