



REPUBLIC OF KENYA



**Jacob v Mutuku & 2 others (Environment & Land Case 1 of 2016)
[2023] KEELC 16459 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 1 OF 2016
A NYUKURI, J
MARCH 15, 2023**

BETWEEN

REBECCA MWIKALI JACOB PLAINTIFF

AND

PETER NICHOLAS MUTUKU 1ST DEFENDANT

STELLAMARIS NZILANI MUTUKU 2ND DEFENDANT

LAND REGISTRAR MACHAKOS COUNTY 3RD DEFENDANT

RULING

Introduction

1. On March 16, 2022, this court allowed the plaintiff's application for stay pending appeal dated February 23, 2021, after hearing both parties. Before dust could settle, nine days thereafter, and more specifically on March 25, 2022, the defendants filed a notice of motion dated even date seeking the following orders;
 - a. Spent.
 - b. That the ruling/orders issued by this honourable court on March 16, 2022 granting stay pending hearing and determination of appeal be vacated and/or set aside.
 - c. That this honourable court be pleased to order the OCS of Ndithini Police Station to enforce the decree by giving security to the defendants while evicting the plaintiff from the suit property and to maintain law and order.
 - d. Costs of the application.



2. That application is premised on grounds listed on its face and the supporting affidavit sworn by Peter Nicholas Mutuku, the 1st defendant on March 25, 2022. The applicants' case is that this court made a ruling on March 16, 2022 granting the plaintiff stay of execution pending appeal, yet the plaintiff had never filed any appeal to date despite being granted leave on November 4, 2020 to file notice of appeal out of time which was filed in November 2020.
3. The applicants complained that prior to the court granting the plaintiff leave to appeal out of time, the defendant had filed his replying affidavit and submissions in opposition to the application for leave to file notice of appeal out of time and served the same on July 30, 2020; but that the same had mysteriously disappeared from the court file, which fact was noted by the court in paragraph 4 of its ruling of November 6, 2020, prompting the defendants to file application for review dated November 17, 2020, which is yet to be heard.
4. The applicant pointed out that in the plaintiff's supporting affidavit dated February 23, 2021, the plaintiff deposed that she had already obtained proceedings from the High Court and was ready to file her appeal but has failed to do that over one year later. He stated that the plaintiff does not reside on the suit property as alleged and therefore intends to enjoy the suit property and prevent the defendants from enjoying fruits of their judgment.
5. That the defendants' advocate wrote a letter dated March 16, 2022 and served it on the plaintiff's advocate on March 21, 2022, requesting to be served with the record of appeal but the plaintiff's advocate has refused to comply, which then means that there is no appeal. He stated that unless the court intervenes, there will be great miscarriage of justice and the respondents will suffer irreparable loss.
6. The application was opposed. The plaintiff filed a replying affidavit sworn on May 13, 2022. Her case was that the application was an abuse of the court process, frivolous and meant to annoy the respondent and delay the prosecution of the appeal. She took the position that there was nothing new or sufficient to warrant setting aside of the orders made on March 16, 2022 and that the application did not meet the threshold for review under order 45 of the Civil Procedure Rules.
7. The plaintiff/respondent further stated that rule 2 of the Court of Appeal Rules defined an appeal to mean an intended appeal and that once notice of appeal is lodged, the appeal is properly preferred under the law. She stated that this court lacks jurisdiction to deal with the validity of the appeal and that the application was misconceived and ought to be dismissed.
8. Although parties were directed to file submissions, none complied. The court has carefully considered the application, the supporting affidavit and the replying affidavit; and is of considered view that the sole issue for determination is whether there is sufficient cause to set aside and or vacate the orders of stay of execution pending hearing and determination of appeal, granted by this court on March 16, 2022.
9. It is not in dispute that the orders of March 16, 2022 were granted upon hearing both parties. Clearly, the applicants are unhappy with those orders as they contend that those orders were granted yet the plaintiff has never filed any appeal. They also fault the orders made on November 6, 2020 on grounds that their replying affidavit and submissions were not considered before those orders were made. They have pointed out that they filed an application for review of those orders in their application dated November 17, 2020 which is still pending.
10. In view of those allegations, I take the view that as the orders of this court made on March 16, 2022 were made upon considering the merits of the application dated February 23, 2021 and taking into account the defendants' replying affidavit as captured in paragraph 3 of the ruling of the court dated



March 16, 2022, this court in so far as the question of stay pending appeal to the Court of Appeal is concerned, is *functus officio*. As the applicants are aggrieved with those orders on grounds that they were granted despite the fact that the appeal had not been filed, their recourse is to file an appeal in the Court of Appeal.

11. The *Black's Law Dictionary*, 9th Edition, defines “functus officio” 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.
12. In discussing the doctrine of *functus officio*, in Election petitions Nos 3, 4 & 5 *Raila Odinga & others v IEBC & others* [2013] eKLR, the Supreme Court of Kenya cited with approval the excerpts from an article by Daniel Malan Pretorius in “*the origins of the functus officio Doctrine, with Specific Reference to its application in Administrative Law*” [2005] 122 SACJ 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 revoked or varied by the decision maker.
13. Although this court has powers to review its decisions under section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*, there was no prayer for review and certainly the application was not premised on any of the conditions for review set out in order 45 rule 1 of the *Civil Procedure Rules* which are;
 1. That there is discovery of new evidence;
 2. There is an error apparent on the face of the record;
 3. For any other sufficient cause.
14. On the question of whether the orders of November 6, 2020 were properly issued, the applicants states that they have filed an application dated November 17, 2020 seeking for the review of those orders. In that regard therefore, perhaps the applicants should consider prosecuting their application aforesaid instead of bringing that matter in their prayer for setting aside the orders of March 16, 2022. As they have not sought to review the orders of November 6, 2020 within this application, I will say no more in regard to the same.
15. In essence, there is no sufficient cause placed before this court to warrant the vacation of this court’s orders made on March 16, 2022.
16. As the applicants’ contention is that the notice of appeal was filed and no record of appeal was served on them on March 21, 2022 when they sought for the same, rules 83 and 84 of the *Court of Appeal Rules 2010* provides recourse where a party that is aggrieved in the manner described by the applicants.
17. In the premises, I find no merit in the application dated March 25, 2022 and I hereby dismiss the same with costs to the respondent.
18. Orders accordingly.



DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 15TH DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

