



REPUBLIC OF KENYA



Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority (Environment & Land Case 106 of 2015) [2024] KEELC 6491 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6491 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 106 OF 2015
LL NAIKUNI, J
SEPTEMBER 26, 2024**

BETWEEN

MISTRY PREMJI GANJI (INVESTMENTS) LIMITED PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY DEFENDANT

RULING

I. Introduction

1. Arising from the numerous development emanating from this matter, the Honourable Court was moved to provide specific direction on how the proceedings were to be tackled before it. In so doing, and for ease of reference, it will be critical that the Court undertakes an indeth expose of the background of this matter.
2. It is instructive to note that Judgment in this matter was delivered on 8th April, 2021 with the Honourable Court regarding the Defendant's actions as being illegal and requiring the status quo ante to be restored. The court also ordered the Defendant to inter alia pay to the Plaintiff a sum of Kenya Shillings Eighty One Million Five Seventy Four Thousand Six Thirty One Hundred (Kshs. 81,574,631/-) as damages for loss of income and the unlawful demolition of the Plaintiff's wall, gate and electrical alarm wiring. Being aggrieved by the said decision, on 15th April, 2021, the Defendant filed a Notice of Appeal dated 14th April, 2021 expressing its intention to challenge the said Judgment before the Court of Appeal.
3. While this was taking place, the Plaintiff proceeded to file a Notice of Motion application dated 30th November, 2021 seeking to allow the Plaintiff and its tenants access to sub-division number 735(original number 626/7) of section VMN Mombasa under Title Number C.R.18624 and sub-Division Numbers 730 to 734 through the frontage abutting the Nairobi-Mombasa Highway.



4. Subsequently, with regard to the preferred appeal, on 26th April, 2024, the Court of Appeal delivered its Judgment in “Civil Appeal No. E051 of 2021: Kenya National Highways Authority –v– Mistry Premji Gangji (Investment) Limited” upheld the judgment delivered in this Court save for the award of special damages and general damages.
5. Pursuant to this, the Defendant filed a Notice of Motion application dated 18th April, 2024 seeking to:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. This Honourable court pleased to issue directions once the Judgment of the court of Appeal in Civil Appeal No. E051 of 2021 Kenya National Highways Authority v Mistry Premji Ganji (Investments) Limited is delivered.
 - e. That the Honourable Court be pleased to issue further or better orders as shall meet the ends of justice.
 - f. That costs be in the cause.
6. By the consensus of the parties and being confronted by the two pending interlocutory application by the Plaintiff and the Defendant respectively, it was agreed and indeed the Honourable Court conducted a Site Visit (“Locus in Quo”) and a prepared its report. The said report is part of this Ruling for ease of reference.
7. Thus, it was a result of this brief background that the Honourable Court has been tasked on providing pragmatic and robust direction on how these proceedings would be managed by this Honourable Court going forward in the fullness of time and in given the surrounding facts, circumstances and inference of the matter hereof.

II. Analysis and Determination

8. I have keenly assessed all the filed pleadings, the oral submissions tendered and lately the Site Visit (“Locus in Quo”) conducted by the consensus and in the presence of all parties.
9. For the Honourable Court to be in a comfortable position to provide an informed, fair, reasonable and Equitable direction it has condensed the subject matter into the following three (3) salient issues. These are:-
 - a. Whether this Honourable Court has any jurisdiction to continue hearing and making any further determination over the subject matter.
 - b. Whether the parties herein are entitled to any reliefs sought from the filed two applications.
 - c. Who will bear the costs of the two applications.

Issue No. a). Whether this Honourable Court has any jurisdiction to continue hearing and making any further determination over the subject matter.

10. Before embarking on the issues under this Sub – heading, as already indicated a Site Visit was conducted with the concurrence of the parties. Thus, its critical to share the report from the said visit and which has had a major influence to the Court arriving at this decision herein.

The Site Visit Report



Republic Of Kenya

In The Environment And Land Court

At Mombasa

Elc. 106 Of 2015

Site Visit Report At Kwa Jomvu Held On 24Th May, 2024 At 11.10 A.m.

I. Introduction.

The team arrived at the site at 11.10 am. It was a distance of approximately 20 kilometres from Mombasa town. It is towards the Changamwe and the Moi International airport. The session assembled and it started with a word of by one of the members. Introductions were conducted and the purpose of the visit was explained by the Judge. The visit commenced in earnest and several observations were made. Eventually, this reports was prepared.

II. The Court:

1. Hon. Justice L.L. Naikuni, ELC No. 3.
2. Firdaus Mbula – The Court Assistant.
3. George Omondi – Usher.
4. John Mwaniki – Driver.

III. The Plaintiffs

1. Mrs. Akwana Advocate for the Plaintiff.
2. Mr. Suresh Patel – the Plaintiff & Proprietor.
3. Mr. Salim Kassim – The Manager.
4. Mr. Eric Onyango – A Tenant – Signon.

IV. The Defendant

1. Mr. Muganda, Advocate for the Defendant.
2. Eng. Antony Omach – KENHA.
3. Eng. Godwill Odhiambo – KENHA, Highway Engineer.
(hereinafter referred to as “The Team”)

V. The Security operatives.

1. Insp. Crispus Maingi.
2. Corprol Gari.
3. Corprol Mwamburi – Driver

VI. The Purpose for the Site Visit.

The Court informed the team the purpose of the site visit (“Locus in Quo”). It indicated that this was pursuant to a Court order made on 15th May, 2024 in accordance with the provision of as Section 173 of the *Evidence Act*, Cap. 80;



Order 18 Rule 11 and Order 40 Rule 10 of the *Civil Procedure Rules, 2010*.
The provisions of Order 18 Rule 11 of *Civil Procedure Rules*, to wit:-

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

While Order 40 Rule 10 (1) (a) provided to wit:-

“The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-

- a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.

By consensus of the parties, it was agreed that Site Visit be conducted led by the team itself and no experts. It was noted that the site visit was not with a view of gathering further evidence on the case but to make observation on matters on the ground so as in the long run assist Court in its decision making functions and/or process. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.

Hence, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

VII. The Procedure.

It was agreed by consensus that Mr. Suresh Patel and Engineer Odhiambo from both sides of the team to be the appointed as team leaders for purposes of this Site Visit.

VIII. The Observations

The team was able to draw the following observations. These were:-The evidence in form of diagrams and maps filed in court were is not adequate by consensus. Thus, by consensus, it was agree there would be need to use the ones that each party had in their possession. It was agreed that parties would be at liberty to formally file them in Court in due course.The location was rather crowded and congested. The on going construction of the main road has caused it to appear rather unplanned. It was surrounded by several industrial set ups and some commercial buildings; yards full of metallic containers for ferrying shipping and inland goods. The team also notices that there



were a few temporary shanties used for residential places within the vicinity. The site was an open huge yard. It occupies approximately three to four acres of land. There were highly built and strong structures using heavy metallic materials and high density iron sheet. The constructed structures were huge go – downs or warehouses used for storing and/or safe keeping of several commercial goods such as soap detergents; sodium sulphate and so forth. The outer part was used as a yard for parking heavy vehicles. It would accommodate approximately ten trucks and their trailers. The team was able to see only two of them. Currently, the yard had only one gate. Initially, the team learnt that there used to be twin gates serving the yard. One was at the front side (which still existed) and another at the back. The Plaintiff appeared extremely passionate about this issue – of bearing two gates serving the yard. However, the team learnt and was evident from the concrete wall that the one at the back was blocked when part of the perimeter wall was demolished allegedly by KENHA on the grounds that it blocked the flyover bridge adjacent to the yard and smooth passage of vehicular traffic. The team learnt that the Government was in the process of acquiring the Plaintiff's land through the compulsory land acquisition pursuant to the provision of Article 40 (3) of the *Constitution* of Kenya, 2010 and sections 1010 to 118 of the *Land Act*, No. 6 of 2012. The team was informed and shown from the maps the plans for expansion of the road by utilizing the land belonging to the Plaintiff. This was confirmed by the Plaintiff. The notice had been published in the Kenya Gazette and the inquiry stage conducted. An award for compensation had been made. The valuation of the land which was to be take away he had been undertaken and shared with KENHA, the procuring agent and the finances for compensation were now remitted and were kept in an account held by the National Land Commission as was required by law. The Plaintiff informed the team that negotiation between KENHA and himself for the full and adequate compensation to be in accordance with the valuation report had been the only sticky and thorny issue. It had been going on for several years now. There was still a disagreement on the issue of figure. KENHA is



willing to pay a sum of Kenya Shillings Twenty Nine Million Six Hundred (Kshs. 29, 600, 000.00/=) while his valuation was worth a sum of Kenya Shillings Thirty Million (Kshs. 30, 000, 000.00/=). There were high prospects on exploring an out of Court settlement time being of essence. The team learnt that the negotiations had protracted for such a long time. The more time it took, the more KENHA continued incurring expenses and financial liability from the EXIM bank where it had borrowed the loan. The team learnt that the front part belonged to KENHA. The Plaintiff wished to be allowed to develop a second gate on the lower side of the property. He argued that would increase efficiency within the yard. It would make traffic flow smooth and efficient. But KENHA were totally in objection to such development taking place. According to them, these would increase heavy traffic and which was susceptible to a road management nightmare and even frequent accident. Thus, it was this particular issue and which was still pending in Court that the Plaintiff and the Defendant wished the Honourable Court to adjudicate on and make a final determination on as parties had completely failed to mutually agree on despite all efforts made to resolve it.

IX. The Directions

At the conclusion of the Site Visit, the Honourable Court provided the following directions:-

- a. That the Honourable Court to prepare and share the draft Site visit report in due course. That parties were granted leave to each file their documents within the next three (3) days
- b. That parties granted leave to file and exchange 2 page skeletal arguments on the issues raised from the application.
- c. That the Honourable Court to render its Ruling on the issues at hand on 19th June, 2024.
- d. That in the meantime, the parties were encouraged to engage in an out of negotiation with a view of arriving an amicable solutions which was in tandem with the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Section 20 (1) and (2) of the Environment & Land Court Act.

The Site Visit Report Signed And Dated At Mombasa This 12th day Of June .2024

.....

Hon. Justice L. L. Naikuni



11. As it is now well established, Jurisdiction is everything, and where a court or tribunal lacks jurisdiction, it cannot proceed with the matter but down its tools. Jurisdiction means a courts power to decide case or issue a decree. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. See the celebrated case of “Motor Vessel M.V. Lillians (supra) at page 10” where Justice Nyarangi as he then was stated:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

“The purpose of Sub- Judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter-----When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to “Jurisdiction must be acquired before judgment. It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited...the moment the court determines that it has no jurisdiction it has to down its tools and proceed no further.”

16. Additionally, still on the same point, in the case of “County Government of Migori –v INB Management IT Consultant Limited (2019) eKLR” whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

“10- The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-“Hon (Lady) Justice Kalpana H RawalJudicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama –v Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-

“.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is



granted and fundamental in adjudication and has to be dealt with first and foremost.....”.

12. The Supreme Court the case:- “*in the Matter of Interim Independent Electoral Commission* [2011] eKLR” held as follows:-

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution* , by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ - v Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution* .

13. I emphasise that the issue of jurisdiction is key since without jurisdiction a court has no powers to proceed to entertain the matter and it has to down its tools. The jurisdiction of the ELC Court is limited by Article 162(2) and (3) of the *Constitution* of Kenya and Section 13 (2) of the *ELC Act* No. 19 of 2011. Article 162(2)(b) which states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land. Article 162 of the *Constitution* as read with section 13 of the Environment and Land Court expounds on the jurisdiction of this Court as follows: -

“

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution* , the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



(e) any other dispute relating to environment and land

The [Environmental Land Court Act](#) grants jurisdiction to the ELC under Section 13 (7) to do the following, thus: -

“..... to make any order and grant any relief as the Court deems fit and just including: -

- (a) Prerogative orders
- (b) Award of damages
- (c) Compensations
- (d) Specific performance
- (e) Restriction
- (f) Declaration or
- (g) Costs.”

14. As stated the broad jurisdiction of the ELC Court is donated by Article 162 (2) (b) which provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Counsel went on to submit that Parliament indeed enacted the [Environment and Land Court Act](#), 2011. On the same breath, the supreme court rendered itself in the case of “[Samuel Kamau Macharia & An. -v KCB and 2 Others](#) Supreme Court Civil Application no. 2 of 2011 that a court’s jurisdiction flows from either the [Constitution](#) or legislation or both. In this case.....
15. Accordingly, it is my humble assertion immediately after the pronouncement of the Court vide its Judgement and that by the Court of Appeal over the same subject matter this Honourable Court finds that it lacks statutory jurisdiction to hear this case any further. Ideally, it will proceed to strike out the two applications but without costs.

Issue No. c). Whether the parties herein are entitled to any reliefs sought from the filed two applications.

16. Under this sub – heading, after the elaborate deliberations above stated, the issues at hand becomes rather straight forward to tackle. In a nutshell, I hold that this Court has become “functus Officio”. A court is functus when it has performed all its duties in a particular case. However, 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.
17. The [Black's Law Dictionary](#), Ninth Edition defines the describes 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.”



18. The rule of *functus officio* has exceptions. According to the provision of Section 99 of the [Civil Procedure Act](#), Cap. 21 establishes the slip rule and it provides that: -
- “Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
19. In expounding on the *functus officio* doctrine, the Supreme Court of Kenya in the case of: “[Raila Odinga & Others –v IEBC & others](#) [2013] eKLR” cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law (2005) 122 SALJ 832”, which is in the following words-
- “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 Court of Appeal has already rendered itself on the matter at hand. The essence of the doctrine of *functus officio* is to give finality to the adjudication of matters. In the case of “*Jersey Evening Post Limited –v Al Thani* (2002) JLR”, which case was cited by the Supreme Court in the case of “[Raila Odinga & 2 Others –v Independent Electoral and Boundaries Commission & 3 Others](#) (*Supra*)” the Court held as follows: -
- “.....A court is *functus officio* 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 or adjudication must be taken to a higher court if that right is available...”
21. In the Court of Appeal decision 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”, cited by LA Achode J. in the other case of “[Re Estate of Kinuthia Mahuti \(Deceased\)](#) Miscellaneous Application P&A No. 158 of 2017, 2018 eKLR”, the Court of Appeal (Githinji, Karanja and Kiage JJA) observed 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...”
22. Based on the above authorities, this Court finds that it cannot determine the said application which involve a judgment that the Court has already determined and one that was appealed against and determined by the Honourable Court of Appeal and for which the court is, therefore, “*functus officio*”.



ISSUE No. c). Who will bear the costs of the two applications.

- 23. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of any legal action or proceedings in any litigation. Section 27 of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By event it means the outcome of the legal action thereof.
- 24. In the instant case, the parties basically sought to be granted directions of the Court after the pronouncement of the Judgements by the two Courts. I strongly feel it would be unreasonable and unfair to cause any party to bear any costs whatsoever in the given circumstances.

III. Conclusion & Disposition

- 25. In conclusion, having conducted an intensive analysis of the framed issues herein, on preponderance of probability, the Honorable Court proceeds to make the following orders.
 - a. That the Notice of Motion application dated 31st November 2021 and Notice of Motion application dated 18th April, 2024 herein are struck out.
 - b. That this Honourable Court being “functus officio” can only deal with the issue of costs and any other issue that does not touch on the Judgment.
 - c. That each party to bear their own costs.

It Is So Ordered Accordingly.

CONCLUSIONS

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2024.

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**HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mrs. Akwana Advocate for the Plaintiff.
- c. Mr. Muganda Advocate for the Defendant

