Swastic Holdings Limited v Kimani (Environment & Land Case E369 of 2021) [2023] KEELC 20115 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20115 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E369 OF 2021

JA MOGENI, J

SEPTEMBER 25, 2023

BETWEEN

SWASTIC HOLDINGS LIMITED ..... PLAINTIFF

AND

ANN NYAGUTHII KIMANI ..... DEFENDANT

RULING

1. Before this court for determination is the defendant/applicant's application dated 09/06/2023 duly filed under orders 9 rule 5 & 9 and order 12 rule 7 of the *Civil Procedure Rules*. The defendant/applicant is seeking the following orders: -

    a. Spent.

    b. That the firm of Jackson Omwenga & Co. Advocates be allowed to come on record in place of Mwaura Shairi & Co. Advocates for the defendant.

    c. That the judgment entered on 27/02/2023 against the defendant be set aside and or varied and or reviewed.

    d. That the defendant be granted leave to defend the suit by adducing evidence.

    e. That the costs of this application be provided for.

2. The motion is premised on the supporting Affidavit of Ann N. Kimani, the defendant herein and grounds (a) to (g) set out on its face.

3. The application was opposed through the replying affidavit of Sathishcandra Rameshbhai Patel, who is the plaintiff/respondent herein, sworn on 29/05/2023 and a notice of preliminary objection dated 5/07/2023 which seeks to strike out the instant application with costs on the following grounds:

1. That the defendant/applicant seeks review of the judgment and order of this court which she already appealed. The applicant opted for an Appeal at the Court of Appeal and now wishes to come back to the trial court to try her luck with Review.

2. That the defendant/applicant having exhausted the option of Appeal, and the Court of Appeal having heard the Application and issued its Ruling therein, it is not open for the Applicant to come back and seek review of the same judgment.

3. That this court is already Functus Officio having already entered a judgment on February 27, 2023.

4. That by virtue of the forgoing, the defendant is forum shopping and conducting litigation on the basis of Trial and error, and the court should guard against abuse of its processes.

5. That the application is grossly incompetent, incurably defective, frivolous, vexatious and an abuse of court process and ought to be struck out in limine.

6. That in that regard, the Court lacks jurisdiction to entertain this Application and the same ought to be struck out with costs to the Plaintiff/Respondent.

4. On 29/06/2023, directions were given on filing of written submissions to the application. The defendant/applicant filed her written submissions on 27/07/2023 while the plaintiff/respondent's submissions were filed on 8/08/2023.

Issues for determination

5. I have considered the applicants' application, both affidavits (in support and against), the preliminary objection together with the rival written submission and I find that the following arise as the issues for determination before this court:

    a. Whether the preliminary objection is merited.

    b. Whether the grounds and facts presented make the applicant's motion dated 9/06/2023 merited.

Analysis and Determination

6. The applicant is seeking review of the judgment of this court issued on 27/02/2023. Section 80 of the *Civil Procedure Act* gives power of review while order 45 of the *Civil Procedure Rules* sets out the rules. But before I deal with the merits of the application for review, I wish to deal with the preliminary issues raised. The plaintiff/respondent has based its preliminary objection mainly on the grounds that the instant application is an abuse of court process and that this court is functus officio.

7. The ingredients of preliminary objections are well settled and the court cannot reinvent the wheel. Preliminary objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd* (1969) EA 696 to mean: -

> "So far as I am aware, 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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

8. I must admit that the grounds in the notice of preliminary objection were a mouthful but the Plaintiff basically raised two points namely abuse of court process and whether the court is functus officio. The issue as to whether or not this court is functus officio is therefore properly raised as a preliminary objection.

9. The plaintiff/respondent submitted that the defendant's application seeks orders that judgment entered on 27/02/2023 be set aside, varied and/or reviewed. That before filing this application, the defendant filed a notice of appeal dated 1/03/2023 at the Court of Appeal and also filed an application for the Court of Appeal to issue an order for stay of execution of the Judgment.

10. The defendant/applicant on the other hand submitted and confirmed that she filed a notice of appeal dated 1/03/2023 and proceeded to the Court of Appeal where she filed an application for stay of execution of the judgment. The defendant submitted that the court of Appeal delivered its ruling on 26/05/2023 by declining to grant the orders sought in the application. On 7/06/2023, the defendant withdrew the notice of appeal and the defendant submitted that there is no appeal pending in the Court of Appeal since the same was withdrawn.

Functus officio

11. In the case of *Raila Odinga v IEBC & 3 others*, the Supreme Court made the following remarks regarding the doctrine of functus officio:

> " We therefore have to consider the concept of "functus officio", as understood in law. Daniel Malan Pretorius, in "The Origins of the Functus Officio Doctrine, with specific reference to its application in Administrative Law" [2005] 122 SALJ 832, has thus explicated this concept; "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 adjudicating 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 conducive. Such a decision cannot be revoked or varied by the decision maker." This principle has been aptly summarized further in Jersey Evening Post Limited v AI Tharil [2002] JLR 542 at 550;
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> "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 conducted, and the court functus, when its judgement 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 or adjudication must be taken to a higher court if that right is available."

12. The decision by the Supreme Court applies in the circumstances of this case. The doctrine of functus is not closed in an application for review of a judgment. On the issues of jurisdiction, Section 80 *Civil Procedure Act* as read with order 45 *Civil Procedure Rules* gives court jurisdiction to review a judgment or an order on the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or account or could not be produced by him at the time the decree was passed or the order made or an account of some mistake or error apparent on the face of the record or for any other reason, decision to obtain a review of the decree or order. As such, the preliminary objection does not succeed on this ground.

Abuse of court process

13. In order to justify the court in granting an application for review sought by the applicant under the provisions of order 45 rule 1(b) of the *Civil Procedure Rules*, certain requirements must be met. The said provision provides as follows:

> (1) Any person considering himself aggrieved—
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
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> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

14. The foregoing provisions are based on section 80 of the *Civil Procedure Act* which states as follows:

> " Any person who considers himself aggrieved—
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

15. It is clear from the foregoing that the review remedy is only available to a party who is not appealing. Order 45 rule 1(a) and (b) in addition to setting out the conditions that an applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party. Also, whereas under order 45 rule 1, a person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision, that provision, in my respectful view, is not a carte blanche for abuse of the process of the court. The provisions of order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of "any person considering himself aggrieved". An aggrieved party may not find the

avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the court. It would also contravene the overriding objective as provided under sections 1A and 1B of the *Civil Procedure Act* whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the court's seal of approval to persons who wish to play lottery with judicial process. Accordingly, I associate myself with the decision in The *Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi* Civil Application No. 277 of 2005 that both options cannot be pursued concurrently or one after the other.

16. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court processes. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.

17. Abuse of court process is an obstacle to the efficient administration of justice. In the instant application, I can see elements of abuse of process of court as stated in the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR.

18. In my view a proper reading of section 80 of the *Civil Procedure Act* and order 45 rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. This Court has perused the record and can confirm that the Applicant herein filed a Notice of Appeal dated 1/03/2023 in the Court of Appeal. It is not disputed that the Applicant herein went ahead and filed an application seeking a stay of execution against the whole judgment of this Court pending the determination of the intended Appeal as well as an injunction pending the determination of the intended Appeal. The Court of Appeal in Civil Application No. E002 of 2023 thereafter delivered a Ruling on 26/05/2023 and dismissed the Applicant's application dated 3/03/2023 for lack of merit and held that costs of the application shall abide the outcome of the appeal. Even though the Applicant herein filed a Notice of withdrawal of Notice of Appeal after her Application was dismissed, it is my understanding that the holding in the Appellate Court's Ruling meant that the Applicant herein indeed filed an Appeal in the Court of Appeal.

19. There is also no doubt that the notice of appeal was filed under rule 74 of the Court of Appeal rules; I take it that once such a notice has been filed the jurisdiction of the Court of Appeal over the matter in issue is thereby activated and by the same token, the jurisdiction of the High Court on the same subject is deactivated. The two courts cannot exercise their respective jurisdictions over the same matter simultaneously; one must give way to the other if not for anything else, for good order. Rule 2 of the Court of Appeal rules provides that "appeal in relation to appeals to the court, includes an intended appeal." A notice of appeal would fit the description of an intended appeal because rule 74 of the rules under which it is filed says "any person who desires to appeal to the court shall give notice in writing." The Court of Appeal has itself held in *Equity Bank Ltd versus West Link MBO Limited* (2013) eKLR that once a notice of appeal is filed an appeal is deemed to be in existence since rule 2 of the *Court of Appeal Rules* defines an appeal as including an intended appeal.

20. If this is the true position in law and, I have no reason to doubt that it is, it means that the applicant's application for review was a nonstarter from the very beginning. Even though the applicant has withdrawn the Appeal, it is evident that the applicant preferred an Appeal in the first instance. She has now filed an application in respect of the same judgment she intended to Appeal against seeking to

have it reviewed. Order 45 rule 1(1) (a) of the *Civil Procedure Rules* is clear that it is only a person who is aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred that may apply for an application for review. The applicant's application flies in the face of this rule and to that extent it is simply an abuse of the due process of the court.

21. To this extent, I find the preliminary objection has merit and I uphold the same. I am inclined to hold that the defendant/applicant's application dated 9/06/2023 is misconceived, incompetent and, in any event, deficient of any merit; I hereby dismiss it with costs to the plaintiff/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2023.

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Omwenga for the Defendant/Applicant

Mr. Manwa with Mrs Ruby for the Respondent

Ms. Caroline Sagina : Court Assistant

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MOGENI J

JUDGE