



REPUBLIC OF KENYA



KENYA LAW
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Busienei v Chebet (Civil Case 14 of 2021) [2024] KEHC 6900 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET**

CIVIL CASE 14 OF 2021

JR KARANJA, J

JUNE 12, 2024

BETWEEN

BENJAMIN KIPRUTO BUSIENEI PLAINTIFF

AND

EUNICE CHEBET DEFENDANT

RULING

1. The Notice of Motion dated 25th July 2023, was filed by the Defendant, Eunice Chebet against the Plaintiff Benjamin Kipruto Busienei, seeking orders to grant leave to the firm of Ms. Bungei and Murgor Associates to come on record for the Defendant in place of Cheruiyot Melly and Associates Advocates and for stay of execution of the judgment delivered on 21st June 2023 and/or further proceedings in this suit pending the hearing and determination of the application interparties.

Also sought by the Defendant/ Applicant is an order for review and/or setting aside of the said judgment together with all consequential orders and for the matter to be heard “*de-novo*.”

2. The grounds in support of the application are contained in the Notice of Motion buttressed by the Applicant’s supporting affidavit dated 25th July 2022 and further affidavit dated 12th March 2024. These are opposed by the Plaintiff/ Respondent on the basis of the grounds and averments contained in his replying affidavit dated 23rd October 2023 and supplementary affidavit dated 8th May 2024.

Prayers two (2) and three (3) of the application are already spent thereby leaving prayer four (4) as the main and only prayer falling for determination at this juncture.

The prayer is anchored on the provisions of Section 80 of the *Civil Procedure Act* and Order 45(1) of the *Civil Procedure Rules*.

3. The application was canvassed by way of written submissions which were duly filed by both parties through B. Murgor and Company Advocates, on behalf of the Defendant/Applicant and Rotich Langat and Partners, on behalf of the Plaintiff/ Respondent. The rival submissions, viewed against the grounds in support of the application raise two issues for consideration and determination by



this court. Firstly, whether the application is proper and competent before the court and Secondly, whether the Applicant has established and proved the necessary ingredients for grant of a review order respecting the judgment of this court delivered on 21st June 2023.

4. In summary, the history of the matter is that the suit was commenced by the originating summons filed herein on 10th December 2021 by the Plaintiff/ Respondent seeking against the Defendant/ Applicant declaratory orders to the effect that the suit parcel of land being Parcel No. Chebarus/Taito Block 7/333 belonged to the Plaintiff and that the Defendant made no contribution whatsoever to its acquisition and/or improvement thereof hence had no beneficial interest over the property.

The Plaintiff in addition sought an order of eviction of the Defendant from the suit parcel of land.

The suit was basically anchored on the provisions of the Matrimonial Property Act and was heard by affidavit evidence and written submissions after which the court rendered the impugned judgment.

5. With regard to the first issue for determination, the Plaintiff/Respondent submitted and contended that the application is fatally defective as this court, having heard and made a final determination of the suit, was now “*functus-officio*” and cannot deal with the matter any longer. In support of the contention, the Respondent relied on the decision of the Supreme Court in the case of Shollei v Judiciary Service Commission and Another (2023) eKLR, where it was held that: -

“.....Noting that in the case of Raila Odinga v Independent Electoral and Boundary Commission and 3 Others (2013) eKLR this court referred to the case of Jersey Evening Post Limited v Thani (2002) JLR 542 at page 550 where it was stated that: -

“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 on adjudication must be taken to a higher court if that right is available.....”

6. The Applicant/ Defendant did not address the issue of functus in response and opted to stick to the main issue of review. Ideally, once a court has fully heard and determined the dispute in finality, it can no longer deal with that matter. Its earlier jurisdiction to deal with the matter becomes spent so that any aggrieved party could henceforth invoke the jurisdiction of an appellate court. In such circumstances the court is said to be “*functus – officio*” to deal with any challenge to its final ruling or judgment on the dispute before it.

The doctrine of “*functus-officio*” is really an expression to the legal principle of finality. Once a court has settled a matter and given its final judgment or decision on the dispute, it would be required to down its tools and divest itself of further jurisdiction to deal with the matter (See Dickson M. Muriuki v Timothy K. Muriuki Civil Appeal No. 21 of 2013 at Nyeri Court of Appeal).

7. The Learned author, Daniel Malan Pretorius, in his article “the origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law” (2005) 122 SALJ 832 states that: -

“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.”

The excerpt foregoing was cited with approval by the supreme court in the case of *Raila Odinga v Independent Electoral and Boundary Commission and Others* (*supra*).

8. The Court of Appeal in the case of *Telkom (K) Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of) Telkom Kenya Limited* (2014) eKLR stated 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.”

In applying the doctrine of “*functus officio*” to this case, the opinion of this court would be that the present application by the Applicant/ Defendant is clearly an attempt to re-open a suit which has already been heard and finally decided by this court, hence lacks further jurisdiction to deal with it.

9. Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of “*functus officio*” but considering the grounds in support of the application and the prayers sought, it is quite clear that the application would not fall within the specified exceptions which imply that the doctrine does not prevent a court from entertaining a case it has already decided, but the court cannot revisit the matter on a merit reconsideration of the same once a final judgment has been entered and a decree issued.

Indeed, the said exceptions would be good fodder for a review application which is part of the present application and the main prayer.

The provision of law aforementioned states that: -

“clerical or arithmetical mistakes in judgments, decrees or order, or errors arising therein 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.”

10. The Applicant has not herein demonstrated that this application falls within the exceptions to the doctrine of *functus officio*. In that regard, the Applicant has also failed to establish and prove the necessary ingredients for the grant of an order of review of this court’s judgment delivered on 21st June 2023.

Under Section 80 of the *Civil Procedure Act*; any person who considers himself aggrieved by a decree or order from which an appeal is allowed may apply for a review of judgment to the court which passed the decree or made the order.

11. Order 45 of the *Civil Procedure Rules* deals with application for review in the following terms: -

“1. Any person considering himself aggrieved: -

- a. by a decree or order from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order,



may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

12. None of this foregoing ingredients of the provision of the law was herein established by the applicant for exercise of this court’s discretion in her favour. Her grounds in support of the application and the submissions in support thereof clearly showed that her intention was to have the matter reconsidered a fresh on the merits simply because she did not agree with the manner in which the matrimonial property in dispute was to be shared between her and her erstwhile husband, the Plaintiff/Respondent as ordered and decreed by this court in its impugned judgment.

It is in-structure to note that the suit was actually instituted by the Respondent against the Applicant. The Applicant had all the opportunity to defend the suit and include any counter-claim that she may have had and known at the time. This application therefore smacks of nothing short of an afterthought. It must therefore be and is hereby dismissed for want of merit and for being fatally defective and incompetent before court on account of the doctrine of “*functus-officio*”.

The Respondent shall have the costs of the application.

Ordered accordingly.

DELIVERED AND DATED THIS 12TH DAY OF JUNE 2024.

J. R. KARANJAH,

JUDGE

