JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 282 OF 2016

BETWEEN:

CHINYAMA M. TAUMBE PHIRI ..... CLAIMANT

-AND-

MARTINA KACHERE ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Theu, of Counsel, for the Claimant
Mr. Banda, of Counsel, for the Defendant
Mrs. Doreen Nkangala, Court Clerk

ORDER

Kenyatta Nyirenda, J.

There is before this Court an application in proceeding brought by the Claimant under Order 10, r.1 of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"] and the Court's inherent jurisdiction.

The Claimant seeks an order:

> *"(a) setting aside the order made on 14th June 2018 striking out the Claimant's case.*
>
> *(b) expunging the said ruling from record, and if already circulated, withdrawing it from such circulation.*
>
> *(c) restoring the matter and endorsing directions as contained in a draft consent order filed by the parties on 12th June 2018 and/or any other such directions as to the court may appear just and expedient."*

The application is supported by a sworn statement, made by Counsel Bright Theu, wherein he narrates the procedural history of the case and takes issue with the findings by the Court that he had lied in his sworn statement.

The Defendant is opposed to the application and there is in that respect a sworn statement by Counsel Jai Banda. The substantive part of the sworn statement states as follows:

> *"3. I have read Counsel Bright Theu's statement and respond as follows:*
>
> *3.1 The Claimant applied exparte for an injunction on 18th July, 2016 and Honourable Justice Mbvundula granted the same on 20th July, 2016 and not 20th July, 2017 as alleged in the sworn statement by Counsel Bright Theu.*
>
> *3.2 Since the granting of the injunction the claimant was content with the status quo as he was and continues to receive rent from the Tenant of the property in dispute herein thereby depriving the claimant the proceeds therefrom for close to two years now.*
>
> *3.3 I am informed by the defendant that prior to the death of her mother the registered owner of the property it was her mother receiving the rent and the claimant is depriving the defendant this income which she has been relying on for her upkeep."*

The application follows in the heels of my ruling dated 18th July 2018 striking out the proceedings herein on the ground of abuse of court process in that more than 20 months had elapsed without the Claimant taking steps to prosecute this case.

In light of the fact that the action herein was struck out, I have not found it necessary to recite in any detail the various aspects of the evidence and the legal arguments advanced by Counsel. Instead, I have opted as a matter of prudence to address what in my view constitutes the threshold question, namely, whether or not the application is caught by the functus officio rule.

Functus officio is a common law rule that prohibits, in the absence of statutory authority, the re-opening of a matter before the same court, tribunal or other statutory actor which rendered the final decision. Once a validly-made final determination has been issued, the court is powerless to change it, other than to correct obvious technical or clerical errors, or unless specifically authorised to do so by statute or regulation.

In the Canadian case of **Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848**, Sopinka J. wrote in relation to the principle of functus officio that:

> *"The general rule (is) that a final decision of a court cannot be reopened.... The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: where there had been a slip in drawing it up, and where there was an error in expressing the manifest intention of the court."*

The functus officio rule exists to provide finality to judicial decisions so that people and businesses are afforded the certainty they require to operate effectively. The ability to revisit and change determinations could easily disrupt the lives and businesses of those affected by the determinations, and cause them hardship and loss. The rule is premised on the idea that overall, the advantages of avoiding uncertainty (and its consequences) outweigh the reasons a court might have for wanting to change a determination in a particular case. If a court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding.

In the present case, having made my ruling on 18th July 2018 striking out the proceedings herein, I became functus officio.

Before resting, I wish to observe that the present case is distinguishable from a proceeding, or any part thereof, that is struck out on account of a party's failure to attend trial. In such a case the Court may, on application by a party under Order 16 of CPR, restore the proceeding, or that part of the proceeding, that was struck out. This power applies in relation to trial. There is no corresponding power vested in the Court under CPR with regard to matters outside trial stage. Counsel Theu admitted as much hence his purported resort to the Court's inherent jurisdiction.

In light of the foregoing and by reason thereof, the application by the Claimant is dismissed with costs.

Pronounced in Chambers this 14th day of August 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE