REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MACHAKOS

HCCC NO. 336 OF 1994

JONAH KISESE NTHENGE.....PLAINTIFF/RESPONDENT

VERSUS

MICHAEL M. NTHENGE (DECEASED) Represented by**BEATRICE**

MUKULU MUTISYA.....DEFENDANT/APPLICANT

RULING

1. This Ruling is in relation to a Notice of Motion Application dated**, 17th October 2018** and filed in Court on the 24th October, 2018. It is brought under Article 48, 259(1), (3) of the Constitution, Order 9 Rule 9a, 22 Rule 22, Order 45 Rule 1, 2, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act.

2. The Application is seeking for Orders:

a. Spent.

b. That the honorable court be pleaded to grant leave to DM Mutinda and Co. Advocates to come on record for the Defendant/Applicant.

c. Spent

d. That this honorable court be pleased to set aside the judgement dated 30th July, 2018

e. That this honorable court be pleased to reopen the case and accord the defendant to ventilate the case on merit.

f. That the costs of this application be borne by the Plaintiff/Respondent.

3. The first prayer seeking for the Application to be certified as urgent and heard ex parte in the first instance, was dealt with on the 25 th day of October 2018, when the Application was ordered to be served for inter parties hearing and when it came for inter partes hearing I directed that the application be canvassed by way of written submissions. Prayer 3 was not addressed but is overtaken by events.

4. In reply to the application, the plaintiff averred vide replying affidavit filed on 28 th November, 2018 that the defendant was given an opportunity to defend himself as he was served with notices but however refused to appear in court and testify and such an applicant ought not to be pardoned.

5. Vide supplementary affidavit filed on 13th February, 2019, the applicant averred that the application is grounded on the oxygen principle and that some of the properties did not belong to the deceased and are not partnership property, and attached a copy of search in respect of vehicle KUQ 850 that was issued on 14th April, 2005.

6. Before I go to the submissions, the instant suit was commenced vide plaint dated 12th August, 1994 seeking the following reliefs:

a. **A declaration that partnership existed since 1968 between the Plaintiff and the Defendant and that the items listed in paragraph 5 of the Plaint are partnership assets.**

b. An order that the Defendant give all partnership records such as books of account, invoices, orders, sales, all bank statements, assets, vouchers and documents relating to drawings since 1968 to date.

c. That proper accounts and/or auditing of partnership business be taken and shared between the Plaintiff and Defendant at equal shares.

d. That the Plaintiff be given back his share capital and be paid his due profits.

e. That the Plaintiff's wife be paid for services rendered at a reasonable amount that the court may deem fit and just.

f. That the Defendant do remove his structures at the Plaintiff's plot No. 30 at Ngelani and deliver vacant possession.

g. That the partnership be wound up.

h. Costs and interest be awarded.

i. Any other relief that this court may deem fit and just

7. After the hearing of the suit a judgement was entered in favour of the plaintiff and the following orders were made:

a. A declaration that a partnership existed between the Plaintiff and the Defendant and the items listed vide paragraph 5 of the Plaint are partnership assets.

b. The partnership business between the Plaintiff and defendant is hereby wound up.

c. The partnership assets listed in paragraph 5 of the plaint shall be shared equally.

d. The partnership assets listed in paragraph 5 of the Plaint and in possession of the Defendant shall be held in trust for the Plaintiff pending sharing between the Plaintiff and Defendant.

e. The books of accounts relating to the partnership be made available to the Plaintiff for his perusal and further action.

f. The Plaintiff is awarded costs of the suit.

8. The applicant was effectively applying for setting aside of the judgment of the court and an order for *de novo* hearing of the suit, which would afford him an opportunity to be heard. Learned counsel for the applicant submitted that the mistake of counsel should not be visited on him. He submitted on the issue whether the court has jurisdiction to reopen the case and sought reliance in the case of **Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (Now known as King Woolen Mills Limited & 2 Others (2016) eKLR** where it was observed that the court has jurisdiction to reopen and rehear a concluded matter where the interests of justice demand. He submitted that the defendant was denied an opportunity to ventilate her case owing to circumstances beyond her control.

9. Learned counsel for the respondent submitted on the issue whether the judgement in this case should be set aside and that it is a matter of discretion and further that it was the conduct of the applicant that led her to lose the case. Counsel cited the case of **Shah v Mbogo (1967) EA 116** and submitted that the actions of the defendant in failing to appear during hearing and judgement only to resurrect months after judgement and pray for reopening of the case ought to be treated with caution and rendered inexcusable.

10. The respondent is not opposed to the firm of D. M Mutinda coming on record and therefore prayer (b) in the application is allowed.

11. Having considered the Application, the submissions by counsels and authorities cited, it is my considered opinion that the issues that arise for determination are:

j. Whether the court is functus officio.

(ii) Whether the judgement delivered on 30th July, 2018 should be set aside.

12. Stroud's Judicial Dictionary, *4th edition, Volume 2, page 131, explains the expression Functus Officio thus-*

FUNCTUS OFFICIO. *(1) An arbitrator or referee cannot be said to be functus officio when he has given a decision which is held to be no decision at all.*

(2) Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay

(3) An arbitrator or umpire who has made his award is functus officio, and could not by common law alter it in any way whatsoever; he could not even correct an obvious clerical mistake.

Similarly, **Black's Law Dictionary,** 5th Edition, at Page 606 explains the expression **Functus officio** as follows:

> **a. A task performed.**
>
> **b. Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority.**

13. The *functus officio* principle was conclusively dealt with 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** where Githinji, Karanja & Kiage JJ.A observed thus:

> **"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. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century. In the Canadian case of *Chandler vs. Alberta Association of Architects [1989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);***
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> **"The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:**
>
> **1. Where there had been a slip in drawing it up, and,**
>
> **2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp. [1934] S.C.R. 186"**

14. The Supreme Court **in Raila Odinga vs. IEBC** 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** in which the learned author stated;

> **..."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."**

15. In the current instance, having looked at the court record, it is noteworthy that this court has made a final decision on the merits of the case having observed that "**The Defendant failed to tender evidence and thus their case was closed**" and also that "**The Plaintiff was cross-examined at length by Counsel for the Defendant and he admitted that most of the properties and documents were in the names of the Defendant**." It was further noted that "**Learned counsels were directed to file written submissions. However it is only counsel for the Plaintiff who filed submissions dated 30/10/2017 and filed on 1/11/2017**". Having regard to the mode that the case was conducted and the observations of the court, this court cannot purport to alter its decision as this would be tantamount to an appeal. An appeal against an order granted by the High Court can only be heard and determined by the Court of Appeal as per **Article 164(3)(a)** of the **Constitution of Kenya**. The court is *functus officio* in this regard. While this court is vested with adjudicative powers, once a court becomes *functus officio*, the only orders it can grant are review orders which are an exception to the *functus officio* doctrine.

16. In the case of **Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited & 2 Others [2016] eKLR the** Court said in part at para. 52 of the Judgment.

> **"... this Court is clothed with residual jurisdiction to re-open and rehear a concluded matter where the interest of justice demands but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation."**

17. A look at the applicant's application and prayers thereof shows that they seek to admit evidence that had not been introduced at the trial of the suit and gave the reason that the information was not available to them. The search being relied upon was issued on 14th April, 2005 after the hearing of the first three witnesses had been completed. There was nothing preventing the applicant from timeously moving the court to admit the said evidence but instead she has sat on her laurels all these 13 years and later pops up with evidence that was available all along. In light of the dilatory conduct exhibited from the foregoing, there is no exceptional circumstance that has been demonstrated to the court to warrant a reopening of the case. The recourse the Applicant in this case would consider is to go to the Court of Appeal.

18. Can the court set aside its judgement? The principles upon which a judgement may be set aside are if it is irregular or illegal. Ojwang, J (as he then was) in **Mungai v Gachuhi & Another [2005] eKLR** stated "a court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity. As those conditions had not been satisfied when I heard the matter and that hearing led to the said ruling, it is apparent that some of the most crucial matters of fact were inadvertently or deliberately distorted, and so just outcome could not have been arrived at…"

19. In my considered view, and taking into account all the circumstances of this case, there is no illegal or irregular judgment entered by this

court, and if the plaintiff is aware of any, it ought to notify this honorable court. An irregular judgment is liable to be set aside by the court ex debito justiciae as a matter of judicial duty to remedy the situation. See **Shah v Mbogo (1967) EA 116.** In order to uphold the integrity of the judicial process the answer to issue number two must be negative.

20. The application has not pleaded for review, however the remedy is alluded to in the supplementary affidavit and the submissions of counsel for the applicant as well as Order 45 is one of the laws under which the application is brought. In playing the devil's advocate, O.45 rule 1 of the Civil Procedure Rules authorizes any person who considers himself or herself aggrieved by the decree or order of the Court, to apply for review of a judgment to the Court which passed the decree or made the order. As indicated in paragraph 17 above, no reason has been given to warrant a review order.

21. In view of the aforegoing observations and save only for prayer 2, the defendant's application dated 17th October2018 lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 26th day of September, 2019.

D. K. Kemei

Judge