



**M'barine & 2 others v M'barine & another (Winding Up Petition 32 of 2014)  
[2022] KEHC 16049 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
WINDING UP PETITION 32 OF 2014**

**A MABEYA, J**

**NOVEMBER 25, 2022**

**BETWEEN**

**ERIC MUGENDI M'BARINE ..... 1<sup>ST</sup> PETITIONER**

**MICHAEL T MAINA ..... 2<sup>ND</sup> PETITIONER**

**WALLACE MUGENDI MURUNGI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ANTHONY URIITHI M'BARINE ..... RESPONDENT**

**AND**

**MARINE POWER GENERATION LTD ..... NOMINAL RESPONDENT**

**RULING**

1. By an application dated October 3, 2021, the applicants/petitioners moved the court seeking a review of the ruling made by the Hon Justice Kasango on April 27, 2020. They also sought that this court declares irregular the orders of the deputy registrar given on September 4, 2020 and for the reinstatement of the petition and an order prohibiting the sale of shares or assets of the nominal respondent.
2. The respondent opposed the application vide the preliminary objection dated October 15, 2021 in respect of which this is the ruling. The grounds of the objection was that, the court was *functus officio* and that the application dated had invoked the wrong jurisdiction.
3. In opposition to the preliminary objection, the nominal respondent filed grounds of opposition dated October 15, 2021 stating that the objection was an abuse of the court process and that the jurisdiction of the court had been properly invoked.



4. The preliminary objection was canvassed by way of written submissions which I have considered.
5. A preliminary objection was defined in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 to consist 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.
6. In the present case, the objection is grounded on the fact that the court lacks jurisdiction to hear the application as it is *functus officio*. The respondent submitted that the court was *functus officio* having had rendered its decision in the matter and thus lacked jurisdiction to entertain the application.
7. In support of that position, the nominal respondent submitted that the application was an abuse of the court process. That it could not be determined after the suit was dismissed by the court. In response, the petitioners submitted that the doctrine of *functus officio* did not bar a party from reviewing court orders
8. In *Telcom Kenya Ltd v John Ochanda* [2014] eKLR, the Court of Appeal held: -
 

“*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.”
9. In *Raila Odunga 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.”
10. In that case, the Supreme Court further referred to the case of *Jersey Evening Post Ltd 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.”
11. I have perused the record. In its ruling dated April 27, 2020, the court observed that the petition would be dismissed for want of prosecution in the event the same was not heard and concluded by July 31, 2020. The application before court that is subject to this objection seeks to set aside or review the said orders.



12. In *Leisure Lodge Ltd v Japhet Asige and another* [2018] eKLR, the court held: -

“On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act. In *Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others* [2018] eKLR, this court said of the doctrine of *functus officio*:-

“I understand the doctrine, like its sister, the *res-judicata* rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.

As was held by the court of Appeal in *Telkom Kenya Ltd v John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

Put in the context of the application before me, I do not consider the decree/holder to ask the court to rehear and make a decision about the dispute in the file on the merits.

I understand the decree-holder/applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment -debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become *functus officio*. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before.”

13. In view of the foregoing, the right for review is one of the rights a party can enjoy after delivery of a ruling or a judgment. In that regard, I find that this court is clothed with the jurisdiction to determine the application.

14. In the premises, I find no merit in the preliminary objection and the same is dismissed with costs.  
It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**A MABEYA, FCI Arb**

**JUDGE**

