



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO. 18 OF 2017

JOHN LOPEZ LUTUKA KIBWENGE.....PLAINTIFF/APPLICANT

VERSUS

MWANANCHI CREDIT LTD.....1ST DEFENDANT/RESPONDENT

MARY RITA WANJIKU & CHARLES MUTINDA MUTUA

T/A MISTAN AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

ENKASA LIMITED.....PROPOSED 3RD DEFENDANT/RESPONDENT

THE LAND REGISTRAR, KIAMBU

LAND REGISTRY.....PROPOSED 4TH DEFENDANT/RESPONDENT

R U L I N G

1. The Original parties in this suit as per the plaint filed on 13th July 2017 were **John Lopez Lutuka Kibwenge (Plaintiff), Mwananchi Credit Ltd (1st Defendant)** and **Mary Rita Wanjiku t/a Mistan Auctioneers (2nd Defendant)**. Subsequently the suit was compromised vide a consent filed into court on 26th July, 2017 and adopted by the court on 31/7/17. The terms of the consent were inter alia that:

“This matter is settled in the following terms:

i) The Plaintiff is indebted to the 1st Defendant in the tune of Kshs.60,000,000/=.

ii) The Plaintiff shall liquate the debt owing to the 1st Defendant in monthly instalments of Kshs.10,000,000/= commencing 31st August 2017.

iii) In default execution by way of sale of the charged property KIAMBU MUNICIPALITY BLOCK 111/231 to proceed”

2. An application subsequently brought by one **Hadija Shee Abu** claiming to be the Plaintiff’s lawful wife and seeking enjoinder as an Interested Party was dismissed by **Ngugi J** in a ruling delivered on 7th June 2018. The matter however did not rest there as a further motion was filed by the Plaintiff on 8th August 2018, seeking *inter alia* to enjoin Enkanasa Ltd and the Land Registrar Kiambu as the 3rd and 4th Defendants and an interim injunction against the proposed 3rd Defendant from evicting or interfering with the Plaintiffs possession of the property described as **Kiambu/Municipality Block 111/231**. The latter is the essence of prayer 5 of the motion granted by **Onyiego J** on 15/8/18.

3. The subject of this ruling is the preliminary objection raised in respect of the motion. The preliminary objection is dated 14th August 2014 and is to the effect that this court is *functus official*.

4. The court directed that the preliminary objection be heard first as it was likely to dispose of the matter. Parties were requested to file their skeletal submissions followed by oral submissions. The 1st & the 2nd Defendants by their skeletal submissions submitted that the court is functus officio by dint of the consent letter adopted as a judgment and order of this court. The court was urged not to entertain the Plaintiff’s application as that would amount to re-opening litigation determined with the consent. They relied on the case of **John Waruinge Kamau vs Phoenix Aviation Limited (2015) eKLR** where it was held that a consent order brings litigation to an end and acquires the force and effect of a judgment. The court was said to have discharged its duty and should take no further step. To support this proposition, counsel quoted the

case of *Dhanji Jadra Ranji vs Commissioner of Prisons & Another (2014) eKLR* and the case of *Ahmednasir Abdikadir & Company Advocates vs Afrison Export Import Limited & 2 others (2017) eKLR*.

5. The proposed 3rd Defendant filed its submissions on 14th September, 2018 and submitted that the doctrine of *functus officio* bars a merit-based decisional re-engagement with the case once final judgment has been entered and a decree issued. Counsel cited several authorities to support this proposition, among them, *Ngugi v Kinyanjui (1989) KLR 146*. Counsel contended that the order of the court has not been reviewed or set aside and as such, the Plaintiff cannot file a fresh injunction application and that the court lacks jurisdiction in this matter. The case of *Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others (2012) eKLR* was cited in support of the submission.

6. In oral submissions, Mr. Kuloba submitted on behalf of the 1st and 2nd Defendants. Counsel submitted that the court is *functus officio* due to consent letter filed on 26/7/17. The suit was said to have been compromised and as such cannot be re-opened. It was contended that no application was made to set aside, review or appeal the order. Counsel submitted that the instant application is akin to seeking stay of the court orders by which execution was to follow in default by the Plaintiff. The court was urged to uphold the preliminary objection and dismiss the application.

7. Mr. Busieka submitted on behalf of the proposed 3rd Defendant. He relied on the submissions by the 1st and 2nd Defendants, his written submissions and list of authorities. He pointed out that there exists an order that compromised the suit and that the applicants have approached the court without setting aside the said order. He reiterated that the court is *functus officio* and as such barred from decisional re-engagement. It was stated that the court is being invited to re-evaluate and determine a second application for injunction when its hands are tied.

8. Miss Mwalози submitted on behalf of the proposed 4th Defendant and associated herself with submissions by the 1st, 2nd and 3rd Defendants. She submitted that the suit is already compromised and if the applicant was unhappy with the consent, they should have attempted to set the same aside. The court was said to have nothing left to determine and the application was said to be an abuse of the court process and as such should be dismissed.

9. Mr. Bosire, counsel for the Plaintiff/Applicant, admitted that indeed a consent judgment was entered into but there occurred an irregularity during execution; that the Defendants may have committed fraud which will divest the Plaintiff of his property. He contended that the execution process in respect of court's judgment has raised new issues and as such, the perpetrators of the fraud have to be enjoined. Counsel contended that even if he filed another case as contended by the Defendants, they will rely on the proceedings of the instant case. He asserted that no prejudice will be suffered by the Defendants.

10. In rebuttal, Mr. Kuloba, contended that the allegations of fraud by the Plaintiff are a new cause of action to be pleaded in a new suit. Counsel, submitted that the Plaintiff would have to first set aside the consent order, seek leave to amend the Plaint so as to plead fraud. He asserted that the 1st Defendant will suffer prejudice if the Preliminary Objection is not allowed.

11. Mr. Busieka also claimed that the proposed 3rd Defendant will suffer great prejudice if the preliminary objection is dismissed as he paid over seventy million to acquire the property. Miss Mwalози, stated that pleadings cannot be amended at this stage. She contended that the parties who allegedly committed the said fraud needed to be involved in the initial suit.

12. The court has considered the written skeletal submissions of the parties as well as the oral submissions made at the hearing of the preliminary objection. The court takes the following view of the matter. A similar preliminary objection was raised in respect of the motion filed by the proposed interested party **Hadija Shee Abu** seeking to be enjoined as an Interested Party. **Ngugi J** in the ruling adverted to earlier, observed *inter alia* that:

“The Plaintiff was party that launched this suit. He framed the suit as being against the two defendants: the first for alleged fraud and intending to improperly sell the suit property, and the second for acting on behalf of the 1st Defendant in the sale. The Plaintiff equally approached this court with a consent order which the court approved and recorded as the order of the court compromising the suit he had brought wholly. As at 31/07/2017, the suit was compromised. There was nothing more to determine in that suit,”

13. The learned judge then concluded that the application by the proposed Interested Party was of no avail and whatever claim such party had against the Plaintiff and 1st Defendant, did not belong in the present suit which had already been compromised. I associate myself fully with the sentiments of **Ngugi J**. The logic therein applies with equal force in this instance notwithstanding the fact, indeed due to the fact that the motion filed on 8/8/18 is brought by the very Plaintiff who compromised this suit.

14. Further, it does not avail to the Plaintiff in defending this view to assert that his cause it relates to events consequent to the judgment of this court in compromising the suit. If indeed the conduct of the public auction of the suit property to the proposed 3rd Defendant was irregular, and the subsequent transfer wrongful, that would constitute a new and separate cause of action and cannot be the basis for re-opening a matter already concluded.

15. It is also pertinent at this stage to note that the instant suit arose from a charge executed by the Plaintiff in favor of the 1st Defendant to secure two loans in excess of KShs.150,000,000/=. The default clause in the consent order provided for the sale of the charged property in reference to the said charge. It seemed from some of the Plaintiff's arguments that the Plaintiff conflated the said execution pursuant to default with the ordinary execution of a decree by way of warrants of attachment and sale under the Civil Procedure Rules.

16. The applicant in the case of *Dhanji Jadra Ranji v Commissioner of Prisons and Another [2014] e KLR* had sought, on the basis of certain defects in concluded proceedings, to have the court's judgment set aside. **Emukule J** (as he then was) observing that there was a

regular judgment on record proceeded to state in his usual erudite manner that:

“Having discharged its duty this court is therefore *functus officio*, defined in the **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.”

The Supreme Court expounding on the concept in Election Petitions Nos. 3, 4 & 5 RAILA ODINGA & OTHERS vs. IEBC & OTHERS [2013] ekr (of *functus officio*) 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.*”

The court also relied on the holding in the case of JERSEY EVENING POST LIMITED VS A1 THANI [2002] JLR 542 at 550 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.[emphasis supplied]*”

The doctrine is therefore that once the court has pronounced itself on the matters before it, it cannot determine the issues on their merit or alter its decision whatsoever”.

17. In his submissions, the Plaintiff has asserted that it is more convenient that the new cause be brought within the instant suit as the same depends entirely on the present suit. Precisely how that is possible at this stage without first setting aside the consent and amending the pleadings is not clear. Besides there is a new suit No. 23 of 2018 filed in this court by the unsuccessful interested party **Hadija Shee Abu** consequent to the ruling by **Ngugi J.** There is no reason why the present Plaintiff who is a Defendant therein (together with the 1st Defendant herein), cannot seek to enjoin the proposed 3rd and 4th Defendants herein as third parties in that suit.

18. For all the foregoing reasons it is my considered judgment that the Plaintiff’s application in the circumstances of this case appears misconceived and is untenable. This court therefore upholds the preliminary objection raised and will strike out the motion filed on 8th August 2018 with costs to the Respondents.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF MAY 2019

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C. MEOLI

JUDGE

In the presence of:- _____

Mr. Bosire for Plaintiff/Applicant

Mrs Wainaina holding brief for Ms. Kuloba for the 1st and 2nd Defendant

Proposed 3rd and 4th Defendants – No appearance

Court Assistants – Kevin/Nancy