



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 225 OF 2017**

**MICHAEL KINYUA MUTUNGI & 6 OTHERS.....CLAIMANT/APPLICANTS**

**VERSUS**

**VIL LIMITED.....RESPONDENT**

**AND**

**ROBIN MWENDA KAUMBUTHU T/A MWENDA KAUMBUTU & CO. ADOVATES...1<sup>ST</sup> CONTEMNOR**

**STEPHEN KIMANI T/A KINYURU MERCHANTS AUCTIONEERS.....2<sup>ND</sup> CONTEMNOR**

**MICHAEL KIPRUTO KANDIE T/A EMINING QUARRY LIMITED.....3<sup>RD</sup> CONTEMNOR**

**KEVIN NZIOKA T/A SKYVIN LIMITED & ASOP ENTERPRISES LIMITED.....4<sup>TH</sup> CONTEMNOR**

**ERIC MWENDA KANYURU T/A SYDNEY PRIDE (K) LIMITED.....5<sup>TH</sup> CONTEMNOR**

**RULING**

1. Before court is the Applicants' application dated 3<sup>rd</sup> February, 2022, seeking reinstatement of their application dated 28<sup>th</sup> September, 2021 and thereafter, that the same is fixed for hearing on priority basis. The application is supported by grounds on the face of the record and the affidavit sworn by **Jackson Mulilu**, one of the Applicants on even date.

2. The Applicants aver that on 30<sup>th</sup> November, 2021, when the application was coming up for hearing, the Counsel on record experienced technical hitches arising from a faulty internet connectivity with the effect that he was logged out of the online hearing system. The Applicants further avers that the hearing proceeded in their Counsel's absence leading to the dismissal of their application of 28<sup>th</sup> September 2021, and which they now seek that it be reinstated.

3. The application was heard interparties on 21<sup>st</sup> March, 2022, where Counsel for the Applicants sought that the court reviews her orders of 30<sup>th</sup> November, 2021. It is Counsel's further submission that the application was dismissed based on a Preliminary Objection heard *ex parte* and were never heard on the objection.

4. The application is premised on Sections 12, 16 and 20 of the Employment and Labour Relations Court Act, and specifically on the proviso to Section 16(3) which allows parties affected by an *ex parte* order to apply to set the order(s) aside.

5. The 1<sup>st</sup> Contemnors did not oppose the application. The 3<sup>rd</sup> and 4<sup>th</sup> Contemnors opposed the application vide a notice of Preliminary Objection dated 17<sup>th</sup> March, 2022, wherein they argue that the court having pronounced itself on the Preliminary Objection dated 15<sup>th</sup> November, 2021, leading to the dismissal of the application, is *functus officio* and *res judicata* and cannot therefore pronounce itself on the application.

6. The 3<sup>rd</sup> and 4<sup>th</sup> Contemnors further opposed the instant application on the ground that the application offends Section 7 of the Civil Procedure Act for reason of being *res judicata*. It is argued that the application sought to be reinstated was dismissed through the upholding of the Preliminary Objection dated 15<sup>th</sup> November, 2021, which objection sought to dismiss that very application.

## Determination

7. I have considered the application together with the affidavit and the grounds in support thereof, the Counsels submissions, and the Preliminary Objection in opposition. The issues for determination are:

- i. Whether the court is functus officio
- ii. Whether the application is res judicata
- iii. Whether the Applicants are entitled to the prayers sought.

### Whether the court is functus officio

8. The 3<sup>rd</sup> and 4<sup>th</sup> Contemnors' position is that they lodged a Preliminary Objection which sought the dismissal of the Applicants application of 28<sup>th</sup> September, 2021, and which objection was upheld. They further argue that by dint of upholding the objection, the court had made a final decision resulting in the dismissal of the application, and is thus functus officio and cannot reinstate the application.

9. The Applicants' on their part, argue that the Objection was not heard on its merit as the same was heard ex parte and that the court did not deliver a judgment so as to render it functus officio. It is further argued for the Applicants that Section 16 gives the court power to review its decisions.

**10. Functus officio, is defined in *Black's Law Dictionary, Ninth Edition* 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.”**

11. The doctrine of functus officio is generally meant to bring finality, certainty and orderliness to the legal process by enforcing a cutoff point. It lends finality to the conduct of proceedings by marking a definitive endpoint to it.

12. Functus officio only kicks in when a final and valid decision is made. Upon the rendering of a final and valid decision, the decision-maker is enjoined from reconsidering the decided matter and rescinding or varying the decision in any manner.

13. The question for this court then becomes whether or not its decision was final and valid as to render it functus officio as far as the application that is sought to be reinstated is concerned.

14. A court decision(s), becomes final when a formal judgment or order is drawn up, issued and entered. Where the proceeding that culminated in the decision was tainted by a breach of natural justice or procedural fairness, then the decision is not valid and the decision-maker ought to start afresh.

15. The Applicants in my view have successfully disputed the validity of the decision rendered herein, for reason that the decision was entered on the basis of a technicality, to wit, non-attendance of the Applicant's Counsel. No ruling was made on the merits of the Preliminary Objection as to render the court functus officio. In the case of *Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550 the court held that:*

***“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.”***

16. I find and hold that the Preliminary Objection in opposition to the instant application does not meet the threshold for the bar of the doctrine of functus officio.

### Whether the application is res judicata

17. The doctrine of *res judicata* is anchored on Section 7 of the Civil Procedure Act. The Court of Appeal in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR* set out the elements that must be satisfied for the bar of *res judicata* to be effectively raised and upheld in the following words:

- “a. the suit or issue was directly and subsequently in issue in the former suit.***
- b. the former suit was between the same parties or parties under whom they or any of them claim.***
- c. those parties were litigating under the same title***
- d. the issue was heard and finally determined in the former suit.***
- e. the court that formally heard and determined the issue was competent to try the subsequent suit in which the issue is raised.”***

18. The issues in the application of 28<sup>th</sup> September, 2021 were issues of contempt of court, while the instant application is one for reinstatement of the application of 28/9/2021. Secondly, the suit in which the two application arise is the same suit and not two different suits filed between the same parties. Finally, the issue in the objection and the application of 28/9/2021, were not finally determined for the reason that the objection was allowed on the premise of non-attendance of the Applicants' Counsel hence on technicality and not on the merits.

19. For the reasons foregone, I find and hold that the application subject of this ruling is not *res judicata* and the preliminary Objection by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents/Contemnors, fails and is dismissed.

20. The Respondents only objection to the application of 3<sup>rd</sup> February, 2022, were the two grounds of the preliminary objection that have failed. There being no other opposition to the application, the same is hereby allowed with the effect that the orders of this court issued on 30<sup>th</sup> November, 2021, are hereby reviewed and set aside, and the Applicants' application dated 28<sup>th</sup> September, 2021, reinstated and the same will be set down for hearing on priority basis.

21. Costs shall abide the application.

22. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21<sup>ST</sup> DAY OF APRIL, 2022.**

**CHRISTINE N. BAARI**

**JUDGE.**

**Appearance:**

Mr. Makori present for the Claimant/Applicant

Mr. Mwenda one of the Respondent present in person

Mr. Khamala present for the 3<sup>rd</sup> & 4<sup>th</sup> Respondents/Contemnors

Ms. Christine Omollo-C/A