**IN THE COURT OF KENYA**

**AT NAIROBI**

**(CORAM: WAKI, MAKHANDIA & ODEK, JJ.A)**

**CIVIL APPEAL NO. 194 OF 2018**

**BETWEEN**

**KENYA DEPOSIT INSURANCE CORPORATION (as liquidator**

**OF DUBAI BANK KENYA LIMITED)................................. APPELLANT**

**VERSUS**

**RAPID COMMUNICATIONS LIMITED ..................1ST RESPONDENT**

**ALBRIGHT HOLDINGS LIMITED ..........................2ND RESPONDENT**

**GARAM INVESTMENTS AUCTIONEERS............3RD RESPONDENT**

**AND**

**BANK OF AFRICA KENYA LIMITED .......1ST INTERESTED PARTY**

**S. GICHUKI WAIGWA .................................2ND INTERESTED PARTY**

**SULTAN PALACE DEVELOPMENT ..........3RD INTERESTED PARTY**

*(An Appeal from the Ruling of the High Court of Kenya at Nairobi (Olga Sewe, J) dated 20th April, 2018*

***in***

***Civil Suit No. 22 of 2017)***

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**JUDGMENT OF THE COURT**

*'Functus Officio'* is a Latin phrase which literally means an officer or agency whose mandate has expired at the expiry date or an agency that has accomplished the purpose for which it was created. But it has a deeper legal meaning. We are called upon in this short interlocutory appeal to determine whether the High Court **(Olga Sewe, J.)** who delivered a ruling on 22nd December, 2017 and made a *'Further order'*to hear the parties on one aspect of that ruling, had the power to do so or was *functus officio*. We are also called

upon, in a cross appeal, to determine whether the court erred in failing to make an order for discharge of mortgaged property after the amount owed was deposited in court.

There is a multiplicity of parties involved and it is prudent to understand their relationship up front. The appellant is the official liquidator of Dubai Bank Kenya Ltd **(Dubai bank)** which has collapsed**.** We shall henceforth refer to it as **KDIC** which is represented before us by learned counsel **Ms. Kihara**, instructed by M/s Musyoka, Wambua & Katiku, Advocates. They also represent the 3rd respondent **(Garam)**, a firm of auctioneers. The 1st and 2nd respondents (**RCL** and **AHL**, respectively) were customers of Dubai bank, and are represented before us by learned counsel **Mr. R. W. Githui,** instructed by M/s Githui & Partners, Advocates. There are three other parties described as 'Interested Parties' when in truth they ought to be respondents, but their description was carried forward from the High Court where they were enjoined after confirming that they would be affected by orders issued in the suit. The 1st interested party, **(BAKL)** is a proved creditor of Dubai bank and is represented by learned counsel, **Mr. A. A. Abuya**, instructed by M/s Walker Kontos, Advocates; the 2nd interested party, Mr. S. Gichuki Waigwa, Advocate **(Waigwa)** represents himself; while the 3rd respondent **(Sultan)** is represented by **Mr. S. N. Gikera,** instructed by M/s Gikera & Vadgama, Advocates.

In issue before the High Court is the intention by KDIC to exercise the bank's statutory power of sale to auction LR. No 209/11609/7 **(the security**), situate in Kileleshwa, Nairobi which is registered in the name of AHL but was given to Dubai bank as security for advancing overdraft facilities to RCL. There is a dispute on the overdraft limit granted to RCL or the amount due as at the time of the intended sale, but it is common ground that the bank balance as at 1st September, 2015 stood at Ksh.25,895,094.40. RCL and AHL were aggrieved by the intended sale as they thought the alleged debt was exaggerated and the intended sale was malicious. That is because they had given what they thought was a reasonable settlement proposal to KDIC who made no response, but still intended to sell the security worth Ksh.63 million for Ksh.25 million. KDIC was to disclose later that Dubai bank had advanced another overdraft of Ksh.116 million to AHL and, according to their agreement, the bank was at liberty to consolidate the loan amount under one Charge. RCL/AHL filed suit on 19th January, 2017, not only to stop the sale permanently, but also to obtain a full discharge of the Charge on the property upon giving a bank guarantee for the loan advanced to RCL. The suit is still pending before the High Court for hearing.

The two respondents also filed a motion on the same day seeking a temporary injunction in terms of the same orders sought in the main suit. The property was due for auction on 24th January, 2017, and the motion was placed before Sewe, J. on 23rd January, 2017. Present before the learned Judge were counsel for RCL/AHL; counsel for KDIC and counsel for BAKL, who made representations. The learned Judge then made the following order stopping the auction on terms:

> ***"Having considered the Notice of Motion dated 18 January 2017 and the affidavit filed in support thereof, it is hereby ordered that Prayer (2) of the Plaintiffs' Notice of Motion ... be granted on condition that the undisputed amount, agreed at Kshs.25 million, be deposited in a joint interest earning account in the names of Counsel for the Plaintiffs and the Defendants within 7 days from the date hereof. The matter is stood over to 30 January 2017 to confirm compliance and for further orders."***

When the matter was next mentioned on **30th January, 2017**, Waigwa and Sultan happened on the scene and expressed their respective interests in the suit:-Waigwa's that he had unpaid legal fees in excess of Ksh.30 million and a charge registered against the security; Sultan's, that they had purchased several properties, including the security, from RCL/AHL in September 2015 for sums in excess of Ksh.1.5 billion. They were aware that the security was Charged to Dubai bank and they were ready to pay off the debt from the balance of the purchase price and obtain a discharge of the security. The applications by Waigwa and Sultan to be enjoined as parties were not opposed, and the court made the following orders:

> ***"(1) the 2nd proposed interested party's application dated 24/1/2017 is hereby allowed and orders granted as prayed in paragraph (1) and (2) thereof.***

***(2) The 3rd proposed interested party's application dated 27/1/2017 and orders granted in terms of prayers (2) thereof. Costs to be in the cause.***

***(3) <u>The 3rd proposed interested party to be a signatory to the joint interest earning account as proposed</u>.***

***(4) <u>The parties are hereby granted more days to comply with the order of 23.1.2017</u>. Further directions on 7.2.2017".*** [Emphasis added].

Pursuant to those orders, a deposit of Ksh.25 million was made in a joint interest earning account in the name of the firms of advocates of RCL/AHL, KDIC and Sultan. The main application by RCL/AHL was then heard *inter partes* by Sewe, J. and a ruling delivered on 22nd December, 2017. The learned judge found, *inter alia*, that the overdraft facility granted to RCL was enhanced to Ksh.45 million; that RCL had admitted that the debt due was Ksh.25,895,094.40; that the process of realization of the security was lawful; that in view of compliance with the interim order for deposit of Ksh.25 million into an escrow account, RCL/AHL were entitled to the orders sought; that while KDIC reserved the right to consolidate the Chargor's accounts, there was no evidence that the process of recovery of the additional facilities had commenced; that a *prima facie* case had been established; and that the balance of convenience tilted towards stopping the intended auction.

In the end, the following orders were made:-

***"[a] That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued to stop and restrain the 1st Defendants herein whether acting by itself or through their agents, the 2nd Defendant, M/s Garam Investments Auctioneers or other servants or anybody acting on its instructions from selling the 2nd Plaintiffs' property Title Number LR No. 209/11609/7 situated in Kileleshwa (hereinafter "the Suit Property")***.

***[b] <u>That as all the parties, including the Interested Parties, are in agreement as to the 1st Defendant' right to the sum of Kshs.25,000,000/= that is now lying in an escrow account in the joint names of Counsel for the Plaintiffs, the 1st Defendant and the 3rd Interested Party, there is no reason why the same should not be paid out forthwith to the 1st Defendant</u>".*** [Emphasis added].

The prayer that the Charge on the security be discharged upon the furnishing of a bank guarantee was declined as it was a substantive prayer in the main suit.

The learned Judge then made the troublesome addendum to the ruling which gave rise to the main appeal before us, thus:-

***"Further order: mention on 23rd January, 2018 for further orders as to the release of the Ksh.25 million that is now in an escrow account".***

There was no appearance for any of the parties on the mention date and it was stood over to 14th February, 2018 when counsel for KDIC, BAKL and Sultan appeared. Counsel for Sultan said there was no dispute that the money was due to KDIC but raised the issue of having the property discharged after payment of the balance of Ksh.895,094.40 of the admitted debt. The parties were given more time to negotiate. When they appeared again on 28th February, 2018, Sultan's counsel explained, and was supported by counsel for RCL/AHL and Waigwa, that the release of the funds without a corresponding discharge of the Charge on the property would cause considerable loss to Sultan who, as admitted by all parties, was the one who paid in the deposit in the escrow account. On the other hand, KDIC's counsel maintained that the court had already made an order for release of the funds and it could not be altered without an application for review. In his view, when the original order for deposit of the money

was made, the interested parties were not there and the court did not care where the money came from. The court was thus *functus officio.*

After considering what the parties had to say, Sewe, J. gave them another seven days to negotiate, and when they returned without agreement, the learned Judge delivered a ruling on 20th April, 2018, stating:

> ***"[6] It is indeed the case that when that order was made, it was not manifest that the Plaintiffs had already sold the Suit Property to the 3rd Interested Party; and therefore the interests of the 3rd Interested Party could not have been envisaged by the order. Accordingly, whereas it may be true, as asserted by Mr. Githui, Mr. Waigwa and Mr. Odera that it was the understanding between the concerned parties that the Suit Property would be discharged upon the deposit being made, to the extent that the 3rd Party was not a party when the order of 23 January 2017, those would be parties' own out of court arrangements which can only be brought on board by an appropriate consent order. So far, there is no such consent order.***
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> ***[7] Secondly, there would be no basis for the 3rd Party insisting on the discharge of the title to the suit property, the Court having taken a decision that, since the prayer for discharge was a substantive prayer in the Plaint, it would have to await the hearing of the substantive suit. Accordingly, that order remains unless and until set aside on review or appeal. I would agree with Mr. Katiku that in that regard, the Court is indeed functus officio.***
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> ***[8] In the result, the orders that commend themselves to the Court, further to the orders issued on 22 December 2017, are that the funds in the Escrow Account be so held pending the hearing and determination of this suit."***

KDIC challenges that order on eight (8) grounds listed in the memorandum of appeal. In written submissions, however, counsel urged the grounds globally submitting in substance that the trial court had no power to reverse the order for releasing the funds to KDIC forthwith. In her view, the only way that order could be revisited was through an appeal or an application for review under ***Order 45*** of the **Civil Procedure Rules (CPR)**. No such application was filed. Counsel cited the case of ***Sanitam Services (E.A.) Limited vs Rentokil (K) Limited & Another*** ***[2019] eKLR*** where the trial court altered its ruling after an application for review but this Court held that the court sat on appeal against its earlier orders which was an erroneous exercise of discretion or power. She also relied on the case of ***National Bank of Kenya Limited vs Ndungu Njau*** ***[1997] eKLR*** to the same effect. Lastly, counsel relied on the

Supreme Court case of ***Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others*** ***[2017] eKLR*** where the Court held that the slip rule does not confer upon a court any jurisdiction to sit on appeal over its own judgment or extensively review or alter it. According to counsel, the alteration of the order in this case took away the right of the appellant which had been granted in the earlier ruling, and should therefore be set aside.

For their part, RCL/AHL observed that at the time the order was made on 23rd January, 2017, the interested parties had not been enjoined, and the order had a default clause that the injunction would lapse if the deposit was not made. One week later, Sultan appeared in court and disclosed that it had a direct interest as a purchaser and the trial Judge appreciated that the funds held in escrow belonged to Sultan. The order made on 20th April, 2018 retaining the money in the account took into account this fact. According to counsel, the escrow account provided security to the court, KDIC and RCL/AHL. Counsel further submitted that if the funds were released to KDIC before the triable issues before the High court are finalized, the right of redemption of the security would be lost. The only cure for that, in counsel's view, is to release the funds in exchange for a discharge of the Charge on the security. That would be the lower, rather than the higher, risk of injustice.

Turning to the claim that the trial court was *functus officio*, counsel submitted that the court was within its powers to invite parties to address it and the appellant participated in those arguments. Citing the case of ***Jersey Evening Post Ltd vs Al Thani*** ***[2002] JLR 542 at 550*** which was cited and applied by the

Supreme Court in ***Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others*** ***[2013] eKLR***, counsel submitted that the doctrine does not prevent the court from correcting errors or prevent a change of mind even when a decision has been communicated to the parties.

Counsel for BAKL did not file written submissions but briefly orally submitted that the trial court had no power to issue another order contrary to the one for release of the deposit in escrow.

The 2nd interested party, Mr. Waigwa filed written submissions which he orally highlighted. He submitted that it was on record, and in everyone's knowledge, that Sultan had bought the security and was ready to repay the loan on it for the Charge to be discharged. It was Sultan who deposited the fund in escrow. Counsel further referred to a supplementary record he filed to show that the appellant had demanded different sums of money from RCL/AHL and that is why the matter must go for trial unless the appellant is ready to discharge the existing Charge on the security. In his view, the trial court was right to make the order it did on 20th April, 2018.

Finally, Sultan not only responded to the appeal in written submissions but also filed a notice of cross appeal challenging the refusal by the trial court to make an order for discharge of the Charge on the security. In opposing the appeal, counsel submitted that the trial court was not *functus officio*. That is because the trial court expressly reserved the opportunity to give directions on the release of the escrow deposit, and the parties were clear that the issue would be revisited. Subsequently they all participated in the proceedings until the final orders were given. Counsel cited in support, the case of ***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 event, he urged, ***Article 159 (2) (a) (b)*** and ***(d)*** of the **Constitution** as read with the overriding objectives in ***sections 1A*** and ***1B*** of the **Civil Procedure Act (CPA)** allow the courts to do substantive justice.

On the cross appeal, counsel submitted that the trial court erred in finding that the escrow deposit belonged to the appellant when it was on record that Sultan deposited the funds on condition that the security would be discharged and handed over to itself. The purpose of the fund, according to counsel, was to assist the court, the appellant, and all the other parties to articulate their cases at the trial with the knowledge that they were secured. That did not give any right of the funds to the appellant since it belonged to Sultan. Indeed, the first prayer in the cross appeal is to have the money refunded to Sultan and the temporary injunction vacated or alternatively Sultan be allowed to pay the balance of the debt in the sum of Ksh.895,094.40 and obtain a discharge of the security from the appellant.

The appellant's counsel, in reply to the cross appeal opposed the main prayer but supported the alternative prayer.

We have fully considered the appeal and the cross appeal, but will first deal with the appeal. The appeal challenges only one aspect of the ruling made on 22nd December, 2017, that is the order for release of the escrow deposit which was reversed on 20th April, 2018. We agree with counsel for the appellant that once a court of law pronounces itself with finality on an issue placed before it for determination, then it has no power or jurisdiction to revisit the merits of that decision. In Latin parlance the court is *functus officio*. Only an appellate court or the same court in an application for review under the provisions of ***Order 45*** of the CPR may lawfully revisit it. The other permissible manner in which a final decision may be revisited is in correction of clerical or arithmetical mistakes, and errors arising from accidental slip or omission under ***section 99*** of the CPA and ***Rule 35*** of the Court of Appeal Rules, commonly known as the 'slip rule'. Even then, the slip rule does not confer jurisdiction or powers on the courts to sit on appeal over their own judgments or to extensively review or substantially alter them. See the ***Fredrick Otieno Outa case (supra).*** The objective is to give effect to the intention of the court when the judgment was given.

The Supreme Court put it more succinctly in the case of ***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:***

> ***"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."*

But the question still remains; when is a court of law rendered *functus officio*?

Put another way, can a court, in its judgment or ruling, reserve the right to revisit a particular issue subsequent to the judgment or ruling? Again the Supreme Court gives further insights when it quoted with approval the case of ***Jersey Evening Post Limited vs A1 Thani* [2002] JLR 542 at 550,** thus:

> ***"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 supplied].

Considering the same issue, this Court in ***Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR*** stated as follows:-

> ***"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. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century. In the Canadian case of Chandler vs. Alberta Association of Architects [1989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);***
>
> *"The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:*
>
> *1. Where there had been a slip in drawing it up, and,*
>
> *2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp. [1934] S.C.R. 186"* [Emphasis added].

So that, finality, which is at the core of the doctrine of *functus officio*, is achieved when the judgment or order has been *'perfected'* or *'drawn up, issued and entered'*. In the matter before us, the impugned order had not been perfected, and indeed, there was a further order made at the time of delivery of the ruling, that it would be revisited. All parties were present when the further order was made and they participated in the deliberations that followed before the order of 20th April, 2018 was made. It is noteworthy that it was made *"further to the orders issued on 22nd December, 2017"*. In those circumstances, it is our view that the doctrine of ***functus officio*** did not apply. We so find.

It follows that the money deposited in escrow in an interest earning joint bank account shall so remain until the hearing and determination of the case before the High Court or until further orders of that court. Escrow is another uncommon word. But one of the meanings is *"an account held in trust or as security"*

-- see **Black's Law Dictionary, 10th Edition.** The trial court appeared to agree with counsel for the appellant that the order made on 23rd January, 2017 for depositing the money did not involve the 3rd interested party (Sultan). That is factually correct, but not entirely so. The court overlooked the further order it made on 30th January, 2017 (reproduced above), enjoining Sultan as a party and allowing it to be a signatory to the joint account. The signatories then became trustees until the purpose for which the deposit was made is concluded or the court makes further orders.

That reasoning puts paid the prayer made by the 3rd interested party in the cross appeal for release of the money to it. The cross appeal further seeks an order for discharge of the security which is one of the prayers rejected by the trial court in its ruling dated 22nd December, 2017, since the issue is triable. There was no appeal against that ruling and it is our view that a cross appeal would be misplaced. More importantly, since we have upheld the order that the escrow deposit shall remain *in situ*, the order for discharge of the Charge on the security would be mutually incompatible with that finding. The cross appeal fails.

The upshot is that both the appeal and the cross appeal are lacking in merit and we order that they be and are hereby dismissed. Each party shall bear its own costs.

**Dated and delivered at Nairobi this 19th day of July, 2019.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

**.......................................**

**JUDGE OF APPEAL**

**J. OTIENO ODEK**

**........................................**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**