



Shah & another (Suing as the Legal Representatives of the Estate of the Late Vinodrai Hirji Shah) v Stima Investment Co-operative Limited & another (Environment and Land Case Civil Suit 605 of 2016) [2024] KEELC 868 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 605 OF 2016
OA ANGOTE, J
FEBRUARY 15, 2024**

BETWEEN

**KAMAL VINODRAI SHAH 1ST PLAINTIFF
SAVITA VINODRAI SHAH 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
VINODRAI HIRJI SHAH**

AND

**STIMA INVESTMENT CO-OPERATIVE LIMITED 1ST DEFENDANT
DICKWAYS CONSTRUCTION COMPANY LIMITED 2ND DEFENDANT**

RULING

1. The court has before it a Notice of Motion Application dated 22nd July, 2022 filed by the 1st Defendant in which it seeks the following orders:-
 - a. That the Judgement delivered on 5th May 2022 be set aside and the consent duly executed, dated and filed in this Honourable Court on the 4th May 2022 be adopted as the Judgement of the Court instead.
 - b. That this Honourable Court be pleased to direct that the Deputy Registrar – Nairobi execute all the necessary documents in default of the Vendor failing to do the same; being an order for specific performance for sale of the Suit Property in terms of the Consent willingly entered hereunder by both parties duly executed and filed in this Honourable Court on the 4th May, 2022 prior to the delivery of the Judgement in the suit on the 5th May, 2022.
 - c. That the Applicants be at liberty to pray for such further or other Orders as the Honourable Court may deem fit to grant.



- d. That Costs of the Application be awarded to the Applicant.
2. The application is supported by the grounds on the face of the Motion and a lengthy Supporting Affidavit sworn by Jonathan Kinyenze, on 22nd July, 2022, where he deponed that on several occasions in the year 2021, the 1st Defendant sought indulgence from both the Plaintiff and the court to adjourn the matter to pave way for negotiations with a view to reaching an out of court settlement, but the same was denied for reason that this was an old matter.
 3. It was deponed that the matter proceeded for hearing, and parties closed their respective cases, filed submissions and was listed for mention on 14th March 2022, to confirm filing of submissions and taking a judgment date and that various meetings and discussions took place between the parties and their advocates and come 14th March, 2022, parties sought an adjournment and mention within 30 days to enable them finalise on the negotiations.
 4. It was deponed on behalf of the 1st Defendant that the parties reached an agreement that the 1st Defendant would purchase the suit property at an agreed purchase price of Kshs. 150,000,000 and that a consent was then filed in court on 4th May, 2022, a day before the date set for delivery of judgment.
 5. It was deponed that the 1st Defendant's advocate mis-diarised the date of delivery of judgment as 6th May, 2022 and as such did not appear and was not represented in court on 5th May, 2022 when judgment was delivered; that the parties had earlier agreed that they would notify the court of the consent and have it adopted as a judgment of the court and that despite the Judgment being delivered, the parties mutually agreed by tele-conversation between their advocates on record, to proceed to implement the terms of the consent.
 6. The 1st Defendant has averred that executing the Judgment against it will result in huge reputational and financial losses as well as suits from third Parties and that the losses to be suffered by the 1st Defendant cannot be compensated by way of damages but by way of specific performance.
 7. It was deponed that rebuilding the wall as ordered will be detrimental to the 1st Defendant as it will mean demolition of the encroaching extension which will render the affected buildings inhabitable, and consequently the county building permits and certificate of occupation will be withdrawn for non-compliance, leading to loss of rental income for the 1st Defendant.
 8. The 1st Defendant urged the court to grant the orders sought because no miscarriage of justice would be occasioned by the grant thereof; that the application has been made expeditiously; that the application discloses all the material facts to enable the court make a just and fair decision and that the application has been brought in good faith and it is in the interest of justice and fairness that the prayers sought in the application be granted.
 9. The Plaintiff's response is by way of a Replying Affidavit sworn by Kamal Vinodrai Shah in which she denied the alleged negotiations for an out of court settlement, stating instead that since inception of the suit they had on several occasions written to the 1st Defendant through their Advocates on record inquiring if they had instructions to negotiate but did not receive any response.
 10. The Plaintiff deponed that parties held discussions on 27th October, 2021 in respect of the suit property, after which the 1st Defendant was to make an offer for consideration; that the offer was received on 10th November, 2021, the date of the hearing, but he did not deem it to be a serious offer and instead an attempt to delay the matter further and that after that date, they held various meetings and several offers and counter-offers were made which they did not agree to



11. It was deponed that eventually, on 25th April, 2022, the Plaintiff made a counter-offer with very specific terms and time being of the essence which offer was accepted by the 1st Defendant.
12. It is the Plaintiff's case that a draft consent and an Agreement for Sale was sent to the 1st Defendant's Advocate for review; that the consent was accepted, signed and filed in court; that their advocate attended court on 5th May, 2022 and did in fact notify the court that a consent had been filed but was informed by the court that the judgment was ready and that there was no formal application to arrest the judgment and the same was delivered.
13. According to the Plaintiff, parties did agree to proceed with the sale of the suit property in good faith, subject to the terms of the consent, which was very specific as to timelines; that in the meantime, parties kept exchanging the agreement and proposed amendments thereto with a view to reaching an agreeable draft and that they received communication from the 1st Defendant's advocate that they were experiencing delays in conducting their due diligence and requested for additional documents.
14. According to the Plaintiff, they eventually received the Agreement signed by the 1st Defendant but without the deposit contrary to the terms of the Agreement for Sale; that they wrote to the 1st Defendant on 28th June, 2022 that if they do not receive the deposit within 7 days, then they would no longer be interested in proceeding and that even after this, the Plaintiff again gave the 1st Defendant a chance to complete their due diligence and pay the deposit on time.
15. The Plaintiff deponed that they lost confidence in the 1st Defendant being able to adhere to the timelines and decided against proceeding with the transaction, which instructions were relayed on 13th July, 2022 and that it is not true that the deposit could not be transmitted without a fully signed sale agreement as the 1st Defendant could have used the copy it had already executed.
16. In conclusion, it was deponed that the 1st Defendant is approaching the court with unclean hands and is therefore not entitled to the orders sought; that the Plaintiffs wish to enjoy the suit property peacefully and quietly without any hindrance from the 1st Defendant who all the while knew it was trespassing on their property and that there is no new and important matter or evidence that was not within the knowledge of the 1st Defendant at the time of the judgment that would warrant for a review of the judgment.
17. The Plaintiffs also filed Grounds of Opposition dated 4th October, 2022 opposing the Motion on the following grounds:
 - a. The Application is an abuse of the court process;
 - b. The Honourable Court having delivered judgment is *functus officio*;
 - c. The Application seeks substantive orders which cannot be granted through an interlocutory application;
 - d. There is no basis to review the judgment dated 5th May, 2022;
 - e. Such and other grounds and/or reasons to be adduced at the hearing hereof.
18. The parties filed submissions and authorities which I have considered.
19. Having considered the Application and grounds adduced in support thereof, the Affidavit filed in support thereto and, the Replying Affidavit and Grounds of Opposition filed in opposition thereto, as well as the submissions of the parties, the questions for determination are:-



- i. Whether the court lacks jurisdiction to deal with the instant application after delivering its judgment.
- ii. If the answer to the above is negative, then whether the 1st Defendant's instant application is merited.

Analysis and Determination

20. On 14th March, 2022 when this matter was fixed for mention to confirm filing of final submissions, counsel for the 1st Defendant informed the court that parties were pursuing an out of court settlement and were at an advanced stage of negotiations.
21. On the other hand, the Advocate for the Plaintiffs asked the court to deliver Judgment in the matter. On 5th May, 2022, the court proceeded to enter judgment in favour of the Plaintiff in the following terms:
 - i. An order be and is hereby issued for the 1st Defendant to demolish the extension that encroaches onto the Plaintiffs' property known as Land Reference Number 209/1431/1 Kolobot Road, Ngara in Nairobi within the next 60 days failure to which the Plaintiffs are at liberty to proceed to do so at the Defendant's costs.
 - ii. The 1st Defendant to rebuild the Plaintiffs' demolished wall within 60 days, and if not, the Plaintiffs to rebuild the wall at the 1st Defendant's costs.
 - iii. The 1st Defendant to pay the Plaintiffs Kshs. 500,000/- as damages for trespass.
 - iv. The 1st Defendant to pay the costs of the suit.
22. Immediately after delivery of the Judgment, the Advocate appearing for the Plaintiff informed the court that parties had filed a consent on 4th May, 2022, a day prior to the date of the Judgment. By the time the court was delivering its Judgment, the said consent had not been adopted by the court.
23. It would appear, however, that the parties decided to disregard the Judgment and pursued the terms of the consent, where they had agreed that the 1st Defendant would purchase the suit property at an agreed price of Kshs. 150,000,000. The parties went ahead to draft an Agreement for Sale which the 1st Defendant has signed but the Plaintiffs have not.
24. It seems the Plaintiffs have decided to pull out of the transaction and have instead decided to pursue execution of the Judgment of the court delivered on 5th May, 2022. The 1st Defendant has moved to court in the instant application seeking the orders as outlined above.
25. It is a well-known fact that once a trial court has delivered its Judgment on merit, it becomes *functus officio* with a few exceptions. The doctrine of *functus officio* provides that once a court renders its final decision regarding the issues in a suit, it lacks any power to re-open it or to re-examine that decision.
26. The Supreme Court of Kenya in the case of [*Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others*](#) [2013] eKLR, 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.”

27. The doctrine prevents a court from revisiting a matter and making determinations on merit thereon, once the final judgment has been delivered, as this would mean that the court would be sitting on appeal of its own decision.

28. There are however some exceptions where a court is allowed to deal with a matter after delivery of judgement. The exceptions in essence do not allow for a re-visiting of the issues determined by the court in its judgment. These exceptions are highlighted in the case of [Silvanus Kizito vs Edith Nkirote Mwiti](#) [2021] eKLR, where the High Court held as follows:

“It was thus incorrect for the trial court to have held as she did that the court had become *functus officio*. The court does not become *functus officio* merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file. In [Leisure Lodge Ltd vs Japhet Asige and another](#) (2018) eKLR the court said and held:

“On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act.”

29. The 1st Defendant has sought for a stay of execution of the judgment of the court delivered on 5th May, 2022 pending hearing and determination of this Application, and that the court should consider the terms of the consent filed on 4th May, 2022. However, this prayer has been overtaken by events.

30. Prayer (c) of the Motion is for setting aside of the Judgement delivered on 5th May, 2022 and the adoption of the consent filed on 4th May, 2022 as a Judgement of the Court instead.

31. The law provides only two instances where a court may set aside its own judgement. The first is found under Order 10 of the [Civil Procedure Rules, 2010](#) which addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Specifically, Order 10 Rule 11 empowers the court to set a side or vary a judgment that has been entered under Order 10 and provides thus:

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

32. The second instance is found under Order 12 of the aforementioned [Rules](#), which deals with hearing of suits and non-attendance by parties. It empowers the court to dismiss a suit where a party fails to attend court with full notice of the hearing date. Where a party demonstrates that it was not aware of



the hearing date through no fault of its own, the court will exercise its discretion in favour of the party. Order 12 Rule 7 of the [Rules](#) provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

33. Where a judgment has been entered or the suit has been dismissed under these two instances, the court, on application, may set aside or vary the judgment or order upon such terms as may be just. The principle behind the setting aside of a judgment under the two provisions is explained in [Mureithi Charles & another vs Jacob Atina Nyagesuka](#) [2022] eKLR, in the following terms:-

“The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.”

34. The bottom line therefore is that the two provisions do not empower a court to set aside its own judgement if it is entered on merit as is the case in the instant Application. The judgment herein was rendered after both parties had been granted sufficient opportunity to be heard.

35. The court may vary its own judgment through review of the decision and/or order made. Review is allowed under Section 80 of the [Civil Procedure Act](#) which reads as follows:

“80. Review

Any person who considers himself aggrieved:-

- (a) by a decree or order from which an appeal is allowed by this [Act](#), but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this [Act](#), may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

36. This section of the law is operationalised under Order 45, Rule 1(b) of the [Civil Procedure Rules](#), which sets out the requirements that should be met for the court to review its decision, which are as follows:

(1). Any person considering himself aggrieved-

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”



37. The 1st Defendant has sought for the judgment of the court to be replaced with the terms of the consent. This is akin to seeking for review of the judgment of the court under the aforementioned provisions. However, since the consent and the negotiations that led to it do not constitute new matters or evidence which were not within the 1st Defendant's knowledge or could not, after exercise of diligence, be produced by him at the time of trial, the court cannot review the Judgment on that ground
38. Further, the 1st Defendant has not claimed any mistake or error apparent on the face of the record which would entitle this court to review its judgment issued on 5th May, 2022. In addition, no sufficient reason has been given for review of the judgment and consequently, this Court has no jurisdiction to review its judgment.
39. If anything, the parties could indeed have filed a formal application to arrest the judgment before delivery thereof, and have the consent adopted before delivery of the Judgment. They did not do so, and are therefore bound by the Judgment of the court.
40. Indeed, the Judgment having already been delivered, the court could not adopt the consent because at that point it become *functus officio* as regards determination of the issues between the parties. The effect of a consent that is not adopted by the court is well explained in a case relied on by both parties, that is *Edward Acholla vs Sogea Satom Kenya Branch & 2 Others* 2014 eKLR, where the court held as follows:
- “ Consent becomes a judgement or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgement or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. The consent herein therefore fell one set shop, that of adoption by the court as the final order on the agreed issues by the parties.”
41. The passage is self-explanatory, and aligns very well with the facts in this instant Motion. It is not in dispute that the consent that the 1st Defendant seeks to rely on was never adopted by the court as a final order on the issues between the parties herein. By virtue of that fact, and going by the decision in the above case, the said consent has no force of law.
42. Further, it is clear from the terms of the consent that it seeks to determine the matters that were in issues between the parties in the suit. That being the case, adopting the consent at this point would be tantamount to re-opening the case and making meritorious determinations thereon while there is in existence a judgment delivered by this court, which has not been appealed against or set aside. Without a doubt, this court has no jurisdiction to undertake such a task.
43. Having failed to show its entitlement to the prayers sought through any of the exceptions to the *functus officio* doctrine, the 1st Defendant cannot unlock the Court's jurisdiction through this Motion.
44. Having determined that the court lacks jurisdiction to grant the prayers sought in the 1st Defendant's Application dated 22nd July, 2022, the same is dismissed with costs to the Plaintiffs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of*;



Mr. Shah for Plaintiff/Respondent

Mr. Otieno holding brief for Kyalo for Defendant/Applicant

Court Assistant - Tracy

