Runji & 3 others v National Land Commission (Constitutional Petition 17 of 2018) [2024] KEHC 13399 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13399 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION 17 OF 2018

OA SEWE, J

OCTOBER 25, 2024

IN THE MATTER OF ARTICLES 10, 22, 23, 25, 27, 28, 40, 47, 67 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 23(1) & (3), 40(3) AND 47(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, NO. 5 OF 2012

AND

IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012

BETWEEN

TERESIA RUNJI ..... 1ST PETITIONER

MARIETA GITONGA CHEGE ..... 2ND PETITIONER

NAOMIKIIO ..... 3RD PETITIONER

SAMMY M KARA ..... 4TH PETITIONER

AND

NATIONAL LAND COMMISSION ..... RESPONDENT

RULING

1. The Notice of Motion dated 12th February 2024 was brought by the interested party, Miritini Free Port Limited, under Order 9 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules. It seeks the following orders:

   (a) Spent

   (b) Leave be granted to the firm of M/s Marende and Nyaundi Associates to come on record as counsel for the interested party in place of M/s Oluga & Company Advocates.

   (c) Upon grant of order b above, the Notice of Preliminary Objection attached to the application be deemed as duly filed upon payment of the requisite court fees.

   (d) Costs of the application be in the cause.

2. The application is premised on the grounds that the Court delivered its judgment on 12th November 2019 thereby rendering itself functus officio; and that the interested party is desirous of changing its Advocates from the firm of M/s Oluga & Company Advocates to the firm of M/s Marende and Nyaundi Advocates pursuant to Order 9 Rule 9 of the Civil Procedure Rules, for which leave is a prerequisite after judgment has been rendered. The interested party also pointed out that it wishes to be heard in respect of the petitioners' application dated 21st December 2023; and therefore that it is in the interest of justice that the instant application be allowed.

3. The aforementioned grounds were amplified in the Supporting Affidavit sworn by Dr. Ken Nyaundi on 12th February 2024. Attached thereto is a copy of the draft Notice of Preliminary Objection intended to be filed by the interested party in which the interested party contends that the Court lacks the jurisdiction to entertain the petitioners' Notice of Motion dated 21st December 2023 for the following reasons:

   (a) The Court is functus officio having delivered itself of a judgment on 12th September 2019.

   (b) The application dated 21st December 2023 is frivolous, incompetent and an abuse of the court process.

   (c) The judgment in the matter is the live subject of Civil Appeal No. 44 of 2021: Miritini Free Port Limited v Theresia Runji & 4 others and Civil Appeal No. 24 of 2020: National Land Commission v Theresia Runji & others.

   (d) There is an order of stay of execution of the judgment herein issued by the Court of Appeal in Mombasa Civil Application No. 10 of 2020: National Land Commission v Theresia Runji & 4 others; and that the essence of the application dated 21st December 2023 is to reverse, annul and disable the order issued by the Court of Appeal.

   (e) The monetary focus of attention in the application dated 21st December 2023 is a different subject matter from the core issue before the court and on which the Court has delivered itself of judgment.

4. In response to the application, the petitioners relied on the Notice of Preliminary Objection dated 5th March 2024. They raised the following grounds therein:

(a) That the combination of Prayers 2 and 3 of the said application is completely untenable as prayer 3 can only be considered once prayer 2 is granted.

(b) The application is of an omnibus nature, hence incapable of proper adjudication by the Court.

(c) The interested party has deposed in paragraph 2 of the Supporting Affidavit that the Court is already functus officio and hence the applicant is estopped from making any application in the same court.

5. On the 4th March 2024, the Court gave directions that the application be heard on 15th March 2024. It is noted however that the interested party proceeded to file written submissions dated 13th March 2024 on which it sought to rely. Although a comment was made in that regard by Mr. Mwanzia, counsel for the petitioners, he raised no objection to those submissions being taken into consideration by the Court. The interested party submitted that the instant application was informed by the wording of Order 9 Rule 9 of the Civil Procedure Rules, which stipulates that after judgment has been entered, a change of Advocates requires approval of the Court where there is no consent to such change.

6. The interested party placed reliance on James Ndonyu Njogu v Muriuki Macharia 2020 eKLR, Stephen Mwangi Kimote v Murata Sacco Society 2018 eKLR and Kazungu Ngari Yaa v Mistry V. Naran Mulji & Co. 2014 eKLR and urged the Court to grant the orders sought by it. In response to the grounds set out in the petitioners' Notice of Preliminary Objection, the interested party submitted that the provisions of Order 9 Rule 10 of the Civil Procedure Rules allow it to combine its application for leave with other prayers, so long as the determination of the other reliefs would await the directions of the Court on the prayer for change of Advocates. The interested party relied on Gitau v Githinji & another (Environment and Land Appeal E006 of 2022) 2022 KEELC 52 (KLR) (16 June 2022) (Ruling) to buttress its argument.

7. The interested party also submitted that, while it acknowledged that the Court is functus officio, it is not estopped from dealing with other proceedings such as review applications, setting aside of judgment, execution proceedings, garnishee proceedings or proceedings under Order 9 Rule 9 of the Civil Procedure Rules, as is the case herein. In this regard, reliance was placed on the decision of the Court of Appeal in Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) 2014 eKLR, Silvanus Kizito v Edith Nkirote Mwiti 2021 eKLR and Leisure Lodge Ltd v Japhet Asige and another 2018 eKLR.

8. The interested party found it ironic that the petitioners readily agreed that the Court is functus officio yet they have filed their own application dated 21st December 2023, which is pending consideration and determination by the Court. The interested party accused the petitioners of approbating and reprobating at the same time, and relied on Republic v Institute of Certified Public Secretaries of Kenya, Ex Parte Mundia Njeru Geteria 2010 eKLR and Behan & Okero Advocates v National Bank of Kenya 2007 eKLR in which such conduct was deprecated. Based on the foregoing, the interested party prayed that its application dated 12th February 2024 be allowed.

9. Counsel for the petitioners reiterated the grounds raised in the Notice of Preliminary Objection dated 5th March 2024 underscoring the omnibus nature of the application and urged the Court to find that it is not amenable to proper adjudication. He relied on the Nicholas Kiptoo Salat Arap Korir v Independent Electoral and Boundaries Commission 2014 eKLR for the applicable principles.

10. It is now trite law that a Preliminary Objection should consist of pure points of law which arise from the pleadings and which, if argued as such may dispose of a suit (See Mukisa Biscuits Manufacturing

Co. Ltd. v West End Distributors (1969) EA 696 at 700). The Supreme Court in the case of Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others 2015 eKLR added that:

> "...15 ...a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record..."

11. Two key issues arise for determination in respect of the Chamber Summons dated 12th February 2024, namely, whether the Court is functus officio and whether the application is fatally defective given its omnibus nature.

A. On whether the Court is Functus Officio:

12. In Raila Odinga & 2 oth*ers v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto (Petition 5, 4 & 3 of 2013*) 2013 KESC 8 (KLR) (Civ) (24 October 2013) (Ruling), the Supreme 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."

13. 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 Vs 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"

14. It is indubitable that in this matter a final judgment was rendered on 12th November 2019 from which an appeal has been filed. Nevertheless, that, of itself, does not preclude the Court from handling subsequent applications in the suit, including an application for change of advocates as is sought

herein. I find succor in Leisure Lodge Ltd v Japhet Asige and another 2018 eKLR, in which the position was aptly stated:

> "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 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".

15. Moreover, that the doctrine is inapplicable to the facts of the instant application is evident in Rule 9 itself that unequivocally uses the phrase "after judgment has been passed". Therefore, I find no merit in the argument that the Court is functus officio.

B. On whether the application is fatally defective for being omnibus in its presentation:

16. The application was essentially brought under Order 9 Rule 9 of the Civil Procedure Rules, which provides:

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

17. Therefore, it is plain that in the absence of a consent between the erstwhile Advocates, the only permissible course was for the interested party to seek the leave of the Court for the firm of Marende & Nyaundi Associates to come on record, as it did. I am therefore in agreement with the explication by Hon. Radido, J. in Kazungu Ngari Yaa v Mistry V Naran Mulji & Co. (supra) inn respect of Rule 9 above that:

1. ...the requirements under (a) and (b) are disjunctive. The requirements envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously.

2. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave.

3. In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.

18. The mischief envisaged by the above provision is not difficult to discern, and was aptly captured in S. K. Tarwadi v Veronica Muehlmann 2019 eKLR as follows:

> ...the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him with another advocate or act in person..."

19. Similarly, in Stephen Mwangi Kimote v Murata Sacco Society (supra), it was held:

> ...Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate

should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties."

20. The question to pose, then, is whether it was proper for the application for leave to be combined with an application for striking out the petitioners' application. In this regard, Order 9 Rule 10 of the Civil Procedure Rules is explicit that:

> An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first."

21. There is nothing intrinsically wrong with an omnibus application in the nature of the subject application for purposes of Order 9 Rule 9 of the Civil Procedure Rules so long as the question of change of advocates is disposed of first. In Gitau v Githinji & another (Environment and Land Appeal E006 of 2022 2022 KEELC 152 (KLR) (16 June 2022) (Ruling) it was held that:

> ...Such an application need not be separate from the substantive application as the prayers for change of advocates can be dealt first but within the same application which may contain other prayers as may be desired by an Applicant."

22. The primacy of the right to legal representation was underscored by the Court of Appeal in William Audi Ododa & Another v John Yier & Another 2007 eKLR as follows:

> ...it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.'
>
> *The Constitution* of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice..."

23. In the premises, I find no merit in the petitioners' Preliminary Objection dated 5th March 2024. The same is hereby overruled. The application by the interested party dated 12th February 2024 is hereby allowed and orders granted as hereunder:

    (a) Leave be and is hereby granted to the firm of M/s Marende and Nyaundi Associates to come on record as counsel for the interested party in place of M/s Oluga & Company Advocates.

    (b) The interested party's proposed Notice of Preliminary Objection be filed and served within 7 days from the date hereof.

    (c) Costs of the application be costs in the cause.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF OCTOBER, 2024

OLGA SEWE

JUDGE