



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 6 OF 2018

BOARD OF TRUSTEES OF THE ANGLICAN CHURCH  
OF KENYA DIOCESE OF MARSABIT.....APPELLANT

-VERSUS-

BENSON BORU JARSO.....RESPONDENT

(Being an appeal from the judgment by Hon. T. M. Wafula, Resident Magistrate in Principal Magistrate's Court at Marsabit in Civil Case No. 37 of 2016 delivered on 30/10/2017).

#### RULING

The application dated 19<sup>th</sup> March, 2020 seeks the following orders:-

1. That the Honourable court be pleased to Order the Appellant to pay the Respondent / Application at least Kshs. 2,000,000/= for his upkeep and further medication.
2. That costs of this application be in the cause.

The application is supported by the Affidavit of the Applicant, Benson Boru Jarso sworn on 19<sup>th</sup> March, 2020. The Respondent filed a replying affidavit sworn by Manasses Kariuki, Karoki on 2<sup>nd</sup> July, 2020. **Mr. Orayo** appeared for the applicant. Counsel submitted that the applicant was involved in a road traffic accident and was awarded general damages by the trial court. The defendant preferred an appeal which has been fully heard and determined. The Court ordered the respondent to deposit a sum of Kshs. 2 million in court which order has been complied with. The applicant was awarded Kshs. 4,320,000 meaning the respondent is still holding Kshs. 2,320,000. The applicant suffered serious injuries namely:-

- i) Comminuted fracture of the radio-ulnar bone with implants
- ii) Fracture of right femur with k-nail
- iii) Fracture of right hip with screws
- iv) Right lower limbs deformity
- v) Left hand deformity

It is further submitted that before the trial court, parties recorded a consent on liability at 20% to 80% in favour of the applicant. The applicant requires the sum of Kshs. 2 million for his upkeep.

**Mr. Kariuki** appeared for the respondent. It is submitted that this court rendered its Judgment way back on 15/12/2018 and further delivered a ruling on stay of execution pending Appeal on 2/4/2019. The Court of Appeal is now seized with the matter this being Nyeri Civil Appeal No. 7 of 2020. Therefore, this court lacks merit to determine any further proceedings. The trial magistrate awarded Kshs. 7,240,000 and on appeal this amount was reduced to Kshs. 4,320,000. Having ordered the respondent to deposit a sum of Kshs. 2,000,000 in court, the orders being sought by the applicant are both strange and alien in law.

**Mr. Kariuki** maintains that this court is now *functus officio* and lacks jurisdiction to entertain the matter further. Counsel relies on 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 the Court of Appeal stated:-

**“Functus officio is an enduring principles 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 later part of the 19<sup>th</sup> Century. In the Candian case of CHANLER 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 he English Court of Appeal In re St Nazaire Co.,(1879),12Ch.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.**

The record shows that the applicant was involved in a road traffic accident on 11<sup>th</sup> April, 2015. As a result of the accident, the applicant sustained severe injuries as stated herein. The award of the trial court was the subject of an appeal and this court heard and determined the appeal. The applicant is now seeking the release of the money deposited in Court so that it can help him with his upkeep.

**Mr. Kariuki** contends that this court is now *functus officio*. Having rendered its judgment as well as a ruling on stay of execution pending appeal, the court cannot entertain any further proceedings. In my view, the concept of “*functus officio*” relates to situations where the court is being asked to hear afresh a matter which it has already dealt with. The result of the second hearing may result to an alteration of a judgment already made by the Court. *Functus Officio* rule does not bar a party from seeking orders subsequent to the delivery of judgment or ruling. The applicant herein is not seeking an alteration of the court’s judgment or ruling. This is a fresh application seeking the release of some funds to the applicant. This court is therefore not *functus officio*. After the delivery of a judgment, a party can appear before the same court and seek other orders such as stay of execution, contempt of court for disobedience of the Court orders, police assistance in furtherance of the Court orders, interpretation of the court’s verdict, release of security or funds held by the Court or third party among several other requests.

The gists of the current application is that the respondent did admit liability to the extent of 80%. The applicant sustained serious injuries and would like to have part of the decretal sum released to him. I do find that such an application cannot be a preserve of the court where an appeal is pending, in this case, the Court of Appeal. The bottom line is that the applicant will be awarded damages. We do not expect a miracle to happen whereby the applicant’s suit before the trial court as well as the awards made by both the trial court and this court will be extinguished by the Court of Appeal. The memorandum of Appeal annexed to the replying affidavit does not challenge the issue of liability. All in all the applicant will be awarded some damages. The only issue for me to determine is whether the sum of Kshs. 2 million deposited in Court should be released to the applicant.

The medical report by **Dr. John Mwanzia** produced before the trial court does confirm the applicant’s injuries. It is now over five (5) years from the time the accident occurred. I am convinced that the applicant requires some financial assistance to enable him undergo further treatment. In my view the sum of Kshs. 2 million should not be fully released to the applicant as the matter is still alive before the Court of Appeal. The court is being called upon to exercise its direction. I do find that a sum of Kshs. 500,000 can cater for the applicant’s urgent needs while awaiting the determination of the appeal.

I do find that the application is merited and is hereby allowed. A sum of Kshs. 500,000 out of the sum of Kshs 2 million deposited in Court to be released to the applicant. Parties shall meet their own respective costs of the application.

**DATED AND SIGNED AT MIGORI THIS ..... DAY OF OCTOBER, 2020**

**S. CHITEMBWE**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MARSABIT THIS 15<sup>TH</sup> DAY OF OCTOBER, 2020**

**A. MABEYA**

**JUDGE**