



**Kiora (Administrator to the Estate of Joseph Tumuna) v Adan & 4 others (Environment & Land Case 108 of 2021) [2024] KEELC 7129 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7129 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 108 OF 2021  
NA MATHEKA, J  
OCTOBER 30, 2024**

**BETWEEN**

**PERIS MJOMBA KIORA (ADMINISTRATOR TO THE ESTATE OF JOSEPH TUMUNA) ..... PLAINTIFF**

**AND**

**YUSUF DAUD ADAN ..... 1<sup>ST</sup> DEFENDANT  
MESHAK KIMUTAI KETER ..... 2<sup>ND</sup> DEFENDANT  
CHEPCHUMA BETT ..... 3<sup>RD</sup> DEFENDANT  
LANDS REGISTRY MOMBASA ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL MOMBASA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The application is dated February 5, 2024 and is brought under Section 80 of the [Civil Procedure Act](#), Order 45 and Order 51 of the Civil Procedure Rules seeking the following orders;
  - a. That the Honorable court be pleased to review/vary or set aside the Judgement issued on 25<sup>th</sup> January 2024, dismissing the Plaintiffs suit due to non-production of the original title deed during the hearing of the main suit.
  - b. That costs of this Application be provided for.
2. It is based on the Affidavit of Peris Mjomba Kiora, the Applicant and on the grounds that the Applicant has applied to court to review the orders entered herein for justice to be done in this matter. That this Application has been brought without any delay. That this matter was dismissed due to nonproduction of the original title. That the Applicant is willing and able to produce the same.



3 This court has carefully considered the application and relied on the supporting affidavit. 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...”

4 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.”

5 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.”

6 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;

- 7 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 case was dismissed due to the non production of the original title but this was only part of the said analysis of the decision. It is clear from the judgement that the court found no evidence to conclude that the title had been transferred fraudulently by the Respondents. It found the evidence insufficient and stated on page 13 of the judgement that;
- 9 The plaintiff has pleaded fraud however she has failed to clearly and distinctly prove it. Fraud cannot be inferred from the facts pleaded, instead fraud must be distinctly alleged and distinctly proved. The plaintiff has made general allegations of fraud which are insufficient to amount to averments of fraud.”
- 10 Producing the document after the judgement has been rendered is not sufficient in this case to review my judgement. 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. ---”

- 11 The Supreme Court of Kenya in the case of Raila Odinga & 2 Others v 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.”

- 12 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.”

- 13 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 and their option would be to file an appeal. I find that this application is not merited and I dismiss it with no orders as to costs.

14 It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30<sup>TH</sup> DAY OF OCTOBER 2024.**

**N.A. MATHEKA**

**JUDGE**

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