



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 2 OF 2014**

***(Before Hon. Lady Justice Maureen Onyango)***

**TIMON OTIENO MBOGA.....CLAIMANT**

**-Versus-**

**KENYA FOREST SERVICE.....RESPONDENT**

**RULING**

There are two applications for determination herein. The first is dated 14th March, 2016 seeking the following orders:-

1. This application to be certified urgent, and heard *ex-parte* in the first instance.
2. This Honourable Court be and is hereby pleased to allow the Respondent to deposit the decretal amount in court effecting compliance of the orders in the Ruling of Honourable Justice Maureen Odero delivered on 21st January, 2016.
3. Cost of this Application be provided for.

The second applications is dated 18th March, 2016 and seeks the following orders:-

1. This Application be certified urgent and be heard *ex-parte* in the first instance.
2. This Honourable Court be pleased to order an extension of the stay of execution orders of Lady Justice Maureen Onyango delivered on 21st January, 2016 pending the hearing of this application *interpartes* and determination thereof.
3. This Honourable Court be pleased to order an extension of the stay of execution orders of Lady Justice Maureen Onyango delivered on 21st January, 2016 pending the *interpartes* hearing and determination of the Respondent/Applicant's Application dated 14th March, 2016.
4. Pending the hearing and determination of this Application the Respondent/applicant deposits the decretal amount into Court.
5. The costs of and incidental to this application be costs in the cause.

The applications are both filed by the Respondent through Nyamweya Mamboleo Advocates and are

supported by the grounds on the face thereof and the affidavits of James Mamboleo, Advocate, advocate on behalf of the Respondent/Applicant.

Both applications are opposed by the Claimant's replying affidavit sworn on 11th May, 2016 and filed on 12th May, 2016.

The two applications were heard together on 31st May, 2016.

## **Background**

The Judgement in this case was delivered in favour of the Claimant on 5th June, 2015. On 15th June, 2015 the Respondent filed an application for stay of execution pending appeal. The application was heard on 28th July 2016 and ruling delivered on 21st January, 2016 allowing the application on condition that the entire decretal sum is deposited in a joint interest bearing account in the name of the advocates for the Claimant and Respondent within 30 days and the appeal filed within 60 days with costs of the application being in the appeal.

The Respondent however failed to comply with the order for deposit of decretal sum in a joint interest bearing account within 30 days as ordered by the court and on 15th March 2016, filed the application dated 14th March, 2016 by way of notice of motion under certificate of urgency seeking leave to deposit the decretal sum in court. The application was fixed for inter partes hearing on 31st May, 2016 following the failure of the applicant to attend court to prosecute the application on when it was called out.

This prompted the Respondent to file another motion under certificate of urgency on 1st March 2016, seeking extension of time for compliance with the orders of 21st January 2016 and further seeking leave to deposit the decretal sum in court pending hearing and determination of the two applications. The court granted orders of stay of execution pending the hearing of the two applications which were heard on 31st May, 2016.

## **Respondent/Applicant's Submissions**

Mr. Odhiambo who was holding brief for Mr. Mamboleo for the Respondent submitted that the ruling on the Respondent's application which was scheduled for 16th October 2015 was delivered on 21st January without notice to the Respondent and the Respondent only learnt about it from the Claimant's advocate on 8th February 2016. That the Respondent's advocates informed their client about the ruling on 9th February 2016. That the Respondent's counsel sent the account opening forms to the Claimant's advocates on 7th March, 2016. On 9th March, 2016 the Respondent received a letter from the Claimant's Advocates MS. D.O.E Anyul & Co. Advocates stating that they were not willing to open the joint account as the applicant had delayed in compliance with the court orders.

Mr. Odhiambo submitted that the delay was caused by the non-cooperation of the claimant's advocates and that the short delay was caused by the fact that the Respondent was not notified of the date of the ruling. He submitted that the appeal was filed on 30th May 2016. He submitted that the appeal will be rendered nugatory if the application is not granted, that the claimant's financial means are not known by the Respondent and that no prejudice would be caused to the Claimant. He prayed that the applications be granted as prayed.

## **Claimant's Submissions**

Mr. Anyul, Counsel for the Claimant opposed the application. Relying on the replying affidavit of the Claimant, he submitted that although the ruling was delivered in the absence of both parties, he had on 4th February, 2016 personally called Mr. Mamboleo and informed him about the ruling and dispatched a copy of the ruling to Mr. Mamboleo on 5th February, 2016. He submitted that the orders of the court were very explicit and were couched in mandatory terms. He submitted that none of the orders had been complied with. He submitted that the appeal had been filed on 30<sup>th</sup> MAY 2016, the day before the hearing, because in the replying affidavit the Claimant had deponed that the stay would serve no purpose

as the appeal had not been filed within the 60 days granted in the ruling of 21st January, 2016.

Mr. Anyul submitted that the Respondent's reason for non-compliance is bureaucracy which is not a valid ground for failure of compliance with court orders.

Mr. Anyul submitted that the present application was made only because the Claimant attempted to extract the decree and notified the Respondent, that the application has not been made in good faith, that the Claimant was within his right to return the forms for account opening as no funds had been released by the Respondent to its advocates by that time.

Mr. Anyul submitted that this court became *functus officio* after giving the orders of stay of execution and the only way the Respondent can come back to this court is by way of review of the orders, and not for extension. That the extension of the orders can only be granted by the Court of Appeal which the respondent avoided going to as it had not lodged the appeal within time.

It was the Claimant's averment that the two applications are incompetent, an abuse of court process and vexatious.

It was submitted that the appeal will not be rendered nugatory by the refusal to grant the orders sought by the Respondent, that the Respondent slept on its rights and does not deserve the orders sought.

Mr. Anyul prayed that the applications be dismissed with costs to the Claimant.

### **Respondent's Rejoinder**

In a brief rejoinder Mr. Odhiambo submitted that the delay was occasioned by reasons that have been explained; being that the Respondent had issues obtaining funds and there was no notice of the date of ruling. He submitted that notice of appeal had been filed. He submitted that good faith was demonstrated when the Respondent sent forms for opening the joint account to the Claimant's Counsel, and that the Respondent's counsel is in possession of the funds. He submitted that the court is not *functus officio* as the court had given directions on 21st March, 2016 before the lapse of the period for compliance with the court's orders.

### **Determination**

The issue for determination from the pleadings and submissions is whether this court became *functus officio* upon delivery of the ruling of stay of decree pending appeal on 21st January 2016, and whether this court has jurisdiction to extend those orders.

The jurisdiction to grant stay of execution and to extend time for appeal is vested in both the court of first instance, that is this court, and on the Court of Appeal, by virtue of Order 42 Rule 6 and 7 of the Civil Procedure Rules.

*Functus Officio* was defined by Supreme Court in **Raila Odinga & others v IEBC & Others [2013]** in which the Supreme Court cited an article by **Daniel Malan Pretorious** titled "**The Origin of the Functus Officio Doctrine, with special reference to its Application in Administrative Law**"(2005) 122 SALJ 832 as follows;-

*"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 a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."*

In the present situation, this court granted a conditional stay of execution. The applicant was not in court

when the order granting conditional stay was made on 21st January, 2016 but was informed about the ruling on 4th February, 2016 by counsel for the Claimant and admits having had a copy by 8th February 2016. If it is assumed that the time started running on 8th February, 2016 the decretal sum should have been deposited into a joint interest earning account on or before 9th March 2016. The two applications herein were filed on 14th and 18th March 2016 respectively, more than 30 days after the applicant learnt about the conditional order of the court. The appeal which was to be filed within 60 days was filed on 30th May 2016 more than 100 days from the date the applicant became aware of the ruling.

It is the opinion of this court that a conditional stay lapses automatically upon failure to comply with the condition upon which it was predicated. The party required to comply should therefore apply for extension or variation of the orders during the validity of the orders and not after the expiry thereof. This is because once the order expires, it is no longer available and cannot be for extended or varied. Such order becomes extinct and cannot be resurrected. The applicant cannot therefore apply for its extension or variation of a non-existent order, but can only apply for a fresh order. It is my opinion that following the lapse of the orders granted on 21st January, 2016 the court became *functus officio* as the court could only exercise the powers of extension once.

I agree therefore with Mr. Anyul that this court is *functus officio* and cannot give any extension or vary orders which are no longer in existence.

**Ruling Dated signed and delivered this 29th day of July, 2016**

**MAUREEN ONYANGO**

**JUDGE**