REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.142 OF 2015

(Before D. K. N. Marete)

EVANS MAGETO MAGATA...CLAIMANT

VERSUS

KISII UNIVERSITY COLLEGE..............................RESPONDENT

RULING

This is an application dated 8th August, 2015. It comes out as follows;

a) THAT service of this application be dispensed with in the first instance.

b) THAT pending the hearing and determination of this application, this Honourable court be pleased to issue a temporary order of stay of the letter dated 12th October 2017.

c) THAT this Honourable court be pleased to declare the letter dated 12th October 2017 and all the letters connected therewith void and order the immediate reinstatement o the Claimant/Applicant as per the terms of the consent order dated 17th December 2015.

d) THAT the costs for this application be provided for."

It is grounded as follows;

i. THAT the Claimant/Applicant was until 29th January 2015 the Respondent's employee when his services were illegally and or unprocedurally terminated.

ii. THAT upon the Claimant/Applicant filing the present cause, a consent order dated 17th December 2015 was reached which had the effect that the Claimant/Applicant was to be reinstated unto his employment with full salary and benefits.

iii. THAT vide a letter dated 14th June 2017 the Respondent with intent to defeat the effect of the said consent order purported to unilaterally vary the terms of employment from that of permanent status to a contract basis and upon seeking clarification the Claimant's services were terminated vide a letter dated 12th October 2017.

iv. THAT the effect of such a variation will render the Claimant/Applicant vulnerable to termination at the expiry of the term of contract and as a result the Claimant/Applicant will be greatly prejudiced.

v. THAT the Claimant/Applicant prays that to avoid such prejudice, this Honourable court should be pleased to declare the letter dated 12th October 2017 terminating the Claimant/Applicant's employment and all the letters connected therewith null and void and that the Claimant/Applicant should be immediately reinstated unto his employment with full salary and benefits.

vi. THAT unless the orders herein are granted the 1st Defendant/Applicant stands to suffer irreparable loss and damages.

The respondent in a Replying Affidavit sworn on 10th September, 2018 opposes the application as follows;

3. THAT the application is fatally defective, is a total abuse of the court process and ought to be refused.

4. THAT the Court having adopted the consent judgement in functus officio, since the Claimant on his own free volition invoked the court's jurisdiction to have the matter resolved by a Consent judgment entered into on 17/12/2015 which consent he was all along privy to (annexed and marked as SOI is copy of the Consent Order).

5. THAT on 25/2/2018 based on the said Consent judgment this Honourable Court upon satisfying itself that the terms of the consent had been complied with proceeded to have the marked as settled.

6. THAT the Claimant's costs were subsequently taxed on 27/9/2018 by the Deputy Registrar at Kshs.155,890/= which sum was paid to the Claimant (annexed and marked SO 2 is copy of the forwarding letter dated 7/10/2016 and the cheque No.026603).

8. THAT the consent judgement as it is valid having been entered voluntarily by the parties herein and no application has been made to review or set aside the Consent judgment.

9. THAT what the Claimant is seeking is to reopen an already concluded matter which this Honourable Court should not entertain as it would defeat the whole purpose of alternative dispute resolution which Article 159 (2) of the Constitution of Kenya, 2010 advocates for.

10. THAT the application is brought in bad faith, is an afterthought and is only aimed at holding the Respondent to ransom when the Respondent has fulfilled its obligations as per the terms of the consent judgment.

The claimant in his written submissions dated 20th November, 2018 brings out a case of termination of his employment as set out under section 41 and 45 of the Employment Act, 2007. I must however add that this is not the frontal subject of this application.

The claimant further submits a variation of the consent entered to *inter partes* at the time of execution. It is his case that these terms were altered vide a letter dated 14th June, 2017 whereby the claimant was employed on a contract basis renewable after three months which was contrary to the consent judgement. This culminated in his termination vide a letter dated 12th October, 2017. He now seeks reinstatement through this application.

The respondent in her written submission dated 15th October, 2018 acknowledges the proceedings of court upto the entry of the consent judgement of court on 17th December, 2015. It is her submission that this court has no further basis of dealing with the subject matter as its hands are tied. It is *funtus officio* and ousted of jurisdiction to deal with the present application.

The respondent in so submitting relies on the authority of **Telkom Kenya Limited vs. John Ochanda (suing on his own and on behalf of 996 former employees of Telkom Kenya Limited [2014] eKLR** where the Court of Appeal exhaustively addressed a similar issue and held as follows;

"*The determination of this appeal hinges on the single issue of whether or not by ordering adduction of further evidence through the filing of affidavits after the suits as consolidated had been heard and concluded, the learned judge overstepped his mandate and erred in law. It is apparent from the record that in ordering that certain materials be placed before him by way of affidavit long after judgment had been entered; the learned judge had the noblest and best of intentions in trying to give effect to the judgment of Mwera J. In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him. He had himself earlier acknowledged that his hands were tied and also noted that he could not ament the judgment as had been sought. The court's only recourse would have been to review the judgment and having refused to do so, it was rendered functus officio.*

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. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19 th century. In the Canadian case of ***Chandler vs. Alberta Association of Architects [1989] 2 S. C. R. 848, Sopinka J.*** *traced the origins of the doctrines as follows; (at p. 860);*

'*The general rule that a 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 to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:*

1. Where there had been a slip in drawing it up, and,

2. Where there was an error in expressing the manifest intention of the court. See Paper Mschinery Ltd. Vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"

The respondent further sought to rely on the authority of **Raila Odinga v IEBC** cited with approval an excerpt from an article by **Daniel Malan Pretorious** entitled, **"The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832** in which the learned author stated;

"*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 makers."

This was as cited **Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited** aforecited**.**

I agree with the respondent. The expression and import of this application does not re-opens the issue of the consent judgement for determination. It picks quarrel with the execution of the consent judgement in that its terms were altered at implementation. Instead of reinstating his position at the time of termination of employment, as was stipulated in consent judgement, the respondent executed a term contract for the claimant. This, and the subsequent termination arising out of disagreement on the term contract *inter partes* generated and perfected this application. The issue of *functus officio*, with all its corresponding colour and is therefore inapplicable in the circumstances.

This application sails through. This is on the basis that an application for a scrutiny of the execution of the consent order dated 17th December, 2015 is permissible but only to that extent. It would however not be feasible as a basis for grant of an order for reinstatement emanating from a fresh and different set of circumstances. This is because it is trite law and practice that an order for reinstatement cannot be issued at an interlocutory stage as is the case here. Besides, such an application would undermine the doctrine of *functus officio* as it is known and applied in law.

Overall, the application should fail due to its form and intent. The respondent submits, and I agree with her that this application can only have been tenable if it was routed towards the path of review of the consent judgement of court. This for obvious reasons, the claimant/applicant is introducing a totally different edifice to these proceedings. It re-opens the matter and therefore ties the court's hands.

I am therefore inclined to dismiss the application with orders that each party bears their costs of the same.

Delivered, dated and signed this 1st day of February, 2019.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Meroka holding brief for Getanda instructed by M.C. Getanda & Company Advocates for the claimant/applicant.

2. Mr. Isiji instructed by Nyairo & Company advocates for the respondent.