



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE NO. 275 OF 1998**

**DHANJI JADRA RAMJI.....PLAINTIFF**

**VERSUS**

**COMMISSIONER OF PRISONS.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated and filed on 11<sup>th</sup> July 2012, the Plaintiff (Applicant) sought the following prayers, **THAT** -

- (a) *the application herein be certified as urgent;*
- (b) *this Honourable court be pleased to set aside its judgment delivered on 13<sup>th</sup> October 2011;*
- c. *this Honourable court be pleased to rectify the error in its proceedings;*
- (d) *arising from the foregoing this Honourable court be pleased to direct that the judgment hereinbe written by the judge before whom the case was heard or otherwise as the court may find fit and appropriate to direct.;*
- (e) *that the costs of this application be provided for.*

**The Applicant's Case**

2. The application was premised on the grounds on the face thereof and on the further grounds in the Supporting Affidavit sworn by the Plaintiff on 11<sup>th</sup> July 2012. The Applicant's case was that this court relied upon incorrect and erroneous proceedings in dismissing the Applicant's suit by its judgment delivered on 13<sup>th</sup> October 2011. The Applicant contended that the court proceedings on which this court relied in making its judgment, contained errors which affected the analysis of evidence, the issue of burden of proof and eventually the outcome of the findings of the court. The Applicant alleged that the record of the testimony of the parties by the trial court between pages 84-89 had been wrongly paginated and arranged, so that-

- (a) the contents of page 89 ought to be the contents at page 84;
- (b) the contents of page 88 ought to be the contents at page 85;

- (c) the contents of page 87 ought to be the contents at page 86;
- (d) the contents of page 86 ought to be the contents at page 87;
- (e) the contents of page 84 ought to be the contents at page 88; and
- (f) the contents of page 83 ought to be the contents at page 89.

3. As a result, the Applicant contended, the accuracy of the court proceedings and the final judgment of the court were affected. To prove this contention, the Applicant referred to page 5 of the judgment, where the court had erroneously cited the testimony of the Defendant's witness as that of the Plaintiff holding-

***“The Plaintiff also testified that although he is not a licensed surveyor, he is a skilled Cartographer and has knowledge of map reading.....”***

4. In addition, relying on the trial proceedings, the court also placed a burden on the Plaintiff that was not his to discharge when it found at page 5 of its judgment that-

***“The witness referred to a map which he had (but did not produce in evidence) which showed the Prisons Department's Land as being L.R. No. 452/1/4 and denied that the suit land (Block 21/514) belonged to the Defendant.”***

5. In light of the above errors, the Applicant urged this court to rectify the errors in the court proceedings and then in the interest of justice, set aside its judgment of 13<sup>th</sup> October 2011 and write a fresh judgment or otherwise give directions that the judgment be made by the court that took down the proceedings.

6. In the submissions filed on behalf of the Applicant on 20<sup>th</sup> January 2014, it was submitted that the court could cure the errors apparent on the face of the record under Sections 99 and 100 of the Civil Procedure Act, and further invoke its inherent jurisdiction to cure any injustice that has been occasioned from relying on the defective proceedings.

#### **The Respondents' case**

6. The application was opposed by the Respondents who filed Grounds of Opposition on 18<sup>th</sup> October 2012. It was contended by the Senior Litigation Counsel of the Second Respondent acting for the first Respondent as well, that the application had been brought in bad faith and is an abuse of the court process. According to him, the allegation of pages missing from the court record is not an error apparent on the court record.

7. In the submissions filed on 29<sup>th</sup> April 2014, the Respondent contended that there is no slip or omission that has been pointed out in the judgment to warrant any amendment under Section 100 of the Civil Procedure Act. The allegation of an error on the face of the record can only be by way of an application for review under Order 45 of the Civil Procedure Rules which has not been sought by the Applicant. The issues raised in the application can only be determined in an appeal and the application should therefore be dismissed with costs.

#### **Issues for determination**

8. There are two main issues that arise from the application and the submissions of the parties; whether there is a defect or error in the court proceedings which can be amended by this court and whether the court can set aside its judgment on account of these errors.

9. The Applicant alleged that the court recording of its proceedings was wrongly paginated and as a result there was confusion of the testimony of the Plaintiff and the Defendant's witnesses testimony and did not ultimately reflect their true evidence. He therefore asked this court, in exercise of its general

powers to amend proceedings under Section 100 of the Civil Procedure Act, to allow the rectification of the court record. The said Section provides-

***“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”***

10. I have carefully perused the original handwritten proceedings of the trial court, and do note that in fact there is an error on pagination of the proceedings of the court as alleged by the Plaintiff. Page 89, should be page 84, 88- 85, 87-86, 86-87, 84-88 and 85-88. As a result of this error, DW1's testimony that ***“he is not a licensed surveyor, he is a skilled Cartographer and has knowledge of map reading”*** was wrongly deemed to be that of the Plaintiff.

11. In addition, the evidence cited at paragraphs 3 and 4 of page 5 of the judgment was actually the testimony of the DW1 who was cross-examined by Counsel but not re-examined. The court therefore misdirected itself at page 6 of the judgment when it found that DW1 had not given any vital testimony that the suit land belonged to the first Defendant. It is clear that in fact there was misapprehension of the evidence resulting from the defect in the court record.

12. The question then is whether the said defect compromised the court's determination of the issues in dispute in this matter. The dispute herein concerned the ownership of the 5 acres parcel of land known as Title Number Nakuru Municipality Block 21/514 to which the Plaintiff and Defendant laid claim. To the court, the answer to this question, which was discerned from the averments of the parties in the pleadings, ultimately depended on **whether this land had been Gazetted as Prisons Land and a restricted area.**

13. I considered the Plaintiff's allegation, that he was the owner of the suit parcel of land after the same was allocated to him and a certificate of lease issued on 20th December 1995. His evidence in totality is that he had acquired this land lawfully without any notice of the Defendant's claim which was also not reflected as an encumbrance in the Lease Certificate issued to him. He denied being a trespasser on the suit land.

14. To this allegation, the Defendant through DW1, maintained that the land had been given to the Kenyan Prison by the British Imperial East Africa Company sometimes in 1878. This land, situate from the Railway Line through Menengai Crater to the Forest Area was subsequently Gazetted as Prison Land in 1955.

15. The court found that the suit land was part of the Prisons Land (L.R. No. 452/1/4) which had been reserved vide Gazette Notice No. 371 of 1961. The Plaintiff who alleged that he had acquired this land lawfully, failed to demonstrate that the same had been degazetted and could therefore be properly alienated.

16. From the above, it is my finding that although there was an error in the pagination of the proceedings which led to a confusion of the parties' testimony it did not affect the ultimate analysis of the evidence by the court or its apportionment of the burden of proof. The finding of the court was based on the entire oral testimony and documentary evidence on record and ultimately answered the question in issue. No prejudice was suffered by any party as a result of this defect in the record.

17. Despite the above finding there remains the question as to whether the said defect may be corrected by the court at this juncture. Section 100 of the Civil Procedure Act vests in this court general powers to amend court proceedings before it. It states -

***“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”***

18. Section 100 is very clear that the purpose of amendment is to **determine the real question or issue**

**raised by or depending on the proceeding.** Flowing from this provision, the phrase “at any time” must be construed to mean from the time when the suit is filed thereby invoking the court's jurisdiction, to when it makes its final pronouncement on the dispute between the parties.

19. Although I appreciate that Counsel for the Applicant only realised the defect in the record when he applied for the typed proceedings for purposes of lodging an appeal, it is my view that the court could not allow such an amendment at this juncture when there is a regular judgment on record delivered after *inter-partes* hearing of the suit.

20. 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.*”

21. 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:

**“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.”**

22. The court also relied on the holding in the case of **JERSEY EVENING POST LIMITED VS A1 THANI** [2002] JLR 542 at 550 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 on adjudication must be taken to a higher court if that right is available. [emphasis supplied]”**

23. 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 is 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.

**“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.”**

24. 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 his mind was influenced into dismissing the Plaintiff's claim.

25. This defect, cannot be said to amount to a error apparent on the face of the record, which can be cured by this court in exercise of its power to review or vary judgments under Order 45 Rule 1 of the Civil Procedure Rules. It is a substantial question that would require a re-examination of the evidence by the court. The errors alleged, if corrected, would affect the substance of the judgment and would amount

in essence to setting aside the judgment of the court.

26. The court has no powers to do so, nor can it set aside its judgment on the basis of the misapprehension of the evidence as doing so would amount to sitting on appeal against its own decision. Any further issues arising from the court's analysis of the evidence and its findings must be determined by the Court of Appeal.

27. For the above reasons, the application dated 11<sup>th</sup> July 2012 is dismissed with costs.

**Dated, signed and delivered at Nakuru this 27<sup>th</sup> day of June, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**