



Omalla (Suing as the administrator ad litem of the Estates of William Opondo Omalla, Augustion Omwanda, Henry Mutula and Dismas Othwilla) v Oriwo & another (Environment & Land Case 36 of 2021) [2023] KEELC 21697 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21697 (KLR)

KISUMU 67A OF 2018

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT & LAND CASE 36 OF 2021

AY KOROSS, J

NOVEMBER 23, 2023

BETWEEN

PAUL OMALLA (SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATES OF WILLIAM OPONDO OMALLA, AUGUSTION OMWANDA, HENRY MUTULA AND DISMAS OTHWILLA) PLAINTIFF

AND

GABRIEL OCHONG ORIWO 1ST DEFENDANT

PHILISTER ACHAPA OBUOR 2ND DEFENDANT

RULING

1. Within the provisions of Sections 152B, 152E, 152F, 152G, 152H and 152I of the [Land Act](#) and Sections 1A, 1B & 3A of the [Civil Procedure Act](#), the plaintiff filed a notice of motion dated 5/05/2023 in which he sought the following reliefs:
 - a. Spent.
 - b. The District Land Surveyor be ordered to mark the boundary between land parcel no North Ugenya/Sega/12 and the defendant's land in the enforcement of the eviction order within 30 days of issuance of this order and thereafter file a report in court within 7 days of conclusion of the exercise confirming compliance.
 - c. The Officer Commanding Station (OCS) of Segga Police station be and is hereby ordered to assist the plaintiff to forcibly evict the defendant from sections of land parcel no North Ugenya/Segga/12 which the defendant has encroached onto within 30 days of issuance of this



order and thereafter file a report in court within 7 days of conclusion of the exercise confirming compliance.

- d. The defendant do meet the costs of the forcible eviction process.
 - e. Costs of this application be granted to the plaintiff.
2. The motion is anchored on the grounds particularised on the face of the motion and on the supporting affidavit of the plaintiff Paul Omalla which he deposed on 5/05/2023.
 3. In them, the plaintiff contended that despite judgment being entered in his favour which ordered the defendants to vacate land parcel no North Ugenya/Sega/12 (suit property) within 90 days from the date of service of the orders of the court or in default, the plaintiff to forcibly remove the 1st defendant upon service of the decree which he duly served on 22/02/2023, the defendants had declined to vacate the suit property.
 4. According to the plaintiff, the decision of this court had not been appealed against and there was no order staying execution of the judgment.
 5. The plaintiff canvassed the motion by written submissions dated 29/08/2023 and they rehashed averments made in the motion and this court need not reiterate it. The defendants did not oppose the motion or did they file submissions.
 6. However, even if the motion is unopposed, the motion has to be subjected to merit evaluation. It must be noted the suit against the 2nd defendant was withdrawn on 5/07/2022 and judgment was never entered against him. Therefore, the prayers being sought against the 2nd defendant are misplaced.
 7. Having carefully considered the plaintiff's motion, affidavit and submissions, the issues falling for determination are whether the court is *functus officio* in some of the prayers being sought and what orders should be issued against the OCS Sega Police station. The two issues which arise for determination will be addressed simultaneously.

Whether this Court is Functus Officio in Some of the Prayers Being Sought

8. [*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 read: -

"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."

9. The doctrine of *functus officio* is an enduring principle of law that prevents re-opening of a matter before a court that rendered the final decision. In the circumstances of this case and well knowing by virtue of Sections 18 and 19 of the [*Land Registration Act*](#) this court lacks jurisdiction to delve into boundary disputes, the land registrar, at the behest of the plaintiff, re-established the boundaries of the suit property and the report therefrom was considered by this court when rendering its decision. If at all he has qualms with the exercise conducted by the land registrar, then that that can only be conducted within the precincts of the [*Land Registration Act*](#).



10. If the plaintiff is dissatisfied with this court's decision, nothing can be easier than for him to appeal against the decision of this court. As it were, this court finds it is functus officio and the prayer for the district land surveyor to mark the boundaries is hereby declined.

What Orders Should be Issued against the OCS Segga Police Station

11. By Section 24 of the [National Police Service Act](#), the polices' role is limited to maintaining law and order and during an eviction process, their duty is limited to maintaining security and no more. The plaintiff did disclose the nature of assistance he sought from the police.
12. However, it is not lost to this court that it is only court bailiffs who have been so appointed, who have the mandate of evicting the 1st defendant from the suit property and as far as this court is aware, the plaintiff has not lodged an application to appoint a court bailiff. See Section 2 (2)(a) of the [Auctioneers Act](#).
13. In considering a prayer for enforcement of its judgment, time for purposes of deeming the eviction process ripe was to commence 90 days from the date of service of the decree of this court. This 90-day period is very crucial since it is in tandem with Section 152E of the [Land Act](#) which provides that a party has to serve the trespasser with a three-month eviction notice.
14. This court has noted the motion was filed prematurely. From the evidence that was tendered, the plaintiff's advocates served a certified copy of the judgment and decree upon the 1st defendant's advocates on 23/02/2023 and time could only lapse on 24/05/2023. This motion was filed on 10/05/2023 and no doubt, it was filed prematurely. Still and as it currently stands, at the time of rendering this ruling, time has since lapsed and obviously no prejudice will be occasioned upon the 1st defendant.
15. Further, by Section 3A of the [Civil Procedure Act](#), this court can issue necessary orders to ensure the ends of justice are met. Court orders, decrees and decisions are not made in vain since it is only by compliance of its orders, that the people of Kenya who have by Article 159 of the [Constitution](#) delegated authority to the court, shall have confidence with the court process including the sanctity of its orders. Consequently, its determinations must be obeyed.
16. Accordingly, the judgment and decree of this court must not be frustrated by a party who has declined to heed its orders and in the absence of a review, appeal or stay of execution of the judgment, I find the plaintiff is deserving of the order for the police to grant security during the eviction process, however, he must bear in mind, the police cannot conduct such a mandate in the absence of a court bailiff.
17. The upshot of the foregoing is that the court finds merit in the defendant's notice of motion dated 5/05/2023. Costs follow the event and since the plaintiff was successful in his claim, costs are awarded to him. The motion is hence only allowed in the following terms:
 - a. That the OCS Segga Police station do provide security during the eviction of the 1st defendant together with his servants and/or agents from land parcel no North Ugenya/Segga/12.
 - b. That the costs occasioned by and incidental to the plaintiff's entry and repossession of land parcel no North Ugenya/Segga/12 shall be borne by the 1st defendant.
 - c. That the plaintiff is hereby awarded costs of the notice of motion.
18. It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 23RD DAY OF NOVEMBER 2023.



HON. A. Y. KOROSS

JUDGE

23/11/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Rashid Wangatia for the plaintiff

N/A for 1st defendant

N/A for 2nd defendant

Court assistant: Ishmael Orwa

