



REPUBLIC OF KENYA



KENYA LAW
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**Muhsin v Ibrahim & 3 others (Civil Case 25 of 2015)
[2025] KEHC 7321 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 25 OF 2015**

J NGAAH, J

MAY 23, 2025

BETWEEN

ABDULKARIM SALEH MUHSIN PLAINTIFF

AND

NEDIM MOHAMMED IBRAHIM 1ST DEFENDANT

SARA ABDELLA ABDUSMED 2ND DEFENDANT

ZUM ZUM INVESTMENTS LTD 3RD DEFENDANT

CHIEF LANDS REGISTRAR 4TH DEFENDANT

RULING

1. Judgment in this matter was entered in favour of the plaintiff on 19th December 2019. It was, however, delivered on 20th December 2019. By an application dated 10th January 2020, the defendants moved this Honourable Court to set aside the judgment. This application was dismissed on 31st May 2021.
2. Subsequently, the plaintiff extracted the decree which was issued on 29th September 2023. A party and party bill of costs was filed and a certificate of taxation dated 9th July 2024 shows that the plaintiff's bill of costs was taxed at Kshs 1,861,830.00.
3. The plaintiff sought to enforce the decree by means of issue of notice to the judgment debtors to show cause why execution should not proceed against them. The judgment debtors were to appear in court on 23rd September 2024 for this purpose.
4. Nonetheless, no cause was shown on 23rd September 2024. The record shows that the notice to show cause was put off pending determination of an application by the applicant dated 20th September, 2024.



5. In the meantime, and more particularly on 28th January 2025, the judgment debtors filed a motion of even date seeking orders:
- “ 1. That this application be certified urgent.
 2. That this Honourable Court be pleased to grant stay of execution of the decree pending hearing and determination of the application.
 3. That this court be pleased to order a stay of further proceedings pending the hearing and determination of the application.
 4. That this Honourable court be pleased to declare this suit and all consequential order as moot and compromised.
 5. That the cost of the application be provided.”
6. This is the application that is the subject of this ruling. It is expressed to be brought under article 159 of the *Constitution*; sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, cap. 21; and, order 22, Rule (a), Rule 25, Rule 51 of the Civil Procedure Rules. The application is supported by the affidavit of Nedim Mohammed Ibrahim, the 1st judgment debtor.
7. According to Ibrahim, the plaintiff is a business partner and Ibrahim’s co-director in the 4th defendant company. At some point, in the course of their relationship, a dispute arose between them as a result of which several suits arose. These suits were filed in this Honourable Court and the Environment and Land Court. The disputes are said to have been conclusively settled by way of a mediation agreement and resolution dated 7th May 2017.
8. However, the plaintiff is said to have failed to co-operate in the implementation of the mediation agreement as a result of which Ibrahim filed another Civil Suit in this Honourable court at Mombasa, being Civil Case No. E051 of 2021 seeking what the judgment debtors have described as “Specific performance of the mediation agreement and the execution dated 9th May 2017”.
9. A judgment is said to have been delivered on 24th November 2023 according to which the mediation agreement is said to have been upheld and the prayer of specific performance granted as prayed in the plaint.
10. Aggrieved by the judgment, the plaintiff appealed in the Court of Appeal and, at the same time, sought stay of execution of the judgment pending the hearing and determination of the appeal. The application was dismissed by the Court of Appeal on 24th May 2024.
11. Against this background, Ibrahim claims that the notice to show cause is “fraudulent, null and void as the instant suit and all consequential orders have been compromised and rendered moot and are of no effect by the Judgment of Hon. Florence Wangari in the Mombasa HCCC E051 of 2021”.The notice to show cause, in particular, is alleged to be null and void and, therefore, should be struck out and the proceedings pursuant to that notice stayed since the suit, in its entirety has been “compromised”.
12. The application has been opposed and a replying affidavit to that effect filed. The affidavit has been sworn by the plaintiff/respondent. According to him, the narrative that the judgment and decree issued in HCCC No. E051 of 2021 compromised the judgment and decree in the instant suit is misplaced and intended to mislead this Honourable Court. Even in its judgment, the court (Wangari, J.) is said to have acknowledged in HCCC No. E051 of 2021 that various suits between the parties, including the instant suit, had been concluded. As far as the respondent is concerned, the only outstanding business in this suit is execution of the judgment.



13. Upon considering the application and the submissions by the learned counsel for the applicants and the respondent, I note that although the application is pegged on “a mediation agreement”, ostensibly compromising this suit, post judgment, there is no evidence on record of such an agreement having been entered and adopted in this case as the court’s own order. Lack of proof of such a mediation agreement having been registered and adopted in this case is sufficient to dismiss the defendant’s application dated 28th January 2025 for the reason that it has neither factual nor legal basis.
14. Speaking of legal basis, judgment in this matter having been rendered way back in 2019, this Honourable Court is, for all intents and purposes, functus officio. This principle and the circumstances when it is not be strictly applied was considered the High Court of South Africa In Re Securebt (Pty) Ltd versus Norris & Another (216992021) 2023 ZAGPJHC1038.
15. While relying on Firestone South Africa (Pty) Ltd v Gentiruco AG, Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298, which is an earlier decision by the Supreme Court of South Africa, the court held as follows:

“20. The general principle is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. “the General Principles, now well established in our law, is that once a court has duly pronounced a final Judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio; its jurisdiction having been fully and finally exercised, its authority over the subject matter has ceased”.

21. An ambiguity or a patent error or omission has been described as an ambiguity or an error or omission as a result of which the judgment granted does not reflect the real intention of the judicial officer pronouncing it, in other words, the ambiguous language or the patent error or the omission must be attributable to the court itself.

22. In many cases the common law principle that there are exceptions to the functus officio rule, which allows a court to vary its own judgment, have been restated. For purposes of this judgment the court will only refer to a few cases starting with the oft-quoted judgment in Firestone South Africa (Pty) Ltd v Gentiruco AG, Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) where the court, considering common law, recognised a number of exceptions to the functus officio rule. These are:

20.1 Supplementing of a judgment. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, cost or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant.

20.2 Clarification of the judgment. A court may clarify a judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter “the sense or substance” of the judgment or order.



20.3 Correction of errors in a judgment. The court may correct a clerical, arithmetical or other error in the judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.”

16. In his submissions on behalf of the applicant, the learned counsel for the applicant cited the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR, which case was cited by the Supreme Court in the case of *Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others* 2013 eKLR. In that case the court is said to have held on this issue that:

“...A court is *functus officio* 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.”

17. If there was any need for “perfection” of the judgment delivered in the instant suit, there is no evidence that the applicant, or any other party in the proceedings for that matter, has ever moved this Honourable Court in that direction. And even if the court, on its own motion, was of the mind that the judgment required “perfection”, there would be no plausible reason why it has not “perfected” the judgment, six years after it was delivered.

18. That said, I suppose the “change of mind” by court or “perfection” to which reference has been made in the *Jersey Evening Post Limited v Al Thani* (*supra*) certainly does not include material alteration of the tenor and the substance of the judgment. As a matter of fact, “alteration” may very well be a misnomer because, generally speaking, “alteration” connotes any variation that may as well go to the root of the judgment. Yet under the principle of *functus officio*, once a judgment has been rendered it ought not to be varied to such a degree. The variation, if any is necessary, should be limited to correction of such errors as are clerical or arithmetic. This is not what the application before court is all about. Neither does the application fall under any of the exceptions of *functus officio* enunciated in *Firestone South Africa (Pty) Ltd v Gentiruco AG*, *Firestone South Africa (Pty) Ltd v Gentiruco AG* (*supra*).

19. In conclusion, therefore, all I can say about the judgment debtors’ application is that, having pronounced itself on the dispute before it and duly rendered its judgment, this Honourable Court cannot go behind it, and declare the judgment as “moot or compromised”. The application is, therefore, dismissed with costs.

SIGNED, DATED AND DELIVERED ON 23RD MAY 2025

NGAAH JAIRUS

JUDGE

