



**Nderu v Ng'ang'a (Environment & Land Case 303 of 2019)  
[2023] KEELC 17118 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17118 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 303 OF 2019**

**MD MWANGI, J**

**APRIL 25, 2023**

**BETWEEN**

**MARGARET WANGUI NDERU ..... PLAINTIFF**

**AND**

**ALICE WACEKE NG'ANG'A ..... DEFENDANT**

**RULING**

(In respect of the Notice of Motion application dated March 19, 2023 by the Plaintiff/Decree holder seeking an order that the Court Bailiffs or any other officer of the court with the assistance of the OCS Ongata Rongai Police Station remove the Judgment-Debtor and her agents and or nominees or anybody claiming through her from the LR No Ngong/Ngong/5677 and put the defendant/Decree-holder in possession).

**Background**

1. The application before me has been brought by the Plaintiff/Decree-holder under the provisions of Order 22 Rule 29(3) of the *Civil Procedure Rules*. The Applicant seeks orders that the Court bailiffs or any other officer of the court assisted by the OCS Ongata Rongai Police Station to remove the Defendant/Judgement Debtor from the suit property LR No Ngong/Ngong/5677 and put the Plaintiff/Decree Holder in possession.
2. The application is premised on the basis that an eviction order was given by the court on September 27, 2022. Further that the Defendant/Respondent has refused to vacate the suit property after the expiry of forty five (45) days as ordered by the court. It is the Applicant's case that the Respondent unsuccessfully moved this court as well as the Court of Appeal for orders of stay of execution pending appeal. As such there is no order either from this court or the Court of Appeal staying execution of the decree.



3. The application is further supported by the affidavit of Margaret Wangui Nderu sworn on the March 1, 2023 affirming the grounds on the face of the application.

### **Response by the Defendant/Respondent**

4. The Defendant's response to the application by the Plaintiff/Applicant was by way of grounds of opposition dated March 21, 2023 and a replying affidavit sworn by the Defendant on March 27, 2023. The deponent reiterated the grounds of opposition in the replying affidavit. She termed the application by the Plaintiff/Applicant as incompetent on the basis that there is a pending appeal in the Court of Appeal hence this court is no longer seized of the jurisdiction to deal with the issue.
5. Secondly, the Respondent stated that the application was tantamount to the Applicant amending her plaint without leave of court and without giving the Defendant/Respondent a chance to be heard on the same.
6. The Defendant argued that even though her application for stay of execution were dismissed, the appeal before the Court of Appeal was alive. It is therefore unfair for the court to 're-open this matter'. The Defendant stands to suffer irrevocable substantial loss by being evicted from the suit property.

### **Court's Direction**

7. The court's directions were that the matter proceeds by way of written submissions. Both parties filed their respective submissions which the court has had the opportunity to read.

### **Submissions by the Plaintiff/Applicant**

8. In her submissions, the Plaintiff submitted on the provisions of Order 22 Rule 29(3) of the [Civil Procedure Rules](#). She submitted that the said rule allows the court where possession of any building or enclosure is to be delivered, and where the person in possession being bound by the decree or does not afford free access, to through its officers, remove or open any door or do any other act necessary for putting the Decree-holder in possession.
9. The Plaintiff submits that in this matter there is a lawful Decree of this court which the Defendant/Judgement Debtor has refused to abide with within the timelines given by the court. She has adamantly remained in possession by way of force and threats to mete out violence.
10. The Plaintiff made reference to the decision of the Supreme Court in the case of [Republic v Ahmed Abolfathi Mohammed & another \(2018\) eKLR](#) where the court emphasized that the dignity and authority of the courts must be upheld at all times for purposes of maintenance of the rule of law and order.
11. The Plaintiff maintains that the arguments by the Defendant in opposition to the application are wrong since the application for stay of execution have already been dispensed with.

### **Defendant/Respondents Submissions**

12. On her part, the Defendant/Respondent submitted that Order 22 Rule 29(3) of the [Civil Procedure Rules](#) is irrelevant. The Defendant argues that the rule applied only to persons in possession of buildings and/or enclosure while this suit was not about immovable property. It was about ownership of land and there is no evidence of locks or bolts to be broken open.
13. Further, the Defendant argues that this court is functus officio. The Defendant avers that, that was the argument used by the court to determine the application made by the Defendant for a stay. The



Defendant prays that the same reasoning be used in the present application and that if the Plaintiff wishes to get the orders sought herein, she can then approach the Court of Appeal. She prays for the dismissal of the Plaintiff's application.

### Issues for Determination

14. Having considered the application by the Plaintiff herein, the responses by the Defendants and the respective submissions filed by the parties, the court is of the view that the issue for determination herein are as follows:-
  - a. Whether the court has the power to determine the application before it or is *functus officio*.
  - b. Depending on the outcome of (a) above, whether the Plaintiff/Applicant is entitled to the orders sought.
15. I will deal with the two issues sequentially.
16. In the case of *Alderman Limited v Zaverchand Ramji Shah & 3 others (Nairobi ELC Civil Appeal E004/2021)*, this court made reference to the Court of Appeal decision in the case of *Telkom Kenya Limited v John Ochanda (2004) eKLR*, where the Court of Appeal explained the doctrine of *functus officio* and its exceptions. The Court of Appeal held that:-

“*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 doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued”.
17. The Court of Appeal pointed out various expectations to the doctrine of *functus officio* in form of proceedings that can be taken after judgment namely:-
  - a. Application for stay,
  - b. Application to correct the decree,
  - c. Application of accounts,
  - d. Application for execution including garnishee applications,
  - e. Application for review, and
  - f. Application under Section 34 of the Act.
18. The Plaintiff's application before me is one in furtherance of the execution of the decree of this court. It is clearly one of recognized exemptions to the *functus officio* doctrine.
19. The Plaintiff's application is premised on Order 22 Rule 29 of the *Civil Procedure Rules*. The Plaintiff having demonstrated that she has a lawful decree of this court, requiring the Defendant to vacate the suit property within forty five (45) days from the date of the court's judgment, and which the Defendant has failed and or refused to abide, the Plaintiff is clearly entitled to the orders sought.



20. Accordingly, the court allows the Plaintiff's application dated March 19, 2023 in the following terms:-
- a. That the court hereby orders the court bailiffs with the assistance of the OCS Ongata Police Station to remove the Defendant/Judgement-Debtor, Alice Waceke Ng'ang'a and or her agents, nominees or anybody whatsoever claiming through her from the parcel of land number Ngong/Ngong/5677 and to put the Plaintiff/Applicant, Margaret Wangui Nderu in possession.
  - b. That the costs of this application be awarded to the Plaintiff/Applicant.

21. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL, 2023**

**M D MWANGI**

**JUDGE**

In the virtual presence of:

Ms Maina holding brief for Mr Mbigi Njuguna for the Plaintiff /Applicant

No appearance for the Defendant/Respondent

Court assistant - Yvette

