



**Unik Driving School v Taib (Miscellaneous Civil Application
245 of 2021) [2024] KEHC 4795 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 245 OF 2021**

OA SEWE, J

APRIL 18, 2024

BETWEEN

UNIK DRIVING SCHOOL APPLICANT

AND

ABDALLA ALI TAIB RESPONDENT

RULING

1. The Notice of Motion dated 4th October 2023 was filed by the respondent herein, Abdalla Ali Taib, under Article 159 of *the Constitution* of Kenya, and Sections 3, 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. It seeks orders that:
 - (a) Spent
 - (b) The ruling delivered herein on 24th August 2023 be amended so as to rectify an error apparent in the said ruling.
 - (c) The ruling delivered herein on 24th August 2023 be amended and directions given for the payment by the applicant of security for costs in the suit.
 - (d) That the ruling delivered herein on 24th August 2023 be amended to read that the applicant is to deposit the taxed costs being Kshs. 365,021/= into an escrow interest-earning account pending the hearing and determination of Miscellaneous (Reference) Civil Application No. 245 of 2021.
 - (e) Such further orders and/or directions be given to the intent that the security for costs payable by the applicant be provided for.
 - (f) That the costs of the application be provided for.



2. The application was premised on the grounds that the Court delivered a ruling herein on 24th August 2023 to enable the respondent secure his taxed costs pending the hearing and determination of the substantive Reference; and that the Court took note and stated that both parties were in agreement that the applicant ought to give appropriate security for the due performance of the orders. However, no order was made in that regard; and therefore the amendment is necessary to cushion the respondent from grave and substantial prejudice. The respondent also averred that unless the orders sought are granted, the substratum of this suit will be defeated and the suit rendered nugatory.
3. The application was supported by the affidavit of Mr. Taib Ali Taib Bajabar, SC, MBS, sworn on 4th October 2023 to which was annexed a copy of the ruling dated 24th August 2023. The respondent reiterated the aforementioned grounds and prayed that the application be allowed.
4. The application was resisted by the applicant vide the Grounds of Opposition dated 29th January 2024. Thus, the applicant contended that:
 - (a) The circumstances of this case are not of such a nature that would warrant the exercise of the Court's inherent jurisdiction under Section 1A and 1B of the *Civil Procedure Act*;
 - (b) The application is anchored on provisions of the law which do not donate any power to this Court to grant the orders sought, thus making the instant application fatally defective;
 - (c) Neither was there a mistake nor error apparent on the face of the record nor discovery of new and important matter or evidence that would warrant review of the Court's order;
 - (d) The application is disguised as an appeal against the decision of the Court; and if the respondent was aggrieved thereby, it ought to have approached the appellate court;
 - (e) The orders sought are an exercise in futility as the application is a disguise to appeal the ruling dated 24th August 2023.
 - (f) The Court is *functus officio*.
5. The application was urged orally on 4th April 2024 by Ms. Taib, counsel for the respondent. She relied on the grounds set out on the face of the application and the averments in support thereof in the Supporting Affidavit. She highlighted the assertion that both parties were in agreement as to the payment of security and that the Court acknowledged as much. She relied on Sections 99 and 100 of the *Civil Procedure Act* and submitted that the amendment is necessary to avert any prejudice to the respondent.
6. On behalf of the applicant, Mr. Barasa relied on the Grounds of Opposition dated 29th January 2024. In his view counsel could not invoke Section 99 of the *Civil Procedure Act* because it was not specifically mentioned on the face of the application as one of the enabling provisions. He further submitted that, because the intention is to have the ruling amended on account of an error on the face of the record, Section 99 is not applicable because it contemplates situations involving clerical and arithmetical errors only. He consequently posited that the application ought to have been brought by way of review or appeal. He relied on *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR in support of his submission that the Court is *functus officio* and has no power to amend the ruling in question.
7. It is consequently manifest from the foregoing that, whereas the application was premised on Sections 3 and 3A of the *Civil Procedure Act*, the respondent's intention, as gathered from the submissions of his counsel, was to rely on the slip rule, as encapsulated in Section 99 of the *Civil Procedure Act*. Counsel also placed reliance on Section 100 of the *Civil Procedure Act*. Thus, the argument advanced



was that the Court made a mistake in not including an order for security for costs in the ruling dated 24th August 2023. On the other hand, the applicant was of the view that the Court is *functus officio* and therefore the only avenue open for the respondent was an approach, not by way of amendment pursuant to Section 100 of the *Civil Procedure Act*, but either by way of review under Section 80 of the *Civil Procedure Act*, or an appeal to the Court of Appeal. In the premises, the issues for determination are:

- (a) Whether the Court is *functus officio*; and
- (b) Whether the orders sought in the application dated 4th October 2023 are warranted.

A. On whether the Court is functus Officio:

8. The principle of *functus officio* was considered at length by the Supreme Court in [Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uburu Kenyatta & William Samoei Ruto](#) (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling), where court cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law,” [2005]122 SALJ 832 stating:

“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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

9. Similarly, in [Telkom Kenya Limited v John Ochanda \(Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited\)](#) (*supra*), the Court of Appeal held as follows on the *functus officio* doctrine:

“*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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler v Alberta Association Of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a 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. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

Where there had been a slip in drawing it up, and,

Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.*, [1934] S.C.R. 186”

10. Hence, it has often been pointed out that the court does not become *functus officio* merely because it has delivered a final decision in civil proceedings, for it retains the jurisdiction to correct errors under the slip rule and for review under Section 80 of the *Civil Procedure Act*.



In this regard, I agree entirely with the position taken in [Leisure Lodge Ltd v Japhet Asige and another](#) [2018] eKLR that:

“On the question that this court is 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. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the *Act*. In *Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others* [2018] eKLR, this court said of the doctrine of functus officio:-

“I understand the doctrine, like its sister, the res-judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.

As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.

I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment-debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. 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”.



11. In the circumstances, upon a careful consideration of the instant application in the light of the ruling dated 24th August 2023, it is manifest that the issue of security was considered at paragraphs 14, 15 and 16. In particular, the Court noted thus at paragraph 16:

“Thus, at paragraph (e) of the Notice of Motion dated 15th June 2022, the applicant indicated its willingness to give appropriate security for the due performance of the orders that may ultimately be binding on it in the event of a successful Reference. Similarly, counsel for the respondent, at page 5 of his written submissions, was agreeable to the taxed costs being deposited in an interest earning account pending the Reference, should the Court be inclined to grant stay of execution.”

12. In so far as no specific order was made in that regard, it cannot be said that the Court is *functus officio* or that the application is a disguised appeal from the decision of the Court.

B. On the merits of the application:

13. Section 99 of the *Civil Procedure Act* states that:

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.” (Emphasis added)

14. That the slip rule is not confined to arithmetical or clerical mistakes is evident in the aforementioned provision. Accordingly, in the case of *Vallabhdas Karsandas Raniga vs. Mansukhalal Jivraj & others* (1965) EA 700, the East African Court of Appeal held that:

“A slip order will only be made where the court is fully satisfied that it is giving effect to the intentions of the court at the time when the judgment was given, or in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

15. The context confirms that the depositing of security was one of the conditions for grant of stay for purposes of Order 42 Rule 6 of the *Civil Procedure Rules*; and therefore it was out of inadvertence that no specific direction was given in that regard. I am therefore satisfied that the application has been properly made under the slip rule to give effect to the intentions of the court at the time when the ruling dated 24th August 2023 was made. It matters not that the said provision was not specifically mentioned by the respondent as one of the enabling provisions, granted the provisions of Order 51 Rule 10 of the *Civil Procedure Rules*.

16. I therefore find merit in the application dated 4th October 2023. The same is hereby allowed and orders made in respect thereof as hereunder:

- (a) The ruling delivered herein on 24th August 2023 be and is hereby corrected under the slip rule to include an order that, pending the hearing and determination of the reference, the taxed costs in the sum of Kshs. 365,021/= be deposited by the applicant, Unik Driving School, in a joint interest earning account in the joint names of counsel on record herein for the parties within 45 days from the date hereof as security for the due performance of the orders that may ultimately be binding on the applicant herein in respect of costs.
- (b) Costs of the application to abide the outcome of the Reference.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF APRIL
2024

OLGA SEWE

JUDGE

