



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISCELLANEOUS CRIMINAL APPLICATION NO. 9 OF 2018

TIMOTHY MAUNDA MBITI.....APPLICANT

VERSUS

FREDRICK KABAIKU KAGAI (OCPD)

BUNYALA/PORT VICTORIA POLICE DIVISION.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Timothy Maunda Mbiti, the applicant herein, has moved the court by way of Notice of Motion dated 10th June 2019 under Articles 10, 25, 27, 28, 40, 47,48, 49, 50(1), 157(11), 159, 163, 232, 238 and 244 of the Constitution of Kenya, 2010, sections 118, 118A, 119, 120, 121 and 346 of the Criminal Procedure Act, sections 3, 49, 55, 60, 92 and the fifth schedule of the National Police Service Act. He is seeking orders as follows:

a) That this court be pleased to order that this application be consolidated with Miscellaneous Criminal Application No.20 of 2018 and that the applications for review of the rulings therein be heard and determined together.

b) That this court be pleased to set aside, vary and/or review the rulings entered on 29th April, 2018 by this court in the two files together with the consequential orders/decrees arising therefrom in light of Sections 118, 118A, 119, 120 and 121 of the Criminal Procedure Act (Chapter 75 Laws of Kenya), Sections 3, 49,55,60,92 and Fifth Schedule of the National Police Service Act (Act No.11A of 2011), and all other enabling provisions of the Law)

c) That this court be pleased to give further orders and/or directions as it may deem fit and just to grant.

2. The application was premised on the following grounds:

a) That there are some mistake and/or error apparent on face of the rulings.

b) That Section 60 of the National Police Service Act (Act No,11A of 2011) was contravened.

c) That the said ruling of the court failed to take into consideration the aforementioned statutory provisions thereby giving police officers powers to act in arbitrariness, in abuse of their office and in excess of their lawful authority therefore infringing on the applicant's right to property and privacy enshrined in Article 40 and 31 of the Constitution of Kenya.

d) The said ruling of the court also gave the police power to usurp the role of the judiciary and courts who have the sole responsibility of granting detention of property and/or orders of destroying exhibits.

e) The due process regarding confiscation of citizens' property was not followed.

f) It would be just and expedient if the application is heard as a matter of priority to protect the Constitutional rights of the applicant from arbitrary and unjustifiable acts of the respondents.

g) This application is *bonafide* made in good faith without any ulterior motive and it will not in any way be prejudicial to any of the

respondents.

h) This court has unfettered jurisdiction to invoke the inherent powers donated to it under the Constitution and review its own orders for purposes of doing substantive justice.

3. The application, except for prayer one, was opposed by the respondents on the following grounds:

a) That the applicant failed to demonstrate that there was an error on the face of record to warrant a review.

b) That the matters raised by the applicant are matters of appeal.

c) That the application is *res judicata*.

4. This case is consolidated with **Miscellaneous Criminal Application No.20 of 2018** for the purposes of the hearing and the determination of the instant application.

5. A miscellaneous criminal application such as the one before me is partly civil and partly criminal in nature. I will therefore, while addressing the application at hand, apply my mind to instances when a court can review its order in both criminal and civil proceedings.

6. The window for review of own orders is usually very narrow so as not to offend the doctrine of *functus officio*. In **The Black's Law Dictionary, Tenth (10th) Edition** describes *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.

In **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, **"The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law"** (2005) 122 SALJ 832 which reads:

"...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"

At Par. 19 in the Raila Case (Supra) the court further stated:

This principle has been aptly summarized further in Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550:

"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" [emphasis supplied].

7. There are exceptions to the doctrine of *functus officio*. Section 99 of the Civil Procedure Act provides:

Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

This position was emphasized by the Court of Appeal in the case of **Telkom Kenya Limited vs. John Ochanda (Suing On His Own Behalf and On Behalf of 996 Former Employees Of Telkom Kenya Limited) [2014] eKLR** where it stated:

'The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional reengagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions...'

8. Order 45 Rule 1 of the Civil Procedure Rules sets out the requirements for a review in the following terms:

1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the

time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

9. Section 346 of the Criminal Procedure Code provides as follows:

The court may at any time amend a defect in substance or in form in an order or warrant, and no omission or error as to the time and place, and no defect in form in an order or warrant given under this Code, shall be held to render void or unlawful an act done or intended to be done by virtue of that order or warrant, provided that it is therein mentioned, or may be inferred therefrom, that it is founded on a conviction or judgment, and there is a valid conviction or judgment to sustain it.

10. The applicant has relied on the decision in the case of **Director of Public Prosecutions vs. Betty Njoki Mureithi [2016] eKLR** Judge G.W. Ngenye-Macharia, observed:

I then hold the view that reviewing its own order, the court would invoke the inherent powers donated to it under the Constitution for purposes of doing substantive justice. Under Article 165(3) (a) the High Court is conferred unlimited original jurisdiction in a criminal matter. This should be read together with Sub-Article (7) which provides that, in making any order, the court should ensure the fair administration of justice. Furthermore, under Article 159 (2) (d) the court should administer justice without due regard to procedural technicalities. That is to say that, the overall objective in granting any order, is to do justice. I have not seen any provision under the Criminal Procedure Code by which this court can review its own orders. But it is also trite to note that a court can vary or review its own orders if new matters are brought to its attention that were not within the knowledge of an Applicant when the order sought to be varied was granted.

The learned judge was only restating the law as it is. It appears that the applicant did not fully appreciate what the judge in the above matter said.

11. From the grounds on which the application is premised, the applicant is challenging my findings. I cannot therefore entertain the application for I would fall afoul with the doctrine of *functus officio*. The applicant if not satisfied ought to have moved to the Court of Appeal. The application is accordingly dismissed.

DELIVERED and SIGNED at BUSIA this 22nd day of July, 2020

KIARIE WAWERU KIARIE

JUDGE.