



REPUBLIC OF KENYA



**KENYA LAW**  
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**Koech v Koech; Too (Objector) (Environment & Land Case 22 of 2015)  
[2023] KEELC 20274 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20274 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 22 OF 2015  
MC OUNDO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**GILBERT KIMUTAI KOECH ..... PLAINTIFF**

**AND**

**WILSON KIPNGENO KOECH ..... DEFENDANT**

**AND**

**PENINAH NYAMBURA TOO ..... OBJECTOR**

**RULING**

1. Pursuant to a Chamber Summons dated the 18<sup>th</sup> February 2021 brought pursuant to the provisions of Order 22 Rule 50 & 51 of the Civil Procedure Rules, Section 3A & 63 (e) of the *Civil Procedure Act* and other enabling laws, the Objector herein sought for the suspension of the Ex-parte Eviction Orders issued on the 7<sup>th</sup> July 2020 and thereafter, the court do vacate all the Orders it had issued pursuant to its judgment of 18<sup>th</sup> May 2018.
2. The application was supported by the grounds therein and the supporting affidavit of the Objector sworn on an undated date.
3. The Defendant/Respondent, in response filed his Notice of Preliminary Objection and Grounds of Opposition both dated 16<sup>th</sup> January 2013 and similar grounds dated 23<sup>rd</sup> March 2023 wherein he had opposed the Chamber Summons for reasons that said application was bad in law and a waste of court's time. That the Court was functus officio and bound by its judgment which had been delivered on the 18<sup>th</sup> May, 2018 where subsequent orders of eviction had been issued on the 12<sup>th</sup> April 2019 and reissued on 7<sup>th</sup> July, 2020 against the Plaintiff Debtor. That indeed the orders had been duly executed on the 17<sup>th</sup> July 2020 and thus the Court lacked jurisdiction to reopen trial of the instant suit.



4. That the cause of action in the instant summons was a totally different one from, the one before the court and ought to be canvassed in a new suit altogether. That the Objector in the instant summons was a stranger to the suit before the Court and should not be entertained.
5. That the Objector, Plaintiff/Debtor and his siblings had trespassed into the suit property being LR No. Kericho/Kaptebengwet/450 wherein they had destroyed the boundary fence, demolished the Defendant/Respondent's house, and built a permanent house therein in disobedience of eviction orders and permanent injunction issued against them. That they had forcefully evicted the Defendant/Respondent and unlawfully dispossessed him.
6. The Respondent's objection was supported by the grounds therein and his supporting sworn on 16<sup>th</sup> January 2023 and 23<sup>rd</sup> March 2023 where there had been no response to the opposition and grounds of objection.
7. Parties were directed to file their written submissions to dispose of the matter.
8. In support of their application dated 18<sup>th</sup> February 2021, the Objector filed her submissions, in respect of an application dated 15<sup>th</sup> (sic) February 2021 to which she had submitted that the matter involved the estate of Ernest Too (deceased) who had died on 7<sup>th</sup> January 2006 and who had married three wives namely;
  - i. Catherine Too (deceased) who did not sire any child with the deceased.
  - ii. Peninnah Too the Applicant herein and the mother of the Plaintiff/Judgment Debtor herein
  - iii. Rhoda Too the mother to the Respondent/Defendant herein.
9. That vide a Judgment dated 18<sup>th</sup> May 2018, the Plaintiff's suit had been dismissed wherein the Plaintiff had sought for orders to file an Appeal out of time and a temporary stay of execution pending the hearing and determination of his Appeal. In its Ruling dated 30<sup>th</sup> August 2018, the court had granted him leave of 14 days from the date of the ruling, and a conditional stay of execution provided a of security for costs of Kshs 75,000/= was deposited. The Plaintiff did not comply wherein the Defendant effected execution of the judgment vide an eviction order dated 7<sup>th</sup> July 2020.
10. That she had filed the application before Court as a beneficiary of the estate of the deceased on the basis that the property in question was her matrimonial home hence execution of the orders would have a long term effect on her. That whereas the deceased had subdivided his land No. Kericho/Kaptebengwet/38 into various title deeds and distributed his properties equally to the three houses in his life time wherein she had been given Kericho/Kaptebengwet/450, on the 5<sup>th</sup> May 1999 the Respondent/Defendant had illegally transferred Kericho/Kaptebengwet/450 to his name.
11. The Objector confirmed that she had not been party to the suit herein which had been filed by her lastborn son wherein she had only got to know of the same when armed police officers evicted her from her matrimonial home.
12. That the parties in that suit lacked the locus standi to file and defend the land case because the issues raised thereon would have been better handled through the Succession Court. That by virtue of being the beneficiary of the estate of the deceased and having been directly affected by the judgment of the Court, she was aware that under the doctrine of functus officio the Court was bound by its judgments but that through this application, she sought for the court to suspend and vacate its judgment and orders dated 20<sup>th</sup> July 2020 (sic) for reasons that the purported transfer of Kericho/Kaptebengwet/450 was illegal as there had been no consent of the owner, secondly that the Defendant/Respondent had no capacity to take possession and even to give consent and finally that that the court do re-assess its



jurisdiction to entertain the current suit on any premises including that of adverse possession in respect of the fraudulent title and the fact that both the Plaintiff and the Defendant did not possess the requisite locus standi to sue and defend the suit from the onset.

13. The Applicant framed her issues for determination as follows:
  - i. Whether or not the Applicant is an interested party and if she has been aggrieved by the orders of the court dated 7<sup>th</sup> July 2020?
  - ii. Whether the Defendant acquired Kericho/Kaptebengwet/450 fraudulently;
  - iii. Whether the Defendant's title to the Suit Land should be cancelled and the same reverted to the deceased's estate;
  - iv. Whether Kericho/Kaptebengwet/450 (formerly part of Kericho/Kaptebengwet/38, is the matrimonial (sic) of the Applicant where she has resided since 1952.
  - v. Whether the Plaintiff and the Defendant herein possessed the locus standi to file and defend a suit in respect of a disputed parcel of land that falls under the law Succession?
  - vi. Whether the Defendant/Respondent validly transferred the land with the consent of his deceased father or step mother or other beneficiaries and dependents.
  - vii. Whether the deceased in his lifetime sub divided and distributed his properties amongst his three wives.
  - viii. Does the Court poses the discretion to grant the orders sought by the Applicant?
14. On the first issue for determination, the Applicant submitted that she had an interest and a big stake in the suit land Kericho/Kaptebengwet/450 wherein stood her matrimonial home and that the orders dated 7<sup>th</sup> July 2020 had greatly affected her despite having not been a party to the suit. That she had lived on the suit property as the 2<sup>nd</sup> wife of the deceased since 1952. That she was therefore an interested person and sought protection as per Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
15. That pursuant to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and the holding by the Supreme Court of Kenya in Communications Commission of Kenya and 4 Others vs. Royal Media Services Limited & 7 Others Petition No.1 of [2014] eKLR, she was an interested party who ought to be joined to the proceedings.
16. That as a beneficiary of the estate of the deceased, her age, state and relevance in the current suit shall suffer prejudice and loss if her application was not heard and determined on merit as was held in the case of Meme vs. Republic, [2004] 1 EA 124. That she was properly before the Court and therefore her application seeking orders to suspend and vacate the court orders of 7<sup>th</sup> July 2020 satisfied the criteria for joinder as an Interested Party in the proceedings. Reference was also made to the decision by the Supreme Court of Kenya in the case of Francis K. Muruatetu and another vs. Republic & 5 others [2016] eKLR.
17. On the second issue for determination, the Applicant submitted that since the Defendant/Respondent had acquired the proprietary interest in Kericho/Kaptebengwet/450 fraudulently, which aspect the court did not take note of in its judgment, this was a reason why there ought to be the suspension of the eviction orders dated 7<sup>th</sup> July 2020 as well the vacation of all the orders issued by the court pursuant to its judgment of 18<sup>th</sup> May 2018. The Applicant then went on to list the alleged fraudulent aspects



- the court ought to have considered before finally submitting that allegations of fraud ought to have been strictly proved beyond reasonable doubt.
18. That the estate of Ernest Too had since moved the High Court in Succession Cause No 6 of 2020 so as to pave way for her to file a suit against the Defendant/Respondent over his fraudulent dealings in Kericho/Kaptebengwet/450.
  19. On the issue as to whether the Plaintiff and the Defendant herein possessed the locus standi to file and defend a suit in respect of the disputed parcel of land, the Applicant submitted that the matter before this court was a succession matter where a portion of land Kericho/Kaptebengwet/450 was contested as the same had moved from the ownership of the deceased to the Defendant/Respondent in a fraudulent and unclear circumstances. That the parcel of land had been a subject of criminal proceedings in Sotik Law Courts over the illegal transfer of the same parcel of land. That since both the Plaintiff and the Defendant were her children and dependents of the estate of the deceased, they lacked the capacity and locus standi to sue and defend the matter respectively. Reliance was placed on the decision in *Daykio Plantation vs. National Bank of Kenya Limited & 2 Others* [2019] eKLR. That the judgment and orders in this case had been arrived at without looking at the substantive and critical aspects of jurisdiction in regards to the litigants' capacities over Kericho/Kaptebengwet/450 and their standing to bring the present suit.
  20. That despite the Court being functus officio, it still had wider discretion over its conduct. The issues in application were not res judicata and the Defendant/Respondent would not suffer any loss, prejudice and/or pain were the court in pursuit of justice grant the orders sought, unlike the Applicant who stood to lose her beneficial portion of the deceased estate if the orders sought were not granted.
  21. In opposing the Application and in support of his grounds of objection, the Defendant submitted that the said application arose as a result of execution of eviction orders dated 7<sup>th</sup> July, 2020 which had emanated from judgment delivered by the court on 18<sup>th</sup> May, 2018. That the Application hence sought to suspend the eviction orders issued and re-issued by the court on the 17<sup>th</sup> July, 2020. That by granting orders of stay, the Objector had also sought to have the Court vacate all the orders it had issued pursuant to the said judgment. That the Application had introduced the Objector as 'the' proprietor of LR No. Kericho/Kaptebengwet/450 without producing any supporting document at all. That the same was devoid of merit, bad in law and, an abuse of the court process.
  22. The Defendant framed his issues for determination as follows;
    - i. Whether this Honourable Court has jurisdiction.
    - ii. Whether the instant summons is bad in law and an abuse of the court process.
    - iii. Whether this Honourable Court is functus officio hence bound by its decisions.
    - iv. Whether the cause of action in the instant summons is res judicata.
    - v. Whether the Objector herein lacks the necessary locus standi to proceed with the application.
  23. On the first issue of determination as to whether the court had jurisdiction, the Defendant submitted that the instant summons by the Objector through the Plaintiff/Judgment Debtor was before Court consequent to the execution of eviction orders dated 7<sup>th</sup> July, 2020. That the Plaintiff/Judgment Debtor despite having been granted leave to file an Appeal out of time, coupled with an application for stay of execution, he had deliberately failed to oblige with the orders obtained from this Court and the Appeal was thereafter abandoned.



24. That the registered proprietor and Defendant/Applicant herein, Wilson Kipngeno Koech held title to Kericho/Kaptebenwet/450 for which the Applicant had refused to recognize and therefore this was an invitation for the Court to reopen the case for retrial to re-determine the question of ownership of the suit property, in a matter that had been concluded. That the court in the circumstance lacked in jurisdiction. That the matters raised in the instant summons were directly and substantially in issue with the matters during trial.
25. The Defendant relied on the provisions of Section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil Procedure Rules to submit that the instant summons was misplaced. That the only option open to the Plaintiff/Judgment Debtor and the Objector was to file a review since the application was made after the execution of the Court's orders of eviction. That if the Plaintiff/Judgment Debtor had any new or compelling evidence as the Objector claimed, then the relevant provision of the law should have been followed. That the Plaintiff/Judgment Debtor had squandered his opportunity of Appeal.
26. On the second issue as to whether the instant application was bad in law and an abuse of Court Process, the Defendant submitted that whereas the Plaintiff/Judgment Debtor had averred in the main suit to have lived in the suit property LR No. Kericho/Kaptebenwet/450 for over 12 years wherein he had made developments thereon, he had now taken an about turn and tagged his mother along to make similar claim, worse so, in the same suit. That the Objector had approached the Court through material non-disclosure and outright deceit wherein she had obtained 30-day order of stay of execution of evection orders dated 7<sup>th</sup> July 2020. That subsequently, execution of eviction had been successfully carried out in their presence on 17<sup>th</sup> July, 2020 where eviction returns had been filed accordingly by the OCS-Konoin Police Station and the Court Bailiff. That the court had thereafter been deliberately misled into issuing belated orders of stay which orders the Objector and her children had misused to forcefully evict the Defendant, trespass into the suit property and build a permanent house, in contempt of orders of permanent junction against them dated 7<sup>th</sup> July 2020 which orders had not been set aside and/or vacated.
27. That the Objector herein had filed similar pleadings and prayers in the Family Court simultaneously which undertaking was 'tantamount to gambling by pursuing paripasu more than one process and which action offended the provisions of Section 6 of *Civil Procedure Act* on duplicity and hence was sub judice.
28. That in the pendency of this suit the Objector's children had filed yet another suit being Kericho 'ELC. Case No. 15 of 2019 over the same Suit LR No. Kericho/Kaptebenwet/450 alleging fraud in the transfer and registration process 'of title deed to the Defendant Applicant and which suit had been withdrawn on account of lack of locus standi. The Objector has once again deposed that there is yet another ongoing matter between her children and the Defendant/Applicant being Sotik PM's Court No. 1305/2018. This alluded to an insatiable mania for lawsuits and depicts a litigious lot that shall only stop their spree when reined in by the law. The same was bad in law and an abusive of the court process.
29. That the Objector had failed to produce before court any warrant of attachment of property and/or receipts to show construction history of property, if any, she claimed was destroyed during the eviction of her son the Plaintiff/Judgment Debtor on 17<sup>th</sup> July, 2020 from LR No. Kericho/Kaptebenwet/450. That she had deliberately misled the Court by producing photos of debris from the Plaintiff/Judgment Debtor's structures which had been removed from the suit property during eviction. She had never been in occupation of any house whatsoever on the suit premises. Reliance was placed on the case in Ephrahim Miano Thamaini vs. Nancy Wanjiru Wangai & 2 others [2021] eKLR.



30. As to whether this Court was functus officio hence bound by its decisions, the Respondent submitted that since the instant application arose as a result of a judgment that had been delivered where orders of eviction had been re-issued on 7<sup>th</sup> July, 2020 and duly executed on 17<sup>th</sup> July 2020, the law was clear on the process of varying, setting aside and/or vacating the same or filing an Appeal. In the absence of the same, the Objector's application was hopelessly misconceived and fatally defective and was doomed to fail. Reliance was placed on the High Court decision in Jane Nambuye Manyonge vs. Republic Misc Cr Appeal No. E048 of 2021.
31. On the fourth issue for determination as to whether the cause of the action in the instant summons was res judicata, the Respondent submitted in the affirmative. That the instant application by the Objector did not concern him as the registered proprietor of LR No. Kericho/Kaptebengwet/450 but purported to lay claim on the ownership, of an imaginary, parcel of the previous mother title LR No. Kericho/Kaptebengwet/38 which was owned by his late father Ernest Kipkpech Too, a matter which had been decided in HCC No. 13 of 1999 and 'CMCC NO. 15 of 1989 where she had sued Ernest Kipkpech Too over his mode of subdivision and distribution of the property which eventually gave rise to the suit parcel No. Kericho/Kaptebengwet/450 amongst 5 other titles.
32. That the Objector herein lacked the locus standi to proceed with application the Court having made its determination that the suit property belonged to the Defendant/Applicant. That the Objector was neither the Defendant/Applicant's liability nor dependent but an alien. That the Plaintiff/Judgment Debtor had mischievously roped in his mother as a "substitute party" to lodge a similar claim over the same occupation.

#### **Determination.**

33. Having considered the submissions herein submitted, and authorities cited thereof to the Chamber Summons dated the 18<sup>th</sup> February 2021 as well as having regard to the Preliminary Objection and grounds of opposition both dated 16<sup>th</sup> January 2013 and 23<sup>rd</sup> March 2023, I find the issues for determination as being:
  - i. Whether the court is functus officio.
  - ii. Whether the Objector herein has the locus standi.
  - iii. Whether the Grounds of Objection raised are sustainable.
34. The Objector herein, vide the present Application sought for the suspension of the ex-parte eviction Orders issued on the 7<sup>th</sup> July 2020 and thereafter, the court do vacate all the Orders it had issued pursuant to its judgment of 18<sup>th</sup> May 2018. In so submitting the Objector gave reasons that she was a beneficiary of the estate of the deceased who had subdivided the original land No. Kericho/Kaptebengwet/38 into various title deeds and distributed his properties equally to his three wives during his life time wherein she had been given the suit land No. Kericho/Kaptebengwet/450 but which land had been fraudulently transferred by the Respondent into his name. That she had not been party to the main suit which had been filed by her lastborn son but only got to know of the same when armed police officers evicted her from her matrimonial home on the suit land herein. That the parties therein lacked the locus standi to file and defend the suit because the issues raised therein would have better been handled by a Succession Court. That the transfer of Kericho/Kaptebengwet/450 was illegal as there had been no consent by the Respondent's deceased father, step mother or other beneficiaries and dependents.



35. The Chamber Summons Application was opposed by the Respondent through his Preliminary Objection and Grounds of Opposition to the effect that the Court was functus officio and bound by its judgment which had been delivered on the 18<sup>th</sup> May, 2018 where subsequent orders of eviction had been issued on the 12<sup>th</sup> April 2019 and reissued on 7<sup>th</sup> July, 2020 against the Plaintiff Judgment Debtor. That indeed those orders had been duly executed on the 17<sup>th</sup> July 2020 and thus the Court lacked jurisdiction to reopen trial of the suit. That the cause of action in the instant Summons was totally different from the one before the court and ought to be canvassed in a new suit altogether. That the Objector who was a mother to the Plaintiff/Judgment Debtor in the instant summons was a stranger, to the suit before the Court, and should not be entertained.
36. Indeed there is no dispute that the Respondent was registered as proprietor of the suit land, Kericho Kaptebengwet/450, after he had been gifted by his father, the original proprietor, pursuant to which the Plaintiff/ Judgment Debtor herein had filed suit against him seeking adverse possession in respect of the same. Vide a Judgment of 18<sup>th</sup> May, 2018 herein reported as Gilbert Kimutai Koech vs Wilson Kipngeno Koech [2018] eKLR, the Plaintiff's claim had been dismissed. Subsequently via a ruling of 30<sup>th</sup> August 2018, the court had granted the Plaintiff leave to Appeal its Judgment out of time. However no Appeal was lodged and eventually the Respondent had sought for eviction orders against the Plaintiff, which orders had been granted on 7<sup>th</sup> July 2020 and duly executed on 17<sup>th</sup> July 2020. The court had therefore discharged its duty and became functus officio.
37. Functus officio, is defined in Black's Law Dictionary, Ninth Edition 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.” I
38. The Supreme Court of Kenya expounding on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832: and held 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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”
39. The Supreme Court of Kenya had also relied on the holding in the case of Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550 to the effect that:
- “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 on adjudication must be taken to a higher court if that right is available.”



40. In the same vein, the Court of Appeal in the case of Telkom Kenya Limited vs. John Ochanda [2014] eKLR, had 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.”

41. Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of functus officio in the following terms-

“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.”

42. In my view, pursuant to the court having delivered itself wherein its order had been perfected by an eviction, I find that this court is now functus officio and the Objector thus lacked the locus to challenge a concluded case where she was not a party.

43. Based on the above analysis and the fact that the Objector is a stranger to the concluded case, it is obvious the court’s hands are tied since the matter had already been finalized. I find in favour of the Respondent’s Grounds of Objection that the Application dated the 18<sup>th</sup> February 2021 herein lacks merit and I proceed to dismiss it with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

