

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 163 OF 2000

WANJALA MUTONGAPLAINTIFF

VERSUS

WILLIAM BARASA WANJALADEFENDANT

RULING

[1] The applicant brings this Notice of Motion under Section 80 of the Civil Procedure Act and Order 44(1)(9) of the Civil Procedure Rules 2010. He prays that the order issued on 1/7/2015 be reviewed, varied and or set aside and costs of the suit.

[2] The application is grounded on the allegation that the file was missing on 19/2/2014, 24/2/2015 and 25/11/2015. That the file was later fixed for dismissal on 1/7/2015 and that on 1/7/2015 the case could not be called out as the judge was not in and was to come on 2/7/2015 and that without notifying the parties the case was heard at 3 p.m. on 1/7/2015.

[3] All these allegations have been denied by the Deputy Registrar of the Court in his letter to court of 4th November 2015 following an order of the court of 3/11/2015, that he explains whether the file was missing on all those dates and if the judge was not in.

[4] This suit was dismissed by the court under Order 17(2) of the Civil Procedure Rules. Under that Order, it is the court that summons the parties to show cause why their suit should not be dismissed for want of prosecution for pending for over one year without any action being taken. If no cause is shown the suit is dismissed. In this case a Notice went out to the applicant asking him to come and show cause on 1/7/2015. The applicant did not come to show cause why his case could not be dismissed. It was therefore dismissed. At that stage the court's order was perfected. Under order 17(2) there is no provision for varying or setting aside the order. The court becomes *functus officio* once the suit is dismissed. The only option open to the party is to appeal against the dismissal.

In *petition No. 5 of 2013, Raila Odinga Vs Independent Electoral and Boundaries Commission and others* the Supreme Court quoting " *The origin of functus officio doctrine with specific reference to its application in Administrative Law*" (2005) 122 SALJ 832, has thus explicated this concept:

" 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."

They also said "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 judgement 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 change to its ruling on adjudication must be taken to a higher court if that right is available" [emphasis supplied]

[5] Although this application is unopposed it must fail. It must fail firstly, for the reasons given by this court's deputy registrar aforesaid. Secondly, for the reason that the Section quoted for review to wit Section 44 does not deal with review but pauper appeals. Thirdly, and finally, for the reason that this court became functus official when the suit was dismissed on 1st July 2015.

The application is therefore dismissed with no order as to costs.

Dated and Delivered at Bungoma this 31st day of May 2016

S.MUKUNYA - JUDGE

Read in open court in presence of:

Nyongesa court assistant

Nanzushi for the defendant/respondent

Bwonchiri for plaintiff/Applicant

Mr. Sichangi h/b