



**Eldoret Express Company Limited v Muiruri (Environment & Land
Case 171 of 2013) [2022] KEELC 4926 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 4926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 171 OF 2013**

**JO OLOLA, J
JUNE 30, 2022**

BETWEEN

ELDORET EXPRESS COMPANY LIMITED APPLICANT

AND

DAVID KAMANDE MUIRURI RESPONDENT

RULING

1. On February 5, 2018, when this matter came up for hearing, counsel holding brief for M/S Amani for the plaintiff/applicant informed the court that M/S was unable to secure the attendance of her witnesses in court. For that reason, she sought for adjournment.
2. The application for adjournment was opposed by counsel for the defendant/respondent on the ground that the date was taken earlier enough and a hearing notice served on counsel for the plaintiff/applicant; that the plaintiff had sufficient time to contact her witnesses and that the court had not been told why the plaintiff/applicants was unable to secure the attendance of her witnesses. Counsel for respondent complained that counsel for the applicant did not have the courtesy to inform him that he would be seeking adjournment before coming to court.
3. Upon considering the submissions by both counsels, this court rejected the application for adjournment and ordered that the matter proceeds for hearing at 11.30 am.
4. When the matter was called for hearing, counsel holding brief for the plaintiff's counsel, M/S Muthoni, renewed the application for adjournment on the grounds that the plaintiff's counsel had sent a letter to the respondent's counsel a day before; that the remaining witnesses were crucial to the plaintiff's case and that shutting them out will be prejudicial to the plaintiff's case. Further that her instructions were limited to seeking for adjournment of hearing of the case to another date.
5. In a rejoinder, counsel for the defendant submitted that the court had pronounced itself on the issue of adjournment. Concerning the letter served on his office, he informed the court that he had been shown



- a copy of the letter but stated that it was served late and that counsel for the plaintiff did not bother to call him. He informed the court that the defendant was in court-ready to proceed with the case.
6. Concerning the renewed prayer for adjournment the court stated that it had pronounced itself on the prayer and added that no persuasive reason had been given by counsel for the plaintiff to make it change its mind. Consequently, the court ordered that hearing proceeds. Because counsel holding brief was not ready to proceed with the plaintiff's case, the court deemed the plaintiff's case closed and proceeded to hear the defence case.
 7. After the defendant gave his evidence in chief, counsel holding brief for the plaintiff, applied for adjourning on the ground that she was not the counsel on record for the plaintiff and for that reason she was unable to cross examine the defendant.
 8. The application was opposed by the advocate on the ground that no good reason had been given why counsel holding brief could not cross examine the witness. The court agreed with the submission's by the defendant's counsel, closed the case and ordered the parties to file submissions.
 9. Dissatisfied by the decision to reject the plaintiff's application for adjournment and the order directing the parties to proceed with the hearing of the case as scheduled, the plaintiff filed the notice of motion dated February 28, 2022 and filed on March 1, 2022 seeking: -
 - (i) Certification of the application as urgent and deserving to be heard *ex parte* in the first instance;
 - (ii) Stay of proceedings pending the hearing and determination of the application;
 - (iii) An order setting aside the proceedings of February 5th, 2019 to allow the plaintiff call its remaining witnesses and to cross examine the defendant's witnesses.
 - (iv) The costs of the application be borne by the respondent.
 10. The application is premised on the grounds that when the case came up for hearing on February 5, 2022 the plaintiff's advocate applied for adjournment but the application was rejected; that a day before the date slated for hearing of the case, the plaintiff's counsel unsuccessfully tried to reach the defendant's counsel to inform him about the intended application for adjournment; that after the plaintiff's counsel was unable to reach the defendant's counsel on phone, she wrote and served a letter at the defendant's counsel's office informing him of her predicaments and of the sensitive nature of the case. Accusing the defendant's counsel of misleading the court that they were never served or contacted by the plaintiff's counsel, the plaintiff contends that unless the orders sought are granted, they will suffer great injustice.
 11. The application is supported by the affidavit of Joseph Nganga Thungu, a director of the plaintiff company in which the deponent has reiterated the grounds on the face of the application. Besides reiterating the grounds on the face of the application, the deponent has deposed that they had three more witnesses to call before closing their case; that they have always been ready to proceed with their case; that the application for adjournment made on February 5, 2018 was the first one and that closing of their case without giving them a chance to produce evidence of the three witnesses is prejudicial to their case and that because counsel holding brief for the plaintiff had limited instructions, they did not get an opportunity to cross examine the defendant. He explained that the case involves fraudulent sale and transfer of 100 acres of the plaintiff's land, and that for the court to determine the matter on its merits, all the facts must be presented to the court by all the witnesses lined up by the plaintiff.
 12. The application is opposed through the replying affidavit of the defendant sworn March 20, 2019 where the defendant has deposed that the plaintiff had a legal duty to take all reasonable steps to ensure that its suit was heard and determined at the earliest available opportunity; that whilst he is



the registered proprietor of the suit property, the plaintiff obtained temporary orders restraining him from developing the suit property; that the orders have subsisted for a long period of time and that the delay in hearing and determination of the suit is prejudicial to him. Further, that the plaintiff has delayed the hearing and determination of the suit by filing and prosecuting frivolous applications. The defendant has further deposed that following various mentions for directions in the absence of the plaintiff's counsel, the matter was on October 15th, 2018 fixed for hearing on February 5th, 2019. He termed the plaintiff's failure to attend court for hearing of its case an indication that it had lost interest in the suit. The defendant further deposed that there was unexplained inordinate delay in bringing the application; that the applicant has not explained why its witnesses did not attend court and that insufficient representation is not a ground for setting aside proceedings. It is contended that if the plaintiff was dissatisfied, it ought to have appealed.

13. Through a further affidavit filed on April 2, 2019, the plaintiff states that it has never demonstrated lack of interest in its case; that it never delayed the hearing of its case as alleged and that the application for adjournment hereto was the first one in the matter. Further that they were informed of the hearing date but were unable to avail witnesses because one was taken ill while the others were held up in government offices; that the application was filed timeously and that the advocate who held their brief could not properly represent them because her instructions were limited to seeking adjournment.
14. The application was disposed of by way of written submissions. The following are found to be the issues for the court's determination: -
 - (i) Whether this court has jurisdiction to hear and determine the application?
 - (ii) Subject to the outcome of (i) above, whether the plaintiff has made up a case for being granted the orders sought?
 - (iii) What orders should the court make?
15. On whether this court has jurisdiction to hear and determine the application, on behalf of the defendant, it is stated that the gravamen of the application is that the plaintiff is aggrieved by the decision of the court to decline its application for adjournment and submitted that the court having pronounced itself on that application, the plaintiff cannot seek to revisit that issue by way of the present application. The court is said to be lacking jurisdiction to revisit the issue and reverse its decision. It is further submitted that if the plaintiff was aggrieved by the decision of the court, its recourse was to appeal and not to apply for setting aside of the impugned orders. This court is said to have become *functus officio* upon delivering its ruling on the application for adjournment. The applicant is also said to have invoked a none existent jurisdiction of the court to wit order 34 rule 3 of the [Civil Procedure Rules](#). The following cases are cited in support of the respondent's submissions:-[ICEA Lion General Insurance Co Ltd v Julius Nyaga Chomba](#) (2020) eKLR and [Brian Muchiri Waibenya v Jubilee Hauliers Ltd & another; Geminia Insurance Co Ltd \(Interested Party\)](#) (2018) eKLR
16. In [ICEA Lion General Insurance Co Ltd v Julius Nyaga Chomba](#) (2020) eKLR it was stated:-

“A court is *functus officio* 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. The 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.”



17. Similarly, in *Brian Muchiri Waibenya v Jubilee Hauliers Ltd & another; Geminia Insurance Co Ltd (Interested Party)* (2018) eKLR it was held:-

“Once a court has determined a case to finality and has performed all its duties, it cannot review or alter its judgment and any challenge thereto must be taken up by the higher court, the Court of Appeal, in this matter. I do not think that this court’s inherent jurisdiction under section 1A, 1B and 3A of the *Civil Procedure Act* can save the situation as presented by the applicant”

18. In the circumstances of this case, it is reiterated that this court has no jurisdiction to reconsider the prayer for adjournment made by the plaintiff on February 5, 2019 because the court heard it on its merits and made a reasoned decision on the same. It is reiterated that the plaintiff ought to have appealed.

19. I have carefully considered the case urged by the plaintiff in support of its application. I have also considered the plaintiff’s submissions which clearly show that the plaintiff was aggrieved by the manner in which this court exercised the discretion vested in it to grant or refuse to grant an application for adjournment. In his application and submission, the plaintiff faults the defendant’s counsel for having misled the court by alleging that he was not contacted by the plaintiff’s counsel and informed of the plaintiff’s predicament. The plaintiff also challenges the manner in which this court exercised its jurisdiction and accuses it of having failed to consider the fact that it had never sought for adjournment before.

20. Based on the decisions in the cases of *George W Omondi v Guilders International Bank Ltd* (2014) eKLR and *Peter M Kariuki v Attorney General* (2014) eKLR, the plaintiff has submitted that this court exercised its discretion unreasonably since the plaintiff’s reasons for adjournment were sufficient and proper to grant the adjournment.

21. It is clear from the plaintiff’s submissions that the plaintiff is challenging the merits of the decision of this court of refusing to grant its application for adjournment.

22. Given that the plaintiff is challenging the manner in which this court exercised the discretionary power vested in it of allowing or disallowing applications for adjournment and further given that the plaintiff is claiming that this court erred by failing to find that the reasons given for seeking the adjourn were proper and sufficient for allowing the application for adjournment, a question of law arises to wit, whether this court has jurisdiction to revisit its decision, made on merit, with a view of reversing it.

23. In answering that question, I adopted the decisions cited by the defendant’s counsel as they satisfactorily deal with that issue. These are *ICEA Lion General Insurance Co Ltd v Julius Nyaga Chomba* (*supra*) and *Brian Muchiri Waibenya v Jubilee Hauliers Ltd & another* (*supra*).

24. Having determined that this court lacks jurisdiction to hear and determine the issues raised in the plaintiff’s application and cognizant of the fact that jurisdiction is everything and that without it a court cannot make a further step, I down my tools.

25. The upshot of the foregoing determination is that the plaintiff’s application has no merits. Consequently, I dismiss it with costs to the respondent.

DATED AND SIGNED AT ITEN THIS 2ND DAY OF JUNE, 2022.

L N WAITHAKA

JUDGE



READ, SIGNED AND DELIVERED AT NYERI THIS 30TH DAY OF JUNE, 2022.

J O OLOLA

JUDGE

