REPUBLIC OF KENYA

IN THE HIGH COURT OF KEYA AT MERU

CIVIL SUIT NO. 11 OF 2020

JANE GACHERI……………………………………………….1ST PLAINTIFF

PURITY KARAMBU…………………………………………..2ND PLAINTIFF

(Suing as the legal reps' of the estate of Sammy Mburugu Gitobu- Deceased)

VERSUS

JOSEPH GICHUHI……………………………………………….1ST DEFENDANT

GLADYS GACERI GICHOGA……………………………….2ND DEFENDANT

RULING

1. On 27th February, 2025, this court delivered a ruling in respect to the Defendant's application dated 14th June, 2024, which sought inter-alia, a stay of execution of the decree herein pending hearing and determination of the appeal filed in the court of Appeal.

2. The court issued the following orders:-
   a) **The applicants are to pay the conceded amount of security of Ksh 3,000,000/- to the respondents within the next 30 days.**
   b) **The applicant shall provide appropriate security for a sum of Ksh 4.5 Million in the form of a bankers**

guarantee or other acceptable security. The same is to be filed in court within 60 days.

c) **The balance of the award of the court shall await the determination of the appeal.**

d) **In default of (a) and (b) above, the Respondents shall be at liberty to execute, but mindful of the provisions of the said section 94 of the Civil Procedure Act.**

e) **Costs shall abide by the outcome of the appeal in the Court of Appeal.**

3. After delivery of the said ruling, the defendants moved the court once again with an application dated 26th March, 2025, which sought the following orders:-

a) ***Spent***

b) ***That pending hearing and determination of this application inter-partes, a stay of execution of the Judgment and/or decree entered on 7th March, 2024 be and is hereby issued and/or granted.***

c) ***That the Honourable court be pleased to review and/or set aside its orders and/or directions issued on 27th February, 2025.***

d) ***That the orders of the court to have the security of Ksh. 3,000,000 be paid to the plaintiffs be varied and the defendants be allowed to deposit the amount in court within thirty (30) days.***

e) ***That this Honourable court to make any other such orders as it may deem just.***

f) ***The costs of this application n be provided for.***

4. Before the said application could be heard and dealt with, the defendants moved the court with the application dated 27th March, 2025 which was prompted by the act of the plaintiffs herein obtaining warrants of attachment and sale before taxation of costs and without leave of the court.

5. That application was subsequently dealt with by the orders issued on 28th March, 2025, which recalled the said warrants.

6. Soon thereafter, the defendants were back in court again, this time with the application dated 15th May, 2025, prompted by the re-issue of warrants of attachment and sale again, before the taxation of costs and without leave of the court.

7. The said application was dealt with by the court on 16th May, 2025, which revoked the said warrants.

8. After issuance of the said orders, the parties were then directed to address the court on the application dated 26th March, 2025.

9. The application is proposed by the grounds set out on the face of it and supported by the affidavit of the 2nd defendant /applicant.

10. In a nutshell, the applicants state that the court in its ruling of 27th February, 2025, ordered that they pay Ksh. 3,000,000/= to the respondents as a condition for stay of execution. That they

are apprehensive that they will not be able to recover the amount from the respondents in case they succeed on appeal.

11. The applicants thus sought a review of the orders of 27th February, 2025 and that they be allowed to deposit the said amount in court. That the application for review was made without delay. That the respondents will not suffer any prejudice since the amount will be accessible to them, if the appeal fails.

12. In response, the 1st plaintiff respondent swore a replying affidavit on 8th May, 2025.

13. In a nutshell, she avers that the application is without merit and is just a delay tactic, intended to deny her the fruits of the judgment herein.

14. The respondent further depones that being a monetary decree the applicants failed to abide by the terms of the orders that they seek to review. That they will suffer loss if not allowed to enjoy the fruits of the Judgment. That the applicants can be restored back to their original position in the event the appeal succeeds.

15. The application was argued through written submissions.

16. For the applicants it was submitted that they have shown sufficient cause to warrant a review. To Buttress this argument, they cited the case of the official ***Receiver and Liquidator – Versus – Freight Forwarders Kenya Limited (2000) eKLR***_

and ***Shanzu Investments Limited Versus Commissioner for Lands (1993) eKLR.***

17. It was argued that the amount ordered to be paid to the respondents is colossal and that noting the respondents’ behaviors of attempting to execute the decree prematurely, they are apprehensive that the respondents may not in the same manner if they are paid the said amount, to the applicants' prejudice.

18. It was further submitted that the respondents have not rebutted the averment that they will be unable to refund the amount in question if the appeal succeeds. Cited was the case of ***National Industrial Credit Bank Limited – Versus – Francis Wasike (2006) eKLR*** and ***Anne Wanjiru Waigwa & Another – Versus Joseph Kiragu Kibarua (2009) eKLR.***

19. It was further submitted that the purpose of security is to protect the interest of both sides to the suit and it would not matter if the security in monetary form is substituted by a bank guarantee or Insurance Bond. Cited in support of these submissions was the case of ***King David Hospital & Another – Versus – Mayuer Enterprises Limited (2023) KEHC 27322 (KLR)*** and ***Gitahi & Another – Versus Warugongo (1988) eKLR.***

20. For the respondents, it was submitted that this court is *functus officio* and cannot entertain the application. To buttress the point, they cited the case of ***Telkom Kenya Limited Versus – John***

Ochanda and others (2014) eKLR and ***Raila Odinga & 2 Others – Versus Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR.***

21. It was submitted that the only exception to the rule on functus officio is found under Section 99 of the Civil Procedure Act, which allows the court to correct any clerical or arithmetical mistake in a Judgment, ruling or order. That in this case, there is no such error/mistake.

22. It was further submitted that the applicants have not met the threshold to warrant a grant of stay of execution in that there is no demonstration of substantial loss. Cited to support this submission was ***Everlyn Jebitok Keter – Versus – Henry Kiplagat Muge & 2 Others (2011) eKLR*** and ***Rocky Driving School Limited – versus- Cute Kitchen Limited (2015)eKLR.***

23. It was further submitted that the court had already issued orders that secured the interest of both sides to the suit. That this application is just a further attempt to prolong the determination of the dispute herein.

24. The substantive prayer herein is that of review. The applicants seek a review of the orders of this court issued on 27th February, 2025.

25. The first issue to consider in whether this court is *functus officio* as alleged by the respondents.

26. The doctrine of *functus officio* bars a court which has rendered or decision with finality from revisiting the same. The doctrine was expounded in the case of ***Raila Odinga -versus- IEBC(supra)*** where the Supreme Court held as follows:-

> ***"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."***

27. Still on the said doctrine, in ***Jersey Evening Post Ltd v. Ai Thani (2002) JLR 542 at 550,*** it was held thus:

> **"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".

28. Of course, there are exceptions, and limited ones to the said rule. Such an execution is allowed under Section 99 of the Civil Procedure Act which provides as follows:-

"Amendment of judgments, decrees or orders
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."

29. The other exception to a limited extent, is that of review, which the applicants have sought. As such when it comes to review, the court is not *functus officio*. Whether the application is competent in itself as a question to be answered in this ruling.

30. The law on review is governed by Section 80 of the Civil Procedure Act, which provides as follows:-

80. Any person who considers himself aggrieved –

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

(b) By a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or order therein as it thinks fit".

31. The provision is further amplified by Order 45 Rule 1 of the Civil Procedure Rules which provides as follows:-

45 (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 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 to the review".

32. Therefore, to succeed, an applicant seeking review ought to show the following:-

    a) There is an apparent error on the face of the record

    b) There is discovery of new evidence that was not available at the time the orders I question were issued.

    c) ***Any other sufficient reason***.

33. There is no unanimity on whether any other sufficient reason ought to be analogous to the first two requirements, I am in agreement with the applicant that any other reason need not ejusdem generis or analogous to the first two grounds, as was stated in ***The Official Receivers – Versus – Freight Forwarders Kenya Limited (Supra*)**.**

34. The question that begs an answer is whether there is any sufficient reason to warrant a review, since there is no error apparent on the face of the record nor a discovery of a new and important matter.

35. In my view there is no sufficient reason. I will give my reasons.

36. What the applicants appear to be doing is to relitigate issues that were already dealt with by the court in the ruling it seeks to be

reviewed. The court considered all the grounds that are being raised now and arrived at the decision in question. In that regard any argument relating to the findings of the court are *res-judicata*.

37. In my view, if the applicants are of the view that the court erred in issuing the orders in question, that is a decisional error, and not an error apparent on the face of the record. It cannot be cured by review. The applicants' recourse lay in the Court of Appeal, not this court.

38. It is thus my finding that there is no valid ground for review, and the matter is now *res-judicata.*

39. The application dated 27th March, 2025 is therein dismissed with costs.

Dated, Signed & Delivered at Meru this 20th day of November, 2025.

H. M. NYAGA

JUDGE