

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 155 OF 2017

APEX STEEL LTD.....APPLICANT

VERSUS

EVANS NYANDORO MAUTI.....RESPONDENT

RULING

1. The background to the instant ruling is that vide a ruling delivered on 25.4.2019 the court dismissed the subject appeal for want of jurisdiction. The applicant approached this court vide notice of motion application dated 23.5.2019 that was brought under Section 3A of the Civil Procedure Act and Order 45 rule 1(b) and 51 rule 1 of the Civil Procedure Rules as well as Article 165(5) (b) of the Constitution seeking for review of the decision that was made on 25.4.2019 on the issue of jurisdiction and alternatively an order to transfer the appeal to the Employment and Labour Relations court.

2. The application was opposed vide a preliminary objection on the grounds that the court is functus officio and that the matter is res judicata.

3. The advocates for the parties agreed to dispose of the preliminary objection through written submissions.

4. The Applicant for unexplained reasons has opted not to stick with the directions given namely to submit on the preliminary objection but has submitted on the application for review and urged the court to review the ruling. Counsel argued that the preliminary objection was misconceived because the court made a decision based on a ruling that was reversed by the court of appeal decision in **Attorney General v Law Society of Kenya (2017) eKLR**. It was argued that in the interest of justice the appeal be transferred to the Employment and Labour Relations Court.

5. In reply, the Respondent's counsel in support of the preliminary objection submitted that the orders sought by the applicant had already been litigated upon before a court of competent jurisdiction. Learned counsel also in placing reliance on the case of **R v County Land Registrar, Kisii County & 2 Others ex parte Nora Bonchaberi Oruochi (2018) eKLR** where it was held that once proceedings are finally concluded in a court any challenge to the decision ought to be taken to a higher court. It was counsel's submission that the court was functus officio in respect of the instant application and therefore the same ought to be dismissed for want of merit.

6. The preliminary objection raised two issues on whether the court is barred by the doctrine of functus officio and res judicata from entertaining the instant application.

7. With regard to the preliminary objection, I made a final determination on the issue of jurisdiction to handle the appeal and not on the issue of review. Therefore to that extent this court is not functus officio. On the issue of res judicata, it is trite law that matters that properly formed the subject of a matter that were handled by the court cannot be re-litigated upon and I disagree that the court is barred by the doctrine of res judicata to handle the instant application as the subject matter of the appeal was the decision of the trial court whereas the instant application touches on a decision made by this court. I disallow the preliminary objection and direct that the parties address me on the review application so that a determination may be made on the same.

8. In the result I find the preliminary objection dated 28.5.2019 lacks merit. The same is dismissed with no order as to costs. Parties are now directed to proceed to set down the application dated 23.5.2019 for hearing on priority basis.

It is so ordered.

Dated and delivered at Machakos this 4th day of February 2020.

D. K. Kemei

Judge