



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1682 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

DR. GEORGE WEKESA..... CLAIMANT

VERSUS

MULTIMEDIA UNIVERSITY OF KENYA.....RESPONDENT

RULING

1. On 6th October 2021, the hearing date taken at the Registry, Counsel for Claimant, Miss Jerotich who was holding brief for M/s Mwongo informed the Court that she was ready to proceed with one witness. Counsel for the Respondent, Mr. Mare of Miller and Company Advocates indicated that he was not ready to proceed with the hearing for two reasons:

2. First that on 16th December 2020, the Court had rendered a ruling on the Respondent's application seeking to have the case dismissed for want of prosecution and the Court found that there had been inordinate delay by the Claimant in prosecuting the case but the Court ruled that that matter be heard on merit subject to the following sanctions –

(a) Claimant to meet the Respondent's costs herein assessed

at Kshs.50,000 to be paid within 30 days;

(b) Claimant shall move and ensure a hearing date is allocated within the next 30 days; and where there is inaction, the suit shall stand dismissed with costs as of 30th January 2021.

3. Counsel submitted that the directions of the Court were not honoured by the Claimant in that as directed by the Court and in his interpretation of the directions, the suit stood dismissed as of 30th January 2021 and there was no suit for the Court to hear. In other words the Court was *functus officio*.

4. Second, the mischievous conduct of the Claimant to delay the matter even further was exemplified by the fact that the Claimant had served upon the Respondent a bundle of documents it intended to use at the hearing. The documents are dated 4th October 2021. Counsel contended that this was intended to camouflage the design to delay the matter as long as possible because the Claimant was enjoying interim orders issued by the Court with a salary and not working of the Respondent.

5. Counsel prayed that the Court finds that the suit stood dismissed with costs on 30th January 2021 as directed by the Court on 16th December 2020.

6. Counsel for the Claimant vehemently denied the submissions by Counsel for the Respondent and responded as follows:

7. On payment of Kshs.50,000, Counsel informed the Court that cheque no 0007600 was forwarded to the Respondent's Counsel and the same was acknowledged and a receipt issued. Counsel did not disclose the date of payment or forwarding of the cheque to their counterpart.

8. On fixing of a hearing date, Counsel submitted that by a letter dated 18th December 2021, it invited the Respondent's firm for purposes of fixing a hearing date on 12th January 2021 and the letter was received on the same day. Counsel contended that around this time, most law firms are closed for the Christmas holiday. That as soon as law firms opened, they obtained the date of 29th March 2021 and served the Respondent on 21st January 2021 by electronic mail whose receipt was acknowledged by one Susan Wangechi, an Advocate at the law firm.

9. That the Respondent's Counsel sent an email intimating that that date was not convenient because Counsel had a part heard matter at the

Kajiado Law Courts and was therefore not available. Counsel added that they endeavoured and took another hearing date but the Respondent's Counsel did not appear which culminated to the current hearing date and served a hearing notice.

10. On the additional documents, Counsel informed the Court that she had called the Respondent's Counsel for his indulgence and the documents were not intended to be an ambush. An application for their admission would have been made in Court. Counsel prayed that the hearing continue since in her view the Claimant had abided by the directions of the Court.

11. She further submitted that no party should be condemned unheard and the Claimant was working for the Respondent and reported to work on a daily basis. That the Respondent's Counsels allegations were untrue.

12. In response, Counsel for the Respondent told the Court that the sum of Kshs.50,000 directed by the Court was paid on 30th March 2021, more than two months after the duration given by the Court and the Claimant did not have the matter allocated for hearing within the duration given by the Court.

13. After hearing both Counsels, the Court sought the indulgence of Counsel to scan through the ruling and the file generally to contextualize the issue for a more informed ruling in view of the submissions and the impact of finding either way.

14. It was agreed that a ruling/hearing be slated for 18th November 2021.

Analysis and Determination

15. The heart of the matter is the ruling dated 16th December 2020, where Mbaru J. expressed herself as follows: -

***“Accordingly, the application seeking dismissal of the suit for want of prosecution shall not be allowed in this instance save the Claimant shall meet the Respondent’s costs herein assessed at Kshs.50,000 to be paid within 30 days. The Claimant shall move and ensure a hearing date is allocated within the next 30 days and where there is no action, the suit shall stand dismissed with costs as of 30th January 2021.*”**

16. In my view, the two issues for determination are whether the Court is *functus officio* in this case by reason of the directions dated 16th December 2020 and depending on the outcome of the first issue; whether the claim herein stood dismissed with costs on 30th January 2021.

17. The directions resulted from an application by the Respondent seeking dismissal of the suit for want of prosecution. The Court declined the request. Counsel for the Respondent invited this Court to find that it is *functus officio* in the matter.

18. According to the **Blacks Law Dictionary, 9th Edition** *functus officio* means –

“Having performed his or her office, without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

19. The doctrine of *functus officio* was explained by the Court of Appeal in **Telkom Kenya Ltd v John Ochanda [2014] eKLR** as follows –

“Functus officio 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. Nazarre Co. (1979) 12 Ch. 12 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate jurisdiction. The rule applied only after the formal judgment had been drawn up, issued and entered and was subject to two exceptions ...”

“What it does bar is a merit based decision to re-engagement with the case once final judgment has been entered and a decree thereon issued.”

20. In **Raila Odinga & 2 Others v IEBC and 3 Others [2013] eKLR**, the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled **“The Origins of Functus Officio Doctrine with Special Reference to its application on Administrative Law (2005) 122 SALJ 832** as follows: -

“The functus officio doctrine is one of the mechanism by means of which the law gives expression to the principal 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 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 reviewed or varied by the decision maker.”

21. A similar observation was made in **Jersey Evening Post Ltd v Al Thani [2002] JLR 542 at 550 –**

“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 officio; when its judgment or order has been respected. 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.”

22. Applying the above principle to the instant case, the Court is not persuaded that it is *functus officio* in this matter for the reason that a final judgment is yet to issue in the main suit.
23. Having found that the Court is not *functus officio*, I will now delve into the next issue of whether the suit stood dismissed on 30th January 2021.
24. Counsel for the Respondent submitted that since the directions of the Court were not honoured within the time frames fixed by the Court the suit stood dismissed on 30th January 2021.
25. Counsel for the Claimant on the other had stated that the amount of Kshs.50,000 was paid by cheque no 007600 and the Respondent’s Counsel acknowledged receipt. The amount was paid after the 30 days’ period.
26. Secondly, the Claimant’s Counsel invited the Respondent’s Counsel on 18th December 2020 for purposes of fixing the hearing date on 12th January 2021. The letter was received on the same day. Counsel told the Court that around this time most law firms are closed for business. That through her firm’s efforts a hearing date was allocated on 21st January 2021. The matter was scheduled for hearing on 29th March 2021 and the Respondent’s firm was notified on the same day and acknowledged receipt. The Respondent’s Counsel subsequently intimated that the date was not convenient. Counsel further indicated that the law firm obtained another hearing date but the Respondent’s Counsel did not appear for the hearing.
27. It is common ground that the first condition was not abided by within 30 days as directed by the Court. It is also not dispute that the Claimant’s Counsel secured a hearing date within 30 days as directed by the Court.
28. According to the Claimant’s Counsel, there was action on their part and the suit did not stand dismissed on 30th January 2021.
29. In the Court’s considered view, a holistic reading of the directions is that the case would only stand dismissed if and only if the two conditions were not complied with and there was inaction on the part of the Claimant. The action as the expressed in the directions is an addition to the two conditions and all had to be taken into consideration in a determination whether the suit stood dismissed on 30th January 2021.
30. The Claimant’s Counsel demonstrated that there was action two days after the directions were issued and the same was sustained until the hearing on 6th October 2021 when the Respondent’s Counsel raised the issue, the third hearing date from 16th December 2020.
31. **The upshot of the foregoing is that the suit herein did not stand dismissed on 30th January 2021 as submitted by Counsel for the Respondent. An early hearing date be agreed upon by the parties for the matter to be heard.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF NOVEMBER 2021

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE