



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO 99 OF 2016

ICEA LION GENERAL INSURANCE CO. LTD.....APPELLANT

VERSUS

JULIUS NYAGA CHOMBA..... RESPONDENT

RULING

1. The appeal lodged by **ICEA Lion General Insurance Co. Ltd** (Appellant/Respondent) against **Julius Nyaga Chomba** (Respondent/Applicant) was determined *vide* the judgment delivered on 7th June 2017 by **Ngugi J.** On 6/2/2019 Julius Nyaga Chomba, (hereafter the Applicant) filed a motion expressed to be brought under Article 40 of the Constitution and sections 1A and 1B of the Civil Procedure Act. The motion seeks that ICEA Lion General Insurance Company (hereafter the Respondent) be compelled by an order of this court to release the motor vehicle registration number **KBN 051A** to the Applicant, as per orders allegedly given of 7th June 2017, or in default, the sum of KShs.4,100,000/= deposited into Barclays Bank account No.203XXX held in the parties' advocates' joint names pursuant to the order of the lower court in **Thika CM's Civil case No. 803 of 2013** be released to the Applicant.
2. The motion is based on grounds that the Respondents have despite requests by the Applicant failed to release the vehicle to the Applicant, and that in the circumstances, the sums held in the above stated account ought to be released to the Applicant should the Respondent fail to comply with the order to release the vehicle to the Applicant. He also complains that the Respondent had unilaterally proceeded to quantify the repairs cost of his motor vehicle without involving him. However, there was no prayer to address this latter complaint.
3. The foregoing is the gist of the supporting affidavit sworn by the Applicant in support of the motion which affidavit also contains a narration of the background of the matter. The Respondent opposed the motion through the affidavit sworn by **Roselyne Kihara**, the Respondent's Legal Officer. The key thrust of the affidavit is that the matter of the release of the vehicle is already spent; that the Respondent has already indemnified the Applicant to the tune of KShs.655,400/= pursuant to the decision of the court; that the Applicant had been invited to address the quantification of the repairs to his vehicle but balked at the invitation; that the purpose for the deposit of the sum of KShs.4,100,000/= is clear and the Respondent is entitled to the said sum; and finally that this court is *functus officio* so far as the application is concerned.
4. The application was canvassed by way of written submissions. The Applicant identified three issues for determination, namely;
 - a) Whether this court is *functus officio*;
 - b) Whether **Foton East Africa** (the garage to which the subject vehicle had been towed after the accident) acted as agents of the Respondent; and
 - c) Whether the Respondent ought to produce the vehicle or in default forfeit the deposited sum of KShs.4,100,000/=.
5. The Applicant took the view that the issue of the release of the subject motor vehicle to him has not been previously adjudicated upon and he is therefore not barred from raising it. The Applicant asserts concerning the second issue that the garage, **Foton East Africa** was the agent of the Respondent and the Respondent is therefore liable for the production of the vehicle, and finally that in default, the Respondent ought to compensate the Applicant for the suit vehicle by forfeiting the deposited sum.
6. On their part, the Respondents took the position that having indemnified the Applicant, they have complied with the decree of the High Court and that the orders sought cannot be granted as this court is now *functus officio*. The application which the Respondents erroneously assert to invoke Order 45 Rule 1 Civil Procedure is in their view incompetent and does not meet the threshold for review.

7. The court has considered the material canvassed. In my considered view, the Applicant's motion stands or falls primarily on the first issue identified in the Applicant's submissions- whether this court is *functus officio*. The background to this motion is not in dispute. The suit filed by the Applicant was finally determined on appeal through the judgment of **Ngugi J** delivered on 7th June 2017, the final part which stated that:

“The conclusion, then, is that this Appeal succeeds. The judgment and orders of the trial court are hereby set aside. Instead, there will be a judgment ordering the Appellant to indemnify the Respondent for the damage to the subject Motor Vehicle only to the extent reflected in the Certificate of Examination and Test of Vehicle by the Government Motor Vehicle Inspector which is dated 20/06/2013 and which was produced as Exhibit 6 in the trial.”

8. As is clear from this order, there was no direction concerning the release of the disputed vehicle to the Applicant as asserted herein by the Applicant. While it is undisputed that the Applicant has under the terms of that judgment received a sum of KShs.655,400/= towards the repair costs of his vehicle, as quantified by the Respondents, he now complains that the motor vehicle itself has yet to be released to him.

9. There is evidence that the Applicant had been invited to participate in quantifying the repair costs to the vehicle on the basis of the report by the Government Motor Vehicle Inspector but he declined, insisting on the prior production of the said vehicle. By his letter dated 16th October 2018, some 3 months since receipt of the cheque for repairs forwarded *vide* the Respondent's letter of 2nd July 2018, the Applicant's advocate asserted that:

“(In) our previous correspondences we have severally requested to know the status and whereabouts of our client's motor vehicle KBN 051A. This matter can never be finalized until your clients release the said motor vehicle for how our client will make the necessary repairs without the vehicle?” (sic)

10. The question of the whereabouts of the vehicle has not been answered directly by the Respondents since first raised in the Applicant's letter of 3rd August 2018, and in this application. They take the position that this court is *functus officio*. The dispute herein was primarily in respect of indemnification in respect of damages to the Applicant's vehicle and not the release of the vehicle to the Applicant. It however appears implicit in the final orders of the judgment of this court that, if the Applicant's vehicle was in the possession of the Respondent's appointed garage, the said vehicle would be returned to the Applicant as he was indemnified for the damage stated in the inspection report dated 20/06/13. The Respondent having indemnified the Applicant as ordered has complied with the judgment of this Court. Ideally, all that ought to have remained was for the vehicle to be released to the Applicant if it was still in the custody of the Respondent.

11. From his letters, depositions and submissions the Applicant appears to assert that the vehicle was in the custody of the Respondent's agents and to have concluded that the vehicle could be missing. The Respondent has adopted a studious silence on that score. If indeed the assertion and conclusion by the Applicant are accurate, it seems to me that a new cause of action would have arisen between the parties and this court would effectively be *functus officio*. A cursory look at the issues identified in the Applicant's submission leaves no doubt on this fact. As I understand it, this dispute was always about the payment of indemnity for damage to the Applicant's vehicle and not about the release of the said vehicle or compensation therefor.

12. The Supreme Court of Kenya expounding on the doctrine of *functus officio* in **Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR** cited with approval 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:

“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.”

13. The court also relied on the holding in the case of **Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550** to the effect 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.”

14. The Applicant's answer to the plea of *functus officio* raised by the Respondent is that his application raises new issues which have not previously been adjudicated upon. Although this submission appears to conflate the doctrines of *res judicata* and *functus officio*, the Applicant's assertion is accurate. Because, issues relating to the release of his vehicle and/or compensation are new matters. The appeal herein having been concluded and the Applicant having been indemnified by the Respondent, it is not tenable for the Applicant to foist a claim for release of or compensation in respect of his presumably lost motor vehicle upon a spent cause. In the circumstances of this case, the court could not and would not grant an order for compensation as indirectly sought by the Applicant. If indeed the vehicle was lost or misplaced while in the custody of the Respondent, that would represent a new and separate cause of action unrelated to the judgment of this court and the Applicant would be at liberty to take his next course of action.

15. Having discharged its duty on this appeal this court is therefore *functus officio*, defined in **Black's Law Dictionary, Ninth Edition** 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.”** In the circumstances, the court is wary of the Applicant's invitation to re-engage with this dispute in a manner that necessarily involves wading into a new controversy between the

parties. The application dated 6th February 2019 is therefore dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY THIS 30TH DAY OF JULY 2020.

C. MEOLI

JUDGE