



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC APPEAL E045 OF 2021

RAPHAEL MULINGE MUTHUSI
FRANCIS MAITHYA MUTAVI
JAMES MUTISYA WAMBUA (*being the officials*
of Kivaa 15 Alive Self-Help Group).....
APPELLANT

VERSUS

MARY NDILA NYOLO.....
RESPONDENT

RULING

1. The notice of motion that is the subject of this ruling is dated 3rd November 2023, and expressed to have been filed in accordance with **Sections 1A, 1B, and 3A** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The appellant seeks the following reliefs from this court:

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- a. That this court determine the costs of the instant appeal and/ capped at a reasonable amount by this court.***
 - b. That the costs of the instant appeal be payable after the hearing and determination of the main suit in Kithimani Magistrate's Court, ELC No. 35 of 2020.***
 - c. That the be no award of costs in respect of the motion.***
2. The motion is supported by the grounds set out in the body thereof and the supporting affidavit of Francis Maithya Mutavi, sworn on 3rd November 2023. In this affidavit, he contends that, upon an award of costs to the respondent, the respondent has filed an unreasonable bill of costs, which could undermine the principles of a fair hearing and the proper determination of the substantive suit.
3. On service, the respondent filed a notice of preliminary objection ("**PO**") dated 6th February 2024, which is also subject to this ruling and raises the following points of law:
 - a. This honourable court lacks jurisdiction as it is not the proper avenue to hear and determine the matter at hand.***
 - b. The appeal was filed by the appellant against the respondent, and the honourable court gave its judgment dated 31st March 2023, dismissing it;***

thus, it lacks the jurisdiction to hear and determine the motion as it is now functus officio.

c. This outcome contravenes Section 7 of the Civil Procedure Act and invokes the principle of res judicata, precluding the re-opening of the case.

4. Notably, when the parties appeared before this court on 26/05/2025, **Mr Mutava**, counsel for the respondent, informed the court that the respondent had also filed a replying affidavit deposed on 6/02/2024 and filed on 8/02/2024. Unfortunately, this court has been unable to trace it from the court record.
5. Nevertheless, having considered the length of time that this motion has been pending, which appears to have hindered the assessment of the bill of costs and the nature of the points of law that meet the legal threshold of the precedent-setting case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors (1969) EA 696**-as it raises a pure point of law, there is a demonstration that all the facts pleaded by the other side are correct, the facts need not be ascertained, the point of law raises the issue of *functus officio* which is a jurisdictional issue, this court finds that it can adequately address the matter without prejudicing any party.
6. In this instance, the court directed the counsel for the parties to file written submissions within designated timelines. However, at the time of penning this ruling, none have been filed; should they be filed thereafter, this court will regard

them as submitted out of time and disregard them. Consequently, as the legal points raised in the PO have satisfied the requisite threshold, the issues for determination are distilled as follows: **(a) whether the court is functus officio** and **(b) whether the motion is merited**. We will begin with the first issue, as it can dispose of the 2nd one.

a. Whether the court is *functus officio*

7. In resolving this matter and the subsequent issue, this court shall consider the motion, affidavit, and the judgment issued by this court on 31st May 2023. Concerning the issue for determination, the doctrine of *functus officio* is a foundational legal principle that prohibits the reopening of a case before a court that has issued a final decision. This doctrine was emphasised in the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR**, which 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.”

This decision went further at **paragraph 19** and states: -

This principle has been aptly summarized further in Jersey Evening Post Limited v Al Thani [2002] JLR 542 at 550: “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 on adjudication must be taken to a higher court if that right is available” [emphasis supplied].”

8. In the instant case, and guided by settled law that costs follow the event, which is anchored in **Section 27 (1)** of the **Civil**

Procedure Act, this court, in its judgment, awarded costs to the respondent as the appeal was unsuccessful. This provision of the law provides thus:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

9. Having made a final decision on the issue of costs, this court is prohibited from revisiting the matter on a substantive basis once a final judgment has been entered and orders have been issued, as is the case herein. The assessment of the costs is now the subject of resolution of the taxing master, and this court need not say more and finds that it is now *functus officio*.

Hence, a determination on the 2nd issue is rendered unnecessary.

10. In the end, it allows the PO dated 6th February 2024 and strikes out the notice of motion dated 3rd November 2023 with costs to the respondent.

Orders accordingly.

Delivered and Dated at Machakos this 20th day of January, 2026.

**HON. A. Y. KOROSS
JUDGE
20.01.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant

Mr. Kitanga holding brief for Mr. Mutua Mboya for Applicant.

Miss. Nzili holding brief for Mr. Mutava for the Respondent.

Miss Masinde for 5th defendant – National Land Commission.

ORIGINAL