**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**JUDICIAL REVIEW NO. 23 OF 2017**

**IN THE MATTER OF THIKA SPORTS CLUB**

**AND**

**IN THE MATTER OF AN APPLICATION BY JOSEPH K. GACHOMBA, SAMUEL NJINU, CHARLES NGUNJIRI AND PETER MBURUGU FOR ORDERS OF CERTIORARI AND PROHIBITION**

**JOSEPH K. GACHOMBA.....1st APPLICANT**

**SAMUEL W. NJINU.....2ND APPLICANT**

**CHARLES NGUNJIRI..... 3RD APPLICANT**

**PETER MBURUGU.....4TH APPLICANT**

**VERSUS**

**THIKA SPORTS CLUB.....1st RESPONDENT**

**Sued Through its Registered Trustees Namely;**

**JOSEPH WAKIMANI.....2ND RESPONDENT**

**JOSEPH MWARIRI.....3RD RESPONDENT**

**JAMES K. MBUGUA.....4TH RESPONDENT**

**And Office Bearers of the Executive Committee**

**Thika Sports Club namely;**

**BETTY NJOKI MUTUA (CHAIRPERSON)..... 5TH RESPONDENT**

**DAVID M. KARUMA (HON. SECRETARY).....6TH RESPONDENT**

**DAVID PARSONS (HON. TREASURER).....7TH RESPONDENT**

**SAMUEL C. MUIRURI (VICE-CHAIRMAN).....8TH RESPONDENT**

**R U L I N G**

1. Before me is an application by way of the Notice of Motion filed on 3rd April, 2018 and expressed to be brought primarily under Order 45 Rule 1(2) and Order 51 Rule 1 of the Civil Procedure Rules. The Respondents/Applicants (Applicants) sought the following order:-

2. **"THAT the Honourable Court be pleased to vary, review its Judgment by Hon. Justice Joel Ngugi that was delivered on 5th March, 2018 and apportion costs taking into consideration the fact that the Applicants were not wholly successful**."

3. The application is premised on the ground that by the judgment delivered by this Court, the Applicants, other than the 3rd Respondent therein, were condemned to pay costs of this suit to the Applicants, now Respondents; and that the said Respondents had only succeeded partially in their suit.

4. **Betty Njoki Mutua**, the 5th Applicant herein swore the supporting affidavit. She deposed that the Respondents to the instant motion had approached the court for orders of *certiorari* and prohibition; and that only the order of c*ertiorari* was granted in the judgment of this court, and that costs were awarded to the Respondents. She contended that costs should be awarded to a successful party and the Respondents having only succeeded partially, and the costs ought to be apportioned. She deposed that the Respondents will not be prejudiced by the application.

5. The Respondents filed a preliminary objection on 25th May, 2018 in response to the Respondents' motion. The preliminary objection is based on the grounds that the application is an invitation to the court to sit in appeal on its own decision and therefore does not lie; that the court lacks jurisdiction as it is *functus officio*; that all relevant factors were taken into account by the court and hence, there is no error on the face of the record.

6. **Joseph K. Gachomba**, the 1st Respondent, filed a replying affidavit on 25th May, 2018 on his own behalf and on behalf of his co-Respondents. To the following effect. That the Respondents to the instant motion succeeded in having the decision of the present Applicants quashed entirely; that this court cannot revisit the findings of a Judge of concurrent jurisdiction and the same should be canvassed before an appellate court.

7. **Betty Njoki Mutua** subsequently swore and filed, in her own behalf and on behalf of the 1st, 4th, 5th, 6th, 7th, and 8thApplicants, what should ideally be intituled as a further affidavit, primarily in opposition to the notice of preliminary objection. Included improperly in the said affidavit are matters of law. In addition, the deponent contended that the instant motion demonstrates that there is an error on the face of the record and therefore, the preliminary objection should be dismissed.

8. The motion and the preliminary objection were, by consent of the parties, argued together. Mr. Chiuri appeared on behalf of the Applicants. His argument was that the court is not *functus officio* and that the court in its judgement did not clearly express itself on the question of costs. He contended that where there is demonstration of an error in expressing the manifestation of the court, review may be allowed. Calling to his aid the decision of the Court of Appeal in **Telkom Kenya Limited vs John Ochanda (suing in his own behalf and on behalf of 996 Others) (2014) eKLR**, he submitted that the Respondents only succeeded partially and that this court has power to revisit the issue of costs in accordance with Section 27 of the Civil Procedure Act.

9. Reliance was also placed on the case of **Little Africa Kenya Limited vs Andrew Mwiti Jason (2014) e KLR** the court (**Gikonyo J**) was persuaded by the definition of the term **"the event"** found in the phrase **'costs follow the event'**, as propounded in the book**, Judicial Hints on Civil Procedure, 2nd Edition** by **Justice Kuloba** (as he then was), to refer to the result of litigation, and the statement that whether successful in part or wholly, a party is entitled to proportionate costs. He prayed that the review application be allowed.

10. Mr. Njuguna, appearing for the Respondents stated that no good reasons have been advanced by the Respondents for the court to interfere with the order of the court regarding costs. He was emphatic that this court is *functus officio* and that by the instant motion, the court is being invited to sit on appeal on a decision of a court of concurrent jurisdiction. Regarding the allegation that the court did not express itself clearly, he contended that it was unfounded, and that the Applicants ought to have filed an appeal, as the present application does not lie. In his view, the decision in the **Telkom Kenya** case supported the Respondent's position. Counsel contended that the instant application constitutes an abuse of the process of the court and should be dismissed.

11. In a brief rebuttal, Mr. Chiuri, reiterated that the judgement of the court did not state the extent of costs payable, whether full or partial and that , the said issue was not a question.

12. The court has considered the material canvassed in respect of the motion, itself expressed to by brought under Order 45 Rule 1(2) of the Civil Procedure Rules, but from arguments raised by the Applicants, is one envisaged by the provisions of Order 45 Rule 1(1) of the Civil Procedure Rule which states:

> **"(1) Any person considering himself aggrieved—**
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> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **(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."**

13. The basic facts of the matter are not in dispute. The Respondents in this suit who are the present Applicants were sued as the 1st to 8th Respondents by the four Applicants (now Respondents) in the main suit which is now determined. The proceedings were principally brought to challenge the decision by the present Applicants suspending the present Respondents' membership of the Thika Sports Club, and the purported exercise of disciplinary power by the Applicants as against the said Respondents.

14. Two key reliefs were sought, namely, an order of *certiorari* to quash the impugned decision and an order of prohibition to prohibit the Applicants from undertaking disciplinary proceedings against the Respondents. The court **(Ngugi J)** having heard the parties delivered his considered judgment on 5th March 2018. Based on his conclusions regarding the decision under challenge, the learned judge granted the first

prayer.

15. He however stated, with regard to the second prayer that the Respondents had not made out a case for prohibition and stated that:

> **"As the Applicants readily concede, the Executive Committee is empowered under Clause 12 of the Club's Constitution, to discipline members – including, where appropriate, by ordering a suspension for a period not exceeding 3 months. In as long as due process is followed and the decisions made are proportionate and in accordance with the club's Constitution, it would be improper for this court to hamstring the Executive Committee from doing its work …. I have left the question whether the Applicants are culpable for lack of adequate oversight and whether the deficiency can be "punished" by suspension open … because I do not wish to embarrass the hearing which the Executive Committee will have, as part of discharging its duties, to give a fair opportunity to the Applicants to raise all these issues before them."**

16. Having quashed the impugned decision and directed for the remittance of the matter back to the Executive Committee for re-hearing, the learned Judge stated regarding costs that

> **"(c) The Respondents (other than the 3rtd Respondent) shall pay the costs of this suit to the Applicants".**

17. The instant motion is apparently brought by the 1st, 4th,5th, 6th, 7th and 8th Respondents in the main suit. The chief grounds upon which the motion is premised are encapsulated in paragraphs 8 and 9 of the affidavit sworn on behalf of the said parties by the 5th Applicant, Betty Njoki Mutua and submissions by counsel. These are that the Respondents had only partially succeeded in their suit and that therefore there is an error apparent on the face of record or an error in expressing the intentions of the court in that the court did not apportion costs

18. Both sides to the motion claimed in their submissions that the Court of Appeal decision in **Telkom Kenya Limited v John Ochanda [suing on his own behalf and on behalf of 996 employees of Telkom Kenya Limited] (2014) e KLR** supports their respective stances regarding the present motion. In that case, the court considered at some length the principle of functus officio and exceptions thereto. The court observed that:

> "*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 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 re-opened 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:***
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> 1. ***Where there had been a slip in drawing it up, and,***
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> 2. ***Where there was an error in expressing the manifest intention of the court. See*** *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.,* ***[1934] S.C.R. 186"***

19. The Court of Appeal further asserted that:

> **The Supreme Court in RAILA ODINGA v IEBC 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;**
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> ***..."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."***
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> **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 re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court;**
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> ***"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."***

20. In The **Telkom Kenya** case, the court recognized that after the rendering of the final judgment of the court, the court's only recourse would have been to review the judgment and having refused to do so, be rendered *functus officio.* The power of the court to review a

judgment for a mistake or error on the face of the record is one of the exceptions to the *functus officio* principle and is embedded in Order 45 Rule 1 (1) of the CPR.

21. In the judgment of **Okwengu JA** in **Associated Insurance Brokers v Kennidia Assurance Co. Ltd [2018] e KLR** the Court of Appeal stated that:

> **[10] It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In *National Bank of Kenya Ltdv Ndungu Njau [1997] eKLR*, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:**
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> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."***
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> **[11]** In ***Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E. A. 173*** this Court further explained an error apparent on the face of the record as follows:
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> ***"An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."***

22. The thrust of the Respondents' challenge raised in the main suit concerned the exercise of the mandate of the committee in arriving at the impugned decision (past) and in anticipated disciplinary proceedings (future) by the Executive Committee. Hence the prayers for *certiorari* and prohibition. So far as I can discern, there was a single cause of action and several issues arose in the matter. It is possible that the cause/issues could be further broken down to multiple causes or issues. However, the fact the court having refused to grant the second prayers sought, proceeded to award costs in respect of the entire suit does not *ex facie* strike me as a mistake or error apparent upon the record.

23. The legal truism that costs follow the event does not obligate the judgment court, to express itself separately, regarding costs concerning every issue/event or cause rather than making a single order in respect of the entire cause. Besides, the question of costs is a matter for the discretion of the court.

24. In this case, the issue of costs was evidently alive in the court's mind as it ordered all the Respondents except the 3rd to bear the costs of the suit. The very fact that the Applicants have engaged in what appears to me an elaborate argument as to the issues and or causes of action under consideration in the matter, which of them succeeded or failed and whether costs ought to have been awarded is sufficient demonstration of the fact that what the Applicants are really seeking is for this court to undertake a merit–based re- engagement with the case. Indeed, stripped of its apparent innocuity, their motion constitutes a challenge to the exercise of the court's discretion in the award of costs, which rightfully belongs to the appellate court.

25. I think I have said enough to demonstrate that this court cannot purport to re-engage with merits of the order on costs by **Ngugi J** without violating the *functus officio* principle. For these reasons, the motion by the Applicants fails and is dismissed with costs to the Respondents. For the avoidance of doubt, the latter order on the payment of costs in respect of the dismissed application applies only to the 1st, 4th, 5th, 6th 7th, and 8th Applicants as the 2nd and 3rd original Respondents were not involved in the dismissed motion.

**DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF JUNE 2019**

**.....**

**C. MEOLI**

**JUDGE**

**In the presence of:-**

Mr. Oronga holding brief for Mr. Njuguna for the Respondent/Petitioner

Mr. Olaka holding brief for Mr. Chiuri for 1st, 5th, 6th, 7th, and 8th Respondent