REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 186 OF 2009

PURITY KEMUNTO MAKORI (Suing on own behalf and as next friend of ARTHUR

JABALI BIRUNDU .....1st PLAINTIFF

GEOFFREY SOMONI MAKORI .....2ND PLAINTIFF

VERSUS

NAIROBI WOMEN HOSPITAL .....1ST DEFENANT

DR. MUTINDA .....2ND DEFENDANT

AND

ICEA LION INSURANCE COMPANY LIMITED.....PROPOSED INTERESTED PARTY

RULING

In the main suit a judgment of which was delivered on 16th May, 2018 the plaintiffs sued the 1st and 2nd defendants for medical negligence. In the course of the trial, a consent judgment was recorded by the plaintiffs on one hand and the defendants on the other, where the 1st defendant was committed to shoulder 90% liability. Subsequently evidence was recorded on quantum leading to the judgment aforesaid.

Before judgment was delivered however the 1st defendant filed an application by way of Notice of Motion dated 12th March, 2018 seeking orders to join the Interested Party herein so that pertinent issues to do with liability be determined, and further that the said intended interested party shoulders any liability that may arise over and above the policy limit.

In the application, the grounds set out on the face thereof alluded to the judgment already on record between the plaintiffs and the 1st defendan,t and that the 1st defendant sought indemnity and or contribution from the proposed interested party, reason being that the liability already admitted on behalf of the 1st defendant by the proposed interested party was without the 1st defendant's consent and or instructions, being its insured.

The application was opposed and there is a replying affidavit sworn by the Deputy Legal Manager and filed on 9th March, 2018. The plaintiffs also filed grounds of opposition on 31st May, 2018. A supplementary affidavit was also filed on behalf of the 1st defendant by the Chief Finance Officer. The judgment of the court was delivered before this application was heard. I observe that, in the prayers sought by the 1st defendant the court was never asked to stay the delivery of the said judgment. Extensive submissions have been made on whether or not this court may revisit the proceedings that have been concluded by way of a judgment referred to above. The question is whether this court is *functus officio*. Parties have cited several authorities in the said submissions which I have read.

Black's Law Dictionary 10th Edition defines *Functus officio* as

> **"(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 judgment delivered on 16th May, 2018 this court referred to the judgment on liability which is now the subject of contest between the 1st defendant and the proposed interested party. If I were to allow the present application, I will be reopening the case so that the 1st

defendant is heard on the issues raised against the proposed interested party, and the said proposed interested party shall then be required to answer the allegations against it by the 1st defendant. The nature of the application is in the form of third party proceedings.

Where a defendant claims that a third party should be held responsible for any decree that may be issued against such a defendant, the procedure is that a third party notice is issued at the instance of the defendant. After service of such a notice the third party is required to enter appearance and file a defence within a specified period. The issues are then crystallised as between the two parties.

A plaintiff in such situations is not concerned about the dispute between the defendant and the third party because if any liability attaches upon the defendant, it is the defendant to seek indemnity from the third party.

I have asked myself whether I have jurisdiction to reopen the proceedings at this stage. In the case of **Jersey Evening Post Limited vs. CI Thani (2002) JLR542** at page550 the court said as follows,

> **"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 where 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 rulings on adjudication must be taken to a higher court if that right is available."**

In the case of **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR** the Court of Appeal stated as follows,

> **"It is apparent from the record that in ordering that certain materials be placed before him by way of affidavit long after judgment had been entered; the learned judge had the noblest and best of intentions in trying to give effect to the judgment of Mwera J. In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him. He had himself earlier acknowledged that his hands were tied and also noted that he could not amend the judgment as had been sought. The court's only recourse would have been to review the judgment and having refused to do so, it was rendered *functus officio*.**
>
> ***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 ago 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);**
>
> **"The general rule that a final decision of a court cannot be re-opened 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"***

The above authorities point to the fact that a party may return or be allowed to join proceedings already determined provided that that opportunity is not to question the merit based decision of the court that has pronounced final judgment. I believe that is one of the reasons that a court is allowed under Order 45 of the Civil Procedure Rules to revisit its decision by way of review or under section 99 of the Civil Procedure Act to address any clerical or arithmetical mistakes arising from any accidental slip or omission.

The 1st defendant may have a valid grievance against the proposed interested party. I believe however, that can be ventilated on a different forum but not in this particular case where judgement has been delivered, a decree issued and sealed. It is in that other forum that issues may be framed, evidence called and matter determined by the court that shall be seized of the same.

In view of the foregoing, I am not persuaded to open the doors in this case to have the proposed interested party join the proceedings which have been concluded. The end result is therefore that the application by the 1st defendant is dismissed. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE