REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CONSTITUTIONAL PETITION NO. 3 OF 2017

IN THE MATTER OF ARTICLES 1,2,3,10,21,28,39,40,47,49,174 & SCHEDULE 4 OF THE CONSTITUTION

AND

IN THE MATTER OF VIOLATION OF ARTICLES 1,2,3,10,21,28,39,40,47,49,174 & 174 OF THE CONSTITUTION

BETWEEN

JAMES GITHUKU GICHUKI...1ST PETITIONER/APPLICANT

REUBEN MUTUKU MBALUKA......................................2ND PETITIONER/APPLICANT

-VERSUS-

MAKUENI COUNTY SAND CONSERVATION &

UTILISATION AUTHORITY..RESPONDENT

RULING

INTRODUCTION

1. The Application for determination is dated 31/07/2017. It is brought under sections 1A, 1B, 3A & 80 of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law). It seeks the following orders;

a) That this honourable Court be pleased to review it's judgment issued on the 11th day of May 2017.

b) That costs of this application be provided for.

2. The Application is premised on the grounds on the face thereof and a Supporting Affidavit of the 2nd Applicant.

3. The gist of the application is that deferring determination of the legal status of the 2nd Applicant's motor vehicle registration No. KBX 382V *(the lorry)*, as envisaged by paragraph 39 of the judgment, is prejudicial to him as no criminal proceedings have ever been instituted. He contends that the effect of the aforesaid deferment is to deny him redress for violation of his rights under Article 40 of the Constitution.

4. The application is opposed through the replying affidavit of Counsel A.K Kiluva sworn on 17/05/2018. He avers *inter alia* that this Court has no jurisdiction to hear and/or entertain the application in the nature and manner it has been filed for being *functus officio*.

5. Directions were taken on 30/05/2018 that the application be canvassed by way of written submissions. The parties complied and filed their respective submissions.

6. Having looked at the application, the replying affidavit, the rival submissions and the authorities cited, it is my considered view that the following issues arise for determination.

a) Whether the Court is functus officio.

b) Whether the application meets the threshold for review.

FUNCTUS OFFICIO

7. The Respondent submits that this Court heard the matter on merit and delivered judgment and therefore has no jurisdiction to hear and/or entertain the application. That if the Court entertains it, then it would be sitting on appeal against it's own judgment. It relies on **Nakuru HCCC No. 275 of 1998; Dhanji Jadra Ramji –Vs –Commissioner of Prisons & Anor** where Justice Emukule expressed himself as follows;

> ***"Having discharged its duty this court is therefore functus officio, defined in the Black's Law Dictionary, Ninth Edition as "[having performed his or her office]" (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."***
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> ***The Supreme Court expounding on the concept in Election Petitions Nos. 3, 4 & 5 RAILA ODINGA & OTHERS vs. IEBC & OTHERS [2013] eklr (of functus officio) cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:***
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> ***"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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."***
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> ***The court also relied on the holding in the case of JERSEY EVENING POST LIMITED VS A1 THANI [2002] JLR 542 at 550 that:***
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> ***"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 on adjudication must be taken to a higher court if that right is available. [emphasis supplied]"***
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> ***The doctrine is therefore that once the court has pronounced itself on the matters before it, it cannot determine the issues on their merit or alter its decision whatsoever. However its decision must be perfected and final so that it's permitted to correct clerical mistakes or errors in the expression of its intention in the judgment. This is further provided for under Section 99 of the Civil Procedure Act, which allows the court to make amendments or rectifications to its judgment or ruling.***
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> ***"Clerical or arithmetical mistakes in judgment, decrees or orders, or errors arising therein from accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of the parties."***
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> ***The Applicant has not alleged any clerical or arithmetic mistake, or any error in the judgment arising from accidental slip or omission. His grievance stems from the record of the testimony of the parties by the trial court. He alleges that as a result, the court placed a burden on the Plaintiff that was not his to discharge and its mind was influenced into dismissing the Plaintiff's claim.***

8. It is therefore clear that for the *functus officio* doctrine to be invoked, the relevant decision must have been final in the real sense of the word.

9. In our case, a plain reading of paragraph 39 of the judgment reveals that determination of the legal status of the lorry was deferred to await the outcome of criminal cases. The argument of pending criminal cases was advanced by the Respondent and although no evidence was tabled to support the same, the Court was kind enough to give it the benefit of doubt.

10. The issue of compensation for violation of the right to hold property was never determined and that's why paragraph 39 of the judgment is worded as such. It is therefore my considered view that since determination of some of the 2nd Applicant's rights was dependent on the outcome of some event, the orders of this Court cannot be said to be final. The upshot is that this Court is not *functus officio*.

THRESHOLD FOR REVIEW

11. The basis for review is order 45 Rule (1) of the Civil Procedure Rules which provides as follows;

> ***(1)Any person considering himself aggrieved-***
>
> ***(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred ;or***
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> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge and could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.***

12. As rightly submitted by the Respondent, the important considerations that can be discerned from the above provision are;

> **a) That there has been a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made; or,**
>
> **b) That there was some mistake or error apparent on the face of the record; or**
>
> **c) For any other sufficient reason.**

13. The Respondent submits that the application does not fulfill any of the three requirements and goes to great detail to demonstrate that there is no error apparent on the face of the record. To buttress this point, the Respondent relies on *inter alia* **Nairobi Court of Appeal Civil Appeal No. 211 of 1996; National Bank of Kenya Ltd –Vs- Ndung'u Njau** where it was held that;

> ***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established."***

14. As much as I appreciate the Respondent's industry in submitting on the issue of 'error apparent on the face of the record', it seems to forget that that is not the only consideration when dealing with applications for review.

15. In our case, it is not in dispute that determination of the legal status of the lorry was deferred to await the outcome of criminal cases. No evidence has been tabled by the Respondent to show that criminal charges were ever instituted against the Applicants. It has been more than one year since the judgment was delivered and although there is no limitation in institution of criminal charges, the Respondent should have at least shown some effort in initiating the process.

16. In the absence of the said criminal charges, the only logical thing to do is to determine the legal status of the lorry otherwise, fanning the uncertainty will continue to block the 2nd Applicant's redress for violation of his Constitutional rights. It is my considered view that the foregoing constitutes sufficient reason to warrant review of the judgment.

THE REVIEW

17. In the absence of proof of any criminal charges pending against the Applicants, the inevitable conclusion is that detention of the lorry was illegal and a violation of the right to own and hold property as provided for by Article 40 of the Constitution. I am in agreement with the holding in **Petition No. 16 of 2015; Marius Wahome Gitonga –Vs- Kenya National Highways Authority (2015) eKLR** where it was held that a truck is a private property secured by Article 40 of the Constitution.

18. The issue of whether the 2nd Applicant should be compensated for illegal detention of the lorry is still pending. He had prayed for exemplary damages. The object of such damages is to punish and deter. **In Rooks –vs- Barnard (1964) AC 1129**, Lord Devlin set out the categories of cases in which exemplary damages may be awarded i.e.;

> ***a) In cases of oppressive, arbitrary or unconstitutional action by the servants of Government.***
>
> ***b) Cases in which the defendants conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff.***
>
> ***c) Where exemplary damages are expressly authorized by statute.***

19. Lord Devlin also gave expression to three considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed i.e;

> ***a) The plaintiff himself must be the victim of the punishable behavior.***
>
> ***b) The power to award exemplary damages must be used with restraint for it constitutes a weapon and can be used either in defence of liberty or against liberty.***
>
> ***c) The means of the defendant, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages.***

20. In our case, there is no doubt that the actions of the Respondent were oppressive, arbitrary and unconstitutional. There is also no doubt that the perpetrator, the Respondent, is a servant of the County Government of Makueni. It is important for the Respondent to understand that this Country operates within the rule of law and any violations of the supreme law of the land will rarely go unpunished. As such, this is a fit case for award of exemplary damages.

21. In the case of **Great Lakes Transport Co. (U) Ltd –Vs- Kenya Revenue Authority [2009] eKLR** the Court of Appeal held that equity would not allow a wrong to be suffered without a remedy and went ahead to assess damages for illegal seizure and detention of a motor vehicle. The Court of Appeal stated as follows:

"In our view from the fact that general damages was pleaded in the body of the Plaint and evidence led to show that the appellant was actively using the subject vehicle it followed that it would suffer loss even if special damages were not properly proved.

Considering all the above and mindful of the legal position that the superior court ought to have considered that it was sitting both as a Court of law and a court of equity, and noting that equity would allow a wrong to be suffered without a remedy, we hold that the appellant was entitled to an award of general damages."

22. The Court of Appeal then went on to assess damages at Kshs.500,000/= which was for a period of six months. The Court of Appeal assessed the damages after considering that the Appellant had done nothing to mitigate the loss.

23. In the instant case, the lorry was detained for approximately two months but considering that the cited authority was decided about nine years ago, it is my considered view that Kshs 250,000/= will be adequate compensation.

CONCLUSION

24. The application has merit and thus allowed in the following terms;

- The judgement of 11/5/2017 is reviewed to the extent that the Applicant is awarded Kshs. 250,000/= as exemplary damages plus costs and interest of this application.

SIGNED, DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE