Bandari Investments & Co Limited v Chiponda & 139 others (Environment & Land Case 16 & 160 of 2021 (Consolidated)) [2024] KEELC 6490 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6490 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 16 & 160 OF 2021 (CONSOLIDATED)

LL NAIKUNI, J

SEPTEMBER 24, 2024

BETWEEN

BANDARI INVESTMENTS & CO LIMITED ..... PLAINTIFF

AND

MARIN CHIPONDA & 139 OTHERS & 139 OTHERS & 139 OTHERS & 139 OTHERS & 139 OTHERS ..... DEFENDANT

RULING

I. Introduction

1. The Honourable Court has been tasked to hear and make determination on the filed Amended Notice of Motion application dated 31st May, 2024. It was instituted by Francis Randugu and Kazungu Katana Kazia, the 1st and 2nd Defendants/Applicants herein. The Application was brought under the provision of Rules 4, 16, 46 & 77 of the *Appellate Court Jurisdiction Act*, Cap. 9.

2. Upon service of the Notice of Motion application there was a response by the Plaintiff through grounds of opposition dated 2nd July, 2024 and a Notice of Preliminary Objection dated 5th July, 2024 opposing the said application hereof.

II. The Applicants case.

3. T he Applicants sought for the following orders:-

    a. That the Honourable Court is invited to grant leave to amend the Notice of Appeal to separate the notices as shown in the annexed notices of appeal.

    b. That the Honourable Court be pleased to make consequential orders and give directions as to issue and service of amended notices.

c. That the Honourable Court be pleased to extend time to issue and serve the amended Notices of Appeal separately.

d. That the costs of the application be in the cause.

4. The application is premised by the grounds, testimonial facts and the averments made out under the 8 paragraphed supporting affidavit of Mr. Francis Randugu [as Legal Representative of the estate of the late Martin M. Chiponda] and Kazungu Katana Kazia, the Defendants herein with one (1) annexture marked as "A" annexed thereto. He averred thus: -

a. They were dissatisfied with the Judgement delivered on 23rd April, 2024 by this Honourable Court, Hon. Naikuni J., therefore they instructed the Learned Counsel to file a Notice of Appeal against the said decision.

b. The current Notice of Appeal was joint. It was necessary and convenient to separate them to avoid the embarrassment that may ensue if one of the joint Appellants were to refuse or fail to prosecute the intended appeal.

c. The error was curable and thus could only be corrected by an amendment of the notice of appeal with leave of court.

d. They would like to appeal to the decision of the Court of 23rd April, 2024 separately.

e. The two Civil cases being [MSA ELC No. 16 of 2021 and MSA ELC No. 160 of 2021] were tried together yet they were not consolidated. Judgement was then entered in [MSA ELC NO.16 of 2021] yet one matter [MSA ELC No. 160 of 2021] in which eviction orders were granted Ex - Parte was not ready for trial.

f. The Respondents had not filed and served notice of address for service and the proposed amendment would only serve to clarify the separate intentions to appeal and would not occasion the Respondents any prejudice or inconvenience.

g. The court had the discretionary power to grant these orders in the interest of justice

h. The separation of the notices of appeal would be convenient to avoid the embarrassment that may ensue if one of them were to refuse or fail to prosecute the intended appeal.

III. The Plaintiff's case

5. The Plaintiff opposed the application through a Six (6) Paragraphed Grounds of Opposition dated 2nd July, 2024. These were as follows:-

a. The Applicant's Application is bad in law as this Honourable Court lacks the requisite jurisdiction to grant the relief sought.

b. The application dated 31st May 2024 cannot be handled by this Honourable Court, as it is functus officio.

c. This Honourable Court cannot grant orders to amend a Notice of Appeal as it is a primary document and cannot lend itself to an amendment.

d. The Notice of Motion application dated 31st May 2024 is therefore misconceived and improperly before this Honourable Court, as it seeks reliefs this Court is not empowered to grant.

e. The time to file Notice of Appeal has lapsed, the applicant has decided to use mischievous ways to introduce another appeal. The proposed Notices of Appeal are frivolous, vexatious and an abuse of Court as it seeks to introduce an entirely new appeal by another party.

f. The application is for dismissal.

6. As indicated, the Plaintiff also filed a 4 paragraphed Preliminary Objection dated 5th July, 2024 on the grounds that:-

a. No Notice of Appeal had been filed in the Civil Case ELC No. 160 of 2021 and consequently there was no Notice of Appeal to amend in this file

b. If the Defendants were aggrieved by the decision in so far as it related to this matter, to wit, ELC No. 160 of 2021 then they should be filed as Notice of Appeal within the time presented by law.

c. The Defendants had not served the application dated 31st May, 2024 on the Defendants' Counsel and they only bumped into the same on 6th July, 2021.

d. It was clear from perusal of the Notice of Motion dated 31st May, 2024 that it was not the intention of the Defendants to serve the application on the Plaintiff's advocates.

IV. Submissions

7. On 9th July, 2024 while in the presence of all the parties, the Honourable Court directed that the Notice of Motion application dated 31st May, 2024 be canvassed by way of written submissions with given stringent timelines. All parties complied and the Court reserved a date for delivering of Judgement on 24th September, 2024 or all facts remaining constant earlier on notice.

V. Analysis and Determination

8. I have carefully read and considered the filed pleadings by all parties in light of the entire record and the relevant provision of *the Constitution* of Kenya, 2010 and the Statures. In order for the Honourable Court to arrive at an informed, just, fair and reasonable decision, I have distilled the three (3) issues for determination are: -

a. Whether the Notice of Preliminary objection meets the threshold founded under the Law and Precedents.

b. Whether the Honourable Court has the powers amend the Notice of Appeal?

c. Whether this Honourable Court has become "functus officio" as result.

d. Who bears the costs of the application and the objection.

Issue No. a). Whether the Notice of Preliminary objection meets the threshold founded under the Law and Precedents.

9. Under this sub title, first and foremost, the Honourable Court will indepth deliberate on the legal efficacy and viability of the Notice of Preliminary objection and whether it is merited. To begin with and as it has now become trite law whenever an objection is raised, it has to be granted precedence before dealing with any other proceeding thereof. Further, the case of "*Mukisa Biscuits Manufacturing*

Limited – Versus - West End Distributors (1969) EA 696" is extremely clear and rather notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

> ".....a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".
>
> In the same case Sir. Charles Newbold, P. stated:
>
> "a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

10. Before the court embarks on determining the merit of the notice of preliminary objection, it has to first determine whether what has been raised herein satisfy the ingredients of a preliminary objection. The Court will also be persuaded by the findings in the case of "*Oraro – Versus – Mbaja* (2005) 1 KLR 141", where the Court held that: -

> "Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence".

11. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable. An objection to the sustainability of an application has to be one where the court has to examine. The Plaintiff has contended that no Notice of Appeal has been filed in ELC No. 160 of 2021 and consequently there was no Notice of Appeal to amend in this file. The Plaintiff contended that if the Defendants were aggrieved by the decision in so far as it relates to this matter, to wit, ELC No. 160 of 2021 then they should be filed as Notice of Appeal within the time presented by law.

12. Further, that the Defendants had not served the application dated 31st May, 2024 on the Defendants Counsel and they only bumped into the same on 6th July, 2021. It was clear that the Defendants did not intend to serve them. Arising from the above, it is not in doubt that a preliminary objection ought to raise a pure point of law, which is argued on the assumption that all facts pleaded by the other side were correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. Further, in the case of "*Quick Enterprises Limited – Versus - Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999", the Court held that: -

> "When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."

13. It is this court's opinion that in determining a preliminary objection, the court will also take into account that the preliminary objection must stem from the pleadings and raise pure point of law. See

the case of "*Avtar Singh Bhamra & Another – Versus - Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004", where the court held that: -

> " A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

14. My examination of the preliminary objection shows that the grounds raised are grounds not raised on a point of law. The Plaintiff has not cited any law that warrants the grant of the orders they seek. Consequently, the Court finds and holds that the Notice of Preliminary Objection is not merited and the same is dismissed.

Issue No. B. Whether the Honourable Court has the powers amend the Notice of Appeal

15. Under this sub - title, the Court shall examine if it can determine an application for an amendment of a Notice of Appeal meant to appeal against its own decision and having been filed in the Court of Appeal already. The Applicants contend that they were dissatisfied with the Judgement delivered on 23rd April, 2024 by this Honourable Court, through Hon. Naikuni J. Thus, they instructed their Legal Counsel to file a Notice of Appeal against the said decision. The current Notice of Appeal was joint. It was necessary and convenient to separate them to avoid the embarrassment that may ensue if one of the joint Appellants were to refuse or fail to prosecute the intended appeal. The error was curable and thus can only be corrected by an amendment of the notice of appeal with leave of court.

16. They would like to appeal to the decision of Court of 23rd April, 2024 separately. The two civil cases [MSA ELC No. 16 of 2021 and MSA ELC NO. 160 of 2021] were tried together yet they were not consolidated. Judgement was then entered in [MSA ELC No.16 of 2021] yet one matter [MSA ELC NO. 160 of 2021] in which eviction orders were granted ex-parte was not ready for trial. The Respondents had not filed and served notice of address for service and the proposed amendment will only serve to clarify the separate intentions to appeal and will not occasion the respondents any prejudice or inconvenience. According to the Applicants the Court had the discretionary power to grant these orders in the interest of justice.

17. From the records, this Honourable Court rendered its Judgment on 23rd April, 2024. The Applicants have brought the application under Rules 4, 16, 46 & 77 of the Court of Appeal, 2021. Rules 16 (1) and 44 of the Court of Appeal Rules, 2010 provides for form of amendments and applications for leave to amend and provides thus:-

> 16. Form of amendments
>
> 1. Where any person obtains leave to amend any document, the document itself may be amended or, if it is more convenient, an amended version of the document may be lodged.
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> 44. Applications for leave to amend
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> 1. Whenever a formal application is made to the Court for leave to amend any document, the amendment for which leave is sought shall be set out in writing and, if practicable, lodged with the Registrar and served on the respondent before the hearing of the application or, if that is not practicable, handed to the Court and to the respondent at the time of the hearing.

18. The governing rule is Rule 46 of the *Court of Appeal Rules*. It states that:-

> " Whenever a formal application is made to the Court for leave to amend a document, the amendment for which leave is sought shall be set out in writing and –

a. If practicable to lodge the document with the registrar, and served on the respondent before the hearing of the application; or

b. If it is not practicable to lodge the document with the registrar, handed to the court and to the respondent at the time of the hearing...

19. The intended appeal is not one filed in this Court. On the contrary, it is one filed against the decision of this Court. Whether or not to grant the application under consideration is a discretionary power which should none the less be exercised judicially, on a balance of convenience after considering the prejudice likely to be to be occasioned to the respondents by allowing the application, or the applicant, if the application is declined.

20. The Plaintiff in their grounds of opposition contended that the Applicants' application was bad in law as the Honourable Court lacks the requisite jurisdiction to grant the relief sought. The Plaintiff also argued that the application dated 31st May 2024 cannot be handled by this Honourable Court, as it is "functus officio". Ideally, post Judgement the determining Court or legal fora has very limited role to play lest its perceived to be sitting on its own appeal. For instance, the Court may deal on issues of granting leave to appeal or stay of execution pending the hearing of an application or appeal. However, the notice of appeal is a legal instrument pre – dorminantly under the purview of the Court of Appeal as it is in this case hereof. Legally speaking, this Honourable Court cannot grant orders to amend a Notice of Appeal as it was a primary documentt and could not lend itself to an amendment. The Notice of Motion application dated 31st May 2024 is therefore misconceived and improperly before this Honourable Court, as it seeks reliefs this Court is not empowered to grant.

21. For this reason, therefore, I am inclined to agree with the Plaintiff, the Notice of Appeal the Applicants intend to file was filed in the Court of Appeal against the decision of this Court. Therefore, it follows that this Honourable Court has no jurisdiction to determine the application for amendment of a document intended to challenge its decision.

Issue No. c). Whether this Court is functus officio

22. This court already penned down on this issue when it delivered its Judgment earlier this year. 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."

23. The doctrine of functus officio was considered by the Court of Appeal in "*Telkom Kenya limited – Versus - John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR", where the court 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."

24. In the case of:- "*Telkom Kenya Limited – Versus - John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Limited* (Supra)", the Court of Appeal held as follows on the functus officio doctrine: -

> " 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--

> The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions. ---"

25. The Supreme Court of Kenya in the case of "*Raila Odinga & 2 Others – Versus - Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR", 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 which reads: -

> " 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."

26. The provision of Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of functus officio in the following terms-

> " 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."

27. It is clear that the doctrine of functus officio does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein. In this instant though it will be misdirection to itself if the Court accommodates the Applicants and determine the application.

28. The Applicants have filed an application seeking to amend their notice of appeal to the Court of Appeal. The Plaintiff has asserted in its grounds of opposition that this Court upon delivering the judgment on 23rd April, 2024, became "functus officio". I hold that the provisions of of the *Civil Procedure Act* can not apply to the application which is meant to bring raise to the challenging of its own decision. It is the opinion of this Court in this present case it is functus officio.

Issue No. d. Who will bear the costs of the objection and the application?

29. The issue of Costs is the discretion of Court. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

30. The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. In the case of: "*Reids Heweet & Company – Versus – Joseph* AIR 1918 cal. 717 & *Myres – Versus – Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-

> " The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action,

the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

31. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. Nonetheless, in the instant case, the Court reserves the discrection not to award costs.

VI. Conclusion and Disposition

32. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities that in this instant application its hands are tied. Thus, the Court proceeds to make the following specific orders:

    a. That the Notice of Preliminary Objection dated 5th July, 2024 be and is found to lack merit thus hereby dismissed entirely.

    b. That the Notice of Motion application dated 31st May, 2024 be and is hereby struck out for the reason that the Court is "functus officio".

    c. That the Honourable Court on the issue of the appeal and the amendment of the Notice of Appeal is functus officio.

    d. That there shall be no orders as to costs.

    It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH 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:-

M/s. Firdaus Mbula – the Court Assistant.

Mr. Wameyo Advocate for the Plaintiff in ELC No. 160 of 2021.

Mr. Wameyo Advocate holding brief for Mr. Munyithya Advocate for the Plaintiff in ELC No. 16 of 2021.

Mr. S. M Kimani Advocate for the 1st and 18th Defendants in the ELC No. 16 of 2021 and Defendants in the ELC No. 160 of 2021.

Mr. Mkan Advocate for the 19th to 132nd Defendants.

Mr. Kimei Advocate for the 140th Defendant.