Kitundu v Sheikh (Civil Suit E327 of 2022) [2023] KEELC 696 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 696 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT E327 OF 2022

JO MBOYA, J

FEBRUARY 9, 2023

BETWEEN

ESTHER KATOSI KITUNDU ..... APPLICANT

AND

MUSA ABDULLAHI SHEIKH ..... RESPONDENT

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the January 17, 2023, the Plaintiff/Applicant has sought for the following reliefs;

    i. That the Application be certified urgent and the same be heard ex-parte in the first instance.

    ii. That this Honourable Court do make an order of Stay of the Taxation of the Bill of Cost dated November 21, 2022 pending the determination of this present Application.

    iii. That this Honourable court issue an order reinstating this suit.

    iv. That the Honourable Court do make such other and further orders as it may deem fit, necessary and expedient in the Interest of Justice;

    v. That cost of this Application be provided for

2. The instant application is premised and anchored on the various grounds that have been captured at the foot of the application. Besides, the application is supported by the affidavit of the Plaintiff/ Applicant notarized on the January 17, 2023 before a notary public based in the sate of Ohio, in the Unites State of America.

3. Upon being served with the instant application, the Defendant/Respondent responded thereto vide ground of opposition, wherein same contended, inter-alia that the honourable court is devoid of the requisite jurisdiction to entertain and adjudicate upon the subject application.

4. Be that as it may, the instant application came up for hearing on the February 6, 2023, whereupon same was canvassed vide oral submissions tendered by and on behalf of the respective Parties.

Submissions By the Parties

Applicant's Submissions:

5. Learned counsel for the Applicant adopted the grounds at the foot of the instant application and reiterated the contents of the supporting affidavit. In addition, learned counsel raised, highlighted and amplified four salient issues for consideration by the court.

6. Firstly, learned counsel submitted that the Plaintiff/Applicant's suit was scheduled and fixed for hearing on the November 14, 2022, whereupon same was dismissed for want of prosecution pursuant to and in line with the provisions of Order 17 Rule 4 of the *Civil Procedure Rules, 2010*.

7. Nevertheless, counsel pointed out that though the suit was dismissed for want of prosecution, the Plaintiff/Applicant has not been afforded the requisite opportunity to tender and adduce evidence before the court.

8. In the premises, learned counsel contended that the impugned dismissal of the Plaintiff's/Applicant's suit was premised and anchored on a technicality, which the honourable court ought to excuse.

9. Secondly, counsel submitted that the honourable court is still seized and conferred with the requisite jurisdiction to entertain and adjudicate upon the instant application and essentially to reinstate the suit for hearing and determination on merits.

10. Thirdly, learned counsel submitted that the Plaintiff/Applicant herein has always been ready and willing to prosecute her suit, save for the one incidence of the November 14, 2022, when the Plaintiff/Applicant was precluded from attending court on the basis of good and sufficient cause.

11. In this regard, learned counsel has therefore submitted that the honourable court ought to be lenient and thereby afford the Applicant an opportunity to be heard on the merits of her case.

12. Finally, counsel for the Applicant admitted and acknowledged that though the supporting affidavit was notarized in the United State of America, however, the notary public did not affix the requisite certificate to authenticate that same is duly licensed and authorized to administer oath in the manner alluded to.

13. Nevertheless, counsel contended that the defect attendant to and evident at the foot of the supporting affidavit, if at all, is one that is curable by dint of Article 159(2) (d) of the *Constitution 2010*.

14. In view of the foregoing, counsel implored the court to find and hold that the instant application is well grounded and thus ought to be allowed.

Respondent's Submissions

15. On behalf of the Defendant/Respondent, learned counsel raised and ventilated three pertinent issues for due consideration and determination by the court.

16. Firstly, learned counsel submitted that the Plaintiff's suit was fixed and listed for hearing on the November 14, 2022.

17. Furthermore, learned counsel added that on the scheduled hearing date, counsel for the Plaintiff attended court and sought for an adjournment on the basis of various, albeit numerous reasons, which were ventilated before the honourable court.

18. Be that as it may, counsel has added that the honourable court proceeded to and considered the application for adjournment and thereafter rendered a ruling whereby the application for adjournment was declined.

19. In addition, learned counsel has submitted that after the application for adjournment had been dismissed by the court, counsel for the Plaintiff/Applicant thereafter informed the court that same had no evidence to tender, insofar as the Plaintiff/Applicant was not available.

20. Premised on the foregoing, counsel has therefore contended that the court was left with no alternative but to dismiss the Plaintiff's suit for want of prosecution. In this regard, counsel added that the dismissal was anchored on the provision of Order 17 Rule 4 of the *Civil Procedure Rules, 2010*.

21. Consequently and to this end, counsel submitted that the court is divested and devoid of the requisite competence and jurisdiction to entertain and adjudicate upon the current application.

22. Secondly, learned counsel for the Defendant/Respondent has submitted that the issues that have been raised vide the current application are the same issues which were ventilated before the court on the November 14, 2022, when the suit was dismissed for want of prosecution.

23. In the premises, learned counsel has therefore contended that the honourable court is thus functus officio and hence cannot re-engage with the subject issues either in the manner alluded to or at all.

24. Finally, learned counsel for the Respondent has submitted that the instant application is supported by an incompetent and invalid supporting affidavit, which has been notarized in state of Ohio, in the United State of America, but which affidavit does not bear the requisite certificate in accordance with the provisions of Section 88 of the *Evidence Act*, Chapter 80 Laws of Kenya.

25. Based on the foregoing submissions, learned counsel for the Respondent has therefore impressed upon the court to find and hold that the current application is not only premature and misconceived, but same is also legally untenable.

26. In a nutshell, counsel has invited the court to dismiss the application with costs.

Issues For Determination

27. Having reviewed and evaluated the application dated the January 17, 2023, as well as the supporting affidavit thereto and having taken into account the grounds of opposition by the Defendant/Respondent; and having considered the submissions tendered by and on behalf of the respective Parties, the following issues do arise for determination;

    i. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the instant Application.

    ii. Whether the Court is functus officio.

Analysis and Determination

Issue number 1 Whether the honourable court is seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the instant application.

28. Before venturing to address and analyze the issue alluded to herein before, it is appropriate and imperative to provide and supply a brief background culminating into the dismissal of the instant suit on the November 14, 2022.

29. In this regard, it is imperative to recall and underscore that the subject suit was fixed and listed for hearing on the November 14, 2022. For the avoidance of doubt, the hearing date, was taken and fixed by consent of the advocates for the respective Parties.

30. Nevertheless, come the November 14, 2022, learned counsel for the Plaintiff/Applicant informed the honourable court that same was not ready to proceed with the hearing of the matter.

31. For coherence, learned counsel for the Plaintiff contended that the Plaintiff was not available and hence same could not testify or tender any evidence before the honourable court. Consequently, counsel implored the court to grant an adjournment and issue a fresh hearing date.

32. Suffice it to point out that the application for adjournment was vehemently opposed by counsel for the Defendant/Respondent, on various reasons, which are duly reflected at the foot of the proceedings of the November 14, 2022.

33. Be that as it may, the court was thereafter called upon to calibrate on the merits or otherwise of the application for adjournment and in this regard, the court rendered a ruling. For clarity, the court found no merit in the application for adjournment and dismissed same.

34. Following the dismissal of the application for adjournment, the court called upon counsel for the Plaintiff/Applicant to prosecute the subject suit or otherwise progress same for hearing.

35. However, it is appropriate to state and underscore that counsel for the Applicant informed the court that same did not have any evidence to tender or place before the court. Consequently, counsel left the matter in the hands of the court.

36. Confronted with a situation where the Plaintiff had placed no evidence before the court, the honourable court proceeded to and dismissed the suit for want of prosecution in line with the provisions of Order 17 Rule 4 of the *Civil Procedure Rules, 2010*.

37. It is the said order that was made on the November 14, 2022, which has aggrieved the Plaintiff/Applicant and hence precipitated the filing and lodgment of the current application, whose import and tenor is restoration of the dismissed suit for (sic) hearing and determination on merits.

38. Nevertheless, the question that arises and which is worthy for determination is whether or not, the honourable court has the requisite jurisdiction to entertain and adjudicate upon the current application, which seeks to impugn the dismissal orders made pursuant to Order 17 Rule 4 of the *Civil Procedure Rules 2010*.

39. To start with, there is no gainsaying that the dismissal of a suit for want of prosecution, under any of the stipulated provisions of the *Civil Procedure Rules*, Order 17 Rule 4, not excepted, constitutes a Judgment in favor of the Defendant or the adverse party.

40. Furthermore, where such a dismissal is undertaken after hearing of submissions and representations from the concerned Parties or their advocates, then it becomes clear that the dismissal was/is made *inter-partes*.

41. In such a situation, it is my humble view that the resultant order or decision, is not a default decision, capable of being set aside or vacated by the very court which made or rendered the impugned order or decision.

42. To the contrary, such a decision that is made after hearing the submissions and representations of the concerned Parties or their duly appointed advocates, constitutes a final order or decision, which is only appealable to the Court of Appeal or such other appellate court, if any, established under the *Constitution 2010*.

43. To underscore the foregoing observation and in particular, that the dismissal of a suit connotes Judgment in favor of the Adverse Party, it is appropriate to restate and reiterate the holding of the Court of Appeal in the case of *Njue Ngai versus Ephantus Njiru Ngai & Another* (2016) eKLR, where the Honourable Court of Appeal stated and 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]

44. Furthermore, where that dismissal is done inter-partes, in the presence of a duly recognized agent appointed by the party, in terms of the provisions of Order 9 Rule 2 of the *Civil Procedure Rules, 2010*, the court becomes divested of Jurisdiction to re-visit the same issue.

45. In this respect, I wish to reiterate the position that was taken by this court in the case of *Homeboyz Entertainment Limited versus Secretary National Building Inspectorate & 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."

46. Additionally, this court also had a second opportunity to consider the import and implication of the provisions of Order 17 Rule 4 of the *Civil Procedure Rules, 2010*. For clarity, this was in respect of the case of *China Bente Industry (K) Ltd versus Seline J Comen & another* [2022] eKLR, wherein the court arrived at and reiterated the same position.

47. Given the foregoing position, I hold the firm view that the dismissal of the Plaintiff's/Applicant's suit pursuant to and by dint of the provisions of Order 17 Rule 4 of the *Civil Procedure Rules, 2010* divests and deprives this honourable court of the requisite jurisdiction to reinstate or restore the dismissed suit for hearing, either in the manner sought or at all.

Issue number 2 - Whether the court is functus officio.

48. Having listened to and entertained submissions by the respective advocates on the November 14, 2022 and thereafter having rendered a determinative decision in the matter, it is evident that this court has appropriated and exhausted its mandate as conferred vide the Provisions of the *Civil Procedure Act* and the Rules made thereunder.

49. In view of the foregoing, I am of the considered view that the honourable 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 offici*o*.

50. 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.

51. For coherence, the Court of Appeal cited and relied on an article via *The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*" (2005) 122 SALJ 832; thereafter proceeded and observed as hereunder;

> ..."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 ,(the dismissal of the Plaintiff's case against the Defendant), the court becomes functus officio and hence same cannot be invited to revert to the matter and make further orders, inter-alia reinstatement of the dismissed suit, whose import would be tantamount to sitting on appeal, in respect of own Decision.

53. Consequently and in the premises, I therefore find 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 analysed 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 courts Dismissal. In a nutshell, the Application dated the January 17, 2023, be and is hereby Dismissed with costs to the Defendant.

56. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023.

HON OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson Court Assistant

Ms. Jackie Akinyi h/b for Mr. Kenneth Mbaabu for the Plaintiff/Applicant

Mr. Nyanyuki for the Defendant/Respondent