



**Republic v Kenya Revenue Authority; Macharia & 4 others (Interested Parties); Okoiti (Exparte Applicant) (Judicial Review 340 of 2013) [2023] KEHC 21443 (KLR) (Judicial Review) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21443 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW 340 OF 2013  
JM CHIGITI, J  
JULY 21, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**AND**

**INVESTIGATING OFFICER (MR CHEGE MACHARIA) . INTERESTED PARTY**

**MRS E. KHAGULI ..... INTERESTED PARTY**

**MRS. T ATEMO ..... INTERESTED PARTY**

**JOHN NJIRAINI (COMMISSIONER GENERAL) ..... INTERESTED PARTY**

**AND**

**PAUL MAKOKHA OKOITI ..... EXPARTE APPLICANT**

**AND**

**MRS L. MALINDA ..... INTERESTED PARTY**

**RULING**

**Brief Background**

1. The Applicant herein filed an application by way of a Notice of Motion dated 17<sup>th</sup> January 2022 seeking orders that: -



1. That this Honourable Court be pleased to determine whether there is no resolution or valid resolution of the Respondent, Kenya Revenue Authority approving the defending of this suit.
  2. That this Honourable Court be pleased to determine whether there is no resolution or valid resolution of the Respondent, Kenya Revenue Authority appointing Ms, Janet Lavuna to defend this suit for and on behalf of the Kenya Revenue Authority.
  3. That this Honourable Court be pleased to determine whether the filing of this suit by the said Ms. Janet Lavuna is invalid for want of Authority from the Kenya Revenue Authority.
  4. That the costs of this Application be provided for.
2. The Application is founded on the grounds set out on the face therein and by a supporting affidavit sworn by Paul Makokha Okoiti dated 17<sup>th</sup> January, 2023 and the exparte Applicants' written submissions.
  3. The Applicant avers that there was no decision made on the letter of appointment from Kenya Revenue Authority appointing Ms. Janet Lavuna to act on behalf of Kenya Revenue Authority in this matter and neither the High Court nor the Court of Appeal had previously pronounced themselves on notice of appointment of Ms. Janet Lavuna in the cause of the dispute.
  4. The Applicant contends that there was no authorization of Ms. Janet Lavuna to institute this suit for and on behalf of the Respondent, when the Respondent had not annexed minutes of a formal resolution appointing the said Ms. Janet Lavuna to sue on behalf of Kenya Revenue Authority. That seeking such authority was mandatory.
  5. The Applicant submitted that the Ex-parte's Application is not res-judicata as alleged in the Respondent's replying affidavit, by virtue of Article 159(2)(d) of the *Constitution of Kenya*, a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice.
  6. Therefore, the Ex-Parte application cannot be termed as being res judicata and this Honourable Court ought to determine whether Kenya Revenue Authority filed board resolution to defend this matter and the notice of appointment of Advocate for Ms. Janet Lavuna as provided for in Order 9 Rule 1 and Rule 7 of the *Civil Procedure Rules* and *Kenya Revenue Authority Act* No. 2 of 1995, Article 13(3).
  7. The Applicant contends that the annexure Marked JG3 dated 26/01/2021 was effected in 2021 yet the Ex-Parte Applicant filed this matter in the year 2013 and therefore it is null and void and should be expunged from the record of the Court as the law cannot be applied retrogressively.
  8. Further, the Applicant submitted that the said Wilson Gaconi had no capacity to swear and file an affidavit on behalf of the Respondent relating to matters of fact when he is not privy to this matter. He did not state that he had been authorized by the Respondent to swear the Replying Affidavit for and on its behalf.
  9. That he swore the Replying Affidavit on the basis that he was advised by the Advocate Mr. Johnson Shijenje for the Respondent, who lacks locus standi in this matter and has no right or legal capacity to appear in this matter since he has not filed Notice of Appointment of the Advocate as provided for in order 9 Rule 1 and Rule 7 of the *Civil Procedure Rules*, no busy bodies ought to be permitted to occupy the Courts time if indeed they are not related to a matter, judicious time is precious and must be guarded jealously.
  10. The Exparte Applicant also filed a notice to the court dated 30<sup>th</sup> August 2022 opposing the Notice of Change of Advocate appointing Mr. Johnson Shijenje as Advocate of the Respondent.



11. Stating that that Mr. Johnson Shijenje herein is a stranger before this Hon. Court and lacks locus standi in this matter since he did not file a Notice of Appointment of Advocate from Kenya Revenue Authority, the party he purports to represent but instead he filed Notice of Change of Advocate dated 18th February, 2022. That he ought to have complied with the provisions of Order 9 (1) (7) of the Civil Procedure Rules, 2010 before coming on record and as such, any pleadings filed by Mr. Johnson Shijenje are fatally defective and must be expunged from the record.

### **The Respondents' case**

12. The Respondent filed a Notice of Change of Advocate dated 18<sup>th</sup> February 2023 appointing Shijenje Johnson Advocate as its Advocate.
13. In opposition to the Applicants Application dated 17<sup>th</sup> January the Respondent filed a replying affidavit dated 25<sup>th</sup> March, 2022 sworn by Willson Gaconi, the Chief Manager of the Respondent's Human Resources Department.
14. That the Respondent therein is established under the Kenya Revenue Authority Act, Cap 469 Laws of Kenya. Under Section 5(1), the Respondent is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) with respect to the performance of its functions under subsection (1), the Authority is required to administer and enforce all provisions of the written laws set out in part 1 & 2 of the first schedule of the KRA Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those Laws.
15. The Respondent averred that the Ex-parte Applicant is a former employee of the Respondent, who has dragged the Respondent before Court in various related matters, some of which are listed in the Respondent's Preliminary Objection filed herein on 2<sup>nd</sup> October 2017. (Annexed and marked Annexure JG 1 is a true copy of the said Preliminary Objection)
16. The Respondent contends that this matter was already concluded when the Court rendered its Judgement on 21<sup>st</sup> May 2014 and that the Honourable Court is now *functus officio*.
17. The Ex-parte Applicant's Application dated 8<sup>th</sup> August 2014, seeking to review the aforesaid Judgement was dismissed with costs on 11<sup>th</sup> December 2014. (Annexed and marked Annexure JG 2 is a true copy of the Ruling to that effect)
18. The Respondent averred that even though a litigant is only allowed to make one application for review, the Ex-parte Applicant has since been making several Applications herein including but not limited to that of 4<sup>th</sup> April 2017 as well as the current Application.
19. That the current Application is *resjudicata* and that litigation herein must come to an end.
20. The Respondent further stated that Ms. Janet Lavuna, Advocate, adversely mentioned in the Application, has since left the employment of the Respondent and is not a party to the proceedings in order to defend herself.
21. The issue of a resolution from the Respondent to a said former Advocate does not arise at all, as all Advocates/Professionals in the employment of the Respondent have job descriptions guiding their professional obligations to the Respondent, hence reason for their employment. (Annexed herewith and marked Annexure JG 3 is a true copy of the Job Description for Advocates in the Respondent's employment)
22. The issue of alleged retainer is neither here nor there, Ms Janet Lavuna, Advocate, having been an employee of the Respondent.



23. The said Ms Janet Lavuna, Advocate, never filed/Instituted this suit as alleged, but was merely defending the suit filed by the Exparte Applicant.
24. Consequently, the Exparte Applicant having not raised any objection from the onset regarding the Respondent's legal representation by the aforementioned Ms Janet Lavuna, Advocate, the Exparte Applicant, acquiesced to Ms. Janet Lavuna acting as such and is now estopped from alleging otherwise.

### **Analysis and Determination**

25. I have considered the Application filed before this court and the affidavit in support, the responses and also the arguments by the parties.
26. Following are the issues for determination:
  - a. Is this court *functus officio*
  - b. Can the reliefs sought be granted

### **The issue of whether this court functus officio:**

27. Through the judgment of 21st May 2014, justice W.Korir dismissed this suit.
28. The Application to review the said judgment was dismissed on 11<sup>th</sup> December 2014.
29. On 7.2.18 Justice Aburili dismissed the Application dated 4.4.2017 wherein the Applicant was seeking orders to set aside Justice Korirs judgment of 21<sup>st</sup> May 2014.
30. The Black's Law Dictionary, Tenth Edition defines the term "functus officio" as having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.
31. The Supreme Court of Kenya when 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 in the following words

"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."
32. The court does not become *functus officio* merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file. 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.”

33. In *Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others* [2018] eKLR, this court said of the doctrine of *functus officio*:-

“I understand the doctrine, like its sister, the *resjudicata* 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.”

34. 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.

35. 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.

36. 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.

37. 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.

38. The following are just but examples:

- i. Application for stay
- ii. Application to correct the decree
- iii. Application for accounts
- iv. Application for execution including garnishee applications
- v. Applications for review
- vi. Application under section 34 of the Act

39. 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.

40. 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.

41. The Applicant has invited this court to issue the following orders:
  1. That this Honourable Court be pleased to determine whether there is no resolution or valid resolution of the Respondent, Kenya Revenue Authority approving the defending of this suit.
  2. That this Honourable Court be pleased to determine whether there is no resolution or valid resolution of the Respondent, Kenya Revenue Authority appointing Ms. Janet Lavuna to defend this suit for and on behalf of the Kenya Revenue Authority.
  3. That this Honourable Court be pleased to determine whether the filing of this suit by the said Ms. Janet Lavuna is invalid for want of Authority from the Kenya Revenue Authority
42. The reliefs sought by the Applicant should have been raised during the hearing of this suit. The suit proceeded into hearing and culminated the judgment of 21<sup>st</sup> May 2014, Justice W. Korir who dismissed this suit. Efforts to set aside the judgment were not successful.
43. I do find that although a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered such proceedings should not amount to re-trying the cause but geared towards bringing the litigation to an end.
44. The Applicant has not demonstrated how the reliefs sought are intended to work towards bringing the litigation to an end as a result of which, this court is *functus officio* and I so hold and this court lacks jurisdiction to grant the orders sought.
45. The Court of Appeal in Court of Appeal at Nyeri, Civil Application No. 21 of 2013: [Dickson Muricho Muriuki V Timothy Kagundu Muriuki and 6 Others](#) made the finding that:
  - “ 20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme court, we are of the view that once this court has pronounced the final judgment, it is *functus officio* and must down its tools. In the absence of statutory authority, the principle of *functus officio* prevents this court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of *functus officio* is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan Courts of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts.
  21. We take cognizance that when this Court has delivered judgment; all pertinent issues and points of law have been fully canvassed and considered. Upon delivery of judgment, the rights of the parties have been determined and it is



a legal requirement that the decree emanating from the judgment should be executed. The submissions by counsel, evidence on record, points of law and relevant authorities all have been raised, re-examined, weighted, deliberated upon and judgment made. What new point of law can subsequently be raised in an interlocutory application for stay of execution that will make this Court change its mind after delivery of judgment and order stay of execution" If there are new points of law or circumstances that arise after judgment, this Court is functus officio and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court.”

## **Disposition**

46. In view of the above finding, this Court has no jurisdiction to delve into the issue whether the applicant has satisfied the conditions for grant of an orders sought since Court orders are not given in vain.

47. This court is bound by the case of *Dickson Ngigi Ngugi v Commissioner of Lands* S.C Petition No. 9 of 2019 [2019] eKLR,

“[36] The Supreme Court made binding finding that Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non iudice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, *Owners of the Motor Vessel “Lillian S” v Caltex Oil, (Kenya) Ltd* [1989] KLR 1, “jurisdiction is everything. Without it, a court has no power to make one more step”.

48. Having arrived at the finding that this court lacks jurisdiction, this court must down its tools. I lack the jurisdiction to deal with the other issues before this court.

## **Order**

1. The application dated 17<sup>th</sup> January 2022 is devoid of merit and the same are dismissed with costs.
2. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JULY, 2023.**

**JOHN CHIGITI (SC)**

**JUDGE**

