



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Ogoti (Civil Appeal 123 of 2018)
[2024] KEHC 1188 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 123 OF 2018
RE ABURILI, J
FEBRUARY 13, 2024**

BETWEEN

DANIEL KARIUKI JUDGMENT DEBTOR

AND

D.N. OGOTI DECREE HOLDER

RULING

1. The applicant vide an application dated 25th October 2023 sought leave to have his name deleted from these proceedings and that the Attorney general take the place of the judgment debtor and have the name of the Judgment debtor Daniel Kariuki substituted with that of the Attorney general and that such leave operate as an absolute bar against any proceedings against the judgment debtor in his personal capacity but instead have the same be against the Hon. Attorney General.
2. It was the applicant's case that he was adjudged to pay Kshs. 1,500,000 plus costs and interest to the respondent in a claim for malicious falsehood, the same having arisen while the applicant was in the course of his duty.
3. The applicant further averred that he was a civil servant currently working as the OCS Usenge Police Station and thus the judgement debt ought to be satisfied by the government in line with Section 4 of the [Government Proceedings Act](#), the same having arisen in the course of his duties.
4. The parties filed submissions to canvass the application the application.

The Applicant's Submissions

5. It was submitted that his prayers were premised on Section 4, 12 (1) and 13 of the [Government Proceedings Act](#). The applicant submitted that the prayers he sought were discretionary as was held in the case of [Gladys Nduku Nthuki v Letsbego Kenya Limited; Mueni Charles Maingi \(Intended Plaintiff\)](#) [2022] eKLR.



The Respondent's Submissions

6. The respondent submitted that in the instant case, the applicant was sued in his own capacity and the fact that he was the OCS Busia Weighbridge does not negate this fact as he was not sued in his official capacity.
7. It was submitted that the applicant instructed the firm of Kimanga & Company Advocates to enter appearance on his behalf and filed a defence where there was no mention of lack of capacity and further, that the Applicant never filed any grounds of opposition in defiance but instead entered appearance, defended the suit and filed an appeal when the judgment was not in his favour and only at the point of execution has he brought an application which is so openly an abuse of court process and is not brought in good faith.
8. The respondent submitted that the Applicant was sued in his personal capacity and therefore cannot claim to be substituted yet he is alive and capable and further, the claim of defamation is a personal claim which can neither survive a dead person and by this virtue, cannot be transferred to someone else as was held In the case of *Hon. Emmanuel Karisa Maitha v The Nation Media Group Ltd & Another* (2007) eKLR.
9. It was submitted that the Applicant cannot claim to have acted in his personal capacity as an officer of the government having not brought up the matter in the trial court and waited until judgment and after his appeal was dismissed and the commencement of execution process for him to bring it up and therefore it was clear that the applicant acted in his own capacity and bringing in the Attorney General is an afterthought and an attempt to avoid execution.
10. The respondent submitted that the court cannot allow amendment after judgment and an appeal is already filed once a court pronounces its final decision on a matter as the court is rendered functus officio and therefore it cannot go back to determine the matter on a merit- based rearrangement as was held in the case of *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR.
11. It was further submitted that the applicant has already filed an appeal in the Court of Appeal and therefore this court can only entertain matters of stay, not substitution of parties.

Analysis & Determination

12. I have considered the application herein as well as the submissions of the parties' counsel and the only issue for determination is whether the applicant can be substituted for the Hon. Attorney General.
13. The history of this matter is that the respondent filed a suit for damages for defamation of character against the appellant judgment debtor herein and judgment was entered against the appellant in favour of the respondent decree holder. The lower court awarded the respondent general damages in the sum of Kshs 1,500,000 plus costs of the suit.
14. Aggrieved by that judgment and decree, the appellant filed this appeal, which appeal was dismissed with costs. The respondent then begun execution process before this court to recover the general damages awarded but this court guided that execution of decree of the lower court could not be carried out in this court except or costs awarded on the successful appeal
15. Upon the respondent making efforts to recover the decretal sum and costs of this appeal, the appellant filed this application seeking to be substituted with the Attorney General.



16. The application is brought under Order 1 Rule 10 of the *Civil Procedure Rules*. Order 1 rule 10(2) of the *Civil Procedure Rules* provides that:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

17. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori v Chege & 3 Others* [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

18. In *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 it was held that:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

19. In *Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique



circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

20. In this case, the intended party is the Hon. Attorney General. The applicant alleges that he committed the acts complained of in the course of his duties as a civil servant and that as such the decree against him ought to be satisfied by the government.
21. The respondent opposes the application on the grounds that the applicant was sued in his personal capacity and further that this court was functus officio having already dismissed the applicant’s appeal and in view of the applicant’s appeal to the Court of Appeal, this court cannot substitute the appellant with the Attorney General.
22. The general rule as to who can sue in a claim of defamation was succinctly discussed in *Gatley & Lindsell on Slander and Libel* 10th Edition at page 197: -

“An action for defamation is a purely personal action. The proper person to sue as a claimant is the person defamed, and the proper person to be sued as defendant is the person who published the defamatory words or caused them to be published (though this may include a person vicariously liable for another). A cannot bring an action of libel or slander against B for words defamatory of C, even though C has purported to assign to him his right of action; a right for damages for libel or slander cannot be assigned. If A suffers damages as a result of a defamatory statement maliciously made about C, who is associated with A’s business, A may have an action for malicious falsehood, but that is not the same thing as an action for defamation.”

23. In the instant case, the applicant having published the words complained of by the respondent and having been found liable for defamation, all this while having acted in his own capacity in the suit and proceedings which have been concluded and only pending execution of decree and costs of this appeal, this court has no power to have him replaced by the Attorney general.
24. The respondent contended that the court was functus officio having determined the appeal and as such could not entertain the instant application. The doctrine of functus officio was considered by the Court of Appeal in *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR, where the court held that -

“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.”

25. In *Leisure Lodge Ltd v Japhet Asige and another* [2018] eKLR the court stated that:

“.....On the question that this court is {{term{refersTo |title Once 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 revoked or varied by the decision-maker; finality.

An enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.} functus officio}}, I do find that a trial court retains the duty and jurisdiction to undertake



and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end.....

I decline to hold that the court has become functus officio. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before.

The following are just but examples:

Application for stay

Application to correct the decree

Application for accounts

Application for execution including garnishee applications

Applications for review

Application under section 34 of the Act

If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed.”

26. In the instant case, it is my view that seeking to substitute a party at this stage of the proceedings, when judgement has been passed, an appeal lodged and dismissed and even execution proceedings commenced, cannot stand.
27. I therefore agree with the respondent that indeed, this court is functus officio and cannot entertain the instant application.
28. Taking all the aforementioned into consideration, I hereby find that the application dated 25th October 2023 lacks merit and the same is hereby dismissed with an order that each party do bear their own costs for the reason that it was the Attorney General who filed the frivolous application.
29. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2024

R.E ABURILI

JUDGE

