



County Government of Kwale v Nyakongo t/a HR Ganijee & Sons & another (Civil Appeal E055 of 2021) [2023] KECA 1066 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1066 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E055 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
SEPTEMBER 22, 2023**

BETWEEN

COUNTY GOVERNMENT OF KWALE APPELLANT

AND

JOHN OMOLLO NYAKONGO T/A HR GANIJEE & SONS ... 1ST RESPONDENT

**INTERGOVERNMENTAL RELATIONS TECHNICAL COMMITTEE 2ND
RESPONDENT**

(An Appeal from the Ruling of the High Court of Kenya at Mombasa (P.J. Otieno J.) delivered on 22nd October 2018 in Mombasa High Court Civil Case No. 96 of 2015)

JUDGMENT

1. The suit from which this appeal arises was commenced in the High Court *vide* a plaint dated 23rd July 2015, brought by the 1st Respondent against the Appellant. By that plaint, the 1st Respondent pleaded that on or about 15th March 2004, the Appellant and the 1st Respondent entered a contract for a project named Urban Development of Kwale Market Phase 1. The 1st Respondent undertook works under the contract and obtained necessary certificates to enable payment but no payment was done. As at 11th December, 2014, it was pleaded, the 1st Respondent was owed ksh 97,823,961.46 on account of work done. According to the 1st Respondent, the Transitional Authority by its letter dated 9th March 2015 wrote to the Appellant informing them of the debt demanded by the 1st Respondent as being genuine and that the Appellant was given an approval to settle the same.
2. It was the 1st Respondent's case that despite the pendency of the contract, the Appellant had proceeded to advertise for the project and despite demands being made, the Appellant had refused, ignored and/or neglected to settle the 1st Respondent's claim thus necessitating the filing of these proceedings. They sought judgment in their favour for; a sum of ksh 97,823,961.46 at 25% monthly interest from 11th December 2014 until payment in full; a declaration that any contract entered into between the



- Appellant and any other third Party for the Construction or undertaking of any or further works on the project known as Urban Development of Kwale Market Phase 1 before termination of the existing contract between the Parties was null and void; a permanent injunction restraining the Appellant whether by itself, its agents and/ or servants from constructing or undertaking any or further works on Urban Development of Kwale Market Phase 1 whilst the Contract between the Appellant and the 1st Respondent still subsisted; Cost of the suit together with interest thereon at Court rates from the date of judgement until payment in full and any other or further orders that the Court deemed fit to grant.
3. In its statement of defence dated 20th August 2015, the Appellant denied all the assertions by the 1st Respondent and stated that the 1st Respondent's suit was time barred and did not lie by virtue of the *Public Authorities Limitation Act* cap, Laws of Kenya (hereafter referred to the *Limitation Act*). The 1st Respondent in its reply to the Appellant's statement of defence dated 15th September 2015, addressed the plea of limitation and in response to the statement of defence, reiterated the contents of the plaint in its entirety.
 4. On 16th February, 2018, the Learned Trial Judge, upheld the Appellant's preliminary objection and held that the High Court did not have jurisdiction to entertain a suit which was filed out of time and declared the matter statute barred and thereby struck it out and awarded costs to the Appellant.
 5. By an application dated 19th March, 2018, the 1st Respondent sought for review the orders issued on 16th February 2018 and reinstatement of the suit. The grounds upon which the application was founded were that there was evidence that the suit was not statute barred because the County Council of Kwale having become defunct, its assets and liabilities were taken over by the Transitional Authority which on the 9th March, 2015 acknowledged the debt on behalf of the Appellant and granted approval for its payment. Upon the said acknowledgment, it was contended, the Authority's successor, Inter-governmental Relations Technical Committee (IGRTC), the 2nd Respondent in this appeal, the 1st Respondent and the Appellant engaged to have the debt settled and exchanged correspondence to that effect.
 6. The application was supported by the Affidavit of the 1st Respondent which basically reiterated the grounds and exhibited documents to show acknowledgement dated 9th March 2015, 8th August 2017 and gazette notice published 24th March 2017 establishing structures for transfer of assets and liabilities of the defunct councils, a letter by the defendants', County Secretary, dated 6th September 2017 stating that the subject debt was inadvertently omitted from the schedule given to the 2nd Respondent and a response thereto seeking that the County Asset and Liabilities Committee do submit a final report including the subject debt in this litigation.
 7. The Application was opposed by the Appellant by the grounds of opposition filed on 13th April 2018 which asserted that the application could not be granted because; there were no disclosed grounds to merit discretion in favour of the applicant; the application is fatally defective, bad in law and an abuse of the court process; that the affidavit in support was incurably defective and offended provisions of the law and that the grounds raised were premature and predicated upon wrong premise as the court had rendered a final decision.
 8. The Trial Judge after hearing the parties and considering the pleadings, allowed the motion dated 19th March, 2018 and set aside the decision striking out the suit and reinstated the same for hearing. In arriving at his decision, the Learned Judge held, inter alia, that there was an error and omission on the part of the court not to have taken regard of the letter of 9th March, 2015 which then led to the suit being adjudged time barred based on that error of fact; and that this was a valid and sufficient reason



for review for which reason even in the absence of additional ground was good enough to allow the application for review.

9. Aggrieved by the said decision, the Appellant lodged this appeal and in its memorandum of appeal dated 8th July 2021 raised the following grounds:
 - a. The learned Judge erred in law and in fact in relying on the letter from the Transition Authority dated 9th March 2015 as an acknowledgement of debt by the Appellant;
 - b. The Learned Judge erred in law and fact by considering the letter dated 9th March 2019 as an acknowledgement of debt by the Appellant;
 - c. The Learned Judge erred in law and fact by considering the letter dated 9th March 2015 an error on the face of the record;
 - d. The Learned Judge failed to consider that the letter dated 9th March 2015 was executed by a third party and was in no way binding upon the Appellant;
 - e. The mere fact that the Court failed to consider the documents before it cannot warrant a proper ground for review of its judgment;
 - f. The Learned Judge erred in fact and law by failing to consider that the application dated 19th March 2018 was incurably defective for failure to comply with the mandatory provisions of Order 45 Rule 1 of the Civil Procedure Rules 2010 and section 80 of the Civil Procedure Act;
 - g. The Learned judge erred in law and fact by failing to consider that the Respondent did not set forth any reasons/ grounds to warrant the Court to exercise its discretion in favour of the Plaintiff whereof the application must be dismissed;
 - h. The Learned Judge erred in fat and in law in allowing the application for review and finding that the letter dated 9th March 2015 was valid and sufficient reason for review;
 - i. The Learned Judge erred in law and in fact by entertaining the application dated 19th March 2018 after holding that it had no jurisdiction to entertain HCCC no 96 of 2015;
 - j. The Learned Judge erred in law and in fact by entering the application dated 19th March 2018 after holding that HCCC no 96 of 2015 was filed out of time and was statute barred;
 - k. The Learned Judge erred in fact and in law by failing to consider that the Court was already *functus officio*
10. The Appellants therefore sought for an order that the Appeal be allowed with costs, the Ruling delivered on 22nd October 2018 be set aside, the Court upholds the Preliminary Objection raised in the statement of defence dated 20th August 2015 and the Costs of the Appeal be borne by the 1st Respondent.
11. We heard this appeal on the Court's virtual platform on 27th March, 2023 on which day Learned Counsel, Mr Omondi held brief for Mr Kibara for the Appellant, Ms Murage appeared for the 1st Respondent, while Mr Mwandeje appeared for the 2nd Respondent. While the Appellant and the 1st Respondent filed submissions, the 2nd Respondents did not do so and at the hearing Mr Mwandeje informed us that he was not opposing the appeal. Mr Omondi and Ms Murage briefly highlighted their submissions.
12. The Appellant distilled his grounds of appeal into four (4) main grounds, thus: that the Learned Judge erred in law and in fact by relying on the letter from the Transition Authority dated 9th March 2015 as



- an acknowledgement of debt by the Appellant; that the Learned Judge erred in law and in fact by failing to consider that the application dated 19th March 2018 was incurably defective for failure to comply with the mandatory provisions of Order 45 Rule 1 of the Civil Procedure Rules 2010 and section 80 of the Civil Procedure Act; that the Learned Judge erred in law and in fact by entertaining the application dated 19th March 2018 after holding that it had no jurisdiction to entertain HCCC no 96 of 2015; and that the Learned Judge erred in law and in fact by failing to consider that the court was already functus officio delivering his ruling on 16th February 2018 striking out the suit.
13. As regards the first ground, the Appellant placed reliance on Section 4 (1) (a) of the Limitation of Actions Act for the position that actions founded on contract may not be brought after the end of six (6) years. It was submitted that though under section 24 (1) of the Act every acknowledgement of the debt must be in writing and signed by the person making it, the Appellant did not sign the letter from the Transition Authority dated 9th March 2015 as an acknowledgement of debt by the Appellant but it was executed by a third party and was in no way binding upon the Appellant. Therefore, the said letter could not operate as an acknowledgment of debt by the Appellant under the Limitation of Actions Act and that the Learned Judge erred in relying on the letter as an acknowledgment of debt by the Appellant.
 14. It was further submitted that the Application in question did not comply with the mandatory provision of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. He placed reliance on the case of Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2019] eKLR and contended that the 1st Respondent failed in the trial Court to satisfy the grounds for review. In its view, the letter dated 9th March 2015 did not amount to new evidence as it was within the 1st Respondent's knowledge at all material times and the failure to adduce it as evidence was a fatal mistake on his part and should not be construed as his inability to produce the document.
 15. The Learned Judge was further faulted for entertaining the application dated 19th March 2018 after holding that it had no jurisdiction to entertain Mombasa HCCC no 96 of 2015. In addition, it faulted the Learned Judge for proceeding to hear the application dated 19th March 2018 after holding that the suit was filed out of time and was therefore statute barred. To the Appellant, the mere fact that the Court failed to consider the documents before it could not warrant a proper ground for review of its judgment, therefore the Learned Judge erred by failing to consider that the Respondent did not set fourth any reasons/ grounds to warrant the Court to exercise its discretion in favour of the 1st Respondent whereof the application ought to have been dismissed.
 16. It was the Appellant's position that the Trial Court, having delivered its ruling on 16th February, 2018, in which it found that the suit was time barred, it was *functus officio* and lacked jurisdiction to deal with the matter and in this regard, reliance was placed on the case of Telcom Kenya Ltd v John Ochanda [2014] eKLR and Raila Odinga v IEBC & 3 others Petition no 5 of 2013.
 17. We were therefore urged to allow the appeal with costs.
 18. The 1st Respondent, in opposing the appeal submitted that in arguing that the admission of the debt by the Transition Authority was an act of a third party and not binding upon the Appellant, the Appellant failed to have regard to the Transition to Devolved Government Act no 1 of 2012, particularly its preamble, Section 15 of the Sixth Schedule to the Constitution and Section 3 of the said Act. According to the Respondent, for the purpose of audit, verification and transfer of debts, the Transition Authority is treated in law as an agent of the Appellant and that for any debt that is verified by the Transition Authority, the Appellant was under a duty to settle it hence the letter by the Transitional Authority amounted to an admission of the debt by the Appellant.



19. It was submitted that in striking out the Respondent's suit the Learned Judge had failed to take into account the letter dated 9th March, 2015 which was incorporated in the Respondent's List and Bundle of Authorities hence the application was brought within the confines of Order 45 of the [Civil Procedure Rules](#) for review on account of error or omission on the part of the Court.
20. On jurisdiction, it was submitted that pursuant to Order 45 rule 1 of the [Civil Procedure Rules](#), a party may perfectly apply for review even where the Court made an order striking out the suit. The present case, according to the Respondent was distinguishable from the Supreme Court decision in [Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission and 3 Others](#) [2013] eKLR.

Analysis and Determination

21. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate is to re- evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In carrying out that duty, we cannot properly substitute our own factual finding for those of the trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong.

We must be cautious in making our determination as to whether the conclusion originally reached upon evidence should stand and it is not enough that we might ourselves have come to a different conclusion from that arrived at by the trial court. See [Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates](#) [2013] eKLR, [Kiruga v Kiruga & Another](#) [1988] KLR 348 and [Peters v Sunday Post Ltd](#) [1958] EA 424.

22. Having said that, it is important to keep in mind that this appeal arises from a decision made on review of an earlier decision striking the suit on the ground that the suit was time barred by limitation statute. The effect of the review was that the suit would be reinstated for hearing and determination on its merit. This therefore is not an appeal against a finding that the suit is caught up by limitation or not. However, the parties before us seems to have laboured under the false impression that we are dealing with an appeal arising from a finding on limitation and whether the cause of action was revived by an acknowledgement.

23. The Appellants argue that the suit having been struck out, the court became *functus officio* and could not entertain the application for review. Order 45 rule 1(1) of the [Civil Procedure Rules](#) states as follows:

1. Any person considering himself aggrieved—
 - (1)
 - 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.



24. It is clear that Order 45 rule 1 does not make a distinction between an order striking out the suit and any other order made in the course of the proceedings. The provision applies to any decree or order either where no appeal is allowed or where it is allowed, no appeal has been preferred against the said decision.
25. The Appellant relied on the doctrine of *functus officio* as barring the 1st Respondent from returning to the court after its suit was struck out. The doctrine of *functus officio* is one of the expressions in law on the principle of finality and *Black's Law Dictionary*, 9th Edition defines *functus officio* as: -
- “ [having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
26. This Court in *Telkom Kenya Limited v John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR while dealing with that principle held that: -
- “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.”
27. We defer to the position adopted by the Supreme Court decision in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR where the Court stated while citing 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 that:
- “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.”
28. That position however clearly applies to a situation where the Court has pronounced itself on merits. It cannot once more revisit the same decision with a view to arriving at a different decision. However, where the decision was not made on its merits like in this case where the suit was struck out on limitation nothing bars a party from applying for review. Secondly, where there is a clear provision permitting the Court to take a particular action, such as by applying for review, the court is not barred from dealing with the matter in order to effectuate the said provision. In other words, the doctrine of *functus officio* cannot operate against an express legal provision such as Order 45 rule 1 of the *Civil Procedure Rules*. That provision expressly gives not only parties to the suit, but any person aggrieved by a decree or order otherwise the provision of the law a right to move the court for review. In those circumstances the principle of *functus officio* cannot be successfully raised to bar such a person from seeking review. This Court in *Aneriko M Simiyu v Redempta Simati* Civil Appeal no 227 of 2004, held that it cannot be correct that a court of law would be said to be *functus officio* when moved to correct a mistake or mistakes on the face of the record because the ultimate result would be injustice. We therefore find that the learned Judge cannot be faulted for entertaining the application.
29. Regarding the issue whether or not the application was properly within the stipulation of Order 45 rule 1 of the *Civil Procedure Rules*, it is important to note that the ruling made on 16th February 2016, striking out the Respondent’s suit arose from a preliminary objection which was raised in the defence. In that decision the Court was clear in its mind that in determining the said objection, it could only rely



on the pleadings filed to establish if the facts as pleaded by the Appellant were conceded or incapable of contestation by the 1st Respondent. The Court appreciated, rightly in our view and based on *Mukhisa Biscuits Manufacturing Co. Ltd v Westend Distributors Ltd* [1969] EA 696, that its decision could only be based on the pleadings without reference to the documents on record unless the facts contained in the said documents were uncontested. However, it is contended by the Respondent that there were on record letters dated 9th March, 2015 and 6th September, 2017 by the Transition Authority and the Appellant respectively in which the debt was admitted and that the admission removed the suit from the strictures of limitation since the admission revived the cause of action.

30. It is not in dispute that in the letter dated 9th March, 2017, the Transition Authority granted approval to Kwale County Government to settle the debt. In the letter dated 6th September, 2017, which was addressed to the Transition Authority by the Appellant, the Appellant acknowledged that the Appellant's liability to the 1ST Respondent was inadvertently excluded. In our view, the failure by the Court to take into account these letters which could possibly have removed the matter from the ambit of limitation was clearly a ground for review since as was held by this Court in *V R M v M R M & Another* [2006] eKLR:-

“We think the correct statement of the law was that followed by this Court in *Narodhco Kenya Ltd v Loria Michelle* Civil Appeal no 24 of 1998 (ur) when it stated: -

“There was nothing on record to disprove the defendant's allegations to the effect that the said new facts came to its knowledge only after the decree. The power to review is not confined to mistakes or errors in the decree. The power is given by Section 80 of the *Civil Procedure Code* (sic) and Order 44 of the *Civil Procedure Rules* as was stated by this court in the case of *Shanzu Investments Limited*. This court said:”

“In *Wangechi Kimita & Another v Mutahi Wakabiru* (CA no 80 of 1985) (unreported) it was held that,

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 of the *Civil Procedure Act*. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous. The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason.”

31. As regards the authority of the Transition Authority upon reading the preamble to the *Transition to Devolved Government Act* no 1 of 2012 and Section 3 thereof together with Section 15 of the Sixth Schedule to the *Constitution*, we cannot say that the submission by the Respondent that Transition Authority was acting as agent for the Appellant was a lame argument. We are however not called upon to determine that issue. Suffice it to state that the said letter constituted sufficient reason for the purposes of the review.
32. In the premises, we find no merit in this appeal which we hereby dismiss with costs to the Respondent.
33. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.



P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

