



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION P & A NO. 158 OF 2017

IN THE MATTER OF THE ESTATE OF KINUTHIA MAHUTI (DECEASED)

STEPHEN KIMANI KIBE.....APPLICANT

VERSUS

KIMANI KINUTHIA.....1ST RESPONDENT

KARENDI GACHINI.....2ND RESPONDENT

WAMBUI KINUTHIA.....3RD RESPONDENT

RULING

1. The Applicant herein filed an application dated 15th November, 2017 seeking to recall the High Court Succession Cause No. 2926 of 1999 which was transferred to Githunguri Resident Magistrate's Court for hearing and determination at the High Court in Nairobi.
2. The Applicant swore an affidavit in support of the application in which he stated that he was one of the Petitioners to whom a grant was first issued alongside Daniel Ndungu Munene at the Resident Magistrate's Court at Githunguri in Probate and Administration Cause No. 15 of 1999. The grant was issued on 22nd April, 1999 and confirmed on 9th December, 1999. The Respondents herein sought a revocation of the grant in the High Court under Probate and Administration Cause No. 2926 of 1999. The court revoked the previous grant and issued a new one to Kimani Kinuthia, Karendi Gachini and Wambui Kinuthia, the Respondents herein, on 17th September, 2002.
3. The Applicant filed an affidavit dated 18th January, 2005 in protest to the confirmation of the grant issued to the Respondents herein. In it, he contended that the deceased who was a brother to his late father, held the land parcel known as Githunguri/Githunguri/129 on his behalf and on behalf of Hannah Wangui Munene, Chege Munene, Kahuha Munene, Kibe Munene and Daniel Ndungu Munene. That the land parcel should therefore be shared amongst the six of them, and the Respondents herein should claim their own father's share.
4. When the application for confirmation was set down for hearing, Counsel for the Applicants, who are the Respondents herein, sought to have the matter transferred to Githunguri Court on the basis that the court had the jurisdiction to hear the matter. The Applicant herein is now seeking to have the matter recalled stating that the Githunguri court is not equipped with jurisdiction to deal with matter of trusts.
5. By consent of the parties, the court directed that the application dated 15th November, 2017 be disposed of by way of written submissions.
6. I have considered the pleadings and submissions filed in this matter. I find that the sole issue for determination is whether the Githunguri court is equipped with jurisdiction to hear this matter and if not, whether this court can recall the Githunguri file to the High Court for its disposal.

Determination

7. The file the subject of this suit was transferred to Githunguri law courts by an order of Musyoka, J issued on 30th January, 2017. The High Court is empowered under **section 18(1)(a)** of the **Civil Procedure Act, Cap 21**, to transfer a case pending before it to a subordinate court for disposal. **Section 18(1)(a)** provides thus:

“On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage-

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal too nay court subordinate to it and competent to try or dispose of the same;”

It is in the spirit of this provision that Musyoka, J. ordered the transfer of the suit to the Githunguri court. The learned judge observed that the value of the estate, which is comprised of the land parcel known as Githunguri/Githunguri/129, did not exceed Kshs. 20,000,000/- and therefore fell within the jurisdiction of the magistrate’s court.

8. M/s Kiania Njau, learned counsel for the Applicant submitted that in transferring the file to Githunguri, the High Court conferred jurisdiction retrospectively to a court which lacked jurisdiction *ab initio*. Counsel urged that while the law allows a High Court to transfer a matter to a subordinate court for its disposal, such subordinate court must be equipped with jurisdiction.

9. M/s Kiania Njau urged the court to recall the file to the High Court while maintaining that the subordinate court lacks jurisdiction to deal with the matter.

10. In opposition to the application, Mr. Kinuthia, learned counsel for the Respondents, submitted that the succession cause was referred to the Principal Magistrate’s Court at Githunguri on the basis that the lower court has jurisdiction to hear succession matters where the value of the estate is below Kshs. 20,000,000/-.

11. It is trite that where a suit is filed in a court which lacks jurisdiction to hear and determine it, that suit will be a nullity, as was held by Nyarangi JA, in the celebrated case of **Motor Vessel ‘Lilian S’ vs. Caltex Oil (K) Ltd [1989] KLR** that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction.”

12. The jurisdiction of magistrates’ courts is provided under **section 7 of the Magistrates’ Court Act 26 of 2015**. A court presided over by a Chief Magistrate is equipped with jurisdiction to determine civil matters where the value of the subject matter does not exceed twenty million shillings. This was the reasoning employed by Musyoka, J. in transferring the matter to the subordinate court. The Githunguri court is also equipped with territorial jurisdiction subject to the prescribed pecuniary limitations, since the property is situate in Githunguri.

13. The Applicant herein further contested the subordinate court’s jurisdiction stating that the court had deliberated on the matter and is therefore *functus officio*. M/s Kiania Njau submitted for the Applicant that the Githunguri court had entered judgment in the matter and making a different judgment would amount to revisiting its judgment as an appellate court.

14. Mr. Kinuthia, learned counsel for the Respondents, asserted that the Applicant was merely seeking to delay the hearing and determination of the matter. Counsel observed that the matter is 20 years old, and should therefore be determined quickly because justice delayed is justice denied. That if the Applicant was dissatisfied with the order of Musyoka J, he should have appealed against it to the Court of Appeal. He urged the court to dismiss the application and order the court at Githunguri to hear the matter without any further delay.

15. The *functus officio* principle was conclusively dealt with by the Court of Appeal in **Telkom Kenya Limited vs. 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);*

“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*”

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.”

16. In the current instance, the High Court presided by Musyoka, J previously deliberated on this matter and as such this court cannot purport to alter the learned judge's 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 by dint of **Article 164(3)(a) of the Constitution of Kenya**. As such, the court is *functus officio* in this regard.

17. 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. This was aptly summarized in the case of **Jersey Evening Post Ltd vs. Al Thani [2002] JLR 542 at 550** which was cited and applied by the Supreme Court in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** 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 or adjudication must be taken to a higher court if that right is available.”

In light of the above therefore, the only recourse available to the Applicant in this case would be to seek a review of the order of Musyoka, J. or to appeal against the said order in the Court of Appeal. In any event, the Githunguri court is properly equipped with jurisdiction to adjudicate on this matter by virtue of **section 7 of the Magistrates' Court Act**.

18. The other bone of contention between the parties herein is whether this is a succession matter or one based on trusts. M/s Kiania Njau for the Applicant submitted that the instant case deals with trusts which do not fall within the ambit of the Githunguri court. Mr. Kinuthia for the Respondents maintained that this is a succession matter and not a case based on trust. As such it can be heard and determined by the Githunguri court.

19. It would appear that the trust referred to herein if it does exist, would be implied since there is no evidence of the existence of a Trust Deed. If it were a trust properly established, then the matter would properly lie with the civil division of the High Court or with the Environment and Land Court. What is required herein however is tracing of the beneficiaries' shares and this is properly within the purview of the subordinate court. An express trust is defined as a trust created with the settlor's express intent usually declared in writing, as opposed to a resulting or constructive trust.

20. In the case of **Charles K. Kandie vs. Mary Kimoi Sang, Civil Appeal 141 of 2012**, the Court of Appeal (Waki, Nambuye & Kiage, JJ.A) while deliberating on the need to prove the existence of a trust observed thus:

“The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust, save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.

See Gichuki vs. Gichuki (1982) KLR 285 and Mbothu & 8 Others vs. Waitimu & 11 Others (1986) KLR 171”

21. The Appellate court further cited and applied the case of **Twalib Hatayan & Anor vs. Said Sagggar Ahmed Al-Heidy & Others [2015] eKLR** where it was stated thus:

“According to the Black's Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (See Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para1453).”

22. As stated earlier in the instant case, the only recourse available to the Applicant would be to seek review orders or to appeal against the orders of Musyoka, J. which transferred the matter to the Githunguri court. Following the grant of the orders, it is for the Githunguri court to hear and determine the matter subject to the conditions prescribed by the learned judge in granting the orders. This is provided under **section 18(2) of the Civil Procedure Act**.

In the premise therefore, I find that the application dated 15th November, 2017 is devoid of merit and consequently dismiss it with costs to the Respondents. The matter shall be heard and determined by the Githunguri court on priority basis.

It is so ordered.

SIGNED DATED and DELIVERED in open court this 24th day of July 2018.

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L. A. ACHODE

JUDGE

In the presence of.....Advocate for the Applicant

In the presence of.....Advocate for the Respondents