



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 63 OF 2005

PETER KIPKEMOI CHERUIYOT.....1ST PLAINTIFF

CHARLES ARAP MAIYWA.....2ND PLAINTIFF

CHERUIYOT ARAP CEHEPKWONY.....3RD PLAINTIFF

ESTHER CHELANGAT.....4TH PLAINTIFF

JONATHAN MIBEL.....5TH PLAINTIFF

CHEPCHILAT ARAP MAINA.....6TH PLAINTIFF

PHILIP RUGUT.....7TH PLAINTIFF

(Suing in a representative capacity)

VERSUS

JAMES FINLAY (K) LTD.....1ST DEFENDANT

COUNTY COUNCIL OF KIPSIGIS.....2ND DEFENDANT

RULING

Introduction

1. This is the 1st Plaintiff's third attempt to revive the suit herein which was dismissed on 30th July, 2014. Soon after delivery of the Ruling dated 28th September 2017, the applicant filed yet another application dated 23rd November, 2017 in which he seeks to "appeal" against the said Ruling and seeks the following prayers:

- i. James Finlay is the only defendant.
- ii. That the costs of this application be borne by the defendant.

2. The said application is based on the following grounds:

1. "That the defunct County Council of Kipsigis ceased being defendant in 2013.
2. That the Attorney General ceased being a defendant in 2013 and was confirmed in court on 12th July 2017.
3. That the application dated 20th November 2007 was improperly before court in July 2014 and the 1st defendant had no part in it.
4. That the proceedings in paragraph 3 in July 2014 was gross abuse of the court process and a conspiracy orchestrated by the 1st defendant (the only defendant) to cause a miscarriage of justice.
5. The deleting of the ruling on application dated 2.10.2007 delivered in court by lady Justice L.N Waithaka on 11.2.2014 and substitution by a crafted ruling attributed to Justice Sergon on the same dated 11.02.2014 is an abomination of a criminal nature.
6. That the 1st defendant did not appeal against the ruling of Justice L.N Waithaka but resorted to conspiracy options by using the 2nd defendant to canvass dismissal of suit, clandestinely on their behalf.
7. That reported loss of file on or about 30th July 2014 one day before the appointed date 31.7.2017 of ruling of application dated 20.11.2007 was deliberate to plan to keep plaintiffs in the dark about what the ruling was all about.
8. The subsequent proceedings were conducted protectively in the absence of the plaintiffs for purposes of miscarriage of justice."

3. The application is supported by a brief affidavit in which the applicant emphasizes that his case is yet to be heard and accuses the defendant (without specifying which one) of being a "game player" determined to ensure that miscarriage of justice is effected in their favour.

4. The application is opposed by the 1st and 2nd Defendants through their Grounds of Opposition dated 26th February, 2018 and 27th February, 2018 respectively. On its part the 1st Defendant states that the application is an abuse of the process of the court as the plaintiff's suit stood dismissed on 30th August, 2014 as per the Ruling of Justice Waithaka delivered on 30th July, 2014 and the court is therefore *functus officio*. The 1st Defendant further states that the plaintiffs never appealed against the ruling delivered on 30th July, 2014. He states that the 1st Plaintiff filed an ambiguous application dated 28th March, 2017 aimed at reviving the suit and the said application was dismissed. They urge that the application is frivolous and is aimed at vexing the defendant

5. In its Grounds of opposition, the second defendant states that the application is frivolous, scandalous, vexatious and an abuse of the process of the court. They state that after the delivering the ruling on 30th July, 2014 dismissing the plaintiffs' suit the court became *functus officio*. Furthermore, the ruling delivered by the court on 28th September, 2017 renders the current application *res judicata*. They argue that the application is limbless, incompetent and fatally defective.

6. In his submissions the 1st Plaintiff seems to be hell bent on reopening the case so that he can ventilate his case against the 1st defendant. He has refused to appreciate that the Ruling of 30th July, 2014 sealed the plaintiffs' fate and he is under the erroneous impression that the 1st defendant has somehow blocked the hearing of the plaintiffs' case.

7. In his submissions counsel for the 1st defendant have stated the court is *functus officio* as the applicant has neither appealed nor applied to review the decree issued pursuant to the ruling of 30th July, 2014. Similarly, the applicant has not appealed against the Ruling dated 28th September, 2017 which re-

affirmed the orders of 30th July, 2014.

8. Counsel for the 2nd defendant concurs with the 1st defendant that the court is *functus officio*. He further submits that the instant application is *res judicata* as it is similar to the one filed on 28th March, 2017. For that reason, he submits that the application has no limbs, is incompetent and fatally defective. He urges the court to invoke its powers to declare the applicant a vexatious litigant as he has filed numerous applications seeking the same orders.

9. Even though it is not clear from his application, the applicant's sole intention is to re-open the case for hearing. Despite this court's Ruling dated 28th September which clearly stated that the court could not re-open the matter, the applicant has stubbornly refused to appreciate that he has reached a dead end. The plaintiff's suit stands dismissed pursuant to the court's ruling dated 30th July, 2014 and no matter how many applications and complaints the applicant makes, this court is not in a position to re-open the matter as the court is *functus officio*.

10. In the case of **Raila Odinga & 2 Others V Independent Electoral and Boundaries Commission & 3 Others (2013) eKLR** the Supreme Court laid out the meaning of the term *functus officio* by citing an excerpt from an article by Daniel Malan Pretorius entitled "**The Origins of the Functus Officio Doctrine with special reference Administrative Law 2005 122SALJ 832**" in which the learned author stated as follows:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to the doctrine, a person who is vested with adjudicative or decision making powers may as a general rule only exercise those powers once in relation to the same matter. The principle is that once such a discussion- has been given (subject to any right of appeal to a superior body or functionary) it is final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued"

A court is functus officio 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 courts functus officio 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 and any challenge to its ruling or adjudication must be taken to a higher court if that right is available".

11. The court has been overly indulgent of the 1st plaintiff and has on several occasions given him gratuitous advice to appeal against the decisions of this court if he is aggrieved by them. However, the 1st plaintiff has chosen to engage the court through ambiguous applications punctuated by toxic letter making wild and damaging allegations against judicial staff, counsel for the defendants and the defendants herein. Since the case was dismissed in 2014, the 1st plaintiff has filed 4 applications and written 9 letters alleging corruption and tampering with the court proceedings by judicial staff and the 1st defendants as well as counsel for both parties.

12. Even though he is within his rights to seek justice, it is wrong for the 1st plaintiff to continue to abuse the court process in the manner he has been doing and this court must put a stop to it. This court's time and resources must be utilized to deal with deserving cases, not cases where litigants are out to settle scores by tarnishing people's names and undermining the dignity of the court.

13. Conduct such as the one exhibited by the 1st plaintiff is not new to the courts. In the case of **Republic**

V Kenya Revenue Authority Ex Parte Paul Makokha Okoiti (2017) eKLR the Court dealt with a similar litigant and cited the Court of Appeal in **J. M Mwakio V Kenya Commercial Bank Limited Civil Appeal No. 156 of 1997**. The Court of Appeal stated as follows:

“The appellant must be told in no uncertain terms that no matter how many applications and suits he may institute in the courts seeking to recover the suit property, such attempts by him would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts. This appeal is indeed vexatious and amounts to an abuse of the process of the court and it is dismissed with costs.”

14. The above words of the Court of Appeal apply to this application which is frivolous, vexatious, and a gross violation of the process of the court.

15. I must add that if the applicant files any more applications in this court he runs the risk of being declared a vexatious litigant.

16. Accordingly, I find no merit in the application and I dismiss it with costs.

Dated, signed and delivered at Kericho this 16th day of March, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Siele Sigira for the 2nd Defendant
2. Mr. Mwitia for Mr. Njeru for the 1st Defendant
3. Court Assistant - Rotich