



**Ogingo v Mokoh (Environment and Land Appeal 192 of 2017)
[2023] KEELC 21158 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 192 OF 2017
MN KULLOW, J
OCTOBER 23, 2023**

BETWEEN

RISPER AKEYO OGINGO PLAINTIFF

AND

TITUS KAHUNYORO MOKOH DEFENDANT

RULING

1. By Notice of Motion dated 27th June, 2023, the Applicant sought for the following orders: -
 - a. Spent.
 - b. The Order of eviction be stayed pending the hearing of this Application.
 - c. The court be pleased to set-aside, review and/or vacate the ruling dated 15th June, 2023 and delivered on the 15th June, 2023 in the interest of justice.
 - d. That costs of the Application and the suit be granted to the defendant/ applicant.
2. The application is based on the 5 grounds thereof and on the Applicant's Supporting Affidavit sworn on even date. The applicant avers that she has since received a hearing date of her Civil Application No 33 of 2019, which has been scheduled for hearing on the 3rd June, 2023 at the Court of Appeal in Kisumu. It is her contention that the said Application seeks to challenge the judgment and decree of this honourable court before the court of appeal.
3. Further, it is her claim that the suit land is the only family land where she lives with her children and thus if the said orders of eviction are not reviewed, then she stands to be rendered destitute and will suffer irreparable damages which cannot be compensated by monetary terms.
4. It is her contention that the effect of the said ruling delivered on 15.06. 2023 will injure her life and urged the court to allow her application as sought in the interest of justice.



5. The Application was opposed. The Respondent filed a Replying Affidavit dated 11/07/2023 wherein he denied all the averments made by the Applicant. It was his contention that this court is functus officio, having rendered its judgment and the ruling sought to be reviewed, was made in execution of the judgment of the court delivered on 12/4/2018.
6. Further, he averred that the Applicant cannot seek to review the judgment and at the same time claim that there is a pending appeal at the Court of Appeal seeking to challenge the same judgment. In conclusion, he urged the court to dismiss the Application with costs.
7. The Application was canvassed by written submissions. Both parties have filed their rival submissions which I have read and considered.

Analysis And Determination

8. This court is of the considered opinion that the sole issue arising for determination is: -
 - a. Whether the Application meets the threshold prescribed by law for the grant of review orders.
9. The substantive law regarding review of a judgment or order of the court is found at section 80 of the [Civil Procedure Act](#), which grants the court the powers to make issue orders for review while the procedural law is provided under Order 45 Rule 1 of the [Civil Procedure Rules](#); which sets out the jurisdiction and scope of review, by outline the circumstances in which an order for review may be granted.
10. Section 80 of the [Civil Procedure Act](#) provides as follows;

“ Any person who considers himself aggrieved—

 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
11. Order 45 Rule 1 of the [Civil Procedure Rules](#) on the other hand provides as follows;

“

“(1) 1) Any person considering himself aggrieved—

 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
12. Order 45 Rule 1 of the [Civil Procedure Rules](#) as stated above, outlines the 4 key elements to be proved in an application for review as follows: -



- i. Discovery of new and important matter or evidence which after exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed, or the order made;
 - ii. Mistake or error on the face of the record;
 - iii. Other sufficient reasons; and
 - iii. That the application has not been made after unreasonable delay.
13. The Applicant seeks to review, set -aside and/or vacate the orders of eviction issued by this Court vide the Ruling dated and delivered on the 15th June, 2023; on the basis that she has discovered new and important evidence showing that the Civil Application No 33 of 2019 filed at the Court of Appeal, has been fixed and scheduled for hearing on the 3rd of July, 2023. It is further her claim that she seeks to challenge the judgment and decree of this court at the Court of Appeal.
 14. She thus contends that unless the orders for review sought herein are granted, she stands to suffer irreparable loss and being rendered destitute since the effect of the ruling dated 15/06/2023 was to order for her eviction.
 15. In that regard therefore, I shall seek to address the element of discovery of new and important matter or evidence as a ground for review orders and determine whether the same has been satisfactorily proved to the required threshold by the Applicant.
 16. In *Tokesi Mambili and others v Simion Litsanga* the Court held as follows: -

“In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.” (emphasis mine)
 17. The Respondent on the other hand submitted that this court is functus officio and is therefore not vested with the requisite jurisdiction to entertain the application since there is a pending appeal at the Court of Appeal. It was further his contention that allowing the Application would amount to reviewing the judgment of the court since the Ruling sought to be reviewed was merely to enforce the judgment of the court.
 18. I have looked at the Applicant’s annexure 1, which is a copy of an email extract dated 25th June, 2023 at 10:28pm informing the Applicant’s counsel on record of the scheduled hearing date of her Civil Application No 33 of 2019; fixed for hearing on the 3rd July, 2023. It is not in dispute that at the time of delivering my Ruling on 15th June, 2023, the said Application at the Court of Appeal had not been fixed for hearing as evidenced in the said email extract neither is it clear whether the said Application had been filed at the time.
 19. In my considered opinion, it cannot therefore be held with certainty that at the time of delivery of the said Ruling, the said information from the Court of Appeal on the hearing of the Civil Application No 33 of 2019; was available but could not have been produced even after the exercise of due diligence, at the time when the decree was passed. This is simply for the reason that at the time of delivering the said Ruling, that information was non-existent and the date was only issued after the delivery of the said Ruling.



20. My understanding of the first ground under Order 45 Rule 1 is that the new information/ evidence must have been available at the time of making decision, but the same could not, even after exercise of due diligence, be produced by the Applicant. To this end, I agree with the Respondent that the said ground cannot be applied to futuristic events. Consequently, it is my finding that the said ground is not applicable in the circumstances of the case and the same therefore fails.
21. Further, I wish to address the effect of the Orders sought in the instant Application. The Ruling delivered on 15/06/2023 sought to enforce and/or implement the judgment of the court delivered on 12/04/2018, in full compliance with said the judgment delivered by my predecessor, Ong'ondo J. The effect of the reliefs sought herein will therefore amount to reviewing and/or setting aside the Judgment of the court; which ordered the eviction of the Applicant from the suit land. The Applicant cannot seek the Review of the Judgment and at the same time contend that there is a pending Appeal challenging the same judgment.
22. Even though the Applicant contends that she seeks to challenge the judgment of this court at the Court of Appeal; it is clear from the record that the Appeal filed at the Court of Appeal was dismissed for nonattendance. It is not clear what the nature of the pending Application at the Court of Appeal is about and the Applicant has not demonstrated whether the same has a bearing on the orders sought to be reviewed.
23. The Respondent contends that this court is functus officio, since judgment had been delivered and the court is thus not vested with the requisite jurisdiction to entertain the instant Application.
24. The Supreme Court of Kenya in the case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR, while addressing the concept of *functus officio* 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.”
25. 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, also 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.”
26. In view of the foregoing, having addressed the effects of the instant Application on the judgment delivered on 12/4/2018 and the ruling dated 15/6/2023, I find that this Court is *functus officio* and in the circumstances, I cannot grant the Orders sought herein.

Conclusion

27. In the upshot, I accordingly find that the Application dated 27th June, 2023 is not merited and I hereby dismiss the same with costs. It is so ordered!



DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 23RD DAY OF OCTOBER, 2023

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Sagwe for the Applicant

Mr. Mulisa for the Respondent

Court Assistant - Tom Maurice/ Victor

