



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC CASE NO.554 OF 2008

NANCY WANJIRU WANGAI.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND.....1ST DEFENDANT

DAVID NJOROGE NGURU.....2ND DEFENDANT

PATRICK NYAMU.....3RD DEFENDANT

FRED OYUGI.....4TH DEFENDANT

JOSEPH OLE KIAMBU.....5TH DEFENDANT

RULING

1. This is the notice of motion dated 17th June 2020 brought under order 51 Rule (1) and order 45 Rules (1) (2) and (3) of the Civil Procedure Rules, Section 1A & B, 3A & 80 of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law.
2. It seeks orders:-
 1. *Spent.*
 2. *That the judgment delivered herein on 29th January 2016 and the resultant decree thereof be reviewed, varied and/or set aside.*
 3. *That the court be pleased to re-hear this suit or make such orders in regard to the re-hearing as it thinks fit and just in the circumstances.*
 4. *Spent.*
 5. *That the costs of this motion be provided for.*
3. The grounds are on the face of the application and are set out in paragraphs (a) to (i).
4. The application is supported by the affidavit of Patrick Nyamu, the 3rd defendant/applicant sworn on the 17th June 2020 and a further affidavit sworn on 11th September 2020.
5. In response to the notice of motion, the plaintiff/respondent filed grounds of opposition and a notice of preliminary objection dated 14th July 2020. The grounds are:-
 1. *That the 3rd defendant has no audience of this court due to non-compliance of the court order issued on 26th September 2019 requiring him to deposit Kshs.460,000/- monthly from 5th November 2019 in a joint interest earning account. He is in contempt of court.*

2. That the application is fatally defective as an appeal lodged from the judgment being Civil Application No.369 of 2019, which has been substantially heard for stay of execution by a three judge bench.

3. That the applicant has no right of review having preferred an appeal.

4. The court is *functus officio* having delivered judgement in this matter back on 29th January 2016 and there is no provision in law for re-hearing of this suit.

5. That the application is *res judicata* to the extent that it seeks stay of execution in light of the court's ruling on 26th September 2019.

6. On the 16th July 2020, the court with the consent of parties directed that the notice of motion and the preliminary objection be canvassed by way of written submissions.

The 3rd defendant's/applicant's submissions

7. The applicant has admitted that he filed a notice of appeal after delivery of judgment but he never filed a record of appeal. However, after the discovery of the new and important evidence which was not in his possession at the time of trial, it became absolutely necessary to seek a review of this court's judgment and he accordingly withdrew his notice of appeal on 9th September 2020.

8. It is now settled and trite law that the mere filing of a notice of appeal does not take away the right of an aggrieved party to seek review. That a notice of appeal is only a formal notification of an intention to appeal and a party is only deemed to have preferred an appeal after lodging the record of appeal and paying the requisite fees. He has put forward the cases of **Leonard Gikaru Wachira vs Southern Travel Services Ltd & Another [2012] eKLR** which quoted the CA decision in **Yani Haryanto vs E. D & F Man (Sugar) Ltd Civil Appeal No 122 of 1992; The Chairman Board of Governors Highway Sec. School vs William Mmosi Moi**.

9. The right of review is donated by Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The 3rd defendant/applicant has sufficiently demonstrated that he has since discovered new and important matters or evidence which was not in his knowledge or possession at the time of the trial. The new evidence is set out in the affidavit of Samson Masaba Munikah, Advocate, sworn on 9th June 2020. That, as one of the registered owners and trustee of Alfred Jose Nakaya (deceased) he did not execute a transfer of lease dated 26th February 2008 in favour of the plaintiff Nancy Wanjiru Wangai.

10. That the alleged title issue to the plaintiff thereof is fake, illegal and obtained through fraud and deceit. He has put forward the case of **Richard K. Bunei & Others vs Lorien Ranching Co. Ltd & Others [2018] eKLR**. From the documents submitted by the applicant, it is clear that the impugned title was obtained by fraud. Once seized of such strong evidence this court must rise and interrogate such fraud. The applicant has made out a case of review as contemplated by Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. This court ought to set aside the judgment delivered on 29th January 2016 and order a fresh hearing of the suit and interrogate the evidence of fraud.

11. The objection by the plaintiff that this court is *functus officio* is a clear misdirection of the legal position and the same must fail. The right of review is a statutory right and once an aggrieved party meets the threshold under order 45 the court that delivered the judgment has the jurisdiction to reopen the case and review it. The right of review overrides the principle of *functus officio*.

12. The new and important evidence of fraud was not heard and determined by the trial court and the plaintiffs plea of *res judicata* has no basis in law or at all.

13. The conditions of stay given by the court on 26th September 2019 were to the benefit of the applicant. The only consequence for failure by him to meet those conditions was to lose the benefit of the stay. He cannot be said to be in contempt and deny him his statutory right of review. This court has the jurisdiction to entertain the present motion, that the said motion is competent and the applicant has exceedingly met the threshold contemplated by order 45. He urges that the motion be allowed with costs.

The Plaintiff's/Respondent's Submission

14. They are dated 8th September 2020. This application is an abuse of court process and ought to be dismissed with costs since the court has become *functus officio* after the court delivered judgment on 29th January 2016.

15. The 3rd defendant/applicant has filed an appeal including an application under Rule 5(2) (b) of the Court of Appeal Rules for stay of execution which has been heard and determined by a three (3) Judge bench. His remedy is to pursue the appeal. She has put forward the cases of **Brian Muchiri Waihenya vs Jubilee Hauliers Ltd & 2 Others [2018] eKLR; Serve in Love Africa (Sila) Trust vs Abraham Kiptarus Kiptoo & Others [2019] eKLR; Mombasa Bricks & Tiles Limited & 5 Others vs Arvind Shah & 7 Others**.

16. This Honorable Court on 26th September 2019 directed the 3rd defendant to deposit Kshs. 5 Million in a joint account of Advocates together with depositing Kshs.460,000/- monthly from the month of November 2019 which orders were never complied by the 3rd defendant. He who comes to equity must come to equity with clean hands.

17. The current application is asking the court to review its judgment on merits in form of a fresh hearing which negates the principles of *res*

judicata and *functus officio*. The 3rd defendant/applicant never filed a counterclaim against the plaintiff. The only claim he filed was against the 1st defendant. The current application is an attempt to apply to the court to set and re-litigate on its own judgment which is against the law. She prays that the application be dismissed with costs.

18. I have considered the notice of motion and the affidavit in support. I have also considered the grounds of opposition and the notice of preliminary objection. I have considered the written submissions filed on behalf of the parties, the oral highlights and the authorities cited. The issues for determination are:-

- (i) *Whether this court has jurisdiction to hear and determine this application.*
- (ii) *Is the preliminary objection merited?*
- (iii) *Who should bear costs?*

19. The application seeks to review, vary and or set aside the judgment dated 26th January 2016. **Section 80** of the Civil Procedure Act provides that:-

Order 45 of the Civil Procedure Rules provides that:-

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review

20. One of the conditions set out under order 45 rule 1 of the Civil Procedure Rules is that an application for review ought to be made without unreasonable delay. It is not in dispute that this court delivered its judgment on 29th January 2016. The current application is dated 17th June 2020 and filed in court on 18th June 2020. This is exactly four and half years since the judgment was delivered in this matter. No explanation has been given. In my view this application has been brought after an inordinate delay.

21. In the intervening period the 3rd defendant/applicant filed a notice of appeal dated 4th February 2016. He has purported to file a notice of withdrawal of the said notice of appeal. The notice of withdrawal is dated 7th September 2020. This was clearly after this application had been filed.

22. The 3rd defendant/applicant also filed a notice of motion dated 22nd February 2016 seeking an order of stay of execution of enforcement of the judgment and decree delivered on 29th January 2016 pending the hearing of the intended appeal. The said application was heard and this court delivered its ruling on 26th September 2019. The court after considering the oral submissions granted the 3rd defendant/applicant the orders of stay of execution on the following conditions:-

“(a) That the 3rd defendant/applicant do deposit Kshs.5,00,000 in a joint interest earning account in the names of the plaintiff’s advocate and the 3rd defendants advocate within sixty (60) days from the date of the ruling in default the orders of stay of execution will lapse.

(b) In addition the 3rd defendant/applicant do deposit the admitted monthly rent of Kshs.460,000/- monthly with effect from 5th November 2019 in a joint interest earning account in the names of the plaintiff’s advocate and the 3rd defendant’s advocate until the determination of the appeal.

(c) The costs of the application be born by the 3rd defendant/applicant”.

It is an undisputed fact that the 3rd defendant/applicant has not complied with these orders to date.

23. As things stand there is no evidence by the 3rd defendant/applicant that the appeal has been withdrawn. What the 3rd defendant/applicant calls new and important matter or evidence are averments by one Samson Masaba Munikah in an affidavit sworn on 9th September 2020. He depones that he is one of the executors of the will of the late Alfred Josse Nakaya. That the other executors are Elina Mwayitsi Nakaya and Michael Mulama Nakaya. He denies that he signed transfer of lease dated 26th February 2008 and states that it is not genuine. There are no affidavits from the other executors disowning the said transfer of lease. In my view what this new evidence purports to do is to introduce a new party the Estate of Alfred Josse Nakaya to these proceedings at this stage. I find that this court lacks jurisdiction to reopen the case and take a new evidence at this stage. In the case of **Telkom Kenya Ltd vs John Ochanda suing on his own behalf and 996 others [2014] eKLR**, The Court of Appeal stated thus:-

“Functus officio is an enduring principle of law that prevents the reopening of a matter before a court that rendered the final decision thereon. The general rule that final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in re St. Nazarine Co. [1879], 12 CHD 88. The basis for it was that the power to rehear was transferred by the Judicature Act of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.....”.

24. Similarly in the case of **Raila Odinga & 2 Others vs IEBC & 3 Others [2013] eKLR** the Supreme Court 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 which reads;

“...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 reviewed or varied by the decision maker”.

I am guided by the above authority and finding that this court is *functus officio* and cannot entertain the current application. The upshot of the matter is that the preliminary objection herein is merited and it is upheld.

25. I have considered the notice of motion and I find that the same has not satisfied the conditions for review as set out under order 45 of the Civil Procedure Rules. There is no application for correction of errors or mistake apparent on the face of the records. In conclusion, I find no merit in this application and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28th day of January 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Thuku for the Plaintiff

Mr. Thangei for the 3rd Defendant

Phillis – Court Assistant.