Nzaku and Nzaku Advoctaes v Chimako Homes Limited (Environment and Land Miscellaneous Application 340 of 2014) [2023] KEELC 21190 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21190 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 340 OF 2014

J OMANGE, J

OCTOBER 31, 2023

BETWEEN

NZAKU AND NZAKU ADVOCTAES ..... APPLICANT

AND

CHIMAKO HOMES LIMITED ..... RESPONDENT

RULING

1. Vide Notice of Motion application dated 5th November 2021 the Applicant seeks the following orders:
    1. Spent
    2. Spent.
    3. That upon hearing this application inter partes the Honourable Court be pleased to vary, review and or set aside its ruling of 11/2/2021.
    4. That upon hearing this application inter partes the Honourable Court be pleased to grant the Applicant an opportunity to file its replying Affidavit to the Respondents Application dated 5/3/2019.
    5. That the Honourable court be pleased to make further/other order as it may deem fit in the circumstances.
    6. That the costs of this application be in the cause.
2. The application was supported by an affidavit sworn by Fredrick Kiluva who deponed that he is the director of the applicant hence competent to swear the affidavit.
3. The Applicant avers that there was a conveyancing transaction that the Respondent herein was carrying out on its behalf. There was disagreement on fees as a result of which the services of another advocate

was sourced. It thus came as a surprise when the Respondent herein filed a bill of costs regarding the conveyancing. This prompted the Applicant to appoint the firm of Mungala & Co Advocates.

4. The Applicant avers that the firm of Mungala and Co Advocates failed to respond to an application dated 5th March 2015 which application taxed the bill of costs in favour of the Respondent herein. The Applicant avers that their advocates became very evasive in the matter and failed to give any updates on the status of their case. It was for this reason, that they appointed new counsel who upon perusing the file discovered that a ruling had been rendered on 11th February 2021.The Applicants contend that it was at this stage that they learned that a bill of costs had been taxed against them.

5. It is on this basis that the Applicant is seeking to have the courts Ruling dated 11th February, 2021 set aside as he states that failure to respond to the application was not occasioned by their mistake but by their then advocate on record Mungala & Co advocates.

6. The Applicant's counsel in their submissions highlighted three issues for determination anchored on whether the failure to file a Replying Affidavit had been occasioned by factors within their control and if the same amounted to an inexcusable delay. The applicant submitted that the failure to respond was not deliberate as stated in their affidavit and that the director of the company issuing instructions to the then advocate became ill and eventually died halting any communication as between him and the advocate and hence could not receive instructions to defend the application. It was submitted based on this breakdown of communication, the then advocate failed to respond to the application.

7. Further the applicant submitted that since the mistake can be attributed to the advocate the same should not hinder them from being heard on merit in court and they placed reliance on the case of *Lee G. Muthoga -vs- Habib Zurich Finance (k) Ltd & Another* Civil Application No. Nairobi 236 of 2009 that emphasized the principle that a litigant should not suffer because of his advocates' oversight and asked the court to allow the application.

8. Mr Newton Mungala the advocate on record at the time of the ruling filed a supporting affidavit to the application reiterating the contents of the supporting affidavit of Fredrick Kiluva. He insisted that communication was hindered due to illness of the Director and eventually death of the Director hence he was unable to defend the application as he could not act on his own instructions.

9. The Respondent filed grounds of opposition dated 17th November 2021 which grounds raised were that the court is Functus Officio on the issue of the certificate of costs and consequential decree. The Respondent further dismissed claims of professional negligence raised by the Applicant stating the same had not been raised at the Advocates Complaints Commission and as such the application was a delaying tactic to prevent the decree holder from enjoying the fruits of his Judgement .

10. The Respondent in his submissions raised three issues for determination;

    i. Whether the Honourable Court is functus officio as pertaining to the application. On this issue counsel submitted that a decision had already been rendered as to who had carried out the sale transaction and the same should not be re-litigated upon.

    ii. Whether the Respondent-Judgment Debtor Application and the prayer thereto as sought are tenable? On this issue it was submitted that the Applicants had not been responding to pleadings filed by the Applicant/decree holder hence should not be given audience before the court as it was lack of interest to defend on their part.

    iii. As to who should bear the costs. Counsel submitted costs should be borne by the applicants.

11. Having considered the present application, the affidavits in support and opposition of the said application, as well as the respective submissions of the parties, the main issues for determination by this court are:

> Whether the Trial Court is functus officio in regards to dealing with this application

The doctrine of functus officio was considered by the Court of Appeal in *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR, which authority the Respondent herein has highlighted where the court held 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."

12. It is not contested that on 9th September 2016 this Court delivered a ruling in favor of the Respondent as against the Applicant as to who carried out the sale transaction hence entitled to file a bill of cost. It is important to note that the Applicant is not challenging this Ruling dated 9th September, 2016 rather the application seeks to set aside the Ruling dated 11th February, 2021 that ordered that the applicants present themselves in court for cross examination on their means as Directors of the Applicant Company.

13. The Supreme Court of Kenya in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 which reads: -

> " 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."

14. Furthermore, Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of functus officio as follows;

> " Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."
>
> It is clear that the doctrine of functus officio does not bar a court from entertaining a matter it has already decided but prevents it from revisiting the matter on merit once final Judgment has been entered and a decree issued. This is not the case in this instance as what is before the court is an application.

15. Whether this court should set aside the Ruling delivered on 11th February 2021.

The power to set aside ex parte orders is discretionary. This was stated in *Patel v E.A Cargo Handling Services Ltd* (1974) EA 75, also relied on by the applicants herein where the court held that:

> " There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just.

> The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to feter the wide discretion given it by the Rules.'

16. In considering whether the court should exercise discretion in favour of the applicant. I will consider the following factors;Reasons for not filing the Replying AffidavitConduct of the applicantPrejudice to the Respondent

17. The record shows that the Applicant was granted leave to file a Replying affidavit which was not utilized or appropriated. The Applicant through its Director places the blame for this omission at the doorstep of its advocates. The advocate on the other hand has conceded that he did not respond but alleges that this was due to the fact that he did not receive proper instructions as the director was taken ill and was always in and out of hospital and at times out of the country. This he indicated was a challenge to him as he could not proceed on his own instructions. In light of these two conflicting positions it is evident that the Applicant is not being candid. Indeed, it is unfortunate to blame the counsel who it is on record filed submissions in opposition to the application. However even if one of the Directors was ill, no reason is given why the other Director did not give the instructions.

18. On the conduct of the Applicant after the impugned ruling, it is a matter of record that the deponent has not attended court in spite of several summons to do so. Even the directions by Hon Lady Justice Komingoi on 20th September, 2022 that the Director should first attend court so that directions could be given on this current application went unheeded. It is also a matter of record that the Applicant has made no effort to sort out the issue of representation in spite of being given several opportunities to do so. And yet this matter has failed to progress due to the issue of representation. This prompted this court in its Ruling dated 2nd March, 2023 to summon the Directors to attend court to clarify on the issue. Again, the courts Directions were not followed. A party who with impunity fails to adhere to court orders and directions should not benefit from the courts discretion.

19. On the question of prejudice to the Respondent, the Respondent has a decree which has not been able to benefit from. The Respondent is entitled to the fruits of his Judgement.

20. In the end, I find that the Applicant herein is not deserving of the exercise of the courts discretion. The Applicant is the epitome of the exception envisaged in *Mbogo v Shah* [1968] EA 93 where the court of appeal held that:

> "...the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

21. As such the application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Mungala for the Applicant

No appearance for the Respondent

Steve - Court Assistant