REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPSABET

CIVIL DIVISION

CIVIL APPEAL CASE NO. 10. 0F 2021

BETWEEN

BATSON MUDASHI ADINGO::::::::::::::::::::::::APPELLANT/1ST RESPONDENT

AND

WILLIAM MUDOGA:::APPLICANT

HENRY ASWANI AGOSA::2ND RESPONDENT

[Being an appeal from the ruling of Hon. D. Alego [SPM] delivered on 25th March 2019 in Kapsabet Succession Cause No. 170 of 2016]

RULING

1. The application vide the summons dated 3rd May 2024 filed herein by the firm of **Mark Mwendwa & Company Advocates** on behalf of **William Mudoga,** traces its footprints from **Kapsabet SPMCC NO. 170 of 2016,** in which the Appellant/ First Respondent, **Batson Mudeshi**

Adingo obtained grant of letters of administration intestate respecting the estate of the late **Kiptarus Arap Arusei** [deceased] comprising of a parcel of land described as **Land Parcel No. Nandi/Serem/271.**

2. In the Petitioner for grant of Letters of Administration, the Appellant indicated that he was a nephew to the deceased, and the grant was eventually issued to him on the 15th May 2017. Thereafter on the 17th November 2017 the Applicant **[William]** and **Henry Aswani Agosa,** the Second Respondent herein, were allowed by the court to be enjoined in the succession proceedings as interested parties. The two had filed an objection to confirmation of the grant and distribution of the estate property as proposed by the Appellant.

3. The objection was duly considered by the trial court and allowed in its ruling made on 25th March 2019. The objectors were thus considered as beneficiaries of the deceased's estate and included in this cause.

   Being dissatisfied with the court's ruling the Appellant filed the present appeal at the Eldoret High Court, being **Civil Appeal No. 39 of 2020 at Eldoret.** The memorandum of appeal was dated 13th May 2020, but on the 16th April 2021, the matter was transferred from Eldoret High Court to this court and became **Kapsabet High Court Civil Appeal No. 10 of 2021.**

4. After the hearing of the appeal, this court differently constituted rendered its judgment on 17th May 2023 upholding the appeal and setting aside the ruling of the lower trial court made on the 25th March 2019.

Thereafter, on the 29th May 2023, the impugned grant of letters of administration was confirmed in favour of the Appellant and a certificate of confirmation of grant issued accordingly. Thus, the estate property **Land Parcel No. Nandi/Serem/271** was wholly transmitted to the Appellant as the sole beneficiary.

5. Seemingly, the judgment of the court delivered on the 17th May 2023 and the issuance of the certificate of confirmation of grant on 29th May 2023, marked the conclusion of this matter in this court.

The next "port of call" for any aggrieved party was the Court of Appeal. However, the Applicant after a period of about one [1] year returned to this court with the present application dated 3rd May 2024, for leave to the firm of **Mark Mwendwa & Company Advocate** to come on record on his behalf and essentially for review of the judgment delivered by this court on 17th May 2023.

6. In response, the Appellant through the firm of **D.E.K Marete & Company Advocate,** filed a Notice of Preliminary

Objection to the application dated 28th March 2025. This was canvassed by written submissions. In addition, the Applicant filed a replying affidavit on the objection. It is dated 26th April 2025.

Both the affidavit and the Applicant's written submissions dated 26th April 2025 were drawn and filed by **Mark Mwendwa & Company Advocates.**

7. The Appellant/ First Respondent's written submissions dated 28th April 2025 were filed by **D.E.K Marete & Company Advocates,** but taken over by **Ochieng Ndolo & Company Advocates** by consent of both firms. There is no response from the Second Respondent on either the application or the preliminary objection.

In essence, this ruling is only on the preliminary objection to the present application dated 3rd May 2024.

8. Basically, a preliminary objection as was stated by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Company Limited Vs. Westend Distributors Limited [1969] E.A. 698,** is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.

9. This means that a preliminary objection cannot be raised if the facts are contested or evidence must be evaluated or the matter requires judicial discretion. Such objections are therefore limited to pure questions of law and cannot involve factual inquiries thereby protecting judicial time and preventing abuse of the court process.

10. Herein, the objections is clearly anchored on the seven [7] grounds specified in the notice dated the 28th March 2025. In this court's opinion however, only ground four [4] raised a point of law in so far as the doctrine of *functus-officio* is invoked which if applied to the circumstances of this case would divest this court's jurisdiction to entertain the impugned application dated 3rd May 2024.

11. The first, second, third and fifth grounds of the objection would require ascertainment by appropriate evidence and indeed, exercise of judicial discretion in arriving at a determination in respect thereof.

While ground six is more or less a contention by the Applicant that the impugned application is an abuse of the court process and ought to be dismissed with costs, ground seven is merely a prayer for dismissal of the application.

12. It is therefore the finding of this court that grounds one, two three, five, six and seven of the objection do not raise pure points of law to mount and sustain the objection. They are accordingly, overruled and dismissed. With regard to ground four [4], the Appellant/ Objector contends that this matter is *"functus-officio"* as this honourable court had pronounced itself and cannot therefore sit on its own appeal since the issues raised herein are captured in the disputed judgment.

13. To buttress the foregoing contention, the Appellant cited the decision of the Court of Appeal in the case of **Telkom [K] Limited Vs. John Ochanda [suing on his behalf and on behalf of 996 former employees of Telkom [K] Limited,** which examined the *"functus Officio"* doctrine. The Appellant thus submitted that this court having discharged its duties and/or pronounced itself via the judgment delivered on 17th May 2023, has no jurisdiction to entertain the application before it as it is *"functus – officio."*

14. In response to the appellate's contention the Applicant in the impugned application cited the decision of the Land and Environment Court in the case of **Cove Investments Limited Vs. Rono & Another [2024]** were the court observed that: -

> **"The doctrine of *"functus Officio"* is a principle of law that prevents the reopening of a matter before a court that has rendered a final decision on the matter. It is to ensure that there is finality in litigation and if a person is aggrieved by an order of the court then they have a right of appeal"**

15. In that regard, the Applicant submitted that in as much as the *"functus officio"* doctrine seeks to promote the doctrine of finality in litigation, there are exceptions to the doctrine under the law as was stated in the case of In re-estate of **Kinuthia Mahuti [deceased] [2018] eKLR,** where the court observed that:-

> **"While this court is vested with adjudicative powers, once a court becomes *functus officio,* the only orders it can grant are review orders which are an exception to the *functus officio* doctrine."**

16. The Applicant therefore contends that the court's power of review is an exception to the *"functus officio"* doctrine and that the court only becomes *"functus officio"* when an appeal has been lodged against its order or decree. That, it is after the filing of an appeal that the court can no longer exercise its power of review.

The Applicant submitted that in this matter no appeal has been lodged against the impugned judgment delivered on 17th May 2023. Therefore, this court is not *functus officio* to hear and determine the application for review of the judgment.

17. The Applicant further cited the case of **Madison Insurance Company Limited Vs. Mung'ot [2022] eKLR,** where it was held that the court is not *functus officio* in respect of post judgment application for review of the judgment and/or setting aside of the judgment.

The Applicant submitted that the present preliminary objection is unmerited and prays for its dismissal with costs.

18. All the factors foregoing clearly indicate that the basic issue for determination with regard to ground four [4] of the objection is whether this court is *functus-officio,* hence lacking jurisdiction to deal with the impugned application for review of its judgment made on 17th May 2023.

Generally, a judgment may be reviewed, but typically for errors apparent on the face of the record or availability of new evidence.

19. The "*functus-officio*" doctrine is a legal principle which pre supposes that once a court has made a final decision it cannot revisit or alter it. The principle puts into effect the

doctrine of finality in litigation. However, there are exceptions to the principle. A court could apply the doctrine of "*functus officio*" when it cannot alter its final judgment just because a party is dissatisfied with the outcome. A decree cannot be altered once it is drawn and executed.

20. The exception to the doctrine include correction of clerical errors or slips or review of a judgment and/or setting aside a judgment **[See, the Madison Insurance Company Limited Case [Supra].** Even in succession causes the doctrine applies, but with some flexibility as courts can revisit or vary orders in succession matters under certain circumstances informed by the need to correct errors or protect the interest of the estate. In any event, the High Court has inherent jurisdiction in succession proceedings and may exercise discretion to ensure justice is done.

21. The Court of Appeal in the case of **Telkom [K] Limited Vs. John Ochanda [suing on his own behalf and on behalf of 996 former Employees of Telkom [K] Limited [2014] e KLR,** which was cited herein by the Appellant/ First Respondent, stated as follows with regard to the doctrine of *"functus-officio."*: -

> **"*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. …………………

In the Canadian case of Chandler Vs. Alberta Association of Architects [1989] 2 S.C.R 84, Sopinka J. **traced the origins of the doctrine as follows [at P. 860]**

"The general rule that a final decision of a court cannot be re opened derives from the decision of the English Court of Appeal in re-stNaizaire Company [1879] 12 ch.D 88. The basis of it was that the power to rehear was transferred by the judicature Acts to the appellate division. 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 the was an error in expressing the manifest intention of the court …………..."***

22. The court went further to state that: -

"The Supreme Court in Raila Odinga Vs. IEBC 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 in which the learned author stated: ………." "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."

23. The Supreme Court in the case of **Raila Odinga & 2 Others Vs. IEBC & 3 Others [2013] e KLR,** cited and applied the case of **Jersey Evening Post Limited Vs. Al Thani [2002] KLR 542** in which 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 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 conducted and the court functus when its judgment or order has been perfected. The purpose of the doctrines 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."**

24. Guided by the foregoing decisions of the court and in particular, the **Raila Odinga case [supra]** and regard being given to the substratum of the intended application of review of the impugned judgment, it is the opinion of this court that the disputed application would not fall within the exceptions to the doctrine of *"functus officio."*

There is no demonstrable slip and/or mistake on the face of the judgment, neither is there new evidence which was not available as at the time of or even before the judgment was

rendered. By and large the intended application is skewed towards questioning the merits of the decision.

25. In particular, the courts' finding that the applicant was not a valid beneficiary of the subject estate and could not claim any right thereon on account of a purchasers interest as there was no evidence whatsoever to establish the fact. The main issue was not whether or not the Appellant/ First Respondent was a beneficiary of the estate in whatever capacity, but whether the Applicant enjoyed a purchaser's interest in the estate by dint of a valid sale transaction, hence a beneficiary thereof.

26. Whereas the trial court found in favour of the Applicant, this court on appeal found otherwise and allowed the appeal in favour of the Appellant. In that regard, this court rendered itself thus: -

> **"…………………..before claiming purchaser's interest the Objectors were under a duty to prove that there was a sale agreement between themselves and the deceased. A chief's letter is not evidence of purchase and the trial magistrate erred in relying on the same as conclusive evidence. The finding that there was evidence that the property was purchased by their kin is erroneous as**

there was no evidence adduced that the purchasers in the agreements were the Objector's kin, or if indeed they were, that they had obtained letters of administration to represent the estates of their kin in their claim for a share of this intestate estate."

27. This finding brought to an end the issue pertaining to the Applicant's alleged purchaser's interest in the property. The Applicant has therefore failed to demonstrate discovery of new evidence and/or slip in the finding so as to invariably upset it and provide sufficient fodder for valid review of the impugned judgment.

28. Clearly, the intended application is an attempt to take a second or even third bite at the cherry. It was pursuant to the impugned judgment of this court that the impugned grant was confirmed and a certificate of confirmation of grant issued thereby implying that the estate has since been distributed to the deserving beneficiary/ beneficiaries. There is nothing left for distribution unless a higher court rules otherwise.

As it were, the estate is since spent.

29. The impugned judgment was a clear and final expression of the court's intention which was ultimately

perfected by the issuance of the certificate of confirmation of grant. The Applicant; if dissatisfied with the decision of the court ought to have agitated for an appeal to the Court of Appeal rather than returning in this court for a review of the judgment without valid grounds.

30. In this matter, there was finality as to the proceedings, merits and the decision.

This court is therefore *"funtus officio",* hence without jurisdiction to deal with the matter any further.

The Applicant's grievance may be addressed in the Court of Appeal as the doctrine of *"functus-officio"* clearly bars a merit based decisional re-engagement with the case once final judgment has been entered and a decree thereon [read certificate of confirmation of grant] issued. [**See, the Telkom [K] Limited Vs. John Ochanda case [Supra]].**

31. In the circumstance, ground four [4] of the notice of preliminary objection dated 28th March 2025 is hereby sustained to the extent that the application dated 3rd May 2024 must be and is hereby dismissed for want of merit and being an abuse of the court process. The Appellant/ First Respondent shall have the costs of the application.

Dated and Delivered this 11th day of February 2026

HON. J. R. KARANJAH,

JUDGE