



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC. CASE NO. 48 OF 2013**

**HELLEN CHERONO W/O JOEL KIMUTAI KEINO.....PLAINTIFF**

**VERSUS**

**JOHN KIPKEMOI MUTAI.....1<sup>ST</sup> DEFENDANT**

**ANNE NGEMA MWANGI.....2<sup>ND</sup> DEFENDANT**

**PRINCIPAL SECRETARY MINISTRY OF LANDS, HOUSING AND**

**URBAN DEVELOPMENT.....3<sup>RD</sup> DEFENDANT**

**GRACE KORIR –DISTRICT LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. What is before me is the plaintiff's application dated 13<sup>th</sup> July, 2017 seeking the following prayers:

a. Spent.

b. That pending the hearing and determination of this application, interim orders of stay of execution that were issued on 30.6.17 be extended as the case may be and if the same have lapsed, they be issued afresh.

c. That the finding of the court vide a Ruling that was delivered on the 30<sup>th</sup> June 2017 to the effect that the Plaintiff's suit is non-existent or has been dismissed be reviewed by setting it aside and that in its place an order that the suit still subsists and/or that it has not been dismissed be made thus allowing the application dated 23.12.2016.

d. That in the alternative and without prejudice to prayer (3) above, owing to the Plaintiff's belief and lack of proper interpretation and understanding of the court's ruling of 25.11.2016, the finding of the court vide a Ruling that was delivered on 30.6.2017 to the effect that the Plaintiff's suit is non-existent or has been dismissed be reviewed by setting it aside and that an order do issue extending limited time for compliance of the same with a rider that the auctioneer's bill be taxed and paid within 14 days of taxation failing which the suit shall stand dismissed and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants/ respondents' advocate be directed to inform the auctioneers of the need to file their bill for taxation thus allowing the application dated 23.11.2016.

e. That necessary orders be issued.

f. That the costs of this application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

2. The application is based on the grounds stated in the Notice of Motion and the plaintiff's supporting affidavit sworn on the 13<sup>th</sup> July, 2017.

3. In the said affidavit, the Plaintiff depones that she complied with the Ruling dated 25<sup>th</sup> November, 2016 by paying Kshs. 15,000 to the Respondents' advocates though he was not issued with a receipt. She blames the 1<sup>st</sup> and 2<sup>nd</sup> respondents' advocate for disobeying the court's directive by failing to forward the auctioneers bill to her advocate for settlement. She further depones that as long as an agreement on the

auctioneers' costs has not been reached or taxed, her suit still subsists and has not been dismissed.

4. She depones that the 1<sup>st</sup> defendant's actions have caused a lot of acrimony within the family resulting in an assault case. She urges the court to make a correct interpretation of the ruling delivered on 25<sup>th</sup> November, 2016 and make a finding that the order of dismissal has not taken effect.

5. In opposing the application counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an affidavit dated 24<sup>th</sup> August, 2017 in which he depones that the plaintiff's application is bad in law, incompetent, lacks merit and is a waste of the court's time and ought to be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

6. He depones that the plaintiff's application does not meet the legal threshold and principles for review of a ruling or order of the court.

He depones that the applicant cannot combine a prayer for review and extension of time and the application is therefore fatally defective.

7. He denies that the plaintiff complied with the court's ruling delivered on 25<sup>th</sup> November, 2016 as he made a payment outside the prescribed period of 14 days.

8. He further depones that the applicant has failed to demonstrate that there is sufficient cause to review the court's ruling dated 30.6.2017 as she has neither pointed out any error apparent on the face of the record nor has she stated that there is discovery of new and important evidence.

9. The thrust of the plaintiff's counsel's submissions is that the court ought to review its ruling since according to him the suit is still subsisting as the auctioneers' fees were neither taxed nor agreed and could therefore not be paid within the period of 14 days prescribed in the court's ruling dated 25<sup>th</sup> November, 2016. Counsel further submits that time being of essence, the Respondent's advocate would either have initiated a move towards settlement of the auctioneer's bill or asked his agent to file their bill in compliance with the court's directive. He submits that the application for review is based on the provisions of section 19 (2) of the Environment and Land Court Act and not order 45 of the Civil Procedure Rules.

10. On the other hand, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendant submits that the Plaintiff has not raised any new grounds nor alluded to an error apparent on the face of the record that would warrant a review of the court's ruling dated 30<sup>th</sup> June, 2017.

#### **Issues for Determination**

11. There is only two main issues for determination:

- i. Whether the plaintiff has made out a case for review of the court's ruling dated 30<sup>th</sup> June, 2017.
- ii. Whether this court is *functus officio*.

#### **Analysis and Determination**

12. As I understand it, the plaintiff's main contention is that the Ruling of 30.6.17 ought not to have found that the 14- day period stated in Justice Munyao's Ruling of 25<sup>th</sup> November, 2016 had ran out since the auctioneers' fees had not been agreed or taxed as stated in the said Ruling.

13. What I find a bit strange is the attempt to lay blame on the 1<sup>st</sup> and 2<sup>nd</sup> defendant's counsel for the plaintiff's failure to pay the auctioneers fees. Clearly time which was stated to be of essence was running against the plaintiff and not the defendants and it was incumbent upon the plaintiff to ensure that they contacted the auctioneer to find out what their costs were so that they could pay within the stipulated period as the reinstatement of the plaintiff's suit was conditional upon the payment of both thrown away costs and the auctioneers' fees within 14 days. The ruling clearly stated that failure to comply with this condition would render the suit dismissed. This is the interpretation that gave rise to the Ruling dated 30.6.2017. Therefore, if the plaintiff holds the view that the court was wrong in its interpretation of Justice Munyao's Ruling dated 25.11.2016 then her option lies in appeal rather than review.

14. In **Origo & Another V Mungala (2005) 2KLR** cited in **Jameny Mudaki Asava V Brown Otengo Asava & Another (2015 eKLR)** the court held as follows:

*"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal".*

15. Having come to the conclusion that the suit herein stands dismissed for failure to comply with the Ruling dated 25.11.2016 I am of the view that this court is *functus officio*.

*"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to the doctrine, a person who is vested with adjudicative or decision making powers may as a general rule only exercise those powers once in relation to the same matter. The principle is that once such a decision has been given (subject to any right of appeal to a superior body or functionary), it is final and conclusive. Such a decision cannot be reviewed or varied by the decision*

maker.

*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”*

*A court is functus officio 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 courts functus officio 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 and any challenge to its ruling or adjudication must be taken to a higher court if that right is available”.*

16. In the final analysis find no merit in the plaintiff’s application and I hereby dismiss it with no order as to costs.

Dated, signed and delivered at Kericho this 6<sup>th</sup> day of April, 2018.

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Siele for the Plaintiff
2. Miss Ngetich for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant
3. Court Assistant - Rotich