**Koloki v Anne Mumbi Hinga (Environment & Land Case 468 of 2017) [2022] KEELC 3720 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3720 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 468 OF 2017**

**JO MBOYA, J**

**JUNE 30, 2022**

**BETWEEN**

**CHARLES PAUL KOLOKI ..... APPLICANT**

**AND**

**ANNE MUMBI HINGA ..... RESPONDENT**

**RULING**

1. Vide the Notice of Motion application dated May 5, 2022, the Plaintiff/Applicant approached the court seeking the following Reliefs/ Orders:

    a. .....Spent.

    b. That this Honourable Court be pleased to set aside the order dated March 9, 2022 and re-instate the Plaintiff's suit for hearing and determination on merits within 45 days.

    c. That the Plaintiff be granted leave to file Response to the Defendant's Amended Statement of Defense within 14 days.

    d. That the Costs of this Application be in the cause.

2. The subject Application is premised on the Grounds contained in the body thereof and same is supported by an affidavit by one, namely, Charles Kaloki, sworn on the May 5, 2022.

3. Though the Application was served upon the Defendant, same did not file any Grounds of opposition. Consequently, it is apparent that the subject application was (sic) factually not opposed.

**Depositions By The Parties:**

Plaintiff's/applicant's Case:

4. Vide Supporting Affidavit sworn on the May 5, 2022, the Plaintiff/Applicant herein, (hereinafter referred to as the deponent), has averred that same appointed and/or instructed the firm of M/s Mathenge Wambugu Advocates to take up the conduct of the subject matter on his behalf on or about the year 2017.

5. Further, the deponent has averred that pursuant to the instructions, counsel indeed took up the matter and indeed proceeded to and caused the matter to be set down for hearing on the March 9, 2022.

6. Nevertheless, the deponent has averred that despite the fact that the suit herein was fixed and/or set down for hearing, counsel on record failed and/or neglected to inform the deponent of the said date.

7. On the other hand, the deponent has further averred that during the course of the proceedings of the March 9, 2022, counsel believed that the deponent was still in Tanzania, yet the deponent had travelled back to Kenya and was thus available within the jurisdiction of the court.

8. The deponent has further averred that on the scheduled date for hearing, his counsel on record misrepresented to the Court the true state of affairs, by contending and/or alleging that same was away in Tanzania, which position was factually erroneous and incorrect.

9. Be that as it may, the deponent has averred that though counsel misrepresented facts to the court, in terms of what has been pointed out in the preceding paragraph, the mis-representation alluded to was an error and/or unintentional mistake, which is excusable and hence the court should exercise its discretion and set aside the said order.

10. Further, the deponent has averred that same has been advised by his counsel on record that though the suit was Dismissed for want of prosecution, the court still has a discretion to set aside and/or review the orders in question.

11. In the premises, the deponent has implored the court to exercise its discretion, set aside the orders rendered on the March 9, 2022 and thereafter re-instate the Suit for hearing and determination on merits.

**Response By The Defendant/respondent:**

12. As pointed out elsewhere herein before, the Defendant neither filed any Replying Affidavit nor Grounds of opposition to the subject application.

13. However, it will become clearer elsewhere in respect of the subject ruling that even where an Application is not factually opposed, the adverse party has a right to canvas and/or raise issues of law and not otherwise.

14. Nevertheless, during the hearing, the Defendant who was duly represented by counsel, who made submissions, albeit on issues of law.

**Submissions By The Parties:**

15. The subject application came up for hearing on the June 9, 2022 and same was canvased *vide* oral submissions, whereupon the Plaintiff's counsel raised various albeit pertinent issues for consideration by the court.

16. First and foremost, the Plaintiff's counsel submitted that the dismissal of the suit vide orders rendered on the March 9, 2022, arose as a result of mistake by counsel for the Plaintiff/Applicant and therefore such mistake ought not to be visited upon the Plaintiff himself.

17. Secondly, the counsel for the Plaintiff further submitted that the Plaintiff herein was never informed and/or advised of the scheduled hearing date and in this regard, the Plaintiff was therefore not knowledgeable of or privy to the hearing date in respect of the subject matter.

18. Thirdly, counsel submitted that though the suit herein was dismissed on the basis of want of prosecution vide Order 17 rule of the *Civil Procedure Rules*, 2010, the court still has jurisdiction to entertain the subject application and to set aside the dismissal orders.

19. According to counsel for the Plaintiff, a dismissal pursuant to Order 17 Rule 4 is amenable to variation and/or setting aside. Consequently, the Counsel for the Plaintiff invited the Court to exercise Discretion in the matter.

20. Finally, counsel for the Plaintiff submitted that the court should be disposed to render substantive justice and same can only be achieved by reinstating and/or restoring the subject suit for hearing and determination on merits, as opposed to dismissal on technicality.

21. On her part, counsel for the Defendant submitted that an order of dismissal made pursuant to the provisions of Order 17 Rule 4 of the *Civil Procedure rules*, 2010, constitutes a final Judgment on merits and hence same can only be appealed against and not otherwise.

22. Further, counsel for the Defendant submitted that to the extent that the suit was dismissed in the presence of the advocate for the respective parties, the resultant decision and/or Judgment was an inter-parties Judgment and thus incapable of being set aside in the manner sought and/or advanced by the Plaintiff/Applicant.

23. The Defendant has also submitted that having dismissed the subject suit for want of prosecution, albeit in the presence of counsel for the Plaintiff, the court is *Functus Officio* and cannot revert back and attend to the subject matter. In this regard, counsel for the Defendant submitted that the subject application constitutes an invite for the court to sit on an appeal over and in respect of own Judgment.

24. In support of the foregoing submissions, counsel for the Defendant relied in the decision in the case of *Njue Ngai versus Ephantus Njiru Ngaei & Another* (2016)eKLR, where the Court of Appeal considered the import and tenor of a Dismissal of a suit for want of prosecution and authenticated that such a dismissal denotes Judgment for the Defendant.

25. Based on the foregoing, the Defendant herein therefore sought to have the subject Application dismissed with costs for being an abuse of the Due process of the Court and devoid of merits.

**Issues For Determination:**

26. Having reviewed the Application herein, together with the Supporting Affidavit thereto and having similarly considered the submissions by and/or on behalf of the Parties, I am of the considered view that the following issues are pertinent and do arise for consideration;

    I. Whether this court is seized and/or possessed of the requisite Jurisdiction to entertain the subject Application.

    II. Whether this court is *Functus Officio* in respect of the subject matter.

**Analysis And Determination**

Whether this Court is seized and/or possessed of the requisite Jurisdiction to entertain the subject Application.

27. It is common ground that the matter was fixed and set down for hearing on the March 9, 2022, and on which date the advocates for the respective Parties attended court for purposes of progressing the hearing of the subject matter.

28. Be that as it may, when the matter was called out for hearing counsel for the Plaintiff made an application for adjournment and informed the court that the Plaintiff herein had chosen to and indeed travelled to Tanzania and hence same was outside the jurisdiction of the court.

29. Nevertheless, the counsel for the Plaintiff was unable to confirm and/or verify when the Plaintiff indeed travelled outside the country to Tanzania and whether same travelled after the hearing date had been set down or fixed.

30. On the other hand, despite the contention that the Plaintiff had travelled to and was in Tanzania as at the March 9, 2022, the counsel had no evidence and or proof to vindicate same.

31. Having entertained the application for adjournment and upon listening to the submissions by the Defendant, the court rendered a ruling whereby the application for adjournment was declined and/or refused.

32. Following the rendition of the ruling and the refusal to grant the adjournment, the court invited the Plaintiff to proceed with the scheduled hearing in line with the provisions of Order 18 of the *Civil procedure Rules*, 2010, but counsel intimated to the court that same had no evidence to tender for and/or behalf of the Plaintiff.

33. Pursuant to the foregoing and given that the Defendant was not admitting any portion of the Plaintiff's claim, the court was obliged to and indeed proceeded and rendered a determination over and in respect of the suit.

34. For coherence, the court proceeded to and dismissed the Plaintiff's suit vide the provisions of Order 17 Rue 4 of the *Civil Procedure rules* 2010, which provisions allow the Court to determine the matter forthwith or otherwise, make such orders as the Court may deem appropriate.

35. At this juncture, it may be important to reproduce the provisions of Order 17 Rule 4 of the *Civil Procedure rules*, 2010, so as to appreciate the import and tenor thereof.

36. For convenience, the said provisions are reproduced as hereunder;

    [Order 17, rule 4.]

    Court may proceed notwithstanding either party fails to produce evidence.

    "Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."

37. The import and tenor of the forgoing provisions, is that the Party in question shall have been afforded and/or granted an opportunity to tender evidence and/or procure the attendance of its witnesses or to perform such other acts, for purposes of progressing the hearing, but same has failed to do so.

38. Suffice it to point out, that unlike the provisions of Order 17 Rule 3 of the *Civil Procedure Rules*, which are invoked in the events of non-appearance and/or attendance on behalf of a Party, Order 17 rule 4 of the *Civil procedure rules* speaks to where the concerned Parties are present and in attendance, save that same is not able or in a position to tender evidence and/or procure the attendants of his/her witness.

39. To my mind, the provisions of Order 17 rule 4 of the *Civil Procedure Rules*, 2010, culminates into the rendition of an Inter-parties decision and/or judgment, which becomes a Judgment and determination on merits for and in favor of the successful Party, in this case the Defendant.

40. To the extent that such a determination is inter-parties and on merits, such a decision, does not lend itself to setting aside and/or variation in line with Order 12 Rule 7 of the *Civil Procedure Rules* 2010, which to my mind, only applies where a Judgment has been entered in default of appearance by either Party or a Dismissal has been procured on same basis.

41. It is appropriate to add, that the provisions of Order 12 Rule 7 of the *Civil procedure Rules* 2010, would only apply to and take care of a dismissal rendered in line with Order 17 Rule 3 of the *Civil Procedure Rules* 2010.

42. To vindicate the foregoing observation, it is imperative to take cognizance of the decision of the Court of Appeal *vide* the case of *Njue Ngai v Ephantus Njiru Ngai & Another* (2016) eKLR, where the Honourable Court of Appeal observed as hereunder;

> " Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of *Peter Ngome vs Plantex Company Limited* [1983] eKLR stating:-
>
> Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff". It uses the word "dismissed". The *Civil Procedure Act* does not define the word "judgment". According to *Jowitt's Dictionary of English Law* 2nd ed p 1025:
>
> Judgement is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."
>
> Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order," "Judgment – in England, the word judgment is generally used in the same sense as decree in this code".
>
> In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order 1XB or under any other provision of law. A dismissal of a suit, under Rule 4(1) is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order 1XB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order 1XB.
>
> This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8." [Emphasis added]

43. As pertains to the foregoing decision, it is apparent to note that the Court of Appeal was considering a scenario where Judgment has arisen or accrued on the basis of non-attendance and indeed the court pointed out that such kind of a Judgment or dismissal lends it self to review and/or setting aside vide an application by the Defaulting Party.

44. However, the situation in respect of the subject matter is different and is worthy to point out that the impugned decision was made in the presence and with the participation of the recognized agents of both Parties.

45. In my humble view, the decision of the court culminating into the decision of the Court on the March 9, 2022, was a Final and determinative order made on merits. Consequently, the dismissal denotes a Judgment to and in favor of the Defendant, which can only be appealed against.

46. Suffice it to note that this Court had an opportunity to render itself on the import and tenor of the provisions of Order 17 rule 4 in a different suit and/or matter, namely;

> *Homboyz Entertainment Limited v Secretary National Building Inspectorat & 2 others* [2022] eKLR, where the court stated as hereunder;

'My reading of the foregoing provision of the law [Order 17 Rule 4 of the *Civil Procedure rules*, 2010], suggest and/or connotes that where a Party has been afforded and/or availed sufficient and/or reasonable opportunity to tender evidence, but same has failed to do so, the court is at liberty to determine the suit forthwith. It is apparent, that by the usage of the Word; by determining the suit, the court is granted the liberty to either enter judgment, where there is a limb of the claim that is admitted by the adverse party or better still dismiss the suit as against the Defendant. Nevertheless, it is imperative to note that even where the suit is dismissed for want of prosecution, such a dismissal constitutes or amounts to a Judgment in favour of the Defendant.

Whereas, a dismissal which is done in the absence of the Parties or one of the Parties, is amenable to be set aside pursuant to an application under Order 12 Rule 7 of the *Civil Procedure Rules* 2010, a Dismissal for want of prosecution, made and/or undertaken in the presence of the Parties leads to an Inter-Partes judgment, in the nature of a Dismissal and same does not lend itself to setting aside. In the circumstances, it is my humble position that having entertained arguments from both the Plaintiffs and the Defendants, on the December 16, 2021, the resultant decision is one that can only be Appealed against and not otherwise.

47. To my mind, I have not been treated to a different persuasion and/or case law to warrant repentance from the considered position espoused in and underscored *vide* the preceding decision.

48. Based on the foregoing, I find and hold that the decision meted out on the March 9, 2022, was a Final Judgment for the Defendant and hence this court is not seized and/ or possessed of jurisdiction to have a second bite in respect of the suit herein.

**Issue Number 2**

49. Whether this court is *Functus Officio* in respect of the subject matter.

50. . Having listened to submissions by the respective advocates on the March 9, 2022 and thereafter having rendered a determinative decision in the matter, it is evident that this court has appropriated and exhausted its jurisdiction.

51. In view of the foregoing, the court cannot be called upon to revert back and deal with the matter a second time. In this regard, it is apparent that the court is *Functus Officio*.

    i. To underscore the import of the Doctrine of *Functus Officio*, it is worthy to take cognizance of the holding of the Court of Appeal in the case of *Telkom Kenya Limited versus John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, where the Court while explaining 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."

52. My understanding of the foregoing excerpt, is that where a court has rendered a final Judgment and in this case a dismissal in favor of the Defendant, the court becomes *functus officio* and hence same cannot be invited to revert to the matter and make further orders, whose import would be tantamount to sitting on appeal, in respect of own Decision.

53. In a nutshell, I therefore found and hold that this court is similarly barred by the doctrine of *Functus Officio* from entertaining and/or adjudicating upon the subject application.

**Final Disposition:**

54. Having reviewed the issues for determination and having analyzed same, I come to the consideration that the subject application is not only misconceived, but same amounts to and constitutes an abuse of the Due process of Court.

55. Consequently and in the premises, the subject Application is Devoid and bereft of merits and same be and is hereby Dismissed with costs to the Defendant.

56. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2022.**

**HON OGUTTU MBOYA,**

**JUDGE**

**In the Presence of;**

**Kevin Court Assistant**

Ms. Njue h/b for Mr. Okemwa for the Plaintiff/Applicant.

Ms. Esami h/b for Mr. Nyamu for the Defendant/Respondent.