



**Bolo v Asaka & 2 others (Land Case 11 of 2016)  
[2023] KEELC 21932 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21932 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
LAND CASE 11 OF 2016  
LL NAIKUNI, J  
NOVEMBER 28, 2023**

**BETWEEN**

**CLERKSON ONAYNGO BOLO ..... PLAINTIFF**

**AND**

**JAMES ASAKA ..... 1<sup>ST</sup> DEFENDANT**

**JACK OOKO ..... 2<sup>ND</sup> DEFENDANT**

**PROSCO ASAKA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. For the determination of the honourable court is the instant Notice of Motion application dated December 3, 2021 filed by the Defendants/Applicants herein. The application was premised under the provision of Sections 1A, 1B, 83A, 63(c) & (e) of the *Civil Procedure Act*, Cap. 21 Laws of Kenya; order, 22 rules 2, 3, 89, order 29 rules 3, 84, order 51 rule1 of the Civil Procedure Rules, 2010.
2. Upon service, the parties filed their respective responses opposing the said application.  
II. The defendants/ applicant's case in the Notice of Motion application dated December 3, 2021
3. The defendants/applicants sought for the following orders;
  - a. Spent;
  - b. Spent;
  - c. Spent;
  - d. Spent;



- e. Spent.
  - f. That the defendants/applicants have complied with the terms of the Judgment herein to the extent of the removal only of the encroachment of their structures on the suit property.
  - g. That the plaintiff's removal and or razing down of the Applicants' entire developments on the property adjacent to the suit property is contrary to the terms of the Judgment herein and unlawful.
  - h. That the plaintiff/respondent be and is hereby restrained from interfering with the Defendants/Applicants property rights to their adjacent property in the public reserve to the suit property in any way as the judgment herein is deemed fully satisfied in terms of removal of the encroachment on the suit property.
  - i. The costs of this application be provided for.
4. The application was based on the grounds, testimonial facts and the averments made out under the 12 Paragraphed supporting affidavit sworn by Jack Ooko and dated December 3, 2021, the 2<sup>nd</sup> defendant/applicant herein and annexures marked as "JO" annexed hereto. He averred that:
- a. Judgment in this matter was given on June 16, 2021 and the same as well as the purport and effect of the same. The said Judgment related to the Plaintiff's titled property LR No.2237/I/MN adjacent to their well-developed property and it only touched on the supposed portion or part of their built-up area that encroached on the Plaintiff/Respondent's property beyond his boundary beacons, an area measuring less than 6 feet by 4 feet that he duly removed in compliance with the judgment.
  - b. It was his understanding that the matter was well settled as advised by his Advocates on record and the only issue remaining was determination of costs awarded to the Plaintiff that could only be determined after taxation.
  - c. The Defendants/Applicants had been unjustifiably rendered homeless and their entire property destroyed and/or appropriated contrary to constitutional rights to property.
  - d. It was therefore a complete surprise when on his usual duties a short distance away from the premises he was informed by neighbours that a bulldozer had arrived at their residential cum commercial premises in the company of the Plaintiff and armed uniformed police officers and that they had broken into their premises and the bulldozer was at work razing the premises together with all contents into rubble. Annexed hereto were copies of the set of photographs of the destruction of the suit property marked as "JO - 2".
  - e. The plaintiff/respondent's conduct in the purported execution of the decree herein when in full knowledge of the fact of compliance on the part of the Defendants/Applicants were unlawful and malicious in the extreme and warrants censure by this Honourable court.
  - f. The defendants/applicants in the circumstances of this case were entitled to orders of stay and restitution even as they sought further redress from the plaintiff/respondent in this or other action.
  - g. It was fair and just that the defendants/applicants' property rights be safeguarded and further loss be mitigated by orders of stay and restitution.
  - h. The defendants/applicants entire property had been razed down in a purported execution of a decree issued herein whereas the defendants/applicants had already complied with the terms



of judgment and removed the encroachment on the Plaintiff/Respondent's property. Annexed hereto were copies of the set of photographs showing the fenced off premises marked as "JOA - 3".

- i. The plaintiff/respondent's conduct amounted to brazen abuse of the court process for malicious ends that amounted to expropriation of property contrary to the constitutional guarantees of the right to property.
- j. They wished to access their destroyed premises, salvage what they could and rebuild their lives again even as they sought remedial measures against the plaintiff/respondent. They be granted the temporary relief as an interim measure.
- k. The affidavit was made in support of their application herein for conservatory and restitution orders.

III. The responses by the plaintiff/respondent to the Notice of Motion application dated December 3, 2021

5. On January 20, 2022, the Plaintiff through the 20 Paragraphed Replying Affidavit sworn by the Plaintiff, Clerkson Onyango Bolo on January 18, 2022 together with annexures marked as "COB" annexed thereto. He averred that:-
  - a. He admitted that the structure was demolished on December 1, 2021 but not on December 11, 2021 as stated by the Plaintiffs/Applicants.
  - b. The demolition was done in compliance with the Court order, decree and warrant to the Court Bailiff. Annexed in the affidavit and marked as "COB - 1" was a copy of the decree and warrant to the Court Bailiff.
  - c. It is not true that the Applicant's property was razed down.
  - d. The execution of the Court order was done professionally and humanly under the supervision of the OCS, Bamburi Police Station.
  - e. All items/properties in the house were removed before execution was carried out.
  - f. The defendants/applicants never complied with the court order thus him taking steps to execute the court order through the Court Bailiff.
  - g. The defendants/applicants never deserved the orders prayed for and should be ordered to reimburse him for the costs incurred in executing the court order/Judgment which was a cost of a sum of Kenya Shillings Six Thirty Eight Thousand (Kshs. 638,000/=), Annexed in the affidavit and marked as "COB - 2" was a schedule and confirmation of payments made to different persons and/or institutions.
  - h. There was no order to stay since execution had already taken place and certificate of execution and handing over of vacant possession filed on December 1, 2021. Annexed in the affidavit and marked as "COB - 3" were copies of the same.
  - i. The property which was demolished was partly on the road reserve and also encroached onto his property.
  - j. Granting the prayers would serve no purpose since the Defendants/Applicants never preferred an appeal against the Court's judgment.



- k. The prayer for restitution, conservatory and restraining orders should not be entertained and allowed by this Honourable Court for doing so would be futile.
- l. There was no evidence that the defendants/applicants were homeless.
- m. The defendants/applicants never files a certificate of compliance in Court to the effect that he had complied with the Judgment/Order of the Court.
- n. He had in no way abused the Court process, never acted out of malice and it was not true that he had expropriated the Defendants/Applicants' property. The application before this Honourable Court was bad in law and an abuse of the Court process.
- o. The structure/house which was demolished never belonged to the Defendants/Applicants. Attached and marked as "COB – 4" herein was a copy of the statement of James Asaka and exhibits attached thereto.
- p. He urged the Court to dismiss the application with costs.

#### **IV. Submissions**

- 6. On May 4, 2023 in the presence of all parties, the Honourable Court ordered that the notice of motion application dated December 3, 2021 and 26<sup>th</sup> January, 2022 through written submissions. Pursuant to that on 24<sup>th</sup> July, 2023 at the time of penning this Ruling only the Plaintiff/Respondents had complied and therefore the decision will be on merit. The Honourable Court set the ruling date on notice.

#### **A. The Written Submissions by the Plaintiff/Respondents**

- 7. On March 15, 2023 the Plaintiff/Respondent herein through the Law firm of Messrs. Odhiambo SE. & Co. Advocates filed their written submissions dated March 11, 2023. Mr. Odhiambo Advocate submitted that the Defendants/Applicants' application dated January 26, 2022 sought for an order that the proceedings and orders of January 18, 2022 be set aside. The grounds upon which the application was made were stated on the body of the application and an affidavit in support of the same and annexure marked as "SOE – 1" attached to the supporting affidavit.
- 8. The Defendants/Applicants had through their Advocate filed a Replying Affidavit in objection/ opposition to the application. The Learned Counsel opined that the issue for determination was whether or not this Honourable Court should have dealt with the application dated December 6, 2021 filed by the Applicant which application was heard on January 18, 2022. The Defendants/Applicants through their Advocates concealed material fact by not disclosing to this Court that the Judgment which was executed by the Court Bailiff and which execution the Defendants/Applicants were complaining about was delivered by Honourable Justice Sila Munyao who was and is still in the station/Mombasa.
- 9. The Learned Counsel submitted that the said Judge/Court ought to have heard and determined the complaints raised in the application dated 6<sup>th</sup> December, 2021 and heard on January 18, 2022. The fact that the matter was cause listed before this Court and not before Honourable Sila Munyao, J. was not a reason for the Defendants/Applicants' Advocates not to inform the Court that the Honourable Court which had delivered the Judgment which was executed and which execution led to the filing the said application was Hon. Silas Munyao, J.
- 10. The Learned Counsel submitted that if that Court which delivered Judgment was '*functus officio*' which they denied, then the same would apply to this Court which had concurrent Jurisdiction as the said Court which delivered Judgment. It was a procedure that if there was any complaint with



regard to execution or implementation of a Court order, an application raising any complaint filed should be heard and determined by the same Court. The Defendants/Applicants were not challenging the jurisdiction of this Court which issue was neither here nor there.

11. In conclusion, the Learned Counsel asserted that the Plaintiff filed the application within the shortest time possible after the Respondents' application was allowed. A period of eight (8) days could not and should not be termed late.

## V. Analysis and Determination

12. I have carefully considered the notice of motion application, dated December 3, 2021 by the defendants/applicants herein, the affidavit in its support and the one in response. I have also studied and perused the file and the proceedings, the case law cited and analyzed the provisions relied on.

13. There are two (2) issues that fall squarely before me for determination. They are:

- a. Whether the Plaintiff/Respondent can be restrained from interfering with the Defendants/Applicants property rights to their adjacent property in the public reserve to the suit property in any way as the judgment herein is deemed fully satisfied in terms of removal of the encroachment on the suit property?
- b. Who to bear the costs of the application dated December 3, 2021?

ISSUE No. a). Whether the Plaintiff/Respondent can be restrained from interfering with the Defendants/Applicants property rights to their adjacent property in the public reserve to the suit property in any way as the judgment herein is deemed fully satisfied in terms of removal of the encroachment on the suit property

14. Essentially, the main issue herein is whether to set aside the Judgement of this Court or not. Judgment to this suit was delivered on 16<sup>th</sup> June, 2021 by my Brother Hon. Justice Sila Munyao where he opined himself as follows:

“I believe that I have dealt with the matters in issue and I now make the following final orders :-

- a) That the defendants are hereby ordered to remove all their developments and structures that encroach into the plaintiff's land parcel LR No. 2237/I/MN within the next 60 days. If they do not so remove the said structures and/or developments, the plaintiff is at liberty to proceed to do so at the cost of the defendants.
- b) That there is hereby issued a permanent injunction restraining the defendants, whether by themselves or through their agents or servants, from entering, being upon, encroaching, or developing on the plaintiff's land parcel L.R.2237/I/MN.
- c) That the plaintiff will have the costs of this suit.”

15. It is not contested that the Judgment in this matter was entered and the case finalized. The law – the provision of sections 99 and 100 of the *Civil Procedure Act*, Cap. 21 allows for the correction of the Judgement but not its merits. The Court of appeal in the case of:- “*Telkom Kenya Ltd v John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd* [2014] eKLR”, the Court of Appeal held as follows on the functus officio doctrine:-

“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...”

“*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 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 Nazarire 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. --”

16. 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.”

17. The rule of “*functus officio* has exceptions. Section 99 of the [Civil Procedure Act](#) establishes the slip rule and it provides that:-

“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.”

18. The [Black's Law Dictionary](#), Ninth Edition defines the describes *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.”

19. In addition, the Supreme court also referred to the case of “[Jersey Evening Post Limited v A Thani](#) [2002] JLR 542 at pg. 550” where the Court stated: -

“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.” [own emphasis]

20. 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.



21. In this matter, the Defendants/Applicants in their application dated December 3, 2021 seeks to have the Plaintiff/Respondent restrained from interfering with the Defendants/Applicants property rights to their adjacent property in the public reserve to the suit property in any way as the Judgment herein was deemed fully satisfied in terms of removal of the encroachment on the suit property. As I earlier indicated my brother Justice Munyao Sila already ordered in his Judgment where he “issued a permanent injunction restraining the Defendants, whether by themselves or through their agents or servants, from entering, being upon, encroaching, or developing on the plaintiff’s land parcel L.R.2237/I/MN.
22. Prayers 6, 7 and 8 had already been granted in the Judgment and granting them would only mean that the Honourable Court would be repeating what a court of competent jurisdiction already ordered. It not only un-procedural, irregular but also erroneous to do that. Therefore, these prayers have been declined.

**ISSUE No. b). Who bears the costs of the Application dated 3<sup>rd</sup> December, 2021**

23. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers vBidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
24. In the present case, in the given circumstances and inferences of the case, the Honourable Court elects not to award costs.

**VI. Conclusion and Disposition**

25. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the principles of Preponderance of Probabilities and the balance of convenience. Ultimately in view of the foregoing, this court arrives at the following decision and makes the order below:-
  - a. That the notice of motion application dated December 3, 2021 by the defendants/applicants herein be and is hereby found to lack merit hence it is dismissed in its entirety.
  - b. That in the given circumstances, this honourable court is “*functus officio*’ and whereby parties are dissatisfied an appeal is preferable.
  - c. That there shall be no orders as to costs.

It Is So Ordered Accrdingly.

**RULING DELIVERED VIA EMAIL AS PER THE DISPATCHED NOTICES TO EACH PARTIES  
IN GOOD STEAD DATED AT MOMBASA THIS 28<sup>TH</sup> ... DAY OF NOVEMBER, 2023.**

.....  
**HON. JUSTICE L. L. NAIKUNI (MR.)**



**ENVIRONMENT AND LAND COURT AT  
MOMBASA**

