



**Swastic Holdings Limited v Kimani (Environment and Land Case Civil Suit E369 of 2021) [2024] KEELC 6517 (KLR) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6517 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E369 OF 2021**

**JA MOGENI, J**

**OCTOBER 7, 2024**

**BETWEEN**

**SWASTIC HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**ANN NYAGUTHII KIMANI ..... DEFENDANT**

**RULING**

1. The plaintiff/applicant filed the notice of motion dated 25/03/2024 seeking orders of stay of execution of the judgment /decree issued by this court pending the hearing and determination of the Appeal filed. Before the notice of motion was heard the defendant/respondent filed a notice of preliminary objection (P.O) dated 10<sup>th</sup> May 2021, which is the basis of this ruling.
2. The respondent in its Preliminary Objection raises the following grounds:
  1. That the Defendant/Applicant seeks stay of Execution of the Judgment, Order and Decree on Costs of this Court dated 27<sup>th</sup> February 2023, a stay which was granted by this Honourable Court for 30 days, lapsed and no extension sought or issued.
  2. That Defendant/Applicant under Rule 5 2 (b) Court of Appeal Rules 2022 sought for stay pending an appeal through Nairobi Court of Appeal Civil Application E002 of 2023 which was dismissed through a Ruling dated 26<sup>th</sup> May 2023.
  3. That subsequently a Notice of Appeal dated 1<sup>st</sup> March 2023 was withdrawn through a Notice of Withdrawal dated 6<sup>th</sup> June 2023.
  4. That the Defendant/Applicant filed an Application dated 9<sup>th</sup> June 2023 for review of the Judgment, Order and Decree on Costs of this Court dated 27<sup>th</sup> February 2023. An application which was dismissed.



5. That Application offends the provision of Order 42 Rule 4.Civil Procedure Rules 2010 for reasons that the proper Notice of Appeal dated 1<sup>st</sup> March 2023 was withdrawn.
  6. That the Defendant/Applicant having exhausted the option of Appeal, and the Court of Appeal having heard the Application and issued its Ruling therein, it is not open for the Applicant to come back and seek stay of Execution at the Trial Court.
  7. That this Court is already Functus Officio having already entered a judgment on 27th February 2023 and granted stay of execution.
  8. That by virtue of the foregoing, the Defendant is forum shopping, Trial and error litigation, and the Court should guard against abuse of its processes.
  9. That the Application is grossly incompetent, incurably defective, frivolous, vexatious and an abuse of court process and ought to be struck out in limine.
  10. That in that regard, the Court lacks jurisdiction to entertain this Application and the same ought to be struck out with costs to the Plaintiff/Respondent.
3. Both counsels filed their submissions to the Preliminary Objection. M/s Otwal and Manwa Associates filed their submissions dated 15.07.2024 and submitted that the defendant/applicant filed an appeal and the Court of Appeal dismissed the appeal through its ruling on 26/05/2023 where the defendant/applicant was seeking stay of execution of this court's judgment.
  4. He further submitted that the applicant had also sought to have this court's judgment reviewed vide the application dated 9/06/2023 and this court vide its ruling dismissed the application. Consequently, having gone to the Court of Appeal and having had the application for stay dismissed, the applicant seeks a stay from this court.
  5. The defendant/applicant submits that Order 42 Rule 6 can only apply where there is a stay pending since the appeal that had been filed was dismissed. Therefore, the defendant/respondent submits that this court is now functus officio.
  6. On his part the plaintiff/respondent filed their submission dated 9/07/2024 by their Counsel M/s Jackson Omwenga & Co. Advocates. In his submissions he contended that the defendant/applicant filed their submissions outside the timelines that were issued by this Honorable Court. He stated that the Preliminary Objection is not one envisaged under the law. He relied on the cases of Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others [2013] eKLR where the Supreme Court cited the leading decision on Preliminary Objections, Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696, The Supreme Court decision in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR, Peter Mungai v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party) [2022] eKLR and the case of Quick Enterprises Ltd Vs Kenya Railways Corporation - Kisumu High Court Civil Case No.22 of 1999,
  7. It was their submission that the Preliminary Objection is misplaced, frivolous and vexatious.
  8. The definition of what constitutes a Preliminary Objection was given in the celebrated case of Mukisa Biscuit Manufacturing Company –Vs- West End Distributors Limited [1969] EA where it was held as follows:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of



the Court on a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

9. In order to qualify as a Preliminary Objection, the applicant must raise a pure point of law. Where there exist contested facts requiring determination, a Preliminary Objection cannot be upheld. The tests to determine whether a matter raises a true Preliminary Objection was summarized in the case of David Karobia Kiiru –Vs- Charles Nderitu Gitoi & Another [2008]eKLR as follows:-

“For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.”

10. From the application filed it is not disputed that the plaintiff/respondent had filed an application seeking stay of judgment delivered by this Honorable Court pending Appeal. This application was dismissed. At the same time the plaintiff/respondent had sought a review before this Honorable Court which application was also dismissed.
11. Under Rule 5 2 (b) Court of Appeal Rules 2022 the plaintiff/respondent sought for stay pending an appeal through Nairobi Court of Appeal Civil Application E002 of 2023 which was dismissed through a Ruling dated 26/05/2023.
12. Thus the preliminary objection has raised a pure point of law by stating that this court has become functus officio since it made a decision and the plaintiff/respondent sought stay from the Court of Appeal which was dismissed.
13. I have observed that the parties herein made elaborate arguments that would essentially go to the merit of the Notice of Motion. Be that as it may, it should be noted that the court’s duty at this point in time is to determine the Preliminary Objection first.
14. The germane issue for determination is whether the Preliminary Objection is merited.
15. The Black’s Law Dictionary, 10th Edition defines a Preliminary Objection as; -  

“... in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”
16. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Moreover, a valid Preliminary Objection should, if successful, dispose of the suit. See the case of David Karobia Kiiru v Charles Nderitu Gitoi & another [2008]eKLR.
17. The gist of the present Preliminary Objection is that the Applicant seeks stay of execution of the judgment, order and decree on costs of this Court dated 27<sup>th</sup> February 2023. It is the argument of the applicant that the said stay was granted for 30 days but it lapsed and no extension was sought or issued. That despite seeking a stay pending appeal by the plaintiff/respondent in Nairobi Court of Appeal Civil Application E002 of 2023, the same was dismissed vide the Court of Appeal Ruling dated 26/05/2023.



18. Further that a Notice of Appeal dated 1<sup>st</sup> March 2023 was withdrawn by the Plaintiff/Respondent vide a Notice of Withdrawal dated 6<sup>th</sup> June 2023. Additionally, the application for review of judgment, Order and Decree on Costs was dismissed by this Honorable Court.
19. Given the fact that the issue of execution of judgment, order and decree on costs was determined via a decision of this court dated 27/02/2023. In essence the application is res judicata although the applicant in the preliminary objection has not pleaded so but it is glaring and obvious.
20. It is also the applicant's contention vide the preliminary objection that this court is functus officio.
21. The doctrine of 'Functus Officio' was stated by the Court of Appeal in the case of *Telcom Kenya Ltd –Vs- John Ochanda* [2014]eKLR as follows:-

“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-

The general rule that 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. D88*. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”

22. Similarly in *Raila Odinga –Vs- [Iebc & 3 Others Petition No. 5 of 2013](#)* the Supreme Court of Kenya cited with approval the following passage from “The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law” by Daniel Malan Pretorious:-

...“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.”

23. In addition the Supreme court also referred to the case of *Jersey Evening Post Limited –Vs- A. Thani* [2002] JLR 542 at pg. 550 where the Court stated:-

“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.” [own emphasis]

24. This Court having determined the main suit and subsequent application seeking stay of execution of judgment and decree on costs by the plaintiff/respondent the Court is now functus officio in the matter. To hold otherwise would amount to reviewing the judgment, Order and Decree of this Court and the decision of the Court of Appeal that did which did not grant a stay which had been prayed for.
25. For the above reasons I find merit in the Preliminary Objection dated 10/05/2021. Accordingly, the Notice of Motion dated 25/03/2023 is hereby struck out. Costs are awarded to the Defendant/Applicant.

Orders Accordingly



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIRIOBI ON THIS 7<sup>TH</sup> DAY OF OCTOBER 2024.**

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**MOGENI J**

**JUDGE**

In the virtual presence of: -

Ms. Gai holding brief for Mr. Manwa for Plaintiff/Respondent

Mr. Omwenga for defendant/Applicant

Caroline Sagina – Court Assistant

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**MOGENI J**

**JUDGE**

