



**Abed v Salim (Environment and Land Appeal E016 of 2023)
[2024] KEELC 7122 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7122 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E016 OF 2023
NA MATHEKA, J
OCTOBER 30, 2024**

BETWEEN

ABDULNASSIR SAID ABED APPLICANT

AND

ABDULRAHIM ALI SALIM RESPONDENT

RULING

1. The application is dated 14th June 2024 and is brought under section 13(1), (2) (e), (7)(a) (14) and 19 of the [Environment and Land Court Act](#) no. 19 of 2011. Section IA, 1B of the [Civil Procedure Act](#) and Article 159 of [the Constitution](#) of 2 Kenya seeking the following orders;
 1. That the matter herein be certified urgent and heard ex parte in the first instance.
 2. That leave be granted to the firm of Opolu & Company Advocates to come on record for the Applicant after Judgement.
 3. That there be a Preservation order by way of interim or Temporary stay of execution of the Judgement and Decree of this court issued on 24th April, 2024 pending hearing and determination of this application inter partes.
 4. That the Honourable Court be pleased to vary or vacate its Orders number 3 in the Judgement herein which states:

The Respondent to hand over vacant possession of business premises situated on plot no. 010860, Kongowea, Mombasa within the next 60 days from the date of this Judgment, and extend the compliance period for handing over vacant possession of the premises by 24 months from the 24th day of June, 2024 to 24th June 2026.
 5. Any other order that the court may deem as just and proper in the circumstances.



6. That the costs of this application be in the cause.
2. It is premised on the following grounds that the execution of the Judgement of the court herein is imminent and by the 24th day of June, 2024 the applicant faces imminent danger and risk of eviction from the suit premises pursuant to the Judgement/ Decree and consequential orders of the court in the said Judgement. The suit premises are being used for purposes of sale and distribution of butchery products such as meat, fish, and poultry. It has heavy equipment, fixtures and machinery including a cold storage room, freezers and fridge. They require time, care and proper alternative premises for relocation. That the time frame or period granted by the court in order number 3 to hand over possession within 60 days from the date of Judgement is too short and inadequate for the applicant to relocate to alternative premises. The butchery premises known as "Hawere Butchery" has heavy machinery such as freezers, generators, and cold storage room equipment and fitting and fixtures that require time and care to relocate. The applicant is in the process of sourcing suitable alternative premises and space to accommodate his business operations, machinery and equipment. The said machinery equipment and appliances cannot be stored or kept in the open as they will be exposed to vandalism, waste, and damage due to the vagaries of weather like heat rain and dust. The applicant faces imminent danger of eviction and destruction of both his machinery and equipment's leading to huge losses. He is unable to store the same in his residential home. The applicant is in the process of sourcing for and acquiring alternative accommodation for his business and upon acquiring the appropriate premises, he shall require time to prepare the same to a suitable station for the butchery business. The strict compliance requirements by the county government upon securing the new premises being a food-based business means that enough time is required before the new business premises can be licensed by the health and inspectorate department of the county government. The applicant has been in the suit premises for over 20 years and undertakes to pay the rent for the period sought without delay and shall endeavor to relocate and hand over possession as soon as he formalizes plans to acquire his own new space which are at advanced stage. The applicant seeks the intervention of the court in the interest of justice to avoid the destruction of his business which shall be catastrophic to him and his entire family as this business is his only source of livelihood. The applicant shall suffer irreparable loss if the orders sought are not granted. The applicant requires leave to appoint another advocate after Judgement. The court has jurisdiction and power to make any order and grant any relief as it deems fit in its appellate jurisdiction which includes the power to extend terms for compliance of its own orders and to stay execution of its own Judgement, orders and decree for a limited period of time for the interest of justice.
3. The respondent submitted that this court is functus officio having rendered its judgment and having already covered the issues sought to be decided in the subject Application. That the notice of termination which led to the case filed at the Tribunal and ultimately this Appeal was issued to the Plaintiff on the 19th of January 2021, hence the Respondent has had a notification for period of Three years and six months of a possibility that the tenancy would be terminated. Annexed is a copy of the notice which is hereby marked as "A". That this Court in its judgment already rendered a decision giving the Respondent two months to vacate from the subject premises and the Respondent having exhausted that period, cannot come back to Court and ask for that period to be reviewed. That he stands to be greatly prejudiced the orders sought for by the Respondent are granted as he shall be delayed and prevented from exercising his fruits of judgment despite having waited for three years and six months.
4. This court has carefully considered the application and submissions therein. The Respondent submitted that this court is functus officio having rendered its judgment and the remedy of review is



not available for the Applicant. In the case of *Mwihoko Housing Company Limited vs Equity Building Society* (2007) 2 KLR 171 is relevant. It was held, that;

"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of *Rose Kaiza Vs Angelo Mpanju Kaiza* 2009, the Court was categorical that;

"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made..."

5. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

(1). Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

6. The aforesaid rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states as follows:

"Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act.

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."



7. Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In *Court of Appeal, Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau*, the Court of Appeal held that;

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".

8. From the above provisions of the law, authorities cited and facts of this case the applicant stated that the suit premises are being used for purposes of sale and distribution of butchery products such as meat, fish, and poultry. It has heavy equipment, fixtures and machinery including a cold storage room, freezers and fridge. They require time, care and proper alternative premises for relocation. That the time frame or period granted by the court in order number 3 to hand over possession within 60 days from the date of Judgement is too short and inadequate for the applicant to relocate to alternative premises and they would require 24 months. I find that is not sufficient in this case to review my judgement on the part of execution. I note that this application was filed in June 2024 and to dated (4 months later) the Applicant is still enjoying status quo. In the case of *Telkom Kenya Ltd vs John Ochanda* (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd (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 Nazaire 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. ---"

9. The Supreme Court of Kenya in the case of *Raila Odinga & 2 Others vs 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."



10. 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.”

11. 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 as is the case herein. Having discharged its duty on this suit this court is therefore functus officio, 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.” In the circumstances, the court is wary of the Applicants’ invitation to re-engage with this dispute by extending the time for execution and their option would be to file an appeal. I find that this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF OCTOBER 2024.

N.A. MATHEKA

JUDGE

