



**Mussaji & another v Mussaji (Environment & Land Case
E149 of 2019) [2023] KEELC 18336 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E149 OF 2019
NA MATHEKA, J
JUNE 21, 2023**

BETWEEN

SHABBIR IBRAHIM MUSSAJI 1ST PLAINTIFF

ONALI EBRAHIM MUSSAJI 2ND PLAINTIFF

AND

MOIZ EBRAHIM MUSSAJI DEFENDANT

RULING

1. The application is dated November 30, 2022 and is brought under 40 rule 1,2,3 (1) & 4, order 51 rule 1 of the [Civil Procedure Rules](#) section IA, 1B and 63 (c) of the [Civil Procedure Act](#) seeking the following orders;
 1. That this matter be certified as urgent and the same be heard *ex parte* in the first instance;
 2. The applicants and the respondent herein do open a joint bank account into which rent accruing from the lands comprised in the following titles (the "suit properties") shall be deposited:
 - a. Mombasa/B1ock xvi/252
 - b. Mombasa/B1ock xvi/253
 - c. Mombasa/b1ock xvi/1388;
 - d. Mombasa/Block xvi/1390.
 3. In the alternative, the firm of Datoos Kithiki real estate agents be appointed to collect rent accruing from the suit properties and pay to each party herein its rightful share;



4. That the court be pleased to order the respondent to furnish an account to the applicants and this honorable court from May 17, 2022.
 5. The costs of this application be borne by the respondents.
2. It is supported by the supporting affidavit of Shabbir Ebrahim Mussaji on the grounds that rent is accruing from the suit properties and despite the judgement delivered in this matter on the May 17, 2022, the respondent continues to collect the same. The respondent does not account to the applicants for the rent collected. The respondent treats the suit properties as his entirely to be controlled by him alone. The respondent has refused to meet or in any way communicate with the applicants with a view to sign forms to facilitate opening of joint bank account and thereby creating a situation where the revenue of the estate is received by him alone and converted for his own use. That despite judgement being delivered in favour of the applicants herein, the applicants continue to suffer consequences resulting from loss of income from the rental collections from the suit properties.
 3. The respondent states that judgment was delivered on the May 17, 2022. annex is a copy of the judgment and marked as "Mem 1". That this court is *functus officio* and therefore cannot hear this application by any of the parties to the suit. That none of the parties have applied to set aside the judgment and/or to open the same for hearing. That a decree had already been issued on the matter. That the prayers sought cannot issue on the application on the suit.
 4. This court has considered the application and submissions therein. Judgement was delivered in this matter and the orders read as follows;
 1. An order that the plaintiffs be deemed to be landlords in respect all tenancies that currently exist and ones which shall in the future exists on the suit properties and the plaintiffs be equally entitled to all rents and other income being derived from the suit properties, i.e.
 - i. Parcel of land of title number Mombasa/block xvi/252;
 - ii. Parcel of land of title number Mombasa/block xvi/253;
 - iii. Parcel of land of title number Mombasa/block xvi/1388;
 - iv. Parcel of land of title number Mombasa/block xvi/1390
 2. An order that the plaintiffs shall equally together with the defendant have equal rights with the defendant to possession and all other dealings involving the suit properties, and should the defendant do anything without the consent and permission of the plaintiffs, then the defendant's actions shall be void and of no consequence in law.
 3. No orders as to costs.
 5. This decision has not been appealed against and the grounds of this application is that the respondent continues to collect the same. The respondent does not account to the applicants for the rent collected. The respondent treats the suit properties as his entirely to be controlled by him alone. The respondent has refused to meet or in any way communicate with the applicants with a view to sign forms to facilitate opening of joint bank account and thereby creating a situation where the revenue of the estate is received by him alone and converted for his own use. Hence that applicants seek for orders that a joint bank account be opened or an agent be appointed by this court. The respondent states that this court is *functus officio* having delivered its judgement.



6. The doctrine of *functus officio* was considered by the Court of Appeal in *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR, where the court held that -
7. *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.”
8. In *Telkom Kenya Ltd v John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd* (supra), the Court of Appeal held as follows on the *functus officio* doctrine-
9. *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--
10. The general rule that 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 of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions. ---”
11. The Supreme Court of Kenya in the case of *Raila Odinga & 2 others v 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 which 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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”
12. Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of *functus officio* in the following terms-
13. Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
14. It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein. It is my finding that the going ahead and issuing orders for joint bank accounts and appointing agents in a judgment I had already rendered on will be revisiting the matter on merit. It is evident that this will be amending my decision and sitting on appeal of my own own decision, a practice that is frowned upon by the law and is meant to be barred by the doctrine of *functus officio*. The judgement is clear and if the applicant feel the respondent is in contempt then the procedure to cure the same is well laid out. I find for those reasons that this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST JUNE 2023.

N.A. MATHEKA

JUDGE

