



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 21 OF 2007

JAMES KABATHI MWANGI

T/A TANGERINE AUTO HARDWARE.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

AND

JOSEPH GATHONJIA GATUNI.....PROPOSED INTERESTED PARTY

R U L I N G

1. There are two applications and one preliminary objection before me for determination. The main application is by the plaintiff dated 26/5/2020. It was brought under ***Order 45 rule 1 and order 51 rule 1 of the Civil Procedure rules and sections 1A, 1B and 3A of the Civil Procedure Act Cap 21.***
2. The application sought orders for review of the judgment delivered on 14/4/2020 to include land parcel **LOC 11/MARAGI/3509 (“the said property”)** in the said judgment, the eviction of **Joseph Gathonjia Gatuni** from the said property and the cancellation of the title to the said property and retransfer of the same to the plaintiff. There was also a prayer for mesne profits and to direct the OCS, Murang’a Police Station to enforce the eviction.
3. The application was supported by the affidavit of the plaintiff sworn on 26/5/2020. It was contended that by the said judgment, the sale of the said property was declared unlawful. That in the premises, the plaintiff was entitled to repossession of the said property from **Joseph Gathonjia Gatuni**.
4. The second application was by **Joseph Gathonjia Gatuni** dated 10/7/2020. It was brought under ***Article 50(1) of the Constitution, Section 1A, 1B, and 3A of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules.*** In the Motion, **Joseph Gathonjia Gatuni** sought leave to be enjoined and oppose the plaintiff’s aforesaid application.
5. In the supporting affidavit he swore on 10/7/2020, he contended that he purchased the said property at an auction on 27/3/2002. He was a bonafide purchaser for value. He had since taken possession thereon and developed the same. That his earlier cases both in the subordinate court and the Land and Environment Court were dismissed to await the outcome of this suit. That there was no declaration that the auction was unlawful in the judgment of this Court of 14/4/2020.
6. The defendant opposed the plaintiff’s application through a preliminary objection dated 24/7/2020. It was contended that this Court lacked jurisdiction to determine the dispute as it offended ***sections 13 and 4 of the Environment and Land Court Act 2011.*** Further, that this Court was *functus officio* having delivered its judgment on 14/4/2020.
7. Further, the defendant filed a replying affidavit by **Williamson Machua Mwangi** in opposition to the plaintiff’s application. He averred that the defendant had already discharged the plaintiff’s properties and released to him the titles for land parcels **Loc 2 Maragi/1771, Loc 15 Kangare 1622 and Loc 2 Maragi/3622** as ordered by the Court. That in the premises, this Court was *functus officio*.
8. It was further averred that causes of action relating to rights to land, cancellation of title and eviction orders could only be granted by the Environment and Land Court. In any event, the new claim was statutory barred by the ***Limitation of Actions Act.***

I have carefully considered the depositions of the parties and submissions by Learned Counsel. The issues for determination are,

whether this court lacks jurisdiction to hear this matter and whether it is *functus officio*, whether **Joseph Gathonjia Gatuni** should be enjoined as an interested party and whether the Judgment of 14/4/2020 should be reviewed.

9. I propose to start with the preliminary objection raised by the defendant since, if it succeeds, it would dispose off all the applications. A Preliminary Objection was defined in **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to consist a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. The same is raised on the basis that the facts as pleaded are correct.

10. Is this Court *functus officio*? The doctrine of *functus officio* is one of the expressions in law on the principle of finality. The **Black's Law Dictionary, Ninth 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 **Telkom Kenya Limited V John Ochanda (Suing On His Own Behalf And On Behalf Of 996 Former Employees Of Telkom Kenya Limited) [2014] Eklr**, 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. There do therefore exist certain exceptions...”

13. In **Raila Odinga & 2 Others V Independent Electoral & Boundaries Commission & 3 Others [2013] Eklr**, the Supreme Court of Kenya 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”.

14. In this regard, a court will not be permitted to re-open a case that it has determined. It can only do so by exercising the restricted jurisdiction under **sections 80 and 99 of the Civil Procedure Act**. That jurisdiction does not allow re-looking at the matter afresh with a view to add or subtract what has already been determined. It is a jurisdiction that is very restricted.

15. Accordingly, a Court is *functus officio* once it has delivered its judgment.

16. In this case, the Court made final determination as per the pleadings that were before it. The property the subject matter of the plaintiff's application was already sold way before the filing of the suit. The plaintiff had the opportunity and right of seeking appropriate orders regarding that property, including orders of eviction if he so wished. The register at the lands office had already been altered in favour of the proposed interested party. He could as well have asked for its rectification before the trial and judgment.

17. In the present application, the plaintiff seeks to re-open the suit afresh and seek orders of eviction and mesne profits. With greatest respect, that is not open to him. The plaintiff cannot seek to have a second bite at the cherry. It is already finished. I hold that this Court is *functus officio* as regards the prayers sought in the Motion by the plaintiff.

18. As regards jurisdiction, the dispute arose out of a contractual arrangement between the plaintiff and the defendant. Up to that point, this Court had jurisdiction to entertain the suit.

19. However, upon delivering its judgment on 14/4/2020, circumstances changed. The Court had pronounced itself on the contractual relationship between the plaintiff and the defendant. Up-to the time of the judgment, if the plaintiff wanted to have his relationship with the intended interested party vis-a-vis the said property pronounced, he had the opportunity and the right to join him in the suit and this Court would have had the jurisdiction to determine that relationship as a consequence of the contractual relationship between him and the defendant.

20. However, the Court having pronounced itself as aforesaid, it is not open to it at this juncture to inquire into the matters of ownership and occupation of the said property. The issues the plaintiff wishes to be determined in the present application were determined or ought to have been determined in the judgment.

21. At paragraphs 19, 21 and 22, the Court made a finding that the sale of the said property, if at all, was unlawful. Then pertinently at paragraph 22 it observed: -

“What remedies should the court give the plaintiff?”

The Court then granted the plaintiff wide remedies discharging him from any liability to the defendant.

22. In view of the foregoing, to delve into the issue of ownership and occupation of the said property would be delving into the jurisdiction of the Land and Environment Court which is not open to this Court.

23. Accordingly, the preliminary objection is upheld. I find that this Court has no jurisdiction to entertain the plaintiff’s application and is, in any event, *functus officio*. Accordingly, the application dated 26/5/2020 is hereby struck out with costs. I need not determine the application by the interested party, in the circumstances.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2021.

A. MABEYA, FCI Arb

JUDGE