Meru Water & Sewerage Services Trustees (MEWASS) & 2 others v M'Mbijiwe ((Acting as the Legal Representative of the Estate of The Hon Kabeere M'Mbijiwe)) (Environment and Land Appeal 28, 30 & 31 of 2012 (Consolidated)) [2025] KEELC 3289 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 3289 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 28, 30 & 31 OF 2012 (CONSOLIDATED)

JO MBOYA, J

MARCH 20, 2025

BETWEEN

MERU WATER & SEWERAGE SERVICES TRUSTEES (MEWASS) .... 1ST APPELLANT

TANA WATER SERVICES BOARD .... 2ND APPELLANT

COUNTY GOVERNMENT OF MERU .... 3RD APPELLANT

AND

KINYUA M'MBIJIWE .... RESPONDENT

(ACTING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE HON KABEERE M'MBIJIWE)

RULING

1. Vide the Application dated the 16th January 2025 the 1st Appellant/Applicant [hereinafter referred to as the Applicant] has approached the court seeking the following reliefs;
   - i. That this Application be certified as Urgent and be heard on priority basis.
   - ii. That the register of land parcel number Ntima/Igoki/2032 be rectified by cancelling the registration of the Respondent Kinyua M'Mbijiwe as the proprietor and in lieu thereof the 1st Appellant Meru Water and Sewerage Services(MEWASS) be registered as the proprietor.
   - iii. That any encumbrances registered against LR. No. Ntima/Igoki/2032 be lifted forthwith.
   - iv. That the Land Registrar do dipense with the production of the original Certificate of Title [Title Deed] for LR.No.Ntima/Igoki/2032 while implementing the orders granted herein.

v. That the Deputy Registrar of this court be empowered to sign all the necessary documents to enable the transmission of L.R No.Ntima/Goki/202 to the 1" Appellant.

vi. That costs of this Application be borne by the Respondent.

2. The instant application is anchored on the various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit by one Patrick Mugendi [the deponent] sworn on even date.

3. The Respondent filed grounds of opposition in answer to the application beforehand. In particular, the Respondent has contended that the application is premised on a deficient decree which was extracted without due compliance with the provisions of Order 21 rule 8 of the Civil Procedure 2010.

4. The application beforehand came up for hearing on the 28th February 2025 whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submissions. To this end, the court ordered that the written submissions be filed and exchanged within set timelines.

5. Pursuant to the direction[s] of the court, the 1st Appellant/Applicant and the Respondent filed their respective written submissions. However, the 2nd Appellant did not file any written submissions. For good measure, the two [2] sets of written submissions filed by the Applicant and the Respondent are on record.

6. Having reviewed the application dated the 16th January 2025; the supporting affidavit thereto and the response filed on behalf of the Respondent and upon consideration of the written submissions filed by the respective parties, I come to the conclusion that the determination of the instant application turns on two [2] salient issues for the determination, namely;

i. Whether this court is seized of the requisite jurisdiction to grant the orders sought; and;

ii. Whether the court is Functus officio.

7. Regarding the first issue, namely; whether this court is seized of the requisite jurisdiction to grant the various reliefs sought at the foot of the application, it is imperative to state that the subject matter came to this court by way of an appeal against the decision of the water appeals board.

8. Furthermore, it is worthy to state that this court entertained and adjudicated upon the appeal beforehand culminating into the delivery of the judgment rendered on the 18th October 2023 and whereupon the court stated as hereunder;

152. The upshot is that the three appeals are allowed. The award is hereby set aside. The court in exercise of its powers under Order 42 Rule 32 of the Civil Procedure Rules, Section 78 of the *Civil Procedure Act* and Section 68 of the *Land Registration Act* hereby issues an inhibition against the Title L.R No. Ntima Igoki/2032 to preserve it for a period of 6 months from the date hereof as the parties herein take the appropriate legal avenues to regularize the ownership of the suit land under Section 78 of the *Water Act*. For the avoidance of doubt, the Respondent shall not take any more loan facility against the suit premises to the detriment of public facility existing on his land.

9. My reading of the pronouncement by the court [differently constituted] drives me to the conclusion that the court dealt with the appeal and thereafter allowed the three [3] appeals that were before the court. Nevertheless, and in the interim the court granted preservatory orders to preserve the status of

the suit property for a duration of 6 months to enable the parties to take appropriate legal avenues to regularize the ownership of the suit property under Section 78 of the *Water Act*, 2016.

10. Having dealt with all the issues, it suffices to state the court exhausted its mandate as provided for vide the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

11. Furthermore, it is important to state that this court whilst exercising its appellate jurisdiction is clothed with powers to grant such orders and/or remedies as could have been granted by the court or tribunal of first instance.

12. However, there is no gainsaying that the appellate court does not have exclusive jurisdiction to grant such orders and/or remedies which were not sought before the subordinate court or tribunal of first instance.

13. Moreover, it is not lost on this court that even whilst engaged in entertaining and adjudicating upon an appeal, this court [appellate court] is still bound by the doctrine of departure. [See the decision of the court of appeal in the case of IEBC v Stephen Mutinda Mule [2013]eKLR] [See also Dakianga Distributors Ltd v Kenya Seed Co Ltd [2015]eKLR].

14. Bearing the foregoing principles in mind, it is now appropriate to revert to the subject application and to discern whether this court can grant the various orders sought at the foot of the application. Firstly, it is imperative to recall that the Applicant is seeking for an order to rectify the register of the suit property by cancellation of the name of the Respondent as the proprietor thereof.

15. The question that does arise is whether such an order was ever sought for before the tribunal whose decision was the subject of appeal and if not, whether such an order can now be sneaked into the appeal and be granted vide an application like the one beforehand.

16. To my mind, the remedy for rectification of the register and cancelation of the name of a party as the proprietor of a designated land is a substantive remedy and same can only be procured vide a substantive suit and not otherwise. [See the provisions of Section 80 of the *Land Registration Act*, 2012]

17. Additionally, the Applicant has also sought to have the various encumbrances registered against the title of the suit property to be removed. However, there is no gainsaying that the Applicant has not gone further to particularize the nature of encumbrances which are sought to be removed/lifted.

18. Be that as it may, my reading of paragraph 152 of the judgment of the court [differently constituted] drives me to the conclusion that some of the encumbrances alluded to relate to loan facilities that were granted against the title of the suit property.

19. If the foregoing observation is true [taking into account paragraph 152 of the judgment] then a question does arise as to whether such remedies can issue without notice to [sic] the parties whose interests were protected vide the impugned encumbrances.

20. Suffice it to state that by dint of Article 50 of the *constitution*, each and every party, who is likely to be affected by a decision of the court is obliged and entitled to be afforded an opportunity to be heard. Furthermore, the provisions of Article 27[1] and [2] of the *constitution* also avails to parties the right of equal protection and benefit under the law.

21. The other relief that has been sought pursuant to the application relates to an order directed to the land registrar to dispense with the production of the original title of the suit property. Nevertheless, there is no gainsaying that there exists clear provision of the law to be invoked and followed by any

person who seeks to have the land registrar to dispense with the production of the original certificate of title/lease, where apposite. [See Section 33 of the *Land Registration Act*].

22. The other relief that has been sought at the foot of the application relate[s] to the deputy registrar being mandated to execute the necessary instrument of conveyance to facilitate [sic] the transmission the suit property to the first Appellant. Notably, the registrar has the requisite mandate to execute instrument of conveyance on behalf of the court but only where a substantive order has since been issued and not otherwise.

23. Having reviewed the nature of reliefs and/or remedies that have been sought at the foot of the application beforehand, I come to the conclusion that the reliefs sought are substantive in nature and that same can only be issued/granted in a substantive suit and not vide an interlocutory application like the one beforehand.

24. Furthermore, there is no gainsaying that the reliefs being sought at the foot of the current application could not have been granted by the court [differently constituted] that heard and determine the appeal. To the extent that the court that heard the appeal was divested of the jurisdiction to grant such orders, there is no doubt that this court by extension is not seized of the powers to grant of the orders sought.

25. Additionally, it is not lost on this court that the grant of the orders that have been highlighted at the foot of the application shall be tantamount to setting aside and/or better still, sitting on an appeal on the decision of a court of concurrent jurisdiction. Such an endeavour would not only be tantamount to inviting anarchy into the corridor[s] of justice, but shall also be tantamount to an absurdity.

26. Pertinently, this court is not clothed with the mandate, authority and/or jurisdiction to overrule a court of coordinate jurisdiction and to grant such orders which the court could not have granted in the first place. Instructively, a court of law, this court not excepted, must act within the confines of the *constitution* and the statute.

27. To buttress the foregoing position and in particular that this court cannot overrule the previous judge and purport to issue orders outside the judgment under reference, it suffice to reference the decision of the Supreme Court of Kenya in the case of Kenya Hotel Properties Ltd v The Attorney General & 3 Others [2022] KESC, where the court stated as hereunder;

> 55. We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves. Again, we take cognizance of our finding in the Samuel Kamau Macharia case where we held that:"A court jurisdiction flows from either the *constitution* or legislation or both.
>
> Thus, a court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is

not one mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (applicant), Constitutional Application Number 2 of 2011. Where the *constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation." (emphasis supplied)

28. Flowing from the foregoing analysis, my answer to issue number one [1] is threefold. Firstly, the reliefs sought at the foot of the application are substantive in nature and hence same can only be canvassed vide a substantive suit and not otherwise.

29. In any event, a clear reading of the Judgment rendered on the 18th October 2023; gives a clear indication that the regularization [if any] could only be pursued elsewhere vide an appropriate legal avenue.

30. Secondly, the learned judge who heard the appeal and rendered the judgment did not grant the reliefs sought. Having not granted same, it would be tantamount to this court sitting on appeal on the decision of a court of coordinate jurisdiction, if this Court were to purport to grant such Order[s].

31. Lastly, this court is bound by the doctrine of departure. To this end, this court cannot purport to expand the boundaries of the pleadings that were filed and thereafter seek to grant orders beyond the four corners of the pleadings or at all.

32. In respect of the second issue, namely; whether the court is functus officio, it is important to underscore that the court heard and disposed of the appeal that was filed by the Appellants. Thereafter the court indeed allowed the appeal and granted the reliefs that were highlighted at the foot of the memorandum of appeal.

33. Having entertained and adjudicated upon the appeal, the court is deemed to have exhausted its statutory mandate. To this end, the court cannot re-visit and/or re-engage with the subject appeal in any manner whatsoever save for the limited aspect provided for vide the slip rule [See Section 99 of the *Civil Procedure Act*].

34. To my mind, this honourable court is functus officio and thus same cannot be invited to have a second bite on the issues. Further and in any event, what the Applicant seeks to do is to evade and circumvent the doctrine of functus officio and to start a fresh litigation vide a closed appeal.

35. Such an endeavour is unfathomable in the eyes of the law.

36. The scope of the doctrine of functus officio was highlighted and elaborated upon in the case of Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR), where the court stated as hereunder;

> It is apparent from the record that in ordering that certain materials be placed before him by way of affidavit long after judgment had been entered; the learned judge had the noblest and best of intentions in trying to give effect to the judgment of Mwera J. In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him. He had himself earlier acknowledged that his hands were tied and also noted that he could not amend the judgment as had been sought. The court's only recourse would have been to review the judgment and having refused to do so, it was rendered functus officio.

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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of Chandler vs Alberta Association of Architects [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,
2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186”

The Supreme Court in Raila Odinga v IEBC 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 in which the learned author stated;

> ...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.”

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. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd vs Ai Thani [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

> 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 or adjudication must be taken to a higher court if that right is available.”

It seems quite clear to us that as at the time the respondents made their application dated 31st January 2012, the proceedings respecting the dispute between the parties had been finally concluded before Mwera J. His judgment and decree had been perfected and, as we have seen, had subsequently been the subject of an appeal to this Court as well as a number of

applications including for stay. The respondents themselves had proceeded to attempt to execute the same. There was finality as to the proceedings, merits and decision in the matter.

And the High Court had become functus officio so that any issues of grievance could only be dealt with by escalation to this Court on appeal.

37. Simply put, I find and hold that the application beforehand is also barred and prohibited by the doctrine of Functus officio.

Final Disposition:

38. Having addressed the two [2] thematic issues that were enumerated in the body of the Ruling, it must have become crystal clear that the application beforehand is misconceived and legally untenable.

39. Consequently, and in the premises, the final orders that commend themselves to this court are as hereunder;

    i. The Application dated the 16th January 2025; be and is hereby dismissed.

    ii. Each party shall bear own costs of the Application.

40. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 20TH DAY OF MARCH, 2025.

OGUTTU MBOYA

JUDGE.

In the presence of .

Mr. Mutuma – Court Assistant

Mr. Kariuki for the 1st Appellant/Applicant.

Mr. Mwanzia for the respondent.

N/A for the 2nd Appellant/Respondent.