



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 286 OF 2007

IN THE MATTER OF THE ESTATE OF NZIOKA NZIMBA (DECEASED)

BETWEEN

JAMES NZIOKA..... 1ST APPLICANT

MUSEMBI NZIOKA.....2ND APPLICANT

JOSPEH KATIWA NZIOKA.....3RD APPLICANT

MAURICE KIOKO NZIOKA.....4TH APPLICANT

AND

HILLARY NGUMBAU NZIOKI.....RESPONDENT

AND

MAGDALENE WANZA KIOKO..... INTERESTED PARTY

RULING

1. On 6th November, 2019, this court issued an order dismissing the application dated 25th October, 2018 on the ground that the Applicants having failed to comply with the directions of the court to file and serve their submissions, the said application remained unprosecuted.
2. By a Notice of Motion dated 3rd September, 2021, the Applicants herein seek that the said application be reinstated and that the said application be heard on its merit.
3. The application is supported by an affidavit sworn by **James Nzioka**, the 1st applicant herein.
4. According to the applicants, though they had agreed in good faith as beneficiaries of the estate of the late **Nzioka Nzimba** that whole estate be registered in the name of one of their brothers, the Respondent herein, immediately the grant was issued, the said Respondent changed and started acting against the interest of the other members of the family. The applicants then instructed the firm of Wairagu & Wairagu Advocate to apply for the revocation of the confirmed grant and the said firm at all times assured them that they were on top of things.
5. It was only upon being served with the order dismissing the application that they realised that the same hence the application for review of the order dismissing the said application. They were however advised that that said application for review would not properly serve their interests hence the failure of the deponent to attend the court on 18th November, 2020 and the eventual dismissal of the application.
6. While conceding that they had been let down by their advocates, the applicants contended that they are desperately seeking to correct wrongs perpetuated by the Respondent on the deceased's estate hence the court ought not to visit the mistake of their advocates on them.
7. The applicants disclosed that there already exist proceedings in Kangundo Law Courts in which it is sought that they be evicted from their ancestral land.

8. In opposing the application, the Respondent swore a replying affidavit dated 25th October, 2021 in which he deposed that the said summons for reinstatement of the application is grossly incompetent and an abuse of the court process as the applicants' summons for revocation or annulment of grant and their contemporaneous notice of motion all dated and filed herein on 25th October, 2018 were both dismissed by this honourable court on 6th November, 2019 a period of close to 3 years now as they failed to prosecute the same. According to him, the summons for reinstatement does not state which of the two applications is sought to be reinstated. Since the applicants sought similar orders in their application dated 20th April, 2021 which they withdrew on 28th June, 2021, it was deposed that the order sought for reinstatement is *res judicata*.

9. According to the Respondent, the confirmed grant herein was long effected and no appeal was ever preferred against the same and that he long sold the subject parcel of land number Matungulu/Kyaume/1520 and he is no longer the registered owner thereof and also not a party in the said pending environment and land case in Kangundo hence the applicants should have sued the parties thereto for such a prayer to be considered.

10. He reiterated his averments in the replying affidavit sworn on 17th December, 2018 and filed herein on 18th December, 2018 in response to the aforementioned dismissed applications and in response to the applicants' attempt to depict him as having duped them and that they purport to be rendered landless. It was his position that he clearly never obtained the grant herein fraudulently by making false statements and concealing material facts from this honourable court and that the grant herein was confirmed way back on 28th February, 2012 before Ngugi J. upon perusing summons for confirmation, the written consents filed herein and upon hearing both counsel and beneficiaries. He thereafter lawfully obtained title to the parcel of land on 18th March, 2013 upon being registered as the absolute proprietor thereof on 29th November, 2012 a period of 9 years now. He averred that all the beneficiaries including the applicants admittedly signed consent form 38 herein consenting to the making of a grant to him and duly signed consent to confirmation of grant all filed herein.

11. According to the Respondent, the sole listed property number Matungulu/Kyaume/1520 was clearly solely granted to him by consent simply because the other beneficiaries are also solely utilizing properties obtained by their deceased father namely: -

- 1) Nzaui/Mumbuni/143-utilized by Mrs. Beatrice Nzioka, James Nzioka, Katwiwa Nzioka, Mbeke Nzioka and Martin Nzioka.
- 2) Parcel of land number 430 at Nzaui location Mumbuni section 2- utilized by Musembi Nzioka.
- 3) Parcel of land number Nzaui/Mumbuni/147- utilized by Musembi Nzioka, Michael Nzioka and Kioko Nzioka; and
- 4) Plot at Nzueni market measuring 40 by 100 ft – utilized by all the children of the deceased i.e. Musembi utilizes two doors (rooms) and all the others one door (room) each.

12. The Respondent therefore averred that from the foregoing it is clear that the applicants and all other beneficiaries were fully aware of and participated actively in these proceedings and it is misleading for the applicants to try to depict him as having disinherited them. Based on legal advice, he deposed that the firm of Nyongesa Nafula and company advocates is not properly on record as they have not served any notice of change of advocate, notice of appointment and acceptance and/or entry of appearance as required by law hence their application herein is incompetent and cannot stand.

13. He urged the Court to find that the application brought herein is not merited and dismiss it with costs in the interest of justice and fairness.

14. The application was similarly opposed by the interested party who deposed that she is a *bonafide* absolute proprietor for value of land registered under L.R Title No. Matungulu/ Kyaume/ 1520 (herein after referred to as the "Suit Property") having purchased the same from Hilary Ngumbau Nzioka on the 29th January 2021.

15. According to her, before purchasing the Suit Property, she carried out due diligence on the suit property and became aware that Hilary Ngumbau Nzioka (the previous owner) had been issued with Certificate of Confirmation of Grant as the sole proprietor of the Suit Property and had caused the property to be registered in his name as the absolute proprietor giving him legal title and ownership of the Suit Property. Further, she also carried out an official search to confirm the status of the Suit Property at Machakos Land Registry, and was issued with Certificate of Official Search which confirmed that Hillary Ngumbau Nzioka, the Respondent herein was an absolute owner and/or proprietor of the Suit Property.

16. She deposed that she understood that the Applicants/Objectors had filed an application dated 25th October 2018 to have the Grant issued to Hillary Ngumbau Nzioka revoked but the same Application was dismissed by this Court on 6th November 2019 hence the court is *functus officio* as far as the application dated 25th October 2018 is concerned. She averred that the Applicants herein cannot rely on a dismissed Application purporting to have this Court make orders on non-existent case and on property which has passed to a third party after confirmation of grant.

17. Based on legal advice, she deposed that she is now a legal and absolute owner of the Suit Property having legally acquired the same from Hillary Ngumbau Nzioka who was by then a legal owner and had absolute rights to dispose the property. She asserted that she bought vacant property and there was no evidence of any occupation or farming as alleged by the objectors and that when sent her brother, Robert Kioko, to the farm on 7th April 2021 to plant for me some crops, the said brother was confronted by Musyoki Nzimba about his presence at the farm. The following day on 8th April 2021 one Christopher Muindi Nzimba, an uncle to the applicants herein, who she sued in Kangundo SPMC SUIT E31 for trespass, and his son with tractor MV registration KBL 417 Ferguson 385 started to plough on the planted area and those seeds planted by her brother on her behalf are unlikely to germinate. Upon inquiring from the Respondent, she was informed that that the objectors are residents of Mumbuni sub-location Wote location Makueni county and with exception of the 2nd Objector their families are settled at

Makueni. Consequently, the allegation the applicants will be rendered landless, homeless and vagabonds by her purchase of the land is not true.

18. It was averred that all along the Objectors knew their case was dismissed as they had advocates on record. Further, on 8th April 2021 the Objectors were given the said court Order by the sub-chief of Muselele sub-location Mr. Kimeu Kasoo in the presence of her brother Robert Kioko and one Boniface Wambua, a neighbour and relative of the Objectors and that it was then that she moved court in Kangundo SPMC ELC case no E31 of 2021 to stop the Respondents therein from trespassing into her land and obtained injunction Orders dated 21st April 2021 barring the Applicants herein from trespassing or otherwise interfering with my quiet possession of my property.

19. According to the Interested Party, despite service of the order upon the Applicants, they continue to enter her land which they now want to farm for a second season, in total disregard of the court order of the Kangundo case. As a result, she has filed contempt proceedings against the 2nd and 3rd Applicants together with others not party to these proceedings and has been legally advised that it is a legitimate expectation and for ends of justice that a decision of the court 20th November 2019 dismissing a case forms a reasonable basis for making investment decision on the subject matter.

20. It was therefore her case that this application is without basis, an abuse of court process and only meant to frustrate her possession and occupation. She urged the court to protect her, an innocent buyer for value, from further harassment by the Applicants. She averred that there is real threat to her right to quiet enjoyment of her property posed by the Applicants who are employing delay tactics in filing applications to buy time as they continue trespassing and illegally occupying her property in total defiance of Court Order and Title deed causing me irreparable damages. She therefore contended that it is in best interest of justice that the Applicants application dated 3rd September 2021 is dismissed with costs.

Determination

21. I have considered the application, the affidavits in support thereof and in opposition thereto as well as the submissions filed.

22. The decision whether or not to reinstate a cause is no doubt an exercise of judicial discretion and like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

23. In this case, as stated at the beginning of this ruling, on 6th November, 2019, this court issued an order dismissing the application dated 25th October, 2018 on the ground that the Applicants having failed to comply with the directions of the court to file and serve their submissions, the said application remained unprosecuted. It is clear that the said application was dismissed and not denied as is erroneously reported in the typed proceedings. However, there is a distinction between a matter which has been disposed of for non-compliance and one disposed of on merits. Whether the terminology applied is dismissal, disallowed, denied or struck out is used, it is not the terminology but the effect of the decision that determines whether further proceedings may be brought on the same matter. As was held in **Abbas G Essaji vs. Gordhan Dewji Solanki [1968] EA 218:**

“Where the court has no jurisdiction to entertain the appeal, what is before it is abortive and not a properly constituted appeal at all and what the court ought to do in such case is to “strike out” the appeal as being incompetent, rather than to have it “dismissed”; for the latter phrase implies that a competent appeal has been disposed of, while the former implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used; and since the earlier matter was capable of being dismissed, that is to say, of being treated as being properly before the court, each must be treated as if it had been struck out, which in effect it was. Since the earlier appeal was incompetent, there was no “res” before the Court capable of being “judicata”.”

24. To my mind the earlier application having been dismissed for non-compliance rather than on its merits, the doctrine of res judicata is inapplicable. However, where the bringing up of subsequent applications amount to abuse of the court process, nothing bars the court from invoking its inherent jurisdiction and disallowing the same.

25. The Respondents have however contended that this Court is *functus officio* as the applicants had made an application seeking similar orders which application they withdrew. Dealing with the said principle, the Supreme Court in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, **“The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832** to the effect that:

“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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

26. In **Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR**, the court observed as regards the doctrine of *functus officio* as follows:-

“I understand the doctrine, like its sister, the res judicata rule to seek to achieve finality in litigation. It is a way of a court

saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file."

27. From the foregoing, the key word is "finality". Can it therefore be said that an application that has been withdrawn by the applicant before being heard amounts to its being determined with "finality" so as to provoke the wrath of the twin principles of *res judicata* and *functus officio*? In my view a withdrawal of a matter before it is heard and finally determined does not render a subsequent application *res judicata*. Nor is the court *functus officio* by the mere fact of allowing the withdrawal of the application. On the same score, it has been held in The Tee Gee Electrics & Plastics Co. Ltd. vs. Kenya Industrial Estates Ltd. Civil Appeal No 333 of 2001 that *Res Judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits.

28. Accordingly, I decline to accede to the objections raised by the Respondent and the Interested Party that the current application is caught up by the two doctrines of *res judicata* and *functus officio*.

29. In this case the application sought to be reinstated was dismissed on 6th November, 2019. The applicant then filed an application dated 20th April, 2021, more than a year after the said dismissal, substantially seeking to compel the Respondent to render an account and to annul the transfer of the subject property, to order to distribution of the estate and to have the letters of administration granted to the Respondent revoked or annulled. On 25th June, 2021 he said application was withdrawn with costs to the Respondent and the Interested Party. The current application dated 3rd September, 2021 was then filed on 8th September, 2021, slightly more than two months after the said withdrawal.

30. According to the applicants they were unaware that the application they now seek to reinstate was dismissed. The Respondents have not challenged the applicants' grounds for seeking the reinstatement. From the replying affidavits, their "beef" with the applicants is that the applicants' grounds for seeking to revoke the grant are unmerited since the applicants consented to the grant being issued to the Respondent and to the subsequent confirmation thereof that led to the transfer of the said land to the interested party. While their contention may eventually be upheld, at this point what the court is required to do is to make a finding on whether the applicants' application ought to be reinstated.

31. Having considered the history of this matter and taking into account the fact that these are succession proceedings, I find that it is in the interest of justice that the Summons seeking to revoke the grant be heard on its merits. All the issues raised by the Respondent and the Interested Party will then be ventilated during the hearing thereof and a final determination made thereat. In order not to convolute the matter further, I find that further proceedings before the Kangundo Court in so far as they are based on the confirmed grant which is under challenge ought to be stayed. For avoidance of doubt any proceedings including orders previously issued in that case remain valid and enforceable.

32. Accordingly, the orders that commend themselves to me and which I hereby grant are:

(a) That the order made herein on 6th November, 2019, dismissing the application dated 25th October, 2018 is hereby set aside and the said application reinstated to hearing.

(b) That there shall be a stay of proceedings in Kangundo ELC No. E31 of 2021 pending the hearing and determination of the said application dated 25th October, 2018 or till further orders.

(c) The costs of this application to be borne by the Applicants in any event.

33. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24TH DAY OF JANUARY, 2022.

G V ODUNGA

JUDGE

DELIVERED IN THE PRESENCE OF:

MS MWAI FOR MR KITUKU FOR THE ADMINISTRATOR/RESPONDENT

MS MWINZI FOR THE INTERESTED PARTY.

MS MISIKO FOR MS NYONGESA FOR THE APPLICANT.

CA SUSAN