Ndengwa v Dandora Juakali Association (Environment and Land Case Civil Suit 89 of 2013) [2022] KEELC 15362 (KLR) (5 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15362 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 89 OF 2013

JO MBOYA, J

DECEMBER 5, 2022

BETWEEN

ROBERT MURIITHI NDENGWA ..... DECREE HOLDER

AND

DANDORA JUAKALI ASSOCIATION ..... JUDGMENT DEBTOR

RULING

1. The Instant Ruling touches on and relates to two Applications, namely, the Application dated the April 27, 2022 and July 22, 2022, respectively. For clarity, the two named Applications have been filed by the Plaintiff/Applicant.

2. Vide Notice of Motion Application dated the April 27, 2022, the Plaintiff/Applicant has sought for the following Reliefs;

    i. Spent.

    ii. ThatDisposition/Order and Decree 1 and 2 granted on November 18, 2021 and issued on February 16, 2022, be Varied/Reviewed/amended as below:

    a. Declaration be and is hereby issued that the Plaintiff is the registered owner of HDDCD001/6 Scheme Dandora Jua Kali Association Plots nos 291 and Plots nos 293.

    b. An order of Permanent Injunction be and is hereby issued restraining the Defendant, the third parties, squatters and/or trespassers under its directions, its agents servants, its agents, servants and/or employees or in any manner howsoever from, trespassing entering, remaining on creating nuisance on or in way dealing with and/or interfering with the Plaintiff's proprietorship interests and/or rights of quiet possession, occupation and enjoyment of Land Reference HDDCD001/6 Scheme Dandora Jua Kali Association Plots nos 291 and Plot nos 293 and or interfering with the Plaintiff's rights and enjoyment thereof.'

iii. That In The Alternative: the Honourable Court do recall the Plaintiff and or other witnesses for Re-examination.

iv. That In The Alternative: the Judgment of November 18, 2021 be set aside; and Plaintiff be allowed to amend Plaint as per the attached Draft

v. Thatany other orders that meet the Interest of Justice do issue.

vi. Thatthe costs of this Application be in the cause.

3. The subject Application is premised and anchored on the various, albeit numerous grounds which have been enumerated in the body thereof. Besides, the A pplication has been supported by the affidavit of the Plaintiff/Applicant sworn on the April 27, 2022.

4. Though served with the subject Application, the Defendant/Respondent does not appear to have responded to same by either by filing a Replying affidavit or Grounds of Opposition.

5. The second Application is the one dated the July 22, 2022 and in respect of which the Plaintiff/ Applicant has sought for the following Reliefs;

a. Spent.

b. That the Application herewith be consolidated and or heard together with the /Decree Holder Plaintiff's application dated April 17, 2022 ; and the orders of June 14, 2022 be varied/stayed to accommodate the application herewith

c. That in the Alternative:amendment/clarification/determination that:

a. Share Certificate No 129 and no 147 by Malimugu Jua Kali Association Development Projects for Plot Nos A-557-MM-469 and A-556-MM-464;

b. Share Certificate No 325 and No 326 by Kayole Junction Housing Scheme for Plot nos Block-5-PL- 210 and Block-5-PL- 211;

c. Share Certificate No 325 and No 326 by Dandora Jua Kali Association for Plot Nos Block-6-261 and Block-6-259;

d. HDDCD001/6 Scheme Dandora Jua Kali Association Plots nos, 291 and Plots nos 293; All refer to the same property and is currently registered with the Nairobi City County as HDDCD001/6 Scheme Dandora Jua Kali Association Plots nos 291 and Plots nos 293.

d. Thatany other orders that meet the interest of J ustice do issue.

6. For coherence, the subject Application is anchored on various grounds, which have similarly been enumerated in the body of the Application.

7. On the other hand, the subject Application is supported by the affidavit of the Plaintiff/Applicant sworn on the July 22, 2022 and to which the Plaintiff/Applicant has attached various/assorted annexures, inter-alia, a copy of the Judgment that was rendered by this Honourable court on the November 18, 2021.

8. For completeness, it is imperative to observe and state that though the Defendant/Respondent was served, same has yet again neither filed a Replying affidavit nor Grounds of opposition.

9. In the premises, it is evident and apparent that both Applications have neither been opposed nor contested.

10. Be that as it may, it is common ground that even when/ where a Suit/Application is not opposed by the adverse Party, the Claimant/Applicant is still under legal obligation and duty to prove and establish the claims/reliefs sought at the foot of the impugned proceedings.

11. Nevertheless, it is also appropriate to state that when the two Applications came up for hearing, the Honourable court ordered and directed that same be canvassed and be disposed of by way of written submissions.

12. In this regard, the Plaintiff/Applicant duly filed written submissions dated the November 21, 2022.

Submissions By The Parties:

a. Plaintiff's/applicant's Submissions:

13. Vide written submissions dated the November 1, 2022, counsel for the Plaintiff/Applicant has raised, isolated and highlighted four pertinent issues for due consideration by the court.

14. First and foremost, counsel for the Plaintiff/Applicant has submitted that at the onset, when the subject suit was filed, the suit properties were known and referred to as Plots Numbers Block-6-261 and Block-6-259, respectively.

15. Nevertheless, counsel for the Plaintiff/Applicant has added that during the course of the instant proceedings, the suit properties changed numbers and ultimately the suit properties are currently described and registered as HDDCD001-6 Scheme Dandora Juakali Association Plots No's 291 and 293, respectively.

16. Be that as it may, counsel for the Plaintiff/Applicant has contended that despite the change in description and registration details relating to the two suit properties, the new numbers refer to and concern the said suit properties.

17. In the premises, counsel has invited the court to make a declaration that indeed the suit properties which were described in the Plaint dated the January 17, 2013 are one and the same with the properties bearing the current registration details.

18. Further, counsel has submitted that the declaration to the effect that the suit properties are one and the same with the current registration details, would enable the Plaintiff/Applicant to enjoy and appropriate the benefits attendant to and arising from the Judgment and decree of the Honourable court.

19. Secondly, counsel for the Plaintiff/Applicant has submitted that the invitation to make a Declaration that the current registration details relates to and concern the suit properties, is not barred by the Doctrine of functus officio.

20. In this regard, counsel has added that the intended declaration falls within the known exception envisaged under the Doctrine of Functus officio.

21. Thirdly, counsel for the Plaintiff/Applicant has submitted that if the honourable court is not disposed and convinced to make the impugned declarations, then the honourable court should review the Judgment and decree and thereafter correct the registration details pertaining to and concerning the suit property.

22. In this regard, counsel for the Plaintiff/Applicant has contended that there exists an Error and Mistake apparent on the face of record and essentially pertaining to the registration details of the suit properties.

23. To this end, counsel has submitted that the Honourable court has sufficient latitude and mandate to decree the intended review, which will realign the suit properties to the current registration details that are available and obtaining at the Land Registry.

24. Fourthly, counsel has submitted that if the Honourable court is not persuaded to grant the orders of review, then the court should proceed to set-aside the Judgment and allow the Plaintiff/Applicant to amend the Plaint in a bid to correct the registration details over and in respect of the suit properties.

25. In respect of the foregoing, counsel for the Plaintiff/Applicant has submitted that the setting aside of the impugned Judgment would therefore allow the Plaintiff/Applicant to institute and undertake corrective measure to align the pleadings with the current registration details obtaining at the land registry and the city council of Nairobi offices.

26. Other than the foregoing, counsel for the Plaintiff/Applicant has added that the instant Application has been made with due promptitude and without unreasonable delay, reckoned from when the Plaintiff discovered the discrepancy in respect of the current registration details.

27. In support of the foregoing submissions, counsel for the Plaintiff/Applicant has cited various decisions inter-alia, *Leisure Lodge Ltd versus Japheth Asige & Another (2018)eKLR*, *Mombasa Bricks & Tiles Ltd & 5 Others versus Arvind Shah & 7 Others (2018)eKLR*, *Telkom K Ltd versus John Ochanda (2014)eKLR*, *Raila Odinga & 2 Others versus Independent Electoral Boundaries Commission & others (2014)eKLR*, *Nasibwa Wakenya Moses versus University of Nairobi & Another (2019)eKLR* and *Michael Muriuki Ngumbuini versus East Africa Building Society (2015)eKLR*.

b. Defendant's/respondent's Submissions:

28. It was pointed out elsewhere herein before that though served with the two named Applications, the Defendant/Respondent neither filed a Replying affidavit nor Grounds of opposition.

29. Similarly, the Defendant/Respondent also did not file any Written submission in response to the two named Applications or at all.

30. For completeness, the only set of written submissions obtaining on the record of the Honourable Court are those filed by and on behalf of the Plaintiff/Applicant.

Issues For Determination:

31. Having reviewed the two named Applications, as well as the Supporting Affidavits attached thereto and having similarly considered the written submissions filed by and on behalf of the Plaintiff; the following issues are pertinent and are thus worthy of determination;

i. Whether the Hounorable court is seized and possessed of the requisite Jurisdiction to grant the impugned Declaration pertaining to and concerning the new registration details alluded to at the foot of the Application.

ii. Whether the Honourable court is Functus Officio.

iii. Whether the Plaintiff has establish a basis of review of the Judgment and whether the intended review can be granted to introduce facts and evidence at variance with the Primary Pleadings.

iv. Whether the Honourable court ought to set aside the impugned Judgment and grant liberty to amend the Plaint.

Analysis And Determination

Issue Number 1 & 2

Whether the Hounorable court is seized and possessed of the requisite Jurisdiction to grant the impugned declaration pertaining to and concern the new registration details alluded to at the foot of the Application.

Whether the court is Functus Officio.

32. It is common ground that the subject suit was originated vide Plaint dated the January 17, 2013 and in respect of which the Plaintiff/Applicant sought specific orders pertaining to and concerning the named properties.

33. Given the importance of the reliefs sought at the foot of the Plaint dated the January 17, 2013, in the determination and resolution of the issues herein, it is imperative that the said reliefs be reproduced.

34. For convenience, the reliefs at the foot of the Plaint dated the January 17, 2017 are reproduced as hereunder;

    a. Declaration that the Plaintiff is registered as owner of Dandora Jua Kali Association Plots nos Block-6-261 and Block-6-259.

    b. Permanent Injunction restraining the Defendant, the third parties, squatters and/or trespassers under its directions, its agents, servants and/or employees or in any manner howsoever from, trespassing entering, remaining on creating nuisance on or in any way dealing with and/or interfering with the Plaintiff's proprietorship interests and/or rights of quit possession, occupation and enjoyment of land Reference Block-6-261 and Block-6-259 and/or interfering with the Plaintiff's rights occupation and enjoyment thereof.

    c. Costs of and incidental to the suit and interests at court rates

    d. Any other remedy as the Honourable court may deem fit and applicable in the circumstances.

35. From the foregoing, it is evident and apparent that the Plaintiff/Applicant herein had sought declaration pertaining to and concerning very specific properties, whose details were well delineated and alluded to in the Plaint.

36. Notwithstanding the foregoing, the Plaintiff now contends that during the intervening period, the registration details pertaining to and concerning the suit properties changed and/or were altered.

37. According to the Plaintiff/Applicant, the suit properties are currently registered as Plots Numbers HDDCD001/6 Scheme Dandora Jua Kali Association Plot No's 291 and 293 respectively.

38. Premised on the foregoing, the Plaintiff/Applicant is now keen to invite the Honourable court to make a declaration, clarification and determination that the new numbers, relates to and concern the same suit properties, alluded to and reflected at the foot of the Plaint.

39. In any event, the Plaintiff/Applicant has contended that the changes pertaining to and concerning the registration numbers, transpired and occurred between the filing of the suit and the time of delivery of the Judgment.

40. In view of the foregoing, the question that now arises for determination is whether this honourable court can proceed to make declaratory orders sought and purport that Plots No's HDDCD001/6 Scheme Dandora Juakali Association Plot No's 291 and 293 are one and the same as the suit properties.

41. In a bid to answer the question raised in the preceding paragraph, it is imperative to recall, restate and reiterate the Doctrine of Departure. For clarity, the essential tenets of the Doctrine of Departure are inter-alia, that Parties are bound by their pleadings.

42. In this regard, no Party or Litigant can be allowed to call or tender evidence which is at variance with the pleadings that have been filed and lodged before a court of law.

43. Contrarily, if a Party/Litigant is keen to tender evidence that is at variance with the pleadings that were filed, then it behooves the Party/litigant to first and foremost seek an amendment of the impugned pleadings.

44. Other than the foregoing, it does not lie within the province of a particular litigant to seek to introduce and (sic) sneak before the court contradictory evidence and purport to invite the Honourable court to imagine that the new evidence/details are the same with what was alluded to in the Pleadings.

45. In respect of the subject matter, this Honourable court notes that the registration details in respect of Plot No's HDDCD001/6 Scheme Dandora Juakali Association Plot No's 291 and 293 are Ex-facie separate and distinct from the suit properties.

46. To my mind, to accede to the application and request to make the impugned declaratory orders, would be tantamount to making declaration in respect of properties that were neither envisaged nor anticipated in the subject proceedings.

47. Additionally, there is also a likelihood of this court being invited to make orders over and in respect of separate properties belonging to third parties, who have no idea about the existence of the subject suit.

48. In a nutshell, I am afraid that the doctrine of departure prohibits this honourable court from making the impugned declaration/clarification sought at the foot of the application dated the July 22, 2022.

49. Without belaboring the point, the importance and significance of the Doctrine of Departure and its implications were addressed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission versus Stephen Mutinda Mule & Others (2014) eKLR*, where the honourable Court of Appeal observed as hereunder;

> ' As the Parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specific may be raised without notice.'

50. Additionally, the importance of Parties being bound by their pleadings was revisited, reiterated and affirmed in the case of *Dakianga Distributors Ltd versus Kenya Seed Company Ltd 92015)eKLR,* where the Court of Appeal stated and observed as hereunder;

> ' A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No 5)* where the learned authors declare:-
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> 'The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.'
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> Sir Jack Jacob in an article entitled *'The Present Importance of Pleadings'* published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in *Malawi Railways Limited v Nyasulu [1998] MWSC 3* states of the importance of pleadings:
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> 'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.
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> In *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis [1986] UGCA 6* the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in *Jones v National Coal Board [1957] 2 QB 55* that:
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> 'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.'
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> This Court in Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others (supra) cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002* where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

'It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'

The judges in that case also stated:

'In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.'

Mr Kimamo Kuria, for the respondent, faulted the learned judge for giving credit of sums alleged in evidence as having been paid by the appellant to the respondent Mr Bosire Gichana, for the appellant, while supporting that part of the judgment believed that the learned judge was entitled to give such credit and that it was not necessary to amend the defence.

We are of the respectful opinion that the learned judge, after holding correctly that parties were bound by their pleadings erred in holding that the appellant was entitled to credit on sums which were not pleaded in the defence at all. The appellant was bound by its pleading in the defence where it claimed that it had issued three cheques in replacement of dishonoured cheques which its witness admitted, and the trial court so found, that they were cheques issued in respect of other independent transactions.

51. In my considered view, what the Plaintiff/Applicant is inviting the Honourable court to do is to ignore and disregard the hallowed Doctrine of Departure and wreek havoc by granting orders in respect of properties that were never pleaded nor duly placed before the Honourable court for determination.

52. Respectfully, I must decline the invitation by and at the instance of the Plaintiff/Applicant.

53. Other than the foregoing, the other aspect/perspective that arises from the application by the Plaintiff/Applicant, touches on and concerns an invitation to undertake a merit-based review of the Judgment and decision.

54. Put differently, the Plaintiff/Applicant is inviting the honourable court to re-evaluate the new sets of documents, which were neither adduced nor produced in evidence and thereafter to alter the texture and character of the Judgment.

55. Essentially, what the Plaintiff/Applicant seeks is to have the entire Judgment altered and varied and the various aspects alluded to as pertains to the said properties to be changed to read (sic)the new details, which were neither pleaded nor appropriately introduced in evidence.

56. To my mind, a court of law which has pronounced his/herself on the merits of a decision cannot by sidewind be invited to alter the Fundamental character and texture of the Judgment in a material way and in particular, concerning the details of the suit property.

57. I beg to point out that any Party/claimant who files a suit pertaining to and concerning an immovable property is called upon to supply the details of the immovable properties in the pleadings and not otherwise. For clarity, there is no room for guesswork in terms of the Details of the Immovable Property, the Subject of the Impugned Proceedings.

58. To this end, the provisions of Order 4 Rule 3 of the *Civil Procedure Rules, 2010* are apt and succinct. For coherence, the named provisions provides as hereunder;

> ' Where the subject-matter of the suit is immovable property [Order 4, rule 3.]
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> Where the subject-matter of the suit is immovable property, the Plaint shall contain a description of the property sufficient to identify it.'

59. Based on the foregoing provisions, there is no gainsaying that if the Plaintiff/Applicant had wanted the court to make declaratory orders over and in respect of the new registration details, then it behooved the Plaintiff/Applicant to amend the Pleadings, albeit before the Judgment.

60. On the other hand, the kind of alteration that are being sought by the Plaintiff are also contrary to and in contravention of the Doctrine of Functus Officio.

61. To this end, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of Telcom Kenya Ltd versus John Ochanda (Suing on behalf and on behalf of 996 former Employees of Telcom K Ltd) (2014) eKLR, where the court stated as hereunder;

> ' It is apparent from the record that in ordering that certain materials be placed before him by way of affidavit long after judgment had been entered; the learned judge had the noblest and best of intentions in trying to give effect to the judgment of Mwera J In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him.
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> He had himself earlier acknowledged that his hands were tied and also noted that he could not amend the judgment as had been sought. The court's only recourse would have been to review the judgment and having refused to do so, it was rendered functus officio.
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> 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 SCR 848, Sopinka J traced the origins of the doctrines as follows (at p 860);
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> '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:
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> 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 JO Rose Engineering Corp, [1934] SCR 186'
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> The Supreme Court in Raila Odinga v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *'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;
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> '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.'

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.

62. Duly guided by the foregoing holding of the court of appeal, I must point out that this court cannot re-engage with the documents and evidence contained at the foot of the supporting affidavit of the said application and utilize same to upset a valid Judgment.

63. In a nutshell, it is my finding and holding that the Application dated the July 22, 2022 is barred by the twin Doctrines of Departure and Functus Officio.

Issue Number3

Whether the Plaintiff has establish a basis of review of the Judgment and whether the intended review can be granted to introduce facts and evidence at variance with the Primary Pleadings.

64. As pertains to the limb of the application dated the April 27, 2022 seeking review, it is important to note and observe that review can only be sought and pursued within the parameters envisaged vide the provisions of Order 45 Rule 1 of the Civil Procedure Rules 2010.

65. Secondly, a Party seeking review of the Judgment, decree and order of the Honourable court must delineate the grounds upon which the review is sought.

66. In this respect, it is common ground that one cannot implead review as a prayer on the face of the application, but fail to enumerate/delienate the ground(s) upon which the review is sought.

67. Unfortunately, the Plaintiff/Applicant herein has sought for Review of the Judgment and Decree of the Honourable court, but nowhere in the grounds of the application has same pointed out which of the three known grounds, is being invoked, applied and relied upon.

68. To my mind, without isolating and highlighting the requisite Grounds upon which the intended review is sought, then the Application for Review would essentially be pre-mature, misconceived and mounted in vacuum.

69. In the premises, it is my finding and holding that having neither identified nor isolated the requisite grounds for Review, the Plaintiff/Applicant herein cannot be allowed to make extensive submissions on review and to address grounds, which have neither been pleaded nor captured in the Impugned Application.

70. To vindicate the foregoing holding, it is appropriate to restate and reiterate the holding in the case of *Stephen Gathua Kimani versus Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR.*

71. For coherence, the Honourable Court stated and observed as hereunder:

' I am alive to the fact that the discretion donated to the court under Section 80 of the *Civil Procedure Act* is unfettered, but for the discretion to be exercise in favour of the applicant, the application for review must be based on the grounds specified under Oder 45 or on any sufficient reason but in either case the application must be made within a reasonable time.'

72. Notwithstanding the foregoing, there is yet another aspect/ perspective which is critical and paramount, in determining whether the orders of review would be available, if at all, to the Plaintiff/ Applicant.

73. In this regard, it is imperative to recall that the purpose of the intended review is to substitute the new Title Numbers in place of the Title Numbers which were duly pleaded and were contained in the body of the pleadings.

74. Consequently, the question that arises is whether review can be invoked and relied upon to defeat the doctrine of departure and thereby alter the character of the suit contained in the body of the Primary Pleadings.

75. My answer to the foregoing question is that review can only be entertained and granted within the four corners of the issues that were captured within the body of the Primary pleadings and not otherwise.

76. In a nutshell , an application for review like the one beforehand cannot be invoked and utilized to expand the Plaintiff's/Applicant's case beyond the Primary pleadings and essentially, to introduce completely New Issues.

77. Be that as it may, it is also imperative to point out that the Judgment and decree of the court that are sought to be reviewed, are premised on the correct facts that were tendered and adduced before the Honourable court.

78. Clearly, there is no Error or Mistake in the description of the suit properties, to warrant the invocation and application of review.

79. To the contrary, what the Plaintiff/Applicant is seeking to achieve is to change the character of the suit properties and to introduce completely new titles, which were neither pleaded nor deliberated upon by the Honourable court.

80. In short, the court herein calibrated and deliberated upon the factual situation as isolated and highlighted vide the pleadings and the evidence that were tendered. In this regard, having made conscious and deliberate decisions pertaining to the titles in question, the Honourable Court is divested of Jurisdiction to entertain and grant the instant Application for Review.

81. Respectfully, the decision in the case of *National Bank of Kenya versus Ndungu Njau (1997)eKLR*, is apt and succinct as pertains to the parameters upon which review can be sought.

82. For coherence, the Court of appeal stated and observed as hereunder;

> ' A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
>
> In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which

has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.'

83. Informed by the holding in the decision cited in the preceding paragraph, it is my finding and holding that the review sought is similarly misconceived, bad in law and legally untenable.

Issue Number4

Whether the Honourable Court ought to set aside the Impugned Judgment and grant liberty to amend the Plaint.

84. The Plaintiff/Applicant has tendered evidence and contended that upon the delivery of the suit Judgment, same established and discovered that the details of the suit properties have since been changed and altered.

85. Further, it has also been contended that as a result of the alterations and variation of the details pertaining to the suit properties, it has become impossible to execute, implement and enforce the decree of this Honourable court.

86. Nevertheless, the Plaintiff/Applicant avers that despite the alteration and changes pertaining to the details of the suit property culminating into the new registration details, the suit property remains one and the same.

87. Be that as it may, whether the new details, namely Plot No HDDCD001/6 Scheme Dandora Juakali Association Plot No 291 and 293 relates to and concerns the same ground as the suit properties, is an issue of evidence that can only be dealt with and ascertained during a plenary hearing.

88. On the other hand, there is also no gainsaying that no plenary hearing can be taken and or undertaken, long after rendition and delivery of a Judgment. For clarity, the delivery of a Judgment terminates and closes the Window for adduction of Evidence.

89. In the premises, the only avenue that remains available is for setting aside of the entire Judgment and thereafter paving the way for the Plaintiff to amend the primary pleadings and (sic) implead the new title details.

90. In my humble view, the setting aside of the impugned Judgment shall enable the Plaintiff/Applicant to remedy the contents of the primary pleadings and similarly to serve the amended Plaint on the Defendant, who shall thereafter be at liberty to respond thereto, if and where deemed appropriate.

91. Premised on the foregoing, the only limb of the Application dated the April 27, 2022 that accords with the Interests of Justice and the provisions of Section 1A and 1 B of the *Civil Procedure Act* Chapter 21 Laws of Kenya, is the aspect bespeaking of the setting aside of the Impugned Judgment.

92. In the circumstances, I am persuaded that the interests of justice dictates that the impugned judgment and decree be set aside and varied, so as to enable the true character of the suit properties to be placed before the Honourable Court and thereafter to be heard, determined and resolved, once and for all.

93. My humble views as articulated and captured in the preceding paragraph resonate with the views held by the Honourable court in the case of *Stephen Boro Githia versuss Family Finance Building Society & 3 Others Nairobi Civil Application No 263 of 2009*, Nyamu J (as he then), where it was stated thus:

> ' A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and the counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding

objective to remove all cobwebs hitherto experienced in the civil process and to weed out as far as practicable the scourge of the civil process starting with unacceptable levels of delay and lost in order to achieve resolution of disputes in a just, fair and expeditious manner. In the circumstances I decline the request to have this matter reheard afresh and direct that the case proceeds from where it had reach. I also direct that this case be fixed for hearing on a priority basis'.

Final Disposition:

94. Having analyzed and dealt with the various issues that were highlighted and amplified in the body of the Ruling herein, it is now appropriate to anchor the subject Ruling and make the Final orders.

95. Be that as it may, had the Plaintiff/Applicant discerned the consequences of the issues that were raised in the two Applications, same would have simplified the issues by simply seeking to set aside the impugned Judgment and to amend the pleadings.

96. Notwithstanding the foregoing, I am now disposed to and Do hereby make the following orders;

    i. The Application dated the July 22, 2022 be and is hereby Dismissed.

    ii. The Application dated the April 27, 2022 is partially allowed, to the extent that the Judgment and decree of the Honourable court issued on the November 18, 2021 be and is hereby set aside.

    iii. Leave be and is hereby granted to the Plaintiff/Applicant to amend the Plaint and the amended Plaint to be filed and served within 21 days from the date hereof.

    iv. The Defendant shall be at liberty to file an amended Statement of Defense, if any and same to be filed and served within 21 days from the date of service of the amended Plaint.

    v. The Plaintiff/Applicant shall be at liberty to file a Reply to the amended Statement of Defense, if any and same to be filed and served within 14 days from the date of service.

    vi. Costs of the Application shall abide the outcome of the main suit.

    vii. Either Party is at liberty to apply.

97. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Akech for the Plaintiff/Applicant.

N/A for the Defendant/Respondent.