



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL NO. 58 OF 2013

MILLING CO-OPERATION OF KENYA (2009) LIMITED.....APPELLANT/APPLICANT

VERSUS

SAMUEL MUCHAI NJUGUNA T/A WAMU STORES.....1ST RESPONDENT

RAHAB WAMBUI T/A WAMU STORES.....2ND RESPONDENT

FRANCIS MURIUKI MURAGURI T/A LUSOI STORES.....3RD RESPONDENT

RULING

1. Before me is an application by the Appellant herein dated the 15th July 2019. It is brought under **Order 22 rule 22, Order 42 Civil Procedure Rules and Section 31 and 63(e)** of the Act. The following orders are sought:

1. Spent

2. An order of stay of execution of orders arising from the court's ruling dated 11th July 2019

3. An order for reinstatement of the appellant's appeal that stood dismissed on the 13th March 2019 for what of prosecution.

2. The application is based on grounds that the applicant is desirous of prosecuting the appeal, that security for due performance of the decree had been deposited in court that the appellant was not able to comply with the orders of this court, to fix its appeal for hearing due to reasons beyond its control, and, that it will be fair and just if the orders are granted as no prejudice will be occasioned to the respondent.

Mr. Jimmy Aggrey Simiyu Advocate for the appellant swore the supporting affidavit on the 15th July 2019, to explain the circumstances leading to the dismissal of the appeal.

3. In opposition, the 3rd Respondent filed a preliminary objection on the 9th September 2019, and raised issues that

1. The court was functus officio

2. That the application is Res judicata by virtue of an earlier application dated 5th April 2019, and ruling dated 11th July 2019.

3. That the application is incompetent for it seeks to reinstate the appeal dismissed under Order 42 rule 35 Civil Procedure Rules.

A replying affidavit was also filed to buttress the preliminary objection.

4. In my ruling delivered on the 11th July 2019, I stated the genesis to the dismissal of the appellant's appeal, and in particular (Par 2), non-compliance of court order dated the 28th January 2019 (Mativo J), to the effect that if the appeal was not fixed for hearing within 45 days of the said order, it stood dismissed, such that as at the 13th March 2019 there was no appeal on record.

5. The above was upon the 3rd Respondent's application dated 25th March 2019, and another by the appellant dated 5th April 2019, for an order of review and/or variation of court orders of the 25th January 2019 stated above – to reinstate the appeal by extending the time within

which the appeal could be fixed for hearing. It was brought under **Order 45 Rule 1, Order 22 rule 22 Civil Procedure Rules, as well as Section 3A and 63(e) of the Civil Procedure Act.**

6. The ruling delivered on the 11th July 2019 was in respect of both applications. The court found no merit in the appellant's application for Review or variation of the court orders dismissing the appeal for want of prosecution.

The stay of execution order could therefore not be granted.

7. I have carefully examined the applications prior to the present one. I agree with the 3rd Respondents preliminary objection that the present application is similar in all aspects to the application dated 5th April 2019. A perusal of the two applications, confirms the similarities and in particular same legal provisions, same prayers as well as the grounds for the same. The said application was heard by a competent court on the 20th June 2019, and dismissed by a ruling dated 11th July 2019.

There is therefore no doubt that the present application is *Res Judicata*. See **Section 7 of the Civil Procedure Act**. Cited was the case **Re Margaret Wahu Kimani (deceased) (2008) e KLR** the court thereof rendered that

“There must be an end to applications of

Similar nature that is to say, further, wider principles of res judicata apply to applications within the suit--- the doctrine of Res Judicata applies to interlocutory applications....”

8. The Court of Appeal in **Mwangi –vs- Njoroge & 2 Others (2005) 2 KLR** page 1 while discussing an appeal from a ruling of the High Court dismissing the appellants application for re-instatement of his appeal dismissed by the court for want of prosecution rendered that

“Order XLI does not provide for an application for an application for the reinstatement of an appeal dismissed for want of prosecution under Order XLI rule 31”.

9. In his response, Mr. Simiyu advocate for the Appellant urged that **Article 159(2)(d)** of the Constitution reversed the era of technicalities under the old justice dispensation.

He cited **Order 42 rule 21 Civil Procedure Rules** to urge that the court has power to reinstate an appeal dismissed for want of prosecution.

Order 42 rule 21 states

“Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs”.

Rule 20 provides for dismissal of appeal for appellants default, where he fails to appear for the hearing of the appeal.

10. The appellant's appeal was not subject to the above provisions, as it was dismissed under provisions of **Order 42 Rule 35(2) Civil Procedure Rules**, being dismissal for want of prosecution. It states

Rule 35 (2) if, within one year after the service of the Memorandum of Appeal, the appeal shall not have been set down for hearing, the registrar shall, on notice to the parties, list the appeal before a judge in chambers for dismissal.

11. The court record shows that a notice to show cause was issued by the Deputy Registrar in terms of rule **35 (2)**, to the appellant to show cause why the appeal should not be dismissed. The appellant was duly served to attend court on the 28th January 2019.

The Advocate appeared for the appellant. The court heard him, and an order was issued that the appeal be filed within 45 days thereafter, failing which it would stand dismissed.

That order was not complied with.

It is therefore clear that all the issues in the present application were dealt with and determined by the court in its ruling dated the 11th July 2019.

12. I am satisfied, and hold that the present application is *Res judicata*, and further that this court has no jurisdiction to revisit its own orders upon a review application, for further orders of review, on similar application.

To that end, this court declares itself *Functus Officio*.

13. The doctrine of *functus officio* is well articulated by the Court of Appeal in the case **Telcom Kenya Ltd –vs- John Ochanda** (suing on his own behalf and of **996 Former Employees of Telkom Kenya Ltd) (2014) e KLR** that

“*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.....”

14. Further, the **Supreme Court of Kenya in Raila Odinga -vs IEBC and 2 Others (2013) e KLR** rendered that

“A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent a 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.

Once proceedings are finally concluded, the court cannot review or alter its decision, any challenge to its ruling or adjudication must be taken to a higher court if that right is available”.

See also **Re Estate of Kinuthia Mahuti (deceased) (2018) eKLR**.

15. It is therefore evident that having made my final decision on the earlier application for review of my ruling dated the 11th July 2019, I lack the necessary jurisdiction to re-consider the present application.

16. For the foregoing, I come to the conclusion that the appellants’ application dated 15th July 2019 is *Res Judicata*, and this court is *functus officio*.

Accordingly the preliminary objection filed by the 3rd Respondent is upheld, with the result that the Application dated 15/7/2019 is dismissed with costs to the respondents.

Orders accordingly.

Delivered, signed and dated at Nakuru this 30th Day of JANUARY 2020.

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J. N. MULWA

JUDGE