



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 21 OF 2017

SERVE IN LOVE AFRICA (SILA) TRUST.....PLAINTIFF

VERSUS

ABRAHAM KIPTARUS KIPTOO.....1ST DEFENDANT

PATRICK KIPKOGEI KIBET.....2ND DEFENDANT

DAVID KIPSANG KIPYEGO.....3RD DEFENDANT

RULING

On the 18th October 2017, this court issued an interlocutory restraining the parties herein from selling, transferring, disposing or in any other way dealing with the suit property. On the 5th of December 2018, these orders were found to have lapsed. The plaintiff now prays that pending the hearing and determination of the suit, there be an order of inhibition to inhibit any dealings on land reference ***Kipsinende/Kipsinende Block 3 (Mosop "A") 61***. The application is based on grounds that the plaintiff is the owner of the land in dispute and that the 1st and 3rd defendants are former trustees. The defendants have attempted to dispose off the land to the detriment of the plaintiff. In the event, the land is disposed of, the plaintiff will suffer irreparable harm.

The respondents' reply is that this court has already made a decision and therefore the plaintiffs' only option is to appeal.

The application in essence seeks to review the orders of the court made on 5th December 2018. The power to review is mandated by **Section 80** of the **Civil Procedure Act** which provides that: -

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 made the order, and the court may make such order thereon as it thinks fit.

The complimentary procedural rule on this is Order 45 of the Civil Procedure Rules. Its Rule 1 provides that: -

1. (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 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. (own emphasis)

The applicant has not demonstrated any mistake or error apparent on the face of the record and therefore the court cannot invoke its discretion for review.

This court is *functus officio* having found that the orders of injunction lapsed after the expiry of 12 months under **Order 40 Rule 6 of the Civil Procedure Rules Cap 21 laws of Kenya**.

The doctrine of *functus officio* is one of the expressions is law on the principle of finality. The Black's Law Dictionary, Ninth Edition defines the describes *functus officio* as: -

“[having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

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** held 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.”

The Court of Appeal followed the Supreme Court decision in **RAILA ODINGA & 2 OTHERS V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS [2013] eKLR**, where the Supreme Court 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** which reads: -

... “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.”

It is this decision in **TELKOM KENYA LIMITED** (supra) and that of **RAILA ODINGA V IEBC** (supra) on the doctrine of *functus officio* that guided and bound the Learned Magistrate in reaching the decision that the court was *functus* and could therefore not review the judgement. The judgement of the lower court as rendered however varied the circumstances to which the doctrine applies and called for an application of its exceptions.

The rule of *functus officio* has exceptions.

Section 99 of the **Civil Procedure Act** establishes the slip rule it provides that: -

“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.”

The Civil Procedure Rules provides under **Order 21 Rule 3 (3)** that: -

“A judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review.”

Case law supports the place for exceptions and this includes that of the Court of Appeal in **TELKOM KENYA LIMITED CASE** (supra) which followed with approval the decision in the Canadian case of **CHANDLER VS ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848**, where in explaining the origins of the rule of *functus officio* it was held in part that: -

“...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.**

The Court of appeal in **TELKOM KENYA LIMITED CASE** (supra) also held that: -

“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...”

I have considered the application, supporting affidavit and replying affidavit and do find that the plaintiff has not satisfied the condition for review under Order 45 of the Civil Procedure Rules. Moreover, there is no application for correction of errors or mistake apparent on the face of record as what the applicant is attempting is to have a second bite on the cherry.

The only option for the plaintiff, is to appeal to the Court of Appeal and apply for stay of execution or injunction under **Rule 5(2)(B) of the Court of Appeal Rules**. Granting the orders sought will amount to sitting on appeal on orders issued by the same court. Application is dismissed with costs.

Dated and delivered at Eldoret this 3rd day of April, 2019.

A. OMBWAYO

JUDGE