



REPUBLIC OF KENYA



Orengé t/a Orengé J & Associates v Nthiga (Miscellaneous Civil Application E368 & E367 of 2019 (Consolidated)) [2025] KEHC 505 (KLR) (Commercial & Admiralty) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
MISCELLANEOUS CIVIL APPLICATION E368 & E367 OF 2019 (CONSOLIDATED)**

JWW MONG'ARE, J

JANUARY 27, 2025

BETWEEN

JULIUS ORENGE T/A ORENGE J & ASSOCIATES APPLICANT

AND

KENNEDY MILTON NTHIGA RESPONDENT

RULING

1. By the Chamber Summons dated 30th September 2024, the Applicant seeks an order to review and/or set aside the court orders issued on 25th July 2024. The Applicant also prays for the reinstatement of the Taxing Master's ruling delivered on 21st March 2023, which allowed the Applicant's Bill of Costs. Furthermore, the Applicant requests the entry of judgment in favor of the Advocate/Applicant for the amount taxed and contained in the Certificate of Taxation, being Kshs. 3,203,949/=.
2. This application is brought on the grounds set forth on the face of the record and supported by the annexed affidavit of Julius Orengé. In the affidavit, the deponent avers that there is a need to review the ruling of this court dated 25th July 2024 in light of the Court of Appeal decision in *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Ltd* (2017) eKLR. The Applicant asserts that the court erred in setting aside the Taxing Officer's decision based on a perceived lack of jurisdiction regarding the issue of the advocate-client relationship.
3. The Respondent opposed the application by filing Grounds of Opposition dated 6th October 2024. The Respondent contends that the application is an abuse of the court process and ought to be struck out, as the court is functus officio. It is further argued that the judicial officer's application of the law does not amount to an error apparent on the record and, therefore, cannot form the basis for a review. Additionally, the Respondent asserts that the Applicant is guilty of selectively highlighting and misquoting the law.



4. Directions issued by the court that the application be canvassed through written submissions but only the Applicant filed their submissions, which I have duly considered.

Analysis and Determination: -

5. Upon careful consideration and evaluation of the pleadings filed herein and the rival submissions by the parties, I note that the main issue for consideration by the court is whether the Applicant has met the threshold for the grant of the orders of setting aside and review.
6. Section 80 of the [Civil Procedure Act](#), 2010, confers upon this court the discretion to review its orders. Section 45 of the [Civil Procedure Rules](#) outlines the parameters for such an application. The provisions of Section 45 state as follows:-

Rule 1

- (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 order made 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 which he applies for the review.

7. The above section provides three instances for review. The Applicant must therefore demonstrate to the court that there has been discovery of a new and important matter or evidence which, after the exercise of due diligence, which was not within his knowledge or could not be produced by him at the time when the decree was passed. Secondly, the Applicant must demonstrate to the court that there is some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.
8. The Applicant seeks to set aside the court orders made on 25th July, 2024, citing all three grounds of review outlined by Section 45 of the [Civil Procedure Act](#). The Applicant argues that the court erred in its finding that the Taxing Master lacked jurisdiction to determine the issue of retainer. Furthermore, the Applicant claims that the court and parties were unaware decision in [Wilfred N. Konosi T/A Konosi & Co. Advocates v Flamco Ltd](#) (*Supra*), and erred in finding that the taxing master failed to lack jurisdiction to determine the issue of advocate-client relationship.



9. The Supreme Court, in *Raila Odinga & 2 Others v IEBC & 3 Others* (2013) eKLR, while discussing the doctrine of *functus officio*, stated:-

“We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“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 revoked or varied by the decision-maker.”

10. 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 Court of Appeal in *Telkom Kenya Limited v John Ochanda (Suing on His own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR)
11. Similarly, in *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR, it was clarified that the doctrine of functus officio does not bar a court from entertaining a matter it has already decided but prevents it from revisiting the merits once a final judgment has been rendered and a decree issued.
12. In *Evan Bwire v Andrew Aginda* (Civil Appeal No. 147 of 2006), as cited in *Stephen Githua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* (2016) eKLR, the Court of Appeal emphasized:-

“An application for review will only be allowed on strong grounds, particularly if its effect will amount to reopening the application or case afresh. In other words, the Applicant must demonstrate that there is new evidence which could not have been obtained even after exercising due diligence.”

13. I am of the considered opinion, that allowing the instant application would, in effect, amount to reopening the case afresh, which this court cannot permit under the circumstances. Litigation must come to an end, and it is incumbent upon parties to present their evidence and arguments fully and comprehensively during the trial process or at any relevant stage where submissions are invited. The principle of finality in litigation is sacrosanct, and courts must guard against abuse of process through applications that seek to relitigate matters that have already been determined.
14. The Applicant claims that the court and the parties were unaware of the Court of Appeal decision in *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Ltd (Supra)*, delivered on 12th July 2017. This assertion is not tenable for several reasons. Firstly, the decision in question predates the initial proceedings in this matter by several years and was widely available as a published precedent. Parties to litigation are expected to exercise due diligence in researching and citing relevant legal authorities to support their case.
15. Secondly, the alleged “unawareness” of a binding precedent cannot constitute a mistake or error apparent on the face of the record, nor can it serve as a basis for review under the applicable legal framework. The Applicant had ample opportunity to bring this decision to the court’s attention



during the initial proceedings but failed to do so. Such an oversight does not meet the threshold for review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, which require a showing of new and important evidence that was not within the Applicant's knowledge despite the exercise of due diligence.

16. Finally, granting the orders sought would undermine the principle of finality and open the door to a floodgate of applications seeking to revisit concluded matters under the guise of review. This court cannot permit such a course of action, as it would set a dangerous precedent and disrupt the administration of justice. The court also notes that contrary to the Applicant's assertion, the doctrine of *functus officio* applies here. Once the court has rendered its final decision and issued a decree, it cannot revisit the merits of the case except through the appellate process.
17. In light of the foregoing analysis, I find that the Applicant has failed to meet the parameters required for a review as set out under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The grounds advanced by the Applicant do not satisfy the conditions for the discovery of new and important evidence, an error apparent on the face of the record, or any other sufficient reason. I am satisfied that this court is now *functus officio*, having delivered its ruling on 25th July 2024.
18. Consequently, the Chamber Summons dated 30th September 2024 is devoid of merit and is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Kipkemoi Sang holding for the Advocate.
2. Mr. Mutuku for the Client.
3. Amos - Court Assistant

