



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

CIVIL DIVISION

CIVIL SUIT NO. 226 OF 2004

STANLEY OSONGO EKAYA.....PLAINTIFF

AND

BRITISH AMERICAN TOBACCO KENYA LIMITED.....DEFENDANT

RULING

1. Two applications are before the court. The Plaintiff's Notice of Motion dated 14th July, 2016 essentially seeking to transfer the file to the Environment and Land Court, and the Defendant's Preliminary Objection thereto. To save on time, the Court heard both the Preliminary objection and the motion consecutively, and notified that parties that depending on the outcome of the preliminary objection it may issue one or two rulings, as the case may be..

2. The notice of motion dated 14th July, 2016, against which the Defendant has filed a preliminary objection seeks the following orders:

"1. ...Spent...

2. THAT this case be and is hereby transferred to the Employment and Labour Relations Court at Nairobi forthwith.

3. THAT there be such other or further orders as the court deems fair and expedient to grant in the circumstances.

4. THAT there exist a fully (sic) Employment and Labour Relations Court of Kenya at Nairobi.

5. THAT it is only just and fair that this case be transferred to the aforesaid court for any further action the parties may want to take.

6. THAT a notice of appeal as lodged in court on 10th October 2012 in the thereabout.[sic]

7. THAT to date there is in place an order of stay made on 9th December 2013 dated 16th December 2013."

3. The Applicants Motion filed on 14th July, 2016, is opposed by the Respondent through a Replying Affidavit deposed by **Pina Ercolano** dated 7th September, 2016.

4. The Defendant's Preliminary Objection, dated 7th September, 2017, is to the effect that this honourable Court is *functus officio* for the following reasons:

“ 1. The Plaintiff's Application pertains to the transfer of Civil suit No. 226 of 2004 from this Honourable Court to the Employment and Labour Relations Court. However, this matter was filed before the High Court in 2004 and judgment of the same was delivered on 28th September, 2012 in favour of the Plaintiff.

2. The matter is currently before the Court of Appeal, the notice of appeal was filed on 10th October, 2012.”

5. Arguing the preliminary objection at the hearing, Ms. Woodward, for the Defendant contended that the suit was heard and concluded, and judgment in favour of the Plaintiff was in fact rendered on 28th September, 2012. Consequently, this Honourable Court is *functus officio*. Counsel relied on the case of **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] e KLR.**

6. Counsel for the defence also argued that the Defendant had filed a Notice of Appeal and is currently awaiting certified copies of the proceedings so as to proceed with the appeal.

7. Mr. Agina, in response and opposition to the Preliminary Objection, submitted that the application sought to transfer the court file to the Employment and Labour Relations Court (ELRC). It was Counsel's submission that the matter was filed in 2004. He conceded that it was concluded before the establishment of the ELRC, but that judgment had, however, been pending in that taxation was outstanding. The intent of the Motion is for purposes of completion of taxation of the bill of costs and for drawing of the decree, so that a party appealing will have something to appeal against.

8. In response, Ms. Woodward submitted that the bill of costs was filed and brought to the attention of the Taxing Officer. Further, that the Defendant was granted injunctive orders on 16 December, 2013 pending the determination of the appeal. This, it was submitted was raised before the taxing officer who found that the bill cannot be taxed. It was also urged that the amount awarded in the judgment is currently in a joint interest earning account.

9. Responding to a question from the court, Mr Agina conceded that there is nothing technically that the Employment and Labour Relations Court will do at this stage of proceedings that this court cannot do.

10. When the Court hears a preliminary objection consecutively with the motion objected to, it must be careful not to inter-mingle the arguments and the basis upon which each rests. Whilst a motion may be grounded on evidence, a preliminary objection is a demurrer, a point of law, as enunciated by Law, JA in the famous **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, at 700** and grounded upon:

“...a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point may dispose of the suit”

11. Here, the preliminary objection challenges this Court's jurisdiction to entertain the application for transfer of the suit as judgment had been rendered as far back as 28th September, 2012 and a notice of appeal had subsequently been filed.

12. As I understand it, the preliminary objection seizes upon the information pleaded under urgency in the motion application, namely at paragraph 6 of the notice and paragraphs 1 and 2 of the grounds of the motion. The paragraphs of these pleadings state as follows:

Ground 1: ***“THAT the case was file[d] on 24th February 2006, that is over 12 years ago.”***

Ground 2: *“THAT the case was determined on 28th September 2012 that is 4 years ago.”*

Prayer 6: *THAT a notice of appeal was lodged in court on 10th October 2012....”*

13. On the basis of the above pleadings in the motion, I am of the view that the preliminary objection was well taken and satisfies the test in **Mukisa**.

14. On the principle on *functus officio* the Court of Appeal aptly observed 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] e KLR that:

“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”

15. In the **Telkom** case above the Court of Appeal also cited with approval the decision of the Supreme Court in the case of **Raila Odinga & 2 Others v. Independent Electoral & Boundaries Commission & 3 others** [2013] e KLR where it observed thus:

[18] We, therefore, have to consider the concept of *“functus officio,”* as understood in law. Daniel Malan Pretorius, in *“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.”

[19] This principle has been aptly summarized further in *Jersey Evening Post Ltd vs. Ai Thani* [2002] JLR 542 at 550:

“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.”

16. It is pleaded in the Plaintiff's motion and it is not in dispute that the judgment in this matter was rendered on 28th September, 2012. It is further not in dispute that there is a stay order pending appeal issued on 16th December, 2013, in respect of the said judgment.

17. The reasons contained in the arguments on the motion, which is not under discussion here, are irrelevant, because a judgment already exists and the suit is admitted to have been determined. This court cannot therefore have any further role subsequent to the judgment except in respect of review, which is not the case here, or in respect of execution proceedings.

18. In the circumstances, I am satisfied that the Preliminary Objection must succeed, and the motion fails. It is so ordered. Costs will be for the Defendant.

19. Orders accordingly.

Dated and Delivered at Nairobi this 13th Day of April , 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1.for the Plaintiff

2.for the Defendant

Court Clerk.....