



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 171 OF 2014

SHAKILA BEGUM ALI (as personal representative of the

Estate of the late MEHBOOB MOHAMED ABDUL GAFOOR MOHAMED MULAH

also known as MEHBOOB MOHAMED ABDULGAFOOR and MEHBOOB MULLAH)..... **PLAINTIFF**

VERSUS

1. VESCON PROPERTIES LIMITED

2. REGISTRAR OF TITLES..... DEFENDANTS

RULING

1. For determination is the notice of motion dated 22nd November 2018 brought under Section 1A, 1B and 3A of the Civil Procedure, Articles 49 and 159 (2) of the Constitution, Order 51 Rule 15 of the Civil Procedure Rules. The application seeks the following orders:

1. Spent

2. That this honourable court be pleased to reinstate the suit herein.

3. That this Honourable court do issue a date for pre-trial for the suit herein.

4. Costs be in the cause.

2. The application is supported by the affidavits of Shakila Begum Ali and grounds inter alia; that after the suit was filed, the 1st defendant entered appearance on 18th October 2014 and filed defence on 11th March 2015. That the plaintiff filed all necessary documents for pre-trial, including witness statements and list of documents. The plaintiff states that he was advised by her previous advocates on record that a valuation report was needed so the plaintiff undertook to have a valuation carried out and provided the same to her previous advocates, and as far as she was concerned, the matter has been proceeding and all was well.

3. The plaintiff avers that she was suddenly informed by her previous advocates that the matter was listed for dismissal on 1st November, 2018 and the notice was received on 29th October, 2018. The plaintiff states that she decided to change advocates in an attempt to have the matter heard and finalized and instructed her current advocates on record on 31st October 2018 and they filed a notice of change on 1st November, 2018. That on 1st November, 2018 the matter came up before Hon. N. Matheka, J who proceeded to dismiss the suit. The plaintiff states that she is interested in having the suit heard and determined and that should this application not be allowed, the plaintiff will suffer great prejudice as the matter was beyond her control and was in the hands of her previous advocates. That consequences resulting from mistake of an advocate should not be visited on her as a client.

4. The motion is opposed by the Defendants. The 1st defendant filed a Replying Affidavit sworn by Praful Velji Halai. It is deposed that the suit was filed on 7th July 2014 and not 9th July 2018 as appears in the application and supporting affidavit. That the plaintiff has been guilty and continues to be guilty of laches and indolence. This is because, despite filing the application on 23rd November, 2018 the applicant only served it on the 1st defendant's advocates on 10th May, 2019, after a period of six months since filing and only six days to the hearing. Further, that the suit was filed over five (5) years ago and has never been prosecuted due to the fact that the plaintiff lost interest in it. It is the 1st defendant's contention that the prolonged delay has caused it unnecessary anxiety as it cannot freely develop the suit land while the suit is pending. That it was therefore appropriate for the court to dismiss the suit for want of prosecution and therefore the same should not be

reinstated. The 1st defendant has noted that the plaintiff was duly served with the notice to show cause through her previous advocates then on record who informed the plaintiff of the same prompting the plaintiff to appoint her current advocates to take over the matter and show cause on 1st November, 2018. That the plaintiff and her advocate failed to show cause leading to the dismissal of the case. The 1st defendant states that having failed to show cause, and being aggrieved by the order of dismissal, the only avenue for her is to seek redress through appeal to the Court of Appeal and not seeking reinstatement. The 1st defendant argues that the plaintiff cannot blame her previous advocates for the dismissal of the suit because it is now settled that a litigant is the owner of his/her case and should follow up the progress of the same. The 1st defendant further contends that once the court dismissed the suit for want of prosecution on merit, the court became “*functus officio*”. The 1st defendant urged the court to disallow the application.

5. The application was canvassed by way of written submissions which were duly filed by the plaintiff/applicant and the 1st defendant. I have considered the application. The suit was filed on 9th July, 2014. The record shows that from 9th July 2014 to 8th March, 2017 no action was taken in the matter. Although the matter was fixed for hearing on 7/6/17 and 25/10/17, the hearing did not take place. Pursuant to a notice to show cause under Order 17 Rule 2 which was duly served by the court, the suit was dismissed by the court on 1st November, 2018. The applicant’s advocate appeared before the court on 1st November 2018. The court however was not satisfied with the reasons given and went ahead to dismiss the suit. According to the court (Matheka, J), the reasons given by the plaintiff through her advocate, were not sufficient.

6. The issue that arises is whether this court has jurisdiction to grant the orders sought for reinstatement of the suit or the court is *functus officio*. Ordinarily a suit would come to an end when a court has rendered a decision and that decision has been effected. At that point, the court is said to be *functus officio* and any party who is aggrieved must now pursue the course of appeal or review to a higher court.

7. In the case of **Raila Odinga & 2 Others –v- Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR** held as follows:

“(18).....Daniel Malan Pretorius, in “The origins of the *functus officio* Doctrine, with specific Applicant in Administrative Law,”(2005) 122 SALJ 832, has thus explicated this concept:

“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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker”.

(19) 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 decisions; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

8. Similarly, in **Menginya Salim Murgani –v- Kenya Revenue Authority (2014) eKLR**, the Supreme Court of Kenya held that:

“It is a general principle of law that a court after passing judgment, becomes *functus officio* and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

9. In this case, the court did deliver its decision on 1st November, 2018 to dismiss the suit for want of prosecution. This decision was done after the plaintiff was heard. In my view, the decision of the court dismissing the suit on 1st November 2018 was made in accordance with the law and procedure and the court cannot be called upon to sit on appeal on its own decision or of a court of concurrent jurisdiction. Applying the laid down principles cited hereinabove to the circumstances of this case, it is my finding that the court is *functus officio* and I have no jurisdiction to entertain the application to reinstate the suit. A party who is aggrieved by the decision of the court may only apply for review or file an appeal. I cannot pretend to sit on appeal over a decision made by a court of concurrent jurisdiction.

10. In the result, I find that the notice of motion dated 22nd November 2018 is without merit and the same is hereby dismissed with costs to the defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 28th day of November 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Hassan for plaintiff

Ms. Mugoya holding brief for Ajieko for 1st defendant

No appearance for 2nd defendant

Yumna Court Assistant

C.K. YANO

JUDGE