REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E061 OF 2022

CYTONN INVESTMENTS PARTNERS FOUR LLP::::::::::::::APPLICANT

VERSUS

JOHN KIOKO MUTUA::1ST RESPONDENT

SERAH NZEMBI MUTUA::::::::::::::::::::::::::::::::::::2ND RESPONDENT

RULING

The Application is dated 23rd January, 2024 and is brought under Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act and seeks the following orders;

1. This application be certified urgent and service thereof be dispensed with in the first instance.
2. This Honourable Court be pleased to review, vary and or set aside its Ruling and orders of the 31st January, 2024 as issued by this court.
3. The prayers 3 and 5 of the Respondent's Notice of Motion application dated the 23rd May, 2023 be dismissed with costs.
4. Costs of this Application be provided for.

It is based on the following grounds that the Applicant is a Limited Liability Partnership duly registered under the Limited Liability Partnership's Act and Solvent, and it entered into a sale agreement and a Joint Venture agreement with the Respondents concerning the parcel of land known as LR. No. 13208/2, 28055, and 28056 for the development project known as Newtown. On the 6th of January, 2023, the High Court, in Nairobi HCOMMIP No. E063 of 2011: In the matter of Cytonn High Yield Solutions LLP (in liquidation), placed two private funds under liquidation – Cytonn High Yield Solutions LLP (CHYS) and Cytonn Real Estate Project Notes LLP (CPN). The Official Receiver was appointed as liquidator for both entities. On the same date, based on an application filed by certain creditors of the two funds on 19th May, 2022, the Insolvency Court further preserved the property owned by the Applicant, Cytonn Investment Partners Four LLP pending the conclusion of the liquidation process.

In its Ruling on the 31st January, 2024, this Honourable Court erroneously interpreted the earlier Ruling of the Insolvency Court in HCOMMIP No. E63 of 2021. The court declared that the Applicant, along with Cytonn High Yield Solution LLP, had been placed under liquidation. The Court further stated that, as a consequence, the Applicant lacked capacity to proceed with the suit and allowed the Respondents' application to strike out the Plaintiff's suit with no orders as to costs. The Ruling of the Insolvency Court on 6th January, 2023, as delivered by Justice Alfred Mabeya, was unequivocal in its decision. The Court placed Cytonn

High Yield Solutions LLP (CHYS) under liquidation and appointed the Official Receiver as the liquidator for CHYS. The Court did not make any declaration regarding the liquidation of the Applicant, Cytonn Investment Partners Four LLP, nor did it assign the Applicant to the liquidation process. It is, therefore, apparent that the Ruling of this Honourable Court, in which it erroneously declared that the Applicant had been placed under liquidation, constitutes an error on the face of the record. This Honourable Court, it its Ruling, failed to take into consideration, its earlier introductory remarks that the Applicant, through the Replying Affidavit of Edwin Dande, explicitly opposed the assertion that it was under liquidation. The Applicant cited the doctrine of separate legal entities, asserting that it remained a separate legal entity from Cytonn High Yield Solutions LLP and retained full capacity to sue and be sued. Despite this, this Honourable Court erroneously concluded that the Applicant had not opposed the averment that it had been placed under liquidation and lacked the capacity to prosecute the suit. This Honourable Court further misapplied the Section 432(2) of the Insolvency Act which provides that once a liquidator is appointed over a company in liquidation, proceedings may only commence or continue with the sanction of the Insolvency Court. The Applicant herein did not require any sanction from the Insolvency Court as it is not under liquidation and no liquidator has been appointed over it.

That this Honourable Court's failure to differentiate between the Applicant and Cytonn High Yield solutions LLP has resulted not only in an erroneous application of the law but also in the establishment of a dangerous precedent for the Applicant. The Applicant seeks to proceed with arbitration claims against the Respondents but has been unable to do so due to the erroneous Ruling. This misapplication of the law severally limits the Applicant's ability to pursue its legal remedies, as it is unlikely that leave will be granted for any litigation, despite the fact that the Applicant is not under liquidation. Furthermore, this Ruling unduly restricts the Applicant's right to appeal and effectively prevents it from pursuing any further legal action. Based on the foregoing, it is manifest that there are errors apparent in the face of the record, which errors ought to be rectified by a review and setting aside of the Ruling and Orders of the 31st January, 2024 which erroneously declared the Applicant to be under liquidation.

This court has carefully considered the application and submissions therein. The Respondent submitted that the remedy of review is not available for the Applicant.

In the case of Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171 is relevant. It was held, that;

> *"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an*

elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

> *"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"*

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

> *"(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.

(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 for the review."

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

"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."

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In Court of Appeal, Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau, the Court of Appeal held that;

> *"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 evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law".*

From the above provisions of the law, authorities cited and facts of this case the applicant stated that in its Ruling on the 31st January, 2024, Court erroneously interpreted the earlier Ruling of the Insolvency Court in HCOMMIP No. E63 of 2021. The court declared that the Applicant, along with Cytonn High Yield Solution LLP, had been placed under liquidation and dismissed the case. However, the correct position was that on the 6th of January, 2023, the High Court, in Nairobi HCOMMIP No. E063 of 2011 In the matter of Cytonn High Yield Solutions LLP (in liquidation), placed two private funds under liquidation – Cytonn High Yield

Solutions LLP (CHYS) and Cytonn Real Estate Project Notes LLP (CPN). That he Court erroneously declared that the Applicant had been placed under liquidation, constitutes an error on the face of the record. That the Applicant and Cytonn High Yield solutions LLP are distinct legal entities. That the Applicant herein not require any sanction from the Insolvency Court as it is not under liquidation and no liquidator has been appointed over it. Hence the Court misapplied the Section 432(2) of the Insolvency Act which provides that once a liquidator is appointed over a company in liquidation, proceedings may only commence or continue with the sanction of the Insolvency Court.

I have perused the court file and find that the application proceeded by way of written submissions. I have also carefully gone through the said ruling delivered on the 31st January 2024 and find that on page 4 of the ruling the Judge did consider the Plaintiff's (Applicant in this application) submissions that the parties in the insolvency petition are distinct from the parties in this matter. That the petition does not in any way affect the parties in this suit. That is the same issue being advance in this application for review. After quoting the impugned ruling in the High Court, in Nairobi HCOMMIP No. E063 of 2011 In the matter of Cytonn High Yield Solutions LLP (in liquidation), the court had this to say;

> *"From the excerpt of this ruling alone, it is evident that the CYtonns including the Plaintiff herein, have been placed under liquidation, which*

fact the Plaintiff has not denied. Further, the Plaintiff has admitted that the fulcrum of the dispute herein has also been preserved in the impugned Ruling. It is trite that under Section 432(2) of the Insolvency Act, it provided that where there is a liquidation Order as in this instance for the Cytonns and a provisional liquidator appointed, any legal proceedings against the company can only be commenced or continued with approval of the court."

The court went on to consider the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) ltd (1989) KLR 1 on jurisdiction and found that by dint of Section 13 of the Environment and Land Court Act this court lacks jurisdiction to handle the matter and proceeded to strike it out. I concur with the Respondent's submissions that this matter and the instant application cannot fulfill the elements for granting a review. I find that there is no omission or error on the face of the record in the instant case. All the issues raised in this application were considered and determination made in the said ruling. I find that there is no sufficient in this case to review the judgement and/or the execution. I note that this application for review is dated 23rd January 2025 and the ruling was delivered on 31st January 2024, the Applicant is guilty of laches.

I find that this court is now functus officio. In the case of Telkom Kenya Ltd vs John Ochanda (suing on his behalf and on behalf of 996 former Employees

of Telkom Kenya Ltd (supra), the Court of Appeal held as follows on the *functus officio* doctrine;

> *"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 general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions. ---"*

The Supreme Court of Kenya in the case of Raila Odinga & 2 Others v 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* 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."

Section 99 of the Civil Procedure Act provides exceptions to the doctrine of *functus officio* in the following terms-

"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."

It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered as is the case herein. Having discharged its duty on this suit this court is therefore *functus officio*, defined in Black's Law Dictionary, Ninth Edition 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."* In the circumstances, the court is wary of the Applicants' invitation to re-engage with this dispute. Having found that this court is functus officio and rejecting the application for review I find that the application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF DECEMBER 2025.

N.A. MATHEKA

JUDGE