Erick Kimingichi Wapang'ana t/a Magharibi Machineries Limited v Equity Bank Limited & another (Civil Appeal 107 of 2016) [2023] KECA 305 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 305 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 107 OF 2016

PO KIAGE, K M'INOTI & M NGUGI, JJA

MARCH 17, 2023

BETWEEN

ERICK KIMINGICHI WAPANG'ANA T/A MAGHARIBI MACHINERIES LIMITED ..... APPELLANT

AND

EQUITY BANK LIMITED ..... 1ST RESPONDENT

ANTIQUE AUCTIONEERS AGENCIES ..... 2ND RESPONDENT

(An appeal from the Ruling and Order of the Environment and Land Court of Kenya at Bungoma (S. Mukunya, J.) dated 27th September, 2016 in ELC No. 91 of 2011)

JUDGMENT

Judgement of Kiage, JA

1 The appellant, Erick Kimingichi Wapang'ana, was advanced an overdraft facility of Kshs 7,800,000 by Equity Bank Limited, the 1st respondent in December 2009. The facility was secured by a legal charge over the appellant's pieces of land known as Title No Ebukusu/South Kanduyi/13584, and Title Nos Ebukusu/South Kanduyi/816 and 2741 (suit properties) as well by as a chattels mortgage over the appellants' moveable assets. Due to a dispute that occurred between the appellant and the 1st respondent concerning the outstanding amount repayable, the appellant defaulted in his repayment of the loan. This prompted the 1st respondent to exercise its statutory power of sale and sought to auction the suit properties on September 19, 2011.

2 In an effort to safeguard his interests, the appellant filed suit at the high court in Bungoma seeking to stop the scheduled auction. Simultaneously, the appellant filed a motion seeking, among other reliefs, an injunction restraining the 1st respondent, its servants, or agents from selling or doing an act of sale

over the suit properties. By a ruling delivered on October 12, 2011, Muchelule, J (as he then was) gave the appellant the much-needed reprieve by granting the reliefs he sought.

3 By a motion dated July 22, 2014, the respondents sought that the injunction issued be discharged, varied and or set aside. The main grounds in support of the application were that the injunction had lapsed by operation of law and that the appellant had not made any effort to clear the outstanding loan amount. S Mukunya, J considered the motion and replying affidavit filed by the appellant. By a ruling delivered on December 16, 2014 the learned judge granted the application, declaring that since the appellant failed toextend or vary the injunction after it was issued, the same had lapsed on October 12, 2012.

4 Aggrieved, the appellant appealed against this ruling *via* Civil Appeal No 23 of 2015. On November 17, 2015, the court of appeal upheld the decision of the learned Judge and dismissed the appeal with costs. Meanwhile, the substantive suit was dismissed by the high court on October 26, 2015 for want of prosecution.

5 Disgruntled by the dismissal of the substantive suit, the appellant filed a review application dated July 28, 2016 under order 45 rule 1(1) and (2) and rule 3(2), order 40 rules 1,2,3,4 and 6 and Section 3A of the *Civil Procedure Rules* as well as article 159 of the *Constitution*. The orders he sought were;

a. That the court order of October 26, 2015 dismissing the suit for want of prosecution be reviewed and set aside.

b. That the court reinstates the injunctive orders granted on October 11, 2015 that expired and were never reviewed.

c. That the notices of intended sale of the suit properties be stayed pending the hearing and determination of the application and eventually the suit.

6 The application was based on the grounds that; since there was a pending Civil Appeal No 23 of 2015 in the Court of Appeal at Kisumu the substantive suit was still alive; the failure to attend the court on October 26, 2015 was not intentional but due to lack of service upon the appellant's counsel; and the failure to renew or extend the injunctive orders was a mistake on the part of his counsel for which the appellant should not be made to suffer.

7 S Mukunya, J considered the application, its reply and the submissions made by both counsel, and held that as the only issue before the court of appeal was whether or not the injunction issued in October 12, 2011 had lapsed, nothing prevented the appellant from fixing the substantive suit for hearing. That appeal was not a new or important matter under the circumstances to persuade the court to review its orders. In any case, the injunctive orders did not exist as they had been extinguished by operation of law as was held by the high court and upheld by the court of appeal.

8 The learned judge noted that when the court fixed the suit for dismissal, the record reflected that a notice was duly served on Masinde & Co Advocates, and on the day of the hearing, none of the parties attended court. Further, when the court dismissed a suit under order 17 rule 2 of the *Civil Procedure Rules*, the suit ceased to exist and consequently, the court became *functus officio* and the only option available to the appellant was to appeal. The stay orders could moreover not be granted, even if such powers were available to the court, since the appellant admitted to owing the 1st respondent Kshs 7,800,000, and did show any efforts he made to repay the debt.

9 Dissatisfied by the ruling, the appellant filed the instant appeal containing 12 grounds which, condensed, are that, the learned judge erred by;

a. Dismissing the suit without affording the appellant a chance to be heard, which was a gross violation of his right to a fair hearing.

b. The hearing and subsequent ruling was unfair and unjustified as the same was done without the knowledge of the appellant or his advocate.

c. The said dismissal was ordered whilst the appellant was prosecuting an appeal against another ruling in the same suit.

d. Holding that the appellant did not tender evidence of repayment of the loan which was erroneous.

10 The appellant prayed for the reinstatement of the of the Environment and Land Court Suit No 91 of 2011 to allow the suit be heard on merit.

11 During the hearing of the appeal, learned Counsel Mr Kigamwa and Mr Makokha appeared for the appellant, and the respondents, respectively.

12 It was submitted that the learned judge failed to consider the requirements for dismissal of a suit for want of prosecution as embodied in order 17 rule 2 of the *Civil Procedure Rules*. The last action in the matter was a ruling delivered on December 16, 2014 pursuant to a motion that was prosecuted on November 20, 2014. Therefore, by October 26, 2015 the prerequisite one year had not lapsed and therefore, the dismissal was premature. Moreover, the court breached the appellant's right to a fair hearing by fixing the matter for hearing without following due procedure or serving the appellant with a notice to show cause. Even though it was stated that there was postal service, the court ought to have satisfied itself by evidence of a certificate of posting before proceeding to dismiss the suit.

13 It was contended that the learned judge erred by holding that he had no power to set aside the dismissal and directing the appellant to appeal, yet due to the procedural hiccups which resulted to an injustice, he had the power to make the order *ex debito justitiae.* Counsel buttressed this point with the holding of the former Court of Appeal in *Ali Bin Khamis v Salim Bin Khamis Kirobe & Others* (1956) 1 EA 195. He submitted further that, the learned judge should not have visited the appellant's counsel's mistake on him and hence the appellant's right to be heard as fortified by article 50 of the *Constitution* was violated. Counsel invited us to consider *Onyango Oloo v Attorney General* (1986-1989) EA 456.

14 Counsel also submitted that the learned judge had the power to extend the injunctive orders well after the lapse of the one year under order 40 rule 6 of the *Civil Procedure Rules*. He thus fell into error by failing to consider the grounds adduced and only relying on the finding of this court in Civil Appeal No 23 of 2015 which, according to Counsel, did not divest the appellant of the right to have the injunctive orders extended. He cited this court's decision in *Attorney General & 6 Others v Mohamed Balala & 11 Others* [2014] eKLR.

15 In opposition, it was reasoned that the prayer to extend the injunctive orders was untenable, the matter having been dispensed with by this court and being contrary to order 45 rule 1 of the *Civil Procedure Rules*. The appellant was thus estopped from filing the review and the learned judge did not err in dismissing the same. Moreover, the appellant filed the review 7 months and 11 days after the dismissal of his appeal and did not proffer any of the grounds for review envisioned in the said rule.

16 Counsel supported the dismissal of the suit for want of prosecution. Four years had lapsed since the appellant filed it and he failed to give a plausible explanation for not setting it down for hearing. Putting blame on his previous advocate was not sufficient. Furthermore, as neither the appellant nor his advocate attended the hearing, the court was well within its jurisdiction to dismiss the suit. Counsel

considered this appeal and the application giving rise to it to be an afterthought aimed at delaying the 1st respondent's exercise of its statutory power of sale. The court was urged to dismiss it with costs.

17 I am cognizant of our role as a first appellate Court, which is to re-evaluate and re-assess the evidence and arrive at our own independent conclusions. See *Selle v Associated Motor Boat Co Ltd & others* [1968] EA 123.

18 Having considered the record, the rival submissions made and the authorities cited, I see that the sole issue for consideration is whether the learned judge erred by dismissing the appellant's application for review. The learned judge predicated his decision on the question of jurisdiction.

19 Jurisdiction is so critical that it calls for a decision in limine. This is so whether or not parties to proceedings have raised it as was held in the oft cited case of *Owners of The Motor Vessel "Lillian S" v Caltex Oil (kenya) Ltd* [1989] eKLR that;

> "It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court."
>
> I therefore must determine the fundamental issue raised by the learned judge that the court had become *functus officio* once the suit was dismissed for want of prosecution. The appellant argues that the learned judge erred by making the finding and for otherwise failing to exercise his power to review the orders of the court debito justitiae.
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> The *functus officio* doctrine was thus pronounced on by the Supreme Court in *Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR;
>
> > "We, therefore, have to consider the concept of "*functus officio*," as understood in law. Daniel Malan Pretorius, in "*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*," (2005) 122 SALJ 832, has thus explicated this concept:
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> > > '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.'"

20 The fundamental question to be answered is whether the court became *functus officio* upon dismissing the suit. The said dismissal was under order 17 rule 2 of the *Civil Procedure Rules* which provides in part;

> "(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
>
> (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit."

21 The record clearly reflects that the appellant filed the suit and the motion seeking the injunctive orders in 2011 but after obtaining the said injunctive orders on October 12, 2011, he went to sleep and did

not fix the suit for hearing nor bother to extend the injunction or take any other step in the suit till the same was dismissed for want of prosecution on October 25, 2015, four years later.

22 From my perusal of the record, and consideration of the matter as a whole, I am satisfied that the court considered relevant facts, acted justly and applied its discretion judiciously. I agree with the learned judge that upon the order of dismissal being made, the suit ceased to exist and that rendered the court *functus officio* its powers therein being at an end. The only recourse available to the appellant was to appeal against such dismissal, as was rightly held by the learned judge. I need only return to the Supreme Court in *Raila Odinga & 2 Others V Independent Electoral & Boundaries Commission & 3 Others* (*supra*);

> " This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550:
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> > '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 on adjudication must be taken to a higher court if that right is available...'"
> >
> > (Emphasis added)

23. The court being *functus officio*, it was devoid of jurisdiction to grant the appellant's prayers. It also had no jurisdiction to review the dismissal order. The only power available to the court was to correct a slip in the judgment or an error in the expression of the court's intention as envisioned in Section 99 of the *Civil Procedure Act*, none of which was sought by the appellant. See *Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and On behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR. In any case, the prayer to reinstate the injunctive orders was untenable, the issue having been canvassed and dismissed by this court.

24. In the result, I would have no basis for interfering with the high court's decision. This appeal lacks merit and I would dismiss it with costs.

25. As M'inoti and Mumbi Ngugi, JJA agree, it is so ordered.

Judgment of M'inoti, JA

26. The I have read in draft the judgment by my brother, Kiage JA, with which I am in full agreement. As order 17, rule 2 of the *Civil Procedure Rules* stood at the material time, the court became *functus officio* once it dismissed a suit for want of prosecution. It was only in February 2020 that the /Civil Procedure Rules were amended *vide Legal notice No 22 of 2020* to allow a party whose suit has been dismissed for want of prosecution to apply. The amendment introduced rule 2 sub-rule 6, which provides as follows:

> "(6) A party may apply to curt after dismissal of a suit under this order."

I would dismiss the appeal with costs.

Judgment of Mumbi Ngugi JA

27. I have read in draft the judgment of my learned brother Kiage, JA with which I am in full agreement and there would be no utility in my adding anything thereto.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF MARCH, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR