REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION NO.83 OF 2017

DOMINIC NZANGI KIMEU.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The Applicant approached this court *vide* a chamber summons filed on 11.2.2019. The Application seeks two substantive prayers: First, it seeks for an order transferring the ***Machakos High Court Miscellaneous Criminal Application No 83 of 2017*** (the "Criminal application") to another court for hearing.

2. In the Criminal application, the Applicants seeks that the conviction meted out against him for the offence of handling stolen goods be quashed and the sentence of 14 years imprisonment be set aside.

3. The operative claims that are central to this application are found in one paragraph in the Supporting Affidavit of the Applicant that is thumb printed but not dated:

> *4. THAT due to the determination of my first appeal No 84 of 2014 and judged to a sentence of 14 years imprisonment and having applied a miscellaneous application under Section 333 of the criminal Procedure Code and the same court implies to hear it have no faith in the same judge and I wish him to withdraw himself from sitting and determining my application….*

4. The applicant is persuaded that justice can only be served by transferring the criminal application to another court.

5. The respondent opposed the application and filed grounds of opposition where counsel found the application to be an abuse of court process: that the applicant had not raised sufficient grounds to warrant the court to recuse itself and that the honourable court is *functus officio* having heard and determined the applicant's appeal and delivered its judgement on 31st July, 2017.

6. The issues for determination are whether the court is functus officio and whether the court can recuse itself from the matter. The *functus officio* principle was dealt with by 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** where Githinji, Karanja & Kiage JJ.A observed thus:

> **"*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 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);***
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> **"*The general rule that a final decision of a court cannot be reopened 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:***
>
> > ***1. Where there had been a slip in drawing it up, and,***
> >
> > ***2. Where there was an error in expressing the manifest intention of the court. Paper Machinery Ltd. vs. J.O. Rose Engineering Corp. [1934] S.C.R. 186"***

7. The Supreme Court in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** 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** in which the learned author stated**;**

> **…"***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."*

8. In the matter before me, the applicant in his own words admitted that the appeal was heard and a sentence passed on him. In this regard the High Court had already handled the appeal and given its judgement in respect of the same. The crux of the criminal application is an invitation to the court to purport to alter a judgement that has been passed and this would be tantamount to sitting on appeal. An appeal against an order granted by the High Court can only be heard and determined by the Court of Appeal by dint of **Article 164(3)(a)** of the **Constitution of Kenya**. As such, the court is *functus officio* in this regard.

9. The only orders the court can grant are review orders which are an exception to the *functus officio* doctrine. This was summarized in the case of **Jersey Evening Post Ltd v Al Thani [2002] JLR 542 at 550** which was cited and applied by the Supreme Court in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** that:

> **"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 or adjudication must be taken to a higher court if that right is available."**

10. In light of the above analysis, the only recourse available to the Applicant in this case would be to seek a review of the order of the court or to appeal against the said judgement in the Court of Appeal.

11. On the request by the Applicant for recusal of this court, I find that this court having determined the appeal and became functus officio then the application becomes untenable. This court cannot purport to make orders of transfer to another court when it is no longer seized with the matter.

12. Having made the above finding, I find that the functus officio doctrine has dispensed with the need to address the second issue.

13. In the circumstances, it is my conclusion that the Application filed on 11.2.2019 lacks merit. It is hereby dismissed in its entirety.

It is so ordered

Dated, Signed and delivered at Machakos this 11th day of June, 2019.

D.K. KEMEI

JUDGE