



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 32 OF 2019**

**MR. LAWRENCE MOSES ESILIA.....1<sup>ST</sup> APPELLANT**

**LEMSOFT CONSULTANCY LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**OFFICE OF THE ATTORNEY GENERAL AND**

**THE DEPARTMENT OF JUSTICE.....RESPONDENT**

**[Being an Application that relates to Kisumu Chief Magistrate's Court Civil Application 114 of 2013 and 629 of 2015, Kisumu High Court Civil Appeal No. 100 of 2013 and Kisumu Court of Appeal Civil Applications 1 of 2015 and 65 of 2015]**

**RULING**

The Amended Notice of Motion dated 21<sup>st</sup> February 2021 was filed by the 1<sup>st</sup> Appellant. It is an application for the following reliefs;

***“1. THAT, this honourable Court be pleased to set aside or vary the unsigned, unsealed and unreceived Judgement of Honourable Fred Ochieng by substituting it with the correct Constitutional and Human Rights Court Judgment/Order, based on prayer items numbers two and five of the Memorandum of Appeal and our letters to the Constitutional and Human Rights Court division dated 18<sup>th</sup> March 2020, 18<sup>th</sup> July 2020 and 18<sup>th</sup> January 2021 respectively.***

***2. THAT, this honourable Court be pleased to order a Constitutional and a Human Rights Court rehearing based on prayer item number 2 of the Memorandum of Appeal. If need be, for the matter to be transferred to Nairobi for judgement based on our letters to the Constitutional and Human Rights Court division dated 18<sup>th</sup> March 2020, 18<sup>th</sup> July 2020 and 18<sup>th</sup> January 2021 respectively.***

***3. THAT, this honourable Court be pleased to give the order being asked for as set out as follows:-***

***“The application of the Appellant(s) dated 3<sup>th</sup> March 2019 be allowed with costs as the ruling of Hon. R.M. Ndombi (RM) dated 6<sup>th</sup> November 2018 is found not to be in line with the Kisumu Chief Magistrate's Court document dated 29<sup>th</sup> June 2018 that requires the Appellant(s) to kindly remit to the Kisumu Chief Magistrate's Court Kshs 56,416.00/= being further court fees on an award of Kshs as per the Plaint dated 12<sup>th</sup> October 2015 as general damages e.t.c”***

***4. THAT, this honourable Court be pleased to add the Magistrates and Judges Vetting Board as an interested party in this matter for the reasons available during the day of hearing.***

***5. THAT, this Honourable Court be pleased to treat this Application as an out of time application due to the Covid-19 Pandemic.***

***6. THAT, the costs of this application be provided for.”***

1. The application was supported by an affidavit which was sworn by the 1<sup>st</sup> Appellant. He deponed that when this Court had fixed the case for hearing, the Court did not specify whether or not it would transfer the case to the Constitutional and Human Rights Court Division

“for judgement/orders based on Prayer item number two of the Memorandum of Appeal.”

2. In the circumstances, the Applicant;

**“..... assumed that the case was to be transferred to the Nairobi’s Constitutional and Human Rights Court Division, as the Kisumu High Court Division does not handle Constitution and Human Rights Matters.”**

3. The Applicant also deponed that this Court gave an unsigned, unsealed and unreceived judgment/order. It was for that reason that he asked the court to set aside or vary the said judgment.

4. The Applicant said that he had not been given an opportunity to raise the issue concerning the proposed transfer of the matter to the Constitutional and Human Rights Court Division.

5. He blamed this Court for causing confusion.

6. As he believes that he has a good claim against the Respondent, the Applicant asserted that it was only fair that he be allowed to pursue the said claim.

7. When the Applicant was canvassing the application, he said that the copy of the judgment which he received, was not signed.

8. By dint of the provisions of **Order 21 Rule 3 (1)** of the **Civil Procedure Rules**, a judgment pronounced by the Judge who wrote it, shall be dated and signed by him at the time of pronouncing it.

9. In this instance both the original hand-written Judgment, as well as the typed version thereof were dated and signed in court, at the time when the judgment was pronounced.

10. In my understanding, when any party to a case, or any other person applies for a copy of the judgment, the same shall be printed from the computer. There is no legal requirement that copies of judgments be signed or dated before the same are made available to the parties who had asked for them.

11. Therefore, although the Applicant received an unsigned copy of the judgment, that did not, and could not, invalidate the judgment which had been pronounced.

12. Once the Court had delivered its judgment in the appeal, the Court became *functus officio*.

13. In the case of **TELKOM KENYA LIMITED Vs JOHN OCHANDA, CIVIL APPEAL NO. 60 OF 2013**, the Court of Appeal noted that once a judgment is pronounced, the court that made the said pronouncement became *functus officio*. The learned Judges of Appeal went to explain the meaning, as follows;

**“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 19<sup>th</sup> Century.”**

14. The Court also made reference to the following words of the Supreme Court, in the case of **RAILA ODINGA & 2 OTHERS Vs I.E.B.C. & 3 OTHERS [2013]eKLR**;

**“... 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.”**

15. By asking this Court to set aside or vary the judgment delivered on 10<sup>th</sup> February 2020, the Applicant is calling upon me to violate the doctrine of *functus officio*. I find no legal foundation upon which I could violate the principle of finality, by exercising my adjudicative authority twice, over the same matter.

16. When the Applicant was asked how he expected this Court to know that he wished to have the appeal transferred to Nairobi, he said that

it is because the matter was of a constitutional nature.

17. He said that he was going to ask the Court to have the case transferred, but the Court did not give him an opportunity to do so.

18. The record will show that the Applicant was given an opportunity to make written submissions. He provided submissions spanning 12 pages, plus 11 pages of authorities.

19. As the Applicant has conceded before me, he did not raise the issue of the transfer of the case, in his submissions.

20. In the event, the question about whether or not the case should be transferred to the Constitutional and Human Rights Court Division, in Nairobi, never arose for determination when the Court was hearing the appeal.

21. And as the Court has already pronounced itself on the appeal, it cannot now re-open the appeal.

22. Accordingly, the application dated 21<sup>st</sup> February 2021 is without merit; and it is therefore dismissed.

23. The Applicant shall pay to the Respondent, the costs of the application.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2021**

**FRED A. OCHIENG**

**JUDGE**