Kimaita v County Government of Meru & 2 others; Mitu & 5 others (Interested Parties) (Constitutional Petition E006 of 2023) [2025] KEHC 3007 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3007 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CONSTITUTIONAL PETITION E006 OF 2023

HM NYAGA, J

MARCH 14, 2025

BETWEEN

EARNEST KIMAITA ..... PETITIONER

AND

COUNTY GOVERNMENT OF MERU ..... 1ST RESPONDENT

COUNTY SECRETARY, MERU COUNTY ..... 2ND RESPONDENT

MERU COUNTY PUBLIC SERVICE BOARD ..... 3RD RESPONDENT

AND

JULIUS KAINGA MITU ..... INTERESTED PARTY

JUSTUS KIAMBI ARITHI ..... INTERESTED PARTY

HELLEN NKIROTE MUGAMBI ..... INTERESTED PARTY

MARTIN MUTUMA KUBAI ..... INTERESTED PARTY

JULIUS GITONGA KABUI ..... INTERESTED PARTY

MBAABU M'INOTI ..... INTERESTED PARTY

RULING

1. The matter coming up for determination is the Application dated 17TH February 2025, which seeks the following orders:-

    a. Spent

    b. Spent

c. That there be a stay of execution of the Ruling and orders of this Honourable Court delivered on 19th September 2024 pending the hearing and determination of intended appeal by the 3rd Respondent and 1st to 5th Interested parties against the Ruling and orders of this court issued on 13th February 2025.

d. That the costs of this application be in the cause.

2. The Application is supported by the grounds set out on its face and the affidavit of Julius Kainga Mitu sworn on even date.

3. In a nutshell, the applicants state that Judgement was delivered by this court on 16th May 2024 and the following orders were issued;

a. The Court however finds that the Composition of the 3rd Respondent violates the provisions of Article 27(8) and 175 (c) of *the Constitution*;

b. On the strength of orders issued by this court in *Kiaga v. Meru County Assembly Service Board & Another (Constitutional Petition E029 of 2022*), the 3rd Respondent has six months from 1st March, 2024 within which to ensure compliance with the two thirds gender rule enunciated under the provisions of Article 27(8) and 175(c) of *the Constitution*.

4. It is averred that when the matter was mentioned on 19th September 2024 for purposes of compliance, in the absence of the advocates for the Applicants, the court delivered a Ruling and determined that the 3rd Respondent did not comply with the Judgement of the court delivered on 16th May 2024 and directed that the 3rd Respondent be dissolved. That the ruling was made ex-parte.

5. It is further averred that the effect of the said Ruling is that the 3rd Respondent which is a statutory body established under section 57 of the *County Governments Act* will be dissolved, contrary to the legal provision that it is a body corporate with perpetual succession. That the implementation of the said ruling will directly affect the legality and operations of the 3rd Respondent and the ability to exist as a statutory body. That the ruling will interfere, violate and infringe upon the contracts of employment of 1st to 5th Interested parties who have fixed term contract of employment and enjoy security of tenure of office and can only be removed pursuant to section 58 of the *County Governments Act*. That the law does not contemplate that a body corporate with perpetual succession can be dissolved through orders of the court.

6. It is further averred that the said ruling delivered on 19th September 2024 ordered for the dissolution of the 3rd Respondent without any transitional caretaker arrangement or formal handover and there is a time sensitive element in re-constitution of a new Board given that the process of filling up vacancies ordinarily take more than 6 months and involves several players, including the office of the Governor, the Assembly, the Selection Panel and the Assembly Committee. That the vacuum created will lead to anarchy, chaos and lawlessness, since there will be nobody responsible for handling disciplinary issues within the County Government of Meru.

7. It is further averred that the application encompasses a matter of paramount public interest with far reaching effect or implications for the governance and administration of the Meru County Public Service including the legality of decisions made by the Board in the last 5 years, including employment, promotions, disciplinary decisions, renumeration and benefits of workers in the County Government of Meru.

8. It is further averred that unless stay is granted, the intended appeal shall be rendered nugatory as new members of the Board will be nominated, approved and appointed to replace the existing members.

9. The Applicants further aver that they are dissatisfied with the Rulings of the court delivered on 19th September 2024 and 13th February 2025, the latter which declined to vacate the earlier orders to allow them to prove and demonstrate their compliance with the Judgement herein.

10. It is also averred that unless stay is granted the Applicants will suffer substantial and irreparable loss. That the orders sought will not prejudice the Petitioner or any other person and the operations of the board will not be illegal or irregular, given that the Board as currently constituted meets the constitutional threshold with 6 members, four of which are male and two are female namely;

    a. Julius Kainga Mitu Chairperson - Male

    b. Justus Kiambi Arithi Member -Male

    c. Hellen Nkirote Mugambi Member - Female

    d. Martin Mutuma Kubai Member -Male

    e. Julius Gitonga Kabui Member - Male

    f. Virginia Kawira Miriti Secretary/CEO- Female

11. It is thus their prayer that the court stays the orders of this court on 19th September 2024, pending their appeal to the Court of Appeal.

12. In response, the Petitioner filed a replying affidavit sworn on 24th February 2025.

13. Although the Response was addressed at the application dated 19th February 2025, it emerged that this particular application had not been paid for, hence the affidavit was treated as a response to the application dated 17th February 2025, which sought similar orders.

14. The same issue arose in respect to the 1st and 2nd Respondents' response in the form of Grounds of Opposition dated 24th February 2025.

15. The Petitioner's response is that the application is misconceived, fatally defective and a pure abuse of the court process.

16. It is averred that the application is also res judicata since the issues raised were fully addressed by the court in its ruling delivered on 13th February 2025.

17. It is further averred that the application is framed as one seeking a review of the orders of the court of 16th May 2024 and the same does not meet the threshold for review. That the review is sought 10 months after the decision was delivered which is unreasonable delay for which no explanation is given.

18. It is further averred that the issues raised pertaining to compliance were raised in court before the Judgement of 16th May 2024 was delivered and it is thus reasonable to assume that the court duly considered the same before rendering its judgement and find that the Board was not properly constituted.

19. It is further averred that in its Ruling delivered on 13th February 2025, the court found that it was being called to review the Judgement of 16th May 2024 albeit the orders sought made no reference to the Judgement. That the court found that inviting it to make a determination on whether the Board was properly constituted would be tantamount to sitting on appeal over its own judgment and ruling.

20. The petitioner opposed any extension of the orders of stay. It is argued that since the Applicants have invoked the jurisdiction of the appellate court, this court is now functus officio. That the right court to grant any orders as the Court of Appeal.

21. The 1st and 2nd Respondents in their grounds of opposition argue that the application is res judicata and runs afoul of section 7 of the *Civil Procedure Act* as it seeks to canvass issues already determined by the court in its Judgement delivered on 16th May 2024 and the Ruling delivered on 13th February 2025.

22. It is further argued that having invoked the Appellate jurisdiction of the Court of Appeal, the Applicants are barred from invoking this court's powers of review.

23. It is further argued that this court is functus officio, having already rendered a ruling on 13th February 2025.

24. The parties were invited to make oral submissions which they did. I will not rehash the same word for word. It suffices to state that I have duly considered them and I will refer to them in this ruling.

25. Having looked at the matter, I find that the issues arising for determination to be;

    a. Whether this court is functus officio as regards the orders sought.

    b. Whether the application is res-judicata

    c. Whether the order sought can be granted.

26. It has been argued that this court is functus officio, having rendered its decision on 13th February 2025.

27. The doctrine of functus officio is well settled. In short, once a court has exhausted its jurisdiction over an issue or matter, it cannot go back to the same issue or matter.

28. Functus officio is a principle of law that prevents the reopening of a matter before the same Court that rendered the final decision. If a party establishes that the court is functus officio, the court will have no business determining the matter further.

29. The Supreme Court of Kenya in the case of Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, 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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

In Jersey Evening Post Ltd vs Ai Thani (2002) JLR 542 at 550, it was held thus:

> " 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 or adjudication must be taken to a higher court if that right is available".

30. As per the decision of the Court of Appeal in Telkom Kenya Limited vs John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR, the functus officio doctrine does not allow;

> " a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

31. It is It is not in dispute that they court delivered a ruling in respect to the application dated 30th of September 2024, where it found that it had no jurisdiction to revisit the merits of the judgment of the court delivered on the 16th May 2024 and the ruling delivered on 19th September 2024 . It is actually this ruling that the applicants have appealed against .

32. In the present application, the applicants have once again, in my view, revisited the same issues that was the subject of the ruling on 13th February 2025 knowing very well that once the court has ruled that it has no jurisdiction, all it can do is down its tools. This was affirmed in Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1) where the court held as follows;

> " Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

33. It is thus my considered view that in so far as the orders of the court made on 16th May 2024 and 19th September 2024 are concerned this court is functus officio.

34. By the same breath, the question of the ruling by the court delivered on 19th September 2024 was fully addressed in the ruling of 13th February 2025. Thus the matters now raised in this present application, as regards the propriety of the decisions on the compliance with the judgment and the order to dissolve the board are res judicata and it will not be proper to go back and look at the same all over again.

35. I will now look at the substance of the application, for stay pending appeal.

36. The Applicants have come under order 42 Rule 6 of the Civil Procedure Rules. The Rule provides as follows:-

    1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

    2. No order of stay shall be made under sub rule (1) unless-

        a. The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant"

37. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

a. Substantial loss may result to him/her unless the order is made;

b. That the application has been made without unreasonable delay; and

c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

38. These principles were enunciated in Butt vs Rent Restriction Tribunal [1979] eKLR cited by the applicants, where the Court of Appeal set out what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

39. A similar holding was made in Sankale ole Kantai T/A Kantai & Co. Advocates vs Housing Finance Co. Ltd (2014) eKLR where the court held that;

> " The sufficient reason the law looks at under Order 42 Rule 6 of the CPR is that substantial loss would occur on the Applicant unless a stay is ordered. That decision is made after a delicate and novel balancing of both rights involved. None is greater or the lesser. And if the court finds there is sufficient reason to grant stay, such restriction or postponement of the Respondent's right to the fruits of his judgment must be secured by provision of security which is sufficient to guarantee performance of the decree which might ultimately binding on the Applicant...
>
> But let me dispel the notion that where the court orders stay of execution under Order 42 rule 6 of the CPR, it has taken away the right of a successful party or offends the principle of justice; to wit, justice shall not be delayed guaranteed under Article 159 of *the Constitution*. Such broad arguments tend to mislead, and also fail to appreciate that Order 42 rule 6 of the Civil Procedure Rules deals with a case of two competing rights where the only constitutional act is judicial balancing of those rights in order to grant a remedy which is appropriate in the circumstances of the case. Such scenario does not envisage preferring one right and not the other or over the other. It envisions a result of the balancing act as

constitutional judicial remedy which does not produce any prejudice or discrimination to any party."

40. The same principles were reiterated in my own decisions in Meshack Ndegwa Njoroge vs Anthony Njuguna Wambui (2024) KEHC 8258 (KLR), R.N. vs M.A.O. (2023) KEHC 2147 (KLR) and Mabati Rolling Mills Ltd and another vs Fredrick Kariuki (2024) KEHC 8247 (KLR), which were cited by the applicants.

41. All the above decisions affirm the position in law when it comes to stay of execution of an order or decree pending appeal.

42. So which order is being appealed against, and what orders are sought to be stayed?

43. In the present application the applicants are aggrieved by the ruling of this court delivered on 13th February 2025, in which the court ruled that it could not cloth itself with jurisdiction and begin to probe the correctness, legality or otherwise of the ruling by L. Kassan, J delivered on 19th September 2024. In that ruling the court dismissed the application dated 30th September, 2024.

44. Now, an order for dismissal is a negative order. It does not call for anything to be done. The question is thus, can this court stay a negative order that it has issued?

45. In Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR the Court of Appeal (Kantai J.A) held as follows:

> " An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:
>
> '..... an order for stay of execution must be intended to serve a purpose .....' "

46. Similarly, in Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR, the Court expounded on stay of execution of such orders, stating:

> " In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:
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> "The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C)."

47. Also, in Raymond M. Omboga v. Austine Pyan Maranga Kisii HCCA 15 of 2010, it was held thus;

> " The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can

be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise..."

48. Guided by the above cases, I find and hold that the order that the application is hinged on is a negative order which is incapable of being stayed. The only execution that can take place is in respect to costs in the application in question which is the subject of the intended appeal. There is no indication that the respondent has commenced any execution for the said costs.

49. Looking at the application in question it is plain to see that the applicants were trying to be clever in that although the orders sought are pending an intended appeal, and that intended appeal is against the ruling of 13th February 2025, they have sought stay against the ruling delivered on 19th September 2024, which is what the applicants are actually aggrieved by. It is common ground that there is no appeal against the said ruling or the substantive judgment itself, delivered on 16th May 2024.

50. In my view this application is yet another attempt to seek a stay of the ruling of 19th September 2024 through the back door, yet the applicants have not appealed against it. This is a bait that the court refuses to swallow, given the earlier findings of the court, based on jurisdiction.

51. Although this court has jurisdiction to order a stay of execution pending appeal, I find that the decision appealed against is negative order and cannot be stayed, save for execution for costs.

52. Since there is no order capable of execution emanating from the ruling appealed against, I find there is no substantial loss to be suffered by the applicants.

53. I also find that the applicants cannot use the present application to stay an earlier decision that they have not appealed against. That would be to condone an outright abuse of the court process.

54. As matters stand, the orders of the court as contained in its judgment delivered on 16th May 2024, and the ruling of 19th September 2024 have not been appealed against and, as stated earlier, this court will not disturb them, for lack of jurisdiction to do so.

55. Therefore, the application dated 17th February, 2025 is found to lack any merit and is dismissed with costs.

56. Consequently, the interim stay orders that were in force pending delivery of this ruling are hereby vacated.

57. That said, I also find that the same reasoning would apply to any other application that purports to revisit the correctness or otherwise of the substantive orders issued by the court on16th May 2024 and 19th September 2024. The window for such application(s) before this court is closed. The matters should now move into the realm of the Court of Appeal.

SIGNED, DATED AND DELIVERED AT MERU THIS 14TH DAY OF MARCH 2025.

H.M. NYAGA

JUDGE