



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 28 OF 2014

GABRIELLA SUSAT PLAINTIFF

VERSUS

COSIMO ROSAFIO..... 1ST DEFENDANT

BAY OCEAN LIMITED 2ND DEFENDANT

RULING

This ruling is in respect of a Notice of Motion dated 23rd March 2021 by the plaintiff/applicant seeking for the following orders:

- 1. THAT the Honourable Court be pleased to order the 1st Defendant to pay a sum of Kshs 501,627.45/- being accrued maintenance and service charges in respect to the Plaintiff's 10 shares in Bay Ocean Ltd apartments representing the ground floor apartment.**
- 2. THAT the costs of this Application be borne by the 1st Defendant/Respondent.**

Before the hearing of the application, counsel for the 1st defendant filed a notice of preliminary objection on the following grounds:

- (i) There is no Judgment, Decree or Order requiring the 1st Defendant to pay the sum, of KShs. 501,627.45 to the Plaintiff or to the 2nd Defendant and that therefore the Court has no jurisdiction to enforce or execute a non-existent or fictitious Decree.**
- (ii) The application is incompetent and misconceived on the grounds that it seeks to vary the Consent contained in the consent letter dated 13/6/2017 and filed on 21/6/2017 crystalized in the consent order given on 19/9/2017 and issued on 25/9/2017 which did not require the 1st Defendant to pay the said KShs. 501,627.45.**
- (iii) This Court is functus officio and there is no suit before it. The 1st Defendant complied fully with the terms of the consent order. The consent order required the Plaintiff to pay service charge. The Plaintiff cannot alter that consent to require the 1st Defendant to make that payment.**
- (iv) The consent order has not been set aside or varied. The Plaintiff already enforced that consent by contempt of Court proceedings.**
- (v) In his Ruling dated, signed and delivered at Malindi on 26/6/2019 in this suit the Hon. Mr Justice J. O. Olola granted the Plaintiff's Notice of Motion application dated 22/5/2018 in terms of prayer 2 of that Motion. The orders sought in prayer 2 of that Motion were to issue summons against the 1st Defendant to Show Cause why he should not be arrested and/or committed to civil jail for a term not exceeding 6 months for disobeying or breaching a Court order issued on 25/9/2017 by way of consent. There was nothing in that prayer requiring the 1st Defendant to pay KShs. 501,627.45.**
- (vi) In prayer 4 of the Notice of Motion application dated 22/5/2018 the Plaintiff had sought a specific order that the 1st Defendant should pay KShs. 501,627.45 but that order was not granted. Any order that is sought and not granted is deemed to have been denied or declined.**
- (vii) This Court in its Ruling delivered on 26/6/2019 declined to order the 1st Defendant to pay KShs. 501,627.45 and the Notice**

of Motion application dated 23/3/2021 is therefore *res judicata* as the Plaintiff seeks an order which she sought but was not granted. The Plaintiff did not appeal against the Ruling that denied her prayer 4 of the Motion dated 22/5/2018.

(viii) Under Explanatory Note Number 5 in Section 7 of the Civil Procedure Act any relief claimed which is not expressly granted shall be deemed for purposes of Section 7 to have been refused. This Court having rejected prayer 4 of the Plaintiff's Notice of Motion dated 22/5/2018 for payment of the said sum cannot sit on appeal on that decision.

(ix) As the application dated 23/3/2021 is an abuse of process of Court and is incompetent it should be struck out with costs to be paid by the Plaintiff and her Advocates jointly and severally.

Counsel agreed to canvas the preliminary objection by way of written submission which were duly filed

PLAINTIFF'S SUBMISSIONS

Counsel submitted that the parties entered into a consent before the matter could be heard on the following terms:

1) That the 1st defendant, Casimo Rosafiq will transfer 10 shares in Bay Ocean Ltd to the Plaintiff, Gabriela Susat representing the ground floor apartment. The Plaintiff, Gabriela Susat will be responsible for stamp duty, legal fees and other charges on that transfer. The transfer of shares and delivery of possession of that ground will be in full claim and the Defendant will not be required to pay the plaintiff a sum of KShs. 4,500,000.00 and Euros 60,000 sued for in the plaint.

2) THAT the plaintiff, Gabriela Susat to pay service charge.

3) THAT each party to bear its advocates costs.

4) THAT upon compliance with Order (1) above, this matter be marked as settled.

The consent was subsequently adopted as an order of the court and counsel submitted that despite the plaintiff having complied with the above consent order, the 1st Defendant has since refused to pay KShs. 501,627.45/- being accumulated maintenance and service charge.

It is on record that on 29th October 2020 this court ruled that the 1st Defendant was in contempt of court and was fined KShs. 100,000/- Counsel relied on the Condition 4 (2) (d) of the Law Society Conditions of Sale (1989) which provides for the obligations of parties to a sale agreement and that a vendor has an implied duty to provide a valid rates and rent clearance receipt, certificate, and copies of paid up utility bills of a property. That failure of the 1st Defendant to pay the service charge accrued before the apartment was transferred to the Plaintiff was in breach of his obligations emanating from the consent order.

Counsel also submitted that the 1st defendant had an obligation to obey the consent orders and relied on the case of **Bob Collymore & Another V Cyprian Nyakundi [2016] eKLR** where the Court held at paragraph 8 that;

“8. It has been said time without number that whenever a court order is made such an order is binding and whoever has difficulty has the opening to come to court to seek an explanation rather than defy it.”

Similarly counsel cited the case of **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** where Ibrahim J (as he then was) stated as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

On the preliminary objection, counsel submitted that the Honourable Court is not *functus officio* as the consent order dated 25th September 2017 has not been executed to perfection and cited the case of **Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v Kenya Power & Lighting Company Ltd [2018] eKLR** where the learned judges held as follows:-

17. On the principle of *functus officio*, we are guided by the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others (supra) where the Supreme Court of Kenya rendered itself thus:

“[18] ... Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“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."

[19] This principle has been aptly summarized further in *Jersey Evening Post Limited v. A1 Thani* [2002] JLR 542 at 550:

"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" [emphasis supplied]."

Counsel therefore urged the court to dismiss the preliminary objection and allow the application as prayed.

1ST DEFENDANT'S SUBMISSIONS

Counsel reiterated the grounds of the preliminary objection as filed which were very elaborate and submitted that the Plaintiff is not entitled to the reliefs sought herein for the reason that she sought a similar relief in her Notice of Motion dated 22nd May 2018 together with an order against the 1st Defendant for notice to show cause.

It was counsel's submission that the court did not expressly grant the relief hence for purposes of Section 7 explanatory note 5 of the Civil Procedure Act, Cap 21, that relief should be deemed denied therefore amounts to *res judicata*. The effect being that this court is then *functus officio*. Counsel urged the court to uphold the preliminary objection and dismiss the plaintiff's application with costs to the 1st defendant.

ANALYSIS AND DETERMINATION

It is trite and a general rule that once a preliminary objection is raised, it should be dispensed with first as if upheld then there would be no need of proceeding further with the application or the suit. Preliminary objections also consist of pure points of law and if the court has to look outside the points of law for facts which have to be ascertained then that would not be a good case to benefit from preliminary objections.

The issues that have been raised by the 1st defendant are that the application is *res judicata*, that the court is *functus officio*, and that this court lacks jurisdiction to enforce a non-existent decree. The issues for determination are as to whether the application is *res judicata*, whether the court is *functus officio* and whether the court has jurisdiction to hear and determine this matter.

The test for determining the application of the doctrine of *res-judicata* is found in **section 7 of the Civil Procedure Act, Cap 21**. In **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others** [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

"(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

The consent order in this case stated that the Plaintiff Gabriella Susat to pay service charge. The order sought in the present application is to the effect that the 1st Defendant should be compelled to pay the service charge. The consent order was adopted as an order of the court and further an application for contempt of court was heard and the 1st defendant fined Kshs. 100,000/ in respect of the failure to obey the consent order.

In the of **Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others** [2013] eKLR the Supreme Court of Kenya cited with approval the following passage from **"The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law"** by Daniel Malan Pretorius:-

...."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."

The consent order entered into by both parties which was adopted by the court determined the issue as to who was to pay service charge

hence the issue had already been dealt with by a competent court in respect of the same parties. These are issues that form part of the record hence the court will not look elsewhere for facts or additional evidence. It therefore follows that the court is *functus officio* as regards the application which was determined by a consent order which has neither been set aside nor reviewed

In the case of **Flora N. Wasike v Destimo Wamboko [1990] eKLR, Hancox J. A**, observed: -

“There are alternative procedures of how a party objecting to a judgement or order, recorded as having been passed with the consent of the parties or their respective advocates, is to go about setting aside or varying the consent judgement or order, namely, by a separate action brought to do so, or it may be challenged in the same suit itself by an application for review under the order relating to that procedure, or by an appeal; any of these methods is possible, and which procedure is adopted must depend very much on the circumstances of the case and on the manner by which the aggrieved party wishes to present his case, as to what witnesses have to be called, the nature of the grounds relied on for seeking to set aside or vary the judgement or order, the nature of the order sought, and so on; the burden in either case would be on the party seeking to set aside or vary the judgement or order.”

Once a consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with a contractual effect. The effect of which like any other judgment, determines and settles the issues in dispute.

In the current case, the consent order settled the case as the issue as to who was to pay service charge was determined. The plaintiff's application therefore is *res judicata* as the issue had been conclusively determined in respect of the same parties by a competent court as was held in the Court of Appeal case of **Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR**:

“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

The upshot is that the preliminary objection has merit and is therefore upheld as prayed thus the plaintiff's application is dismissed with costs to the 1st defendant.

DATED AND DELIVERED AT MALINDI THIS 13TH DAY OF OCTOBER 2021

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.