REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELCNO. E019 OF 2021 (OS)

HAROLDS KALAMA WANDARY & 104 OTHERS ……………………. PLAINTIFFS

VERSUS

HUSEINBHAI GHULAMHUSSEIN BHARMAZ & ANOTHER……… DEFENDANTS

RULING

1. The application dated **17th March 2025** has been brought by the plaintiffs. They seek an order that this court do review its judgment that was delivered by M.A. Odeny J. on 25th November 2022 and that it will be pleased to make such further orders as are necessary for the ends of justice to be met.
2. It is stated that in the judgment dated 21st November 2022, the applicants' suit was dismissed with no orders as to costs for failing to meet the threshold for proof of adverse possession as the plaintiffs did not state when they took possession of the suit land and thus did not enable the court to determine when time started running; that they further failed to state the specific portions that they were occupying and for how long; that the plaintiffs were not a homogeneous group bearing the same ages, or that they had the same entry points in time into the suit land. It is urged that the court's holding calls for a *review* of the judgment.
3. The application is supported by the sworn affidavit of the first plaintiff. He states that the plaintiffs can explain the year in which each applicant came into occupation of the suit property and state specific portions of land occupied by each applicant if the court grants them leave to adduce new evidence to that effect. And that is where the applicants have gone wrong because the application before this court is for review based on the affidavit on the record rather than one for adducing of additional evidence. Even a court's power of review has its own limits. In *Outa v Okello & 3 others*

[2017] KESC 25 (KLR) the Supreme Court of Kenya cited an Indian decision in *Sow Chandra Kanta and Another v. Sheik Habib 1975 AIR 1500, 1975 SCC (4) 457*, thus:

> *"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and over-ruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."*

4. The Supreme Court of Kenya in the *Outa case* (supra) further stated as follows:

> *"74. In Northern India Caterers (India) v. Lt. Governor of Delhi 1980 AIR 674, the Court had to decide whether it could review its own decision based on the ground that the decision was based on an erroneous appreciation of facts. In dismissing the review application, the Court remarked:*
> *"It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so."*

5. In *Telkom Kenya Ltd v Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Ltd) [2014] KECA 600 (KLR)*, the single issue the Court of Appeal grappled with was whether or not by ordering adduction of further evidence through the filing of affidavits after the suits as consolidated had been heard and concluded, the learned judge overstepped his mandate and erred in law. The court stated as follows:

> *"20. It is apparent from the record that in ordering those certain materials be placed before him by way of affidavit long after judgment had been entered; the learned judge had the noblest and best of intentions in trying to give effect to the judgment of Mwera J. In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him. He had himself earlier acknowledged that his hands were tied and also noted that he could not amend the judgment as had been sought.*

The court's only recourse would have been to review the judgment and having refused to do so, it was rendered functus officio."

6. In offering to produce more evidence in support of their case to enable the court grant them a positive judgment, the plaintiffs have conceded that they left gaps in their evidence and that the court was correct in failing to grant them judgment in their favour, and that they wish to have their case reopened for more evidence of the type which the very judgment pointed out was not provided at the hearing. It is evident that they are now seeking to close the evidential gaps that they left when they were prosecuting their case which amounts to litigation in piecemeal. It is not that they are saying that the said evidence was not in their possession, or that they did not know of it, or that it was not within their reach. All that they are saying is that they want to be allowed to adduce it, to have a second bite at the cherry. If all litigation proceeded in that fashion, it is doubtful that any case would ever be deemed fully and finally concluded. The court became *functus officio* upon issuance of judgment and could only review the judgment but not reopen it for the taking of further material evidence as proposed by the plaintiffs. In *Telkom Kenya Ltd (supra),* the court also stated as follows:

   "21. 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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of Chandler Vs Alberta Association Of Architects [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
   22.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 St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for 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:
   23.Where there had been a slip in drawing it up, and,Where there was an error in expressing the manifest intention of the court. SeePaper Machinery Ltd. vs. J.O. Rose Engineering

Corp., [1934] S.C.R. 186" The Supreme Court in Raila Odinga v 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."*
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> *24.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 and these have been captured thus in Jersey Evening Post Ltd Vs Ai Thani [2002] JLR 542 at 550, also cited and applied by the Supreme Court;*
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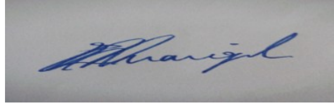
> *25.A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and 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.""*

7. As they have conceded that there is no error on the face of the record in the judgment or proceedings, their application for review under Order 45 CPR lacks merit and it is hereby dismissed with costs.

Dated, signed and delivered at Malindi on this 13th May 2026.



MWANGI NJOROGE

JUDGE, ELC MALINDI.