



**Gathatha Farmers Co Ltd v Okiro; Kaitet Tea Estate (1977) Ltd (Interested Party)
(Environment & Land Case 57 of 2011) [2023] KEELC 16648 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 57 OF 2011
FO NYAGAKA, J
MARCH 27, 2023**

BETWEEN

GATHATHA FARMERS CO LTD PLAINTIFF

AND

OTIENO OKIRO DEFENDANT

AND

KAITET TEA ESTATE (1977) LTD INTERESTED PARTY

RULING

1. Before me is a Notice of Motion dated 27/01/2023. It was filed by the interested party. It moved this court under sections 152E of the *Land Act*, 2012, Regulations 65, 66 and 67 of the *Land Regulations*, 2017, sections 1A, 1B and 38 of the *Civil Procedure Act* and Order 42(6) (sic) Rule 51 of the *Civil Procedure Rules*, and all other enabling provisions of law. Through it, he sought the following orders:
 1. ...spent
 2. That this honourable court be pleased to issue an order of eviction of the Respondent from all those properties known as Nos. 5709, 5210/2, 5711, 6137 and 8190.
 3. That this honourable court be pleased to direct the Officer Commanding Station, Endebess Police Station to provide security to the applicant while evicting the respondent and any other trespassers(s) from the applicant's parcels of land known as Nos. 5709, 5210/2, 5711, 6137 and 8190 situate at Endebess.
 4. The costs of this Application be provided for.
2. The Application which was based on thirteen (13) grounds was supported by the affidavit of one Peter Kipngeno Kotut sworn on 21/01/2023. The grounds were that judgment herein was delivered



on 30/05/2018; the applicant sought a stay of execution of the same through an application dated 03/08/2018; the court dismissed the Application vide a ruling dated 24/10/2018, paving way for the execution of the decree dated 18/06/2018; by an Application dated 12/11/2018 the respondent moved the court of Appeal for stay of the execution of this Court's decree; that Order 42(6) of the [Civil Procedure Rules](#) provided that an applicant aggrieved by the decision of the trial court on an application for stay of execution can only challenge it in a higher court but not lodge a fresh one; the applicant served the respondent with a Notice to Vacate dated 29/06/2021 and it was to last 90 days; that it was after that that the Respondent filed in the court of Appeal the application dated 12/11/2018; on 3/12/2021 the Court of Appeal dismissed the Application; on 05/06/2018 and 03/08/2018 the respondent filed a Notice of Appeal and Memorandum of Appeal against the judgment of this court; on 27/05/2022 the Court of Appeal dismissed the respondent's Appeal and confirmed the Judgment of this court which was to the effect that the applicants were the absolute owners of the parcels of land in issue; the respondent was keen on stifling and sabotaging justice by all means and impeding the applicant from realizing the fruits of the judgment herein; the respondent is leasing and is likely to part with possession of all the parcels of land to defeat the judgment here; and the matter has been lying before court for long and should come to an end.

3. The affidavit in support of the Application deponed to the above content as facts of the Application, save that to it were annexures PKK-1 and PKK-2 being copies of the judgment and decree of this court; PKK-3 a copy of the judgment of the Court of Appeal in Kisumu Court of Appeal, Civil Appeal No. 92 of 2018, delivered on 27/05/2022; PKK-4 a copy of the Ruling of this court dismissing the Application for stay of execution; PKK-5 a copy of the Eviction Notice of 29/07/2021; PKK-6 a copy of the Ruling of the Court of Appeal dismissing the respondent's application for stay of execution; and PPK-7 photographs of the suit properties.
4. The respondent opposed the Application through a replying affidavit sworn by him on 07/03/2023. In it he detailed the history of the suit herein, how it was dismissed for want of prosecution on 16/01/2002 but was reinstated, and he annexed and marked as OO2 a copy of his then replying affidavit to the Application for reinstatement. He deponed that the suit was statute barred by virtue of the [Limitation of Actions Act](#). He stated that the suit was initially instituted in Eldoret as Civil Suit No. 113 of 1987, dismissed in 2002 for want of prosecution and "instituted" (sic) in the year 2011. Whereas he did not deponed to the fact that it was transferred to Kitale and given the current number, he deponed that judgment was delivered herein on 30/05/2018; that he was the legal owner of the land in issue and was in the process of making an Application to the Court of Appeal to show that he was indeed the legal owner. He annexed and marked as OO3 copies of documents he claimed show that he was the owner of the parcel of land known as LR. No. 5710/2 by virtue of his late father Zakaria Okiro having obtained it in 1957 from on Edmund William Dolier the father of Guy W. Dolier for exemplary work for him. That his father died in 1980 and under Luo customary law, he inherited it by kindredship (sic). He applied for letters of Grant of Administration of the father's Estate in Succession Cause No. 48 of 1989 and was granted it on 29/06/1990 without any objection from the Applicant. He annexed and marked as OO6 a Certificate of the Letters of Administration Intestate. He then deponed that his portion of 36 acres was never included in the sale to Gathatha Farmers Company and the title is in the name of Edmund William Dolier and the applicant's title was still legal and unchanged. He annexed and marked as OO7(a) and (b) copies of the title. He then discounted the Plaintiff's claim as the owner of the parcel of land LR. No 5710/02 yet in an affidavit sworn on its behalf on 20/06/2007 it indicated that the original agreement could not be traced. He deponed that that was crucial and sensitive evidence which anyone must ensure it was kept well. He annexed and marked as OO8(a) and (b) copies of the affidavit and statutory declaration on the issue. He then swore that the land belonged to him by way of adverse possession and if the land was given to the plaintiff he would lose his legal right and look up to



the plaintiff to give him what was his. He annexed and marked OO9 a copy of letter dated 07/03/2023 given by the Chief of Koibei Location stating that he had been on the land for a long time.

5. In response to the replying affidavit, one Peter Kipng'eno Kotut swore a Supplementary Affidavit on 10/03/2023 on behalf of the interested party and filed it the same date. At this point I wish to indicate that no leave was sought by the Interested Party to file the Supplementary Affidavit as required by the law, specifically Order 51 Rule 14(3) of the Civil Procedure Rules, 2010. The provision stipulates as follows:

“Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.”

6. To the extent that the interested party filed the supplementary affidavit without leave of court, I find it improperly on record and declare is a strange document which the Court has no obligation to look at and/or consider. I strike it out of the record because any document filed in any matter without leave of court or as permitted by law is illegally on record and a nullity.
7. That said, the parties were given chance to submit orally on the Application. The applicant submitted through learned counsel that it sought the eviction of the respondent for reason that there was a valid judgment of the court delivered in its favour on 30/05/2018 from which the respondent appealed and the appeal was dismissed on 25/05/2022. Further, it summed it that it had issued to a Notice to Vacate but he had failed to do so.
8. After the respondent had submitted on his part, as will be summarized below, learned counsel for the applicant responded to the submissions by adding that there was no stay of execution of the judgment of the court hence the Application should be granted. Regarding the respondent's plea that he be granted more time, for up to two years, to prepare to vacate since he has to fell down his huge trees, sisal plants planted on the farm and bananas spanning 2 acres thereof while also pulling down his structures, the applicant submitted on humanitarian grounds the respondent should be given 30 days to do so. He however argued that the respondent should not cut down any trees or do anything that could devalue the property because it bought the farm with its developments. Learned counsel submitted that the respondent may only remove the structure he had built thereon and personal effects and crops but no other.
9. On his part respondent took the court through lengthy submissions on the history of the suit, particularly after this court delivered its judgment and he preferred both an appeal therefrom and filed application for stay of execution thereof. He stated how after the hearing of the Application before the Court of Appeal, then sitting in Eldoret, he and his learned counsel were approached outside the court premises by learned counsel for the applicant to negotiate this matter. Following that, in a subsequent meeting held at the applicant's office in Endebess in Trans Nzoia County it was then indicated by the applicant that it was interested in buying his farm and that the respondent could look for alternative land for him to shift to but at the expense of the applicant. He agreed to do so and got a 50-acre land in Nzoia Scheme. He entered into an agreement with the seller on condition that the applicant would pay the sum, a deposit of which Kshs. 20,000,000/= was needed to offset a charge thereon to release the property for transfer to him after completing the balance of Kshs. 19,000,000/=. The applicant never honoured his promise. The respondent then changed his mind about proceeding further with the agreement to sell his land to the applicant.
10. Meanwhile, behind the applicant's back, both learned counsel for the applicant and his were pursuing the appeal and when he discovered that he filed a Notice to Act in person. He acted in person by



doing submissions as required when he was called upon to do so, and appeared at the virtual hearing. Meanwhile a son to one of the plaintiff's then managers known as John Odanga approached him at Endebess and told him he wanted to facilitate titling of the farm. He trusted him and gave him his phone and some documents. The man pretended that the respondent's phone was not functioning well and that they both go to Kiminini to repair it. They went to Kiminini Market and the man got a screw to open the phone but in a flash, he disappeared with both the phone and documents. The Respondent traced the man to Kitale town some day after, got him arrested and taken to Kimini Police Station where he was incarcerated for a while and then released and to this day he is nowhere. The respondent lamented that the actions of the said son of Mr. Odanga was part of a wider scheme to have him lose this case both in the trial stage and appeal.

11. If the story by the respondent post judgment herein is anything to go by, that is the pain and story of a bitter litigant who even after losing the case herein he was a subject of a con by someone known to him. Painful as the story may be, it is clear that the attempted negotiations between him and the Applicant were post-judgment, and the loss of his phone and some documents to the unnamed son of Odanga were after the decision of this court, and as it got clear, they did not affect the Respondent's participation in the appeal he preferred. Thus, he cannot blame the court process at all.
12. In the end the respondent asked for more time to prepare fell down his trees, crops and remove the structures. He prayed to two years to do so. However, he failed to clearly state what he intended to do during that period of time. He faltered as to whether he want to move out of the land or remain on it as he pursued other processes. He submitted that for him to state what he could do during that period he pleaded for was a way of limiting him in his constitutional right to appeal. At the conclusion of the submissions the court retired to write its ruling.

Issues, Analysis and Determination

13. I have considered the Application, opposition thereto, the law and submissions of both parties. Only two issues lie before me for determination. These are whether the Application is merited and who to bear the costs of the same at the end of it. As to the relevance of the provisions under which it was brought this court notes that all the provisions cited except Order 42 Rule 6 of the [Civil Procedure Rules](#), and that which is referred to as "all other enabling provisions of law" are relevant. Order 42 Rule 6 relates to applications for stay of execution pending appeal, and no such application is before me. The phrase "all other enabling provisions of law" is meaningless and therefore neither here nor there.
14. I will at this initial point indicate that the Application before me is a post-judgment one. It is clear from the history of this matter, which I will not rehash, that the suit herein was instituted several years ago. Actually, it was instituted on 03/06/2011 vide a Plaint dated the same date. That fact is contrary to that which the Respondent herein sought to convince the Court through his deposition in paragraph 7 of his replying affidavit about the relationship of this matter with Eldoret High Court Civil Suit No. 113 of 1987.
15. It is not in dispute, and from the documents presented before me in support of the Application and some in the relying affidavit, that after the institution of this suit and pleadings closed, the suit proceeded to hearing. Judgment was delivered on 30/05/2018. The respondent herein appealed against the judgment in Kisumu Court of Appeal, Civil Appeal No. 92 of 2018. Judgment in the Appeal was delivered by their Lordships and Ladyship on 27/05/2022. It dismissed the appeal with costs to the appellant. The applicant has moved this court to enforce the judgment which was affirmed by the Court of Appeal.



16. With that background in mind, I indicate here that the parties to this Application did well to summarize the journey travelled herein over the issues that were before the court. But I wish to state further that as it stands, this court is *functus officio* in relation to the merits or demerits of the case.
17. The doctrine of *functus officio* is one that is well known and understood in legal practice. It simply means that all that the court was required to do has been done and no more remains to be attended to. In this respect, the court reclines and folds its hands and says, as Jesus said (in John 19:30, King James Version of the Holy Bible), “It is finished.” The court is *functus officio*. It means the court has pronounced itself and that is what it shall follow. In Bryan Garner’s *Black’s Law Dictionary*, Eleventh Edition, 2019, p. 815 the phrase is defined as
- “ [having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
18. In Election Petitions Nos. 3, 4 & 5 *Raila Odinga & others v IEBC & others* [2013] eKLR the Supreme Court of Kenya while expounding on the doctrine of *functus officio* cited with approval an excerpt from the article by Daniel Malan Pretorius, in “*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*,” [2005] 122 SALJ 832. The excerpt reads:
- “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.”
19. It also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 where it was stated as follows:
- “A court is *functus* 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*, when its judgment or order has been perfected. 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 on adjudication must be taken to a higher court if that right is available.”
20. In the instant Application, the court is only called upon to give effect to its judgment. Much as it is likely to be painful to the respondent, if the judgment rightly found that the parcels of land do not belong to him but to the applicants, it has to be complied with, and if it is not, it has to be enforced as by law established. That is why the *Land Laws Regulations*, 2017 came in to safeguard the rights of the persons being evicted. Eviction must be carried out if that is the only way to remove the judgment debtor from the decree holder’s property. But it can only be done in a humane manner. That does not call for re-opening of the case.
21. Therefore, much of the deposition that the respondent gave this court and the submissions he made were irrelevant at this stage. The only issue this court is to consider is whether there is a valid judgment in this matter, that it is in favour of the applicant and against the party in respect of whom the prayers in the instant application relate to for enforcement, and that the orders sought are in line with the said



valid judgment. This court is not called upon to re-look into the evidence of the parties on the case. That is now settled both by this court and the Court of Appeal. I am afraid I cannot reopen the case as the applicant wishes me to do.

22. Following the judgment of this court, a decree was issued. The decree is sought to be enforced by way of eviction since the respondent has not willingly removed himself from the suit lands. In fact, in his replying affidavit he only made reference to land parcel No. LR. No. 5710/2 and not the others. But whether he referred to others or not is neither here nor there. A Notice to Vacate the suit lands was duly issued. It was not complied with to date. As a matter of fact, yesterday when this court considered the fact of service to give the respondent more time to prepare to submit on the Application, he made an appalling statement to the effect that he can only move out of the land when he is dead. That portended impunity and complete disrespect of the law. But the court politely reminded him to respect his seniority as a citizen and do the right thing which, if it is to move out of the land, he should and it the court directed him not to move out he still should obey.
23. The totality of the matter herein is that the Application dated 27/01/2023 is merited and I grant prayers (2), (3) and (4) thereof to the effect that there be and is hereby issued an order of eviction of the Respondent, his servants, agents and or assigns from all those parcels of land known as LR. Nos. 5709, 5210/2, 5711, 6137 and 8190 situate in Endebess area of Trans Nzoia County. Further, that the OCS Endebess Police Station to provide security for the eviction. The respondent shall bear the costs of this Application.
24. The execution herein is suspended for sixty (60) days to enable the applicant to move from the suit lands as he prayed. His plea of two (2) years is refused.
25. Orders accordingly.

RULING DATED,SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 27TH DAY OF MARCH, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE

