**Raindrops Limited v County Government of Kilifi (Civil Suit 9 of 2015) [2023] KEHC 17654 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17654 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL SUIT 9 OF 2015**

**SM GITHINJI, J**

**MAY 18, 2023**

**BETWEEN**

**RAINDROPS LIMITED ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF KILIFI ..... DEFENDANT**

**RULING**

1 For determination before the court is the Defendant's preliminary objection dated January 21, 2022 raised against the plaintiff's application dated January 10, 2022. The Preliminary Objection is based on the following summarized grounds;

1. By judgment delivered on July 13, 2021, this court rendered itself with finality therefore the court is functus officio.
2. This court no longer has jurisdiction.

2 The preliminary objection was disposed of by way of written submissions which I have weighed. From the submissions by the parties, the issue arising for determination is Whether the court has jurisdiction to entertain the notice of motion dated January 10, 2022.

3 The defendant's preliminary objection is based on the fact that the court rendered itself vide the judgment dated July 13, 2021and thus it is functus officio. The Supreme Court of Kenya expounding on the doctrine of functus officio in Election Petitions Nos 3, 4 & 5 *Raila Odinga & others v IEBC & others* [2013] eKLR 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:

> "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."

4 The court also relied on the holding in the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 to the effect 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."

5 In response to the plea of this court being functus officio , the plaintiff in its submissions states that the orders of injunction sought in the application are not akin to the ones sought in the plaint rather the plaintiff is seeking to restrain the defendant from defeating the final orders of the court, the partial decree as was issued by the court directed only to persons to execute an order, the defendant has not been ordered and nor can he execute the partial decree until the final orders of the court are issued, the actions by the defendant has to be stopped to allow the court deliver its final orders.

6 It is trite that a court does not become functus officio merely because it has delivered a final decision in civil proceedings. The court retains the power to undertake several actions post judgment. This position was well stated in the case of In *Leisure Lodge Ltd v Japhet Asige and another* (2018) eKLR the court said and held:

> " 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 v Arvind Shah & 7 others* [2018] eKLR, this court said of the doctrine of functus officio: -
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> "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.

7 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.

8 As was held by the Court of Appeal in *Telkom Kenya Ltd v 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.

9 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.

10 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 stayApplication to correct the decreeApplication for accountsApplication for execution including garnishee applicationsApplications for reviewApplication 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 This court has not changed its views on the point and reiterates that here it has become functus officio as far as application for review is concerned. In any event a Court of Law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a judgment. To do that would be an abdication of duty and a license for parties to do the unimaginable then shout from rooftops that the court is functus officio because there is a final judgment".

12 So now, the question is whether the Preliminary Objection is meritorious? The purpose of a preliminary objection was broadly discussed in *Charles Onchari Ogoti v Safaricom Ltd & anor* [2020] eKLR as follows:

> "(9) This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where Law J.A and Newbold P (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:
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> Law, JA.:
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> "So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
>
> Newbold, P.:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."

[10] The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of article 163 (7) of the *Constitution* of Kenya 2010.

(11) In case cited by the 1st Respondent, *David Nyekorach Matsanga & another v Philip Waki & 3 others* [2017] eKLR, and the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ. after considering various holdings of the Supreme Court of Kenya on question of Preliminary Objection held as follows:

"We quickly turn to the question whether we have before us a Preliminary Objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

"A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

In *Hassan Ali Joho & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:

"a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit"

13 For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit. Guided by these principles and without going into the merits of the application dated 10th January 2022, the issues raised by the parties herein cannot be summarily dismissed by a Preliminary Objection. I have taken into account the fact that my brother Hon. Justice Nyakundi delivered judgment on January 13, 2022 and reserved final orders upon the parties herein fulfilling their obligation. This is to mean that each party is at liberty to move the court upon such obligations not being met.

14 I therefore find that the preliminary objection dated January 21, 2022fails and the same is hereby dismissed with costs to the plaintiff.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 18TH DAY OF MAY, 2023.**

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

Ms Gitari holding brief for Mr Muthama for the Defendant

Mr Odipo for the Plaintiff