Regeru v County Government of Kiambu & another (Environment & Land Case 1411 of 2016) [2024] KEELC 5806 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5806 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1411 OF 2016

JO MBOYA, J

AUGUST 9, 2024

BETWEEN

PETER NJOROGE REGERU ..... PLAINTIFF

AND

COUNTY GOVERNMENT OF KIAMBU ..... 1ST DEFENDANT

NATIONAL LAND COMMISSION ..... 2ND DEFENDANT

RULING

1. The 1st Defendant/Applicant has approached the court vide Notice of motion application dated the 20th of February 2024; brought pursuant to the provisions of Section 3, 3A and 80 of the *Civil Procedure Act*; Orders 45 Rule 2 and 3; and Order 51 of the Civil Procedure Rules 2010 and wherein the Applicant has sought for the following reliefs;

    i. That this Application be certified as urgent and it be heard Ex-parte in the first instance.

    ii. That this Honourable Court be pleased to stay execution of the judgment issued on 5th March, 2020, the subsequent decree dated 13th May, 2020 and all consequential Orders thereto pending hearing and determination of this Application.

    iii. Thai this Honourable Court be pleased to set aside the Judgment issued on 5th March,2020 and the subsequent decree dated 13th May, 2020 and this matter do proceed for hearing de novo.

    iv. That the 1" Defendant be at liberty to Amend their pleadings and introduce new evidence in relation to this suit.

    v. Thai the Judgment of this Honourable Court delivered on 5th March, 2020 be reviewed to include:

a. Consideration that pursuant to Article 62(2) of *the Constitution*, all the land known as Muguga/Gitaru/1042 Original No. Muguga/Gitaru/487/85 [the property] was public land held in trust for the community (to wit, the local residents of Kabete Constituency and its environs in Kiambu County) by the 1" Defendant;

b. Consideration that at the time of hearing and determination of this matter and pursuant to Article 62(2), the National Land Commission which is mandated as the sole administrator of public land on behalf of the 1" Defendant, was not duly served with the pleadings and attendant hearing notice, thereby barring them from adducing crucial evidence in their possession, much to the detriment of the 1"Defendant;

c. Consideration that the title documentation in respect to the property and which was produced by the Plaintiffs was obtained fraudulently and therefore, they are not the duly registered owner of the land.

vi. That this Honourable Court be pleased to issue such other orders as the Court may deem just and expedient in the circumstances;

vii. That the costs of this Application be in the cause.

2. The instant application dated the 20th Day of February 2024; is anchored on the various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of one Waithira Waiyaki sworn on the 20th February 2024 and in respect of which the deponent has exhibited four [4] documents inter-alia a copy of the gazette notice dated the 17th July 2017.

3. Suffice it to point out that upon being served with the application beforehand, the Plaintiff/ Respondent filed a Replying affidavit 22nd April 2024 and wherein same [deponent] has contended inter-alia that the subject application is not only misconceived but constitutes an abuse of the due process of the court insofar as the issues being adverted to were dealt with by the court and thus same cannot be re-agitated afresh.

4. Be that as it may, the application beforehand came up for hearing on the 22nd May 2024 whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing of the written submissions.

5. Fast forward, the 1st Defendant/Applicant filed written submissions dated the 19th June 2024 whereas the Plaintiff/Respondent filed written submissions dated the 1st July 2024. Instructively, the two sets of written submissions forms part of the record of the court.

Parties'submissions:

a. Applicant's Submissions:

6. The Applicant filed written submissions dated the 19th June 2024 and wherein same [Applicant] has adopted the grounds highlighted at the foot of the application as well as the averments continued in the body of the supporting affidavit. Furthermore, the Applicant has thereafter raised and canvassed two [2] salient issues for determination by the court.

7. Firstly, learned counsel for the Applicant has submitted that the Applicant herein has since discovered new and important evidence which were not in custody of the Applicant during and at the time when the judgment of the court was delivered. In this regard, learned counsel for the Applicant has pointed

out that the Applicant has since discovered that the suit property which underpins the judgment beforehand was/is indeed public property and hence same ought not to be decreed in favour of the Plaintiff/Respondent.

8. On the other hand, learned counsel for the Applicant has also submitted that same [Applicant] has also discovered and established that the certificate of title held by the Plaintiff/Respondent herein was procured vide fraud. Consequently, and in this regard, learned counsel for the Applicant contends that there exists new evidence which is important and thus need to be taken into account by the court.

9. Further and in addition, it has been contended that the Applicant has also established that the court process and pleadings filed by the Plaintiff/Respondent were not properly served upon the 2nd Defendant/Respondent and hence the said 2nd Defendant/Respondent was precluded from producing and/or tendering pertinent evidence within her [2nd Defendant's possession].

10. Arising from the foregoing, learned counsel for the 1st Defendant/Applicant has thus invited the court to find and hold that the new evidence, which is said to have been discovered and obtained by the Applicant, are sufficient to warrant review.

11. To this end, learned counsel for the applicant has cited and referenced inter-alia the holding in the case of Republic v Public Procurement Administrative Review Board & 2 Others [2018]eKLR; Pancras T Swai v Kenya Breweries Ltd [2014]eKLR; Sada Mohammed v Charang Singhnand & Another [1959]EA 793 and Republic v Advocates disciplinary Tribunal Ex-parte Apollo Mboya [2019]eKLR, respectively.

12. Secondly, learned counsel for the Applicant has submitted that the Applicant herein is entitled to the reliefs sought at the foot of the application. In any event, learned counsel for the Applicant has contended that it is in the interests of justice that the reliefs sought be granted.

13. In a nutshell, learned counsel for the Applicant has submitted that the application beforehand is meritorious and thus ought to be allowed.

b. Plaintiff's/Respondent's Submissions:

14. The Respondent herein filed written submissions dated the 1st July 2024; and wherein same [Respondent] has reiterated the contents of the Replying affidavit dated the 22nd April 2024 and thereafter highlighted three [3] issues for consideration and determination by the court.

15. First and foremost, learned counsel for the Respondent has submitted that this honourable court [differently constituted] heard the dispute beforehand in the presence of the parties and thereafter rendered a judgment on merits. In this regard, counsel for the Respondent has contended that having rendered a judgment on merit, this court is now functus officio and thus cannot be invited to re-engage with the same issues, either in the manner contended or at all.

16. Furthermore, learned counsel for the Respondent has submitted that if the Applicant herein was aggrieved and dissatisfied with the judgment of the court, same [Applicant] was obligated to mount an appeal and not otherwise.

17. In support of the foregoing submissions, namely, that the court is functus officio, learned counsel for the Respondent has cited and referenced the holding in the case of Telkom Kenya Ltd versus John Ochanda [suing on his behalf and on behalf of 996 former employees of Telkom Kenya [2014]eKLR].

18. Secondly, learned counsel for the Respondent has submitted that the instant application has been made and mounted with unreasonable delay, which delay has neither been accounted to nor explained. In

this respect, learned counsel has therefore invited the court to find and hold that the application is negated by the doctrine of Latches.

19. Thirdly, learned counsel for the Respondent has submitted that despite the terms of the judgment of the court, which decreed that the 1st Defendant/Applicant vacate and hand over the suit property to the Plaintiff/Respondent, same [1st Defendant/Applicant] has failed to do so. In any event, it has been contended that the 1st Defendant/Applicant has remained in occupation of the suit property to date.

20. Arising from the foregoing, learned counsel for the Respondent has thus implored the court to find and hold that the 1st Defendant/Applicant is in contempt of the orders of the court and hence same [1st Defendant/Applicant] should not partake of audience before the court for as long as same has not purged the contempt.

21. To buttress the foregoing submissions, learned for the Respondent has cited and referenced the holding in the case of Trust Bank Ltd v Shanzu Villas Ltd [2004]eKLR.

22. Premised on the foregoing, learned counsel for the Respondent has implored the court to find and hold that the subject application is not only defeated by the doctrine of latches, but same is a thinly veiled attempt to invite the court to sit on appeal on the decision of a court of concurrent/coordinate jurisdiction.

Issues for Determination:

23. Having reviewed the application beforehand as well as the response thereto and upon consideration of the written submissions filed on behalf of the parties, the following issues do emerge [crystalise] and are thus worthy of determination;

    i. Whether the honourable court has the jurisdiction to set aside the judgment either in the manner sought or at all.

    ii. Whether the Applicant herein has established and demonstrated the existence of new important evidence which was not in her custody and/or possession at the time of the judgment.

    iii. Whether this court is Functus officio.

    iv. Whether the instant application constitutes and/or amounts to an abuse of the due process of the court.

Analysis and Determination:

Issue Number 1 Whether the honourable court has the jurisdiction to set aside the judgment either in the manner sought or at all.

24. The 1st Defendant/Applicant herein has sought for a plethora of relief in the body of the application beforehand. For coherence, one of the reliefs that has been sought for by the Applicant herein relates to setting aside the judgment issued on the 5th March 2020 as well as the consequential decree arising therefrom and which was issued on the 13th May 2020. Furthermore, the Applicant has also sought for an order that upon setting aside of the said judgment and decree, the matter beforehand does proceed for hearing de novo.

25. To my mind, what the Applicant is asking the court to do is to set aside the judgment which was rendered and/or delivered by this court [differently constituted] and thereafter to direct the hearing to commence afresh.

26. Before venturing to consider whether or not the court is seized of the requisite jurisdiction to set aside the impugned judgment and decree, it suffices to provide a brief background leading to the entry of the impugned judgment.

27. To start with, the instant matter was filed by and on behalf of the Plaintiff/Respondent vide Plaint dated the 14th November 2016 and which Plaint was thereafter amended on the 2nd November 2018. Nevertheless, upon being served with the summons to enter appearance and the Plaint in respect of the instant matter, the 1st Defendant/Applicant duly entered appearance and filed a statement of defence on the 7th February 2017.

28. Additionally, the instant matter was thereafter subjected to the usual pretrial directions whereupon the Defendants, inter-alia the 1st Defendant/Applicant were given timeline within which to file and serve the list and bundle of documents, list of witnesses and witness statement, if any.

29. Be that as it may, it is apparent that the Defendants failed to file the requisite documents and thereafter the hearing of the matter proceeded in the presence of learned counsel for the Plaintiff/Respondent and the 1st Defendant/Respondent. Instructively, learned counsel for the 1st Defendant/Applicant fully participated in the proceedings of 20th February 2020 and in indeed cross examined the Plaintiff's witness.

30. On the other hand, it is also instructive to underscore that upon the close of the Plaintiff's case, learned counsel for the 1st Defendant was afforded an opportunity to call witness. However, it is evident on record that learned counsel for the Applicant intimated to the court that same was not calling any witness. Furthermore, learned counsel for the Applicant proceeded and closed the Applicant's case.

31. Subsequently, the court proceeded to and rendered a judgment wherein, the court took into account the pleadings filed by and on behalf of the parties as well as the evidence tendered. For good measure, the court found and held that the Plaintiff/Respondent had duly proved his case to the requisite standard, culminating into the judgment being given in favour of the Plaintiff/Respondent.

32. Suffice it to point out that it is the judgment under reference which is now the subject of the current application for setting aside.

33. Arising from the foregoing background, the question that this court needs to address and adjudicate upon is whether such a judgment which was rendered after hearing the parties and in particular, the 1st Defendant/Applicant can be set aside, either in the manner sought or at all.

34. To my mind, the court has the requisite jurisdiction to entertain and engage with an application for setting aside the judgment that was entered either in default of appearance [failure to enter appearance and defence] or in default of attendance [failure to attend court on the scheduled date]. In such a situation, the court will be called upon to consider the reasons and/or explanations if any, and thereafter to render an appropriate decision taking into account inter-alia the necessity to have matters heard and determined on merits; as well as the interests of justice. [See Philip Keipto Chemwollo v Augustine Kubende & Another [1986]eKLR]. [See also James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR].

35. Notwithstanding the foregoing, it is important to underscore that where the court has heard the matter in the presence of and with the participation of the adverse parties, in this case, the 1st Defendant/Applicant and thereafter rendered a judgment on merits, the same court cannot be re-invited to set aside such a judgment and decree fresh hearing.

36. In my humble view, once a court entertains and adjudicate[s] upon a matter, culminating into judgment on merits, such a judgment can only be the subject of review [subject to lawful cause] or an appeal and not otherwise.

37. Simply put, a court which has rendered a judgment on merits cannot be invited to set aside such a decision either in the manner sought at the foot of the instant application or at all. Consequently, and in this regard, it is my finding and holding that the subject application which seeks the setting aside of a judgment rendered on merits is not only misconceived, but same is legally untenable.

38. Arising from the foregoing discussion, it is my finding that this court is devoid and or divested of jurisdiction to set aside a judgment on merit, which was rendered by a court of coordinate/concurrent jurisdiction. [See Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR].

Issue Number 2 Whether the Applicant herein has established and demonstrated the existence of new important evidence which was not in her custody and/or possession at the time of the judgment.

39. Other than the question of setting aside the impugned judgment, the Applicant herein has also approached the court seeking for an order of review of the impugned judgment and the consequential decree, on the basis of discovery of new and important evidence.

40. Furthermore, the Applicant has ventured forward and contended that the new and important evidence which same [Applicant] has discovered relates to the fact inter-alia that the suit property is public land, that the certificate of title was procured fraudulently and that the 2nd Defendant was never served with the court process and pleadings and that arising from the failure to do so, the 2nd Defendant was precluded from tendering critical documents before the court.

41. Be that as it may, it is worthy to recall that the dispute pertaining to and concerning the suit property herein was commenced vide Nairobi HCC Petition No 584 of 2012, wherein the Plaintiff/Respondent was the 3rd Petitioner.

42. Furthermore, it is common ground that Petition No. 584 of 2012 was heard and determined and a judgment was rendered by Hon. Justice Majanja on the 19th April 2013 and wherein the learned judge [now deceased] found and held that the suit property among others were private properties and not otherwise.

43. Other than the foregoing findings, the learned judge also ordered and directed that if the commissioner of lands was keen to compulsorily acquire inter-alia the suit property for purposes of the construction of the southern bypass, then it behooved the commissioner of land [now defunct] to compensate the Plaintiff/Respondent.

44. Subsequently, evidence abound that the commissioner of lands, now defunct in liaison with Kenya National Highway Authority established that the suit property was no longer required for purposes of the construction of the southern bypass and in this regard, a suitable gazette notice was duly published.

45. Arising from the judgment rendered vide Nairobi HCC Petition No. 584 of 2012 and coupled with the decision by the commissioner of lands to de-gazette the suit property from the plots that were the subject of compulsory acquisition, the status of the suit property reverted to and remained as private property belonging to the Plaintiff/Respondent.

46. For good measure, the judgment of Hon. Justice Majanja vide Nairobi HCC Petition No 584 of 2012 and the subsequent ruling of Lady Justice Mumbi Ngugi [Judge] as she then was remains in existence

to date. In this regard, the contention by the Applicant that the suit property is public land is therefore erroneous and mistaken, taking into account the findings of Honourable Justice Majanja, Judge, which were never appealed against.

47. Other than the foregoing, the Applicant has also contended that the certificate of title in favour of the Respondent was procured and obtained by fraud and hence, the question of fraud constitutes new evidence to be canvassed before this court.

48. Be that as it may, it is worth repeating that the legality or otherwise of the certificate of title in favour of the Plaintiff herein was the subject of the judgment vide Nairobi HCC Petition No 584 of 2012 and by extension the judgment under reference.

49. Other than the foregoing, the other aspect which has been highlighted by the Applicant to constitute a new and important issue to warrant review, relates to the allegations that the pleadings and court processes were [sic] never served upon the 2nd Respondent.

50. However, it is instructive to underscore that the 2nd Defendant/Respondent herein was duly served with the pleadings and court process pertaining to the subject matter and the same [2nd Defendant/Respondent] proceeded to and instructed an advocate who entered appearance on the 28th March 2018 and thereafter filed a statement of defence dated the 18th June 2019, respectively.

51. To my mind, the contention by learned counsel for the Applicant that the 2nd Defendant/Respondent was never served with the pleadings and court processes is not only being dishonest, but built on quicksand. For good measure, it behooves learned counsel for the Applicant to cross check his facts before endeavouring to propagate falsehoods, which does not portend well the obligation of Counsel by dint of the Provisions of Section 1A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

52. Notwithstanding the foregoing, it is not lost on this court that learned counsel for the Applicant herein has neither been retained nor engaged by the 2nd Defendant/Respondent and hence same [learned counsel for the Applicant] cannot pretend to make representations on behalf of the 2nd Defendant/Respondent before being properly instructed. [See Order 9 Rule 1 of the Civil Procedure Rules, 2010 which recognized agents].

53. Having highlighted the perspective[s] that are contended to constitute new and important evidence, it is now apposite to revert back and consider whether the Applicant herein has indeed met and satisfied the threshold to warrant review either in the manner sought or otherwise.

54. Firstly, it is incumbent upon the Applicant seeking review to not only mention the discovery of new and important evidence but same is obligated to venture forward and establish that [sic] the new evidence under reference could not have been procured and availed to court despite exercise of due diligence.

55. In my humble view, what is purported to be new evidence was indeed evidence that was available and within the public domain and hence the Applicant herein could with the exercise of due diligence have come across same. In this respect, it is my finding and holding that what is touted and purported as new evidence, is certainly not new evidence by any stretch of imagination.

56. Secondly, there is no gainsaying that an Applicant, the current Applicant not excepted, seeking to partake of the discretion of the court must approach the seat of justice with fidelity and honesty. Simply put, such an Applicant must not approach the court with soiled hands or at all.

57. In a nutshell, it is my finding and holding that the Applicant herein has neither met nor satisfied the threshold for granting review on the basis of new and important evidence. In this respect, it suffices to

take cognizance of the holding of the court in the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR.

58. For coherence, the court summarized the ingredients under pinning the grant of review and stated thus;

> 30. The principles which can be culled out from the above noted authorities are:-
>
> i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
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> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
>
> v. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
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> vi. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
>
> vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
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> vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
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> viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
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> ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
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> x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

59. Likewise, the Court of Appeal has had occasion to consider the extent under which review can be granted on the basis of discovery of new and important evidence which was not available at the time of delivery or rendition of the impugned decision.

60. To this end, it suffices to take cognizance of the holding in the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, where the court held as hereunder;

> The respondent failed to prove that it had discovered new evidence after the exercise of due diligence not within its knowledge or which could not be produced at the time when ruling was delivered. Order 45 Rule 3(2) provides that an application for review shall "... not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree was passed or made without strict proof of such allegation. Other than the confusion in dates, no sufficient reason was given by the respondent as to why the letters were not filed before the taxing officer. This to my mind was an oversight on the part of the respondent but it was not a mistake apparent on the face of the record."

61. Simply put, it is my finding and holding that the Applicant herein has not demonstrated that same [Applicant] has discovered new and important evidence, which could not have been tendered and placed before the court at the time when the judgment and decree was rendered.

62. On the contrary, what is discernible from the subject application is an endeavour by the Applicant to have a second bit on the cherry and to bring forth documents which same [1st Defendant/Applicant] failed to tendered before the court despite liberty having been granted. [See the orders of the court made on the 19th February 2019].

Issue Number 3

Whether this court is Functus officio.

63. Barring repetition, it is worthy to recall and reiterate that the hearing in respect of the instant matter was taken on the 20th February 2020 when PW1 testified and was thereafter cross examined by learned counsel for the Applicant. Furthermore, it is also worth recalling that after the close of the Plaintiff's case, the counsel for the 1st Defendant/Applicant addressed the court and intimated the same [Applicant] had no witnesses to call. Instructively, counsel for the Applicant proceeded and closed the Applicant's case.

64. Additionally, the court thereafter granted liberty to and in favour of the parties, namely, the Plaintiff/Respondent and the 1st Defendant/Applicant to file and exchange written submissions.

65. First forward, there is no gainsaying that upon receipt of the submissions the court proceeded to and rendered a judgment. For good measure, the judgment which was rendered by the court was one which was on merits and not otherwise.

66. In my humble view, once a court of law engages with a dispute and thereafter renders a judgment, such a judgment can only be impeached vide an appeal. In this regard, I beg to reiterate that an aggrieved party cannot revert back to the same court and seek to have a second bite on the cherry.

67. Without belabouring the point, it is my finding and holding that upon delivery of the judgment and the consequential decree, this court became functus officio and same [court] is divested of the requisite jurisdiction re-engage with the issues before hand, let alone allowing amendments and the hearing to commence de novo.

68. As pertains to the concept of functus officio, it suffices to adopt and reiterate the succinct elaboration vide the holding of the Court of Appeal in the case of Telkom Kenya Limited v John Ochanda (Suing

On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR, where the court held thus;

> 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 ago 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);
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> > "The general rule that a final decision of a court cannot be re-opened 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"
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> The Supreme Court in Raila Odinga v IEBC 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 in which the learned author stated;
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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 superior body or functionary) 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.

69. Guided by the foregoing erudite exposition of the law, I come to the conclusion that this honourable court is functus officio and thus same [court] cannot be re-invited to re-engage with the subject dispute de-novo and with a view to rendering another merit-based decision, either in the manner sought or at all.

Issue Number 4

Whether the instant application constitutes and/or amounts to an abuse of the due process of the court.

70. Despite the findings pertaining to and concerning the various issues which have been highlighted and addressed herein before, there is still need to advert to and discuss the question of abuse of the due process of the court.

71. To start with, it worth recalling that the learned counsel for the Applicant herein is the same counsel who appeared before the learned judge on the 20th February 2020 when the hearing of the instant matter was taken and thereafter cross examined the Plaintiff/Respondent.

72. Similarly, it is the same counsel who at the close of the instant case [the hearing of the Plaintiff's case] intimated to the Honourable Court that same [Counsel] had no witness and thereafter ventured forward to close the Applicant's case.

73. Notwithstanding the position hitherto taken, learned counsel has now reverted to this court and same [counsel] is seeking to set aside a judgment rendered on merit. Furthermore, the same counsel has the temerity to implore the court to have the matter heard de-novo.

74. Surely, learned counsel for the Applicant should be taken to be knowledgeable of court processes and procedures. Furthermore, it is not lost on this court that the Applicant and her counsel are obligated to assist the court towards achieving just, expeditious and proportionate determination of dispute. [See Section 1B of the *Civil Procedure Act* and Section 3 of the *Environment and Land Court Act*, 2011].

75. However, despite the explicit provisions of the law, including the ones referenced in the preceding paragraphs, the Applicant and her counsel are before the court and same are seeking to have a second bite on the cherry. Quite clearly, the application beforehand, whose net effect is calculated to invite this court to sit on appeal on the decision of a court of coordinate jurisdiction amounts to and constitute an abuse of the due process of the court.

76. To this end, it suffices to take cognizance of the holding of the Supreme Court of Kenya in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016)* [2018] KESC 27 (KLR) (19 September 2018) (Ruling),

> 27. In *Kenya Section of the International Commission of Jurists v Attorney General & 2 Others Criminal Appeal No. 1 of 2012*; [2012]eKLR, this Court, on the issue of abuse of the process of the Court, held inter alia:
>
> > " The concept of "abuse of the process of the Court" bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice.
> >
> > The bottom line in a case of abuse of Court process is that, it "appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption..."....Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process."

77. To my mind, the current application and the reliefs sought thereunder fall within the parameters that constitutes abuse of the due process of the court and hence same [application] ought to be frowned upon.

Final Disposition:

78. Flowing from the discussion contained in the body of the ruling, it must have become apparent that the subject application is not only misconceived and legally untenable, but same also constitutes a gross abuse of the due process of the court.

79. Consequently and in the premises, the application dated the 20th February 2024; be and is hereby dismissed with costs to the Plaintiff/Respondent.

80. At any rate and to avert the filling of a supplementary bill of costs, the costs be and are hereby certified in the sum Kes.25, 000/= only.

81. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF AUGUST 2024.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court assistant

Mr. Mararo for the 1st Defendant/Applicant

Mr. Kiarie Njuguna for the Plaintiff/Respondent

N/A for the 2nd Defendant/Respondent