



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. 178 OF 2011

ANGELA NAFULA KHAMALA..... APPELLANT

VERSUS

ZACHARIA BARASA T/A SIUMA TRADERS.....RESPONDENT

[Being an appeal from Bungoma CMC Case No. 45 of 2007]

JUDGMENT

1. This is an appeal arising from the decision of Hon. J.K.Ng'ar ngar in Bungoma CMCC NO. 45 of 2007. In the said suit the appellant had sought to recover the value of cattle alleged to have been wrongfully attached and sold by the respondent. The matter went to trial and judgment entered. At the execution stage the court file went missing, where upon the appellant had the court file reconstructed. After reconstruction of the file the respondent filed an application seeking to have the judgment set aside and the suit against it struck out. The court had the application and granted the prayers. This appeal is against the said order.
2. The appellant's grounds of appeal are as follows;
 - **The Learned Magistrate erred in law and fact when he set aside a regular judgment entered after inter parte hearing.**
 - **The Learned Trial Magistrate erred in law and fact when he heard a matter when the court was *functus officio*.**
 - **The Learned Trial Magistrate erred in law and fact when he entertained an application filed by a stranger in the proceedings.**
 - **The learned trial magistrate erred in law and fact when he purported to sit on appeal of a lower court's judgment, thus acting without jurisdiction**
 - **The learned trial magistrate was biased as against the appellant.**

SUBMISSIONS

Appellant's submissions

It was submitted on behalf of the appellant that the decree of the court was issued after a full hearing where both parties adduced evidence and therefore the court had no basis upon which to set aside the judgement; judgment was entered and decree issued on 28.3.2008 and the respondent's applicant was filed 3 years 4 months later, this it was contended was an afterthought on the part of the respondent; that the court had discharged its function and the court's duty then was only for purposes of execution; that the court acted outside its functions; it was further said that the trial court did not give reasons for its decision and was out to assist the respondent. The appellant relied on the following cases

1. *Leonard N.K. Moss vs. Villa cane Limited and another [2005] eKLR,*
2. *Amayi Okumu Kanaka & 2 others vs. Moses Okware Opari & Another Civil Appeal No. 15 of 2010,*
3. *Deepak Ashwin Kumar Maru versus Rehemat Essa Dosani & Benson Okumbi – HCCC (Nbi) ELC 658 of 2011.*

Respondent's submissions

The Respondent opposed the appeal on the following grounds;

That the respondent was at all material times an agent of the court on a duty; a licenced court bailiff and authorized to execute court orders. He attached cows pointed to him as belonging to the appellant; the execution was done out of a valid judgment that has not been set aside; the respondent having been sued for damages arising from the attachment mentioned before, entered a defence, later he learnt that the court file went missing; he was never heard, he was not known to the witness who allegedly gave evidence at the hearing.

Further he contended that since the original court file is unavailable, there is no proof of a hearing having taken place; the court acted within jurisdiction, there was no abuse of court process, the application before court was not an appeal but made within the law.

DETERMINATION

The issue before the court is whether or not the lower court could entertain an application for setting aside a regular judgment at the execution stage. There is an agreement between the parties that this matter had reached execution; that a regular judgment had been entered more than 3 years before the application was set aside.

I have perused the Lower court file and specifically the application of 28th July, 2011 that triggered this appeal. The respondent application read inter alia;

“3. The honorable court be pleased to set aside judgement entered in this case against the 2nd defendant be set aside.

4. That the honourable court be pleased to strike out the plaintiff's suit against the 2nd defendant.”

The application was based on the grounds that; the respondent was not informed of the judgment by his counsel then on record; he had a good defence and he had a valid decree from Bungoma SPMCC No. 558 of 2006 which was not challenged.

In his supporting affidavit he blamed his counsel on record then for not keeping him abreast of his case.

On the other hand the appellant contents that the case was fully heard and judgment entered against the respondent and a decree issued.

The above statements by the respondent may as well have been so but could the Learned Magistrate set aside a regular judgment and strike out a plaint at the stage of execution?

The application was brought under the Sections 1A, 1B, 3A, 63e, Order 12 Rule 7 and Order 51 Rule 9.

Order 12 deals with hearing and consequences of non-attendance. It is not denied that the matter went for hearing where both parties called evidence

Order 51 Rule 9 deals with transfer from court to chambers. The application therefore was mainly pegged on overriding principles.

I am in agreement with the appellants counsel that once judgment was entered, other than for purpose of execution, the court's function was done. Thus trial court was *functus officio* and ought not to have entertained the application seeking to set aside the judgment and to strike out a pleading that had been dealt with at a full hearing.

In **Election Petition Nos. 3, 4 & 5 Raila Odinga & Others Vs. IEBC & Others [2013] Eklr**, the Supreme Court cited with approval an excerpt from "**The Origins of the *Functus Officio* Doctrine, with specific reference to its administrative Law.**" [2005] 122 SALJ 832 in an article by Daniel Malau Pretorius as follows;

"The *functus officio* doctrine is one of the mechanisms by means of which the law gives expressions 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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker."

The court also made further reference to the case of **Jersey Evening Post Limited Vs. AI Thani [2002] JLR at 550** where it was stated 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 a clerical error 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 of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenged to its ruling on adjudication must be taken to a higher court if that right is available."

The respondent had not complainant about a clerical mistake but was aggrieved by the judgment. Since the trial court was *functus officio* it ought not to have entertained the application.

Based on the above the appeal succeeds; the trial court's ruling of 27th October, 2011 is hereby set aside.

Costs of this appeal go to the appellant.

Dated at Bungoma this 11th day of JUNE 2015.

ALI-ARONI

JUDGE.