



REPUBLIC OF KENYA



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Mbita v Barasa & 2 others; Laborde & 10 others (Intended Defendant) (Environment & Land Case E004 of 2023) [2023] KEELC 22168 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22168 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E004 OF 2023
FO NYAGAKA, J
DECEMBER 13, 2023

BETWEEN

REUBEN FWAMBA MBITA PLAINTIFF

AND

HENRY SHIKUKU BARASA 1ST DEFENDANT

JOASH CHIMUGE WASWA 2ND DEFENDANT

JOHN NYONGESA NGWEYA 3RD DEFENDANT

AND

JEREMY LABORDE INTENDED DEFENDANT

FRANCIS MUTIMBA INTENDED DEFENDANT

DOMINIC KHISA INTENDED DEFENDANT

ISAAC WANJOFU INTENDED DEFENDANT

MAURICE WANYONYO INTENDED DEFENDANT

LUCHENDO WANYONYI INTENDED DEFENDANT

EVANS ILUNDU INTENDED DEFENDANT

FRANCIS SIMIYU INTENDED DEFENDANT

WYCLIFFE MUKHANDA INTENDED DEFENDANT

JOSEPH WAFULA INTENDED DEFENDANT

VICTORIA MBOLOLE INTENDED DEFENDANT



RULING

Background

1. On 13/02/2023, this Court adopted the Plaintiff's and the 1st to 3rd Defendants' consent dated 26/10/2022. The consent decreed that the Plaintiff herein is the lawful owner of Kiminini/Kinyoro Block 3(Matisi) 19, (hereinafter the suit land) and ordered cancellation of the title held by the Defendants. Thereafter, the Court issued an eviction Order against the Defendants and a permanent injunction against them from trespassing onto or accession the suit land. The dispute was then marked settled.
2. Through the Chamber Summons Application dated 24/05/2023 (hereinafter 'The Chamber Summons Application'), the 1st to 11th Intended Defendants sought leave to be joined to the suit as Defendants. They also sought a stay of execution of the consent Order and the Decree thereof be vacated or set aside and the case be set down for hearing on merit.
3. The proposed or Intended Defendants Parties argued that the Kenya Good News Outreach Church has been in occupation of the suit land since 1982 and that the parcel does not belong to the Plaintiff.
4. The Intended Defendant claimed that the Plaintiff and the Defendants herein had no say over the property that would entitle them to unilaterally sign it off discreetly without notifying the persons in physical occupation. The Intended Defendants, therefore, claimed that they were entitled to be joined to the proceedings.

The Preliminary Objection

5. In response to the Chamber Summons Application, the 1st to 3rd Defendants, despite the Orders of this Court of 13/06/2023, granting leave to the 4th -14th Interested Defendants to be joined as Defendants, filed the notice of Preliminary Objection dated 23/08/2023. It was couched in the following manner:

Take Notice that Counsel for the Defendants shall raise an Objection to the application by the intended Defendant/Applicant to be determined in limine, since

- a. The suit herein was already heard, determined, judgment entered and decree issued and as such no proceedings are alive for the applicant to be joined.
- b. The intended defendant/Applicants have officials of the Organization and can only champion their grievances through the officials who are the Defendants in the instant suit.

The Submissions

6. In support of its Preliminary Objection, the 1st - 3rd Defendants filed written submissions dated 04/10/2023. It was their case that there are no live proceedings for the intended /Defendants Applicants to join since it was determined and a decree issued on 14/02/2023.
7. This Court's decision in Florence Nafula Ayodi & 5 Others v Jonathan Ayodi and John Tabalya Mukite & Another Benson Girenge Kidiavai & 67 Others (intended Interested Parties) 2021 was referred to buttress the need for a party to satisfy itself that the proceedings are alive before seeking to be joined.



8. On the second limb, the Defendants submitted that according to the rules of the Organization such as the Intended Defendant, members get to air their view through officials. It, therefore, was their case that the Application was not merited.
9. The Defendants urged the Court to uphold the Preliminary Objection and to dismiss the Chamber Summons Application with costs.

The Intended Defendants' Case

10. The intended Defendants challenged the Preliminary Objection through written submissions dated 23/10/2023.
11. In a bid to demonstrate that the suit is still alive, the Intended Defendants sought to distinguish this Court's decision in Florence Nafula Ayodi & 5 Others -vs- Jonathan Ayodi Ligure and the one in HOPF -vs- Director of Survey & 2 Others; Sakaja & 2 Others (Interested Party) by stating that the suit herein is still alive since, when the Application to be joined was filed, the Plaintiff was using and fully enjoying the Orders obtained in the same proceedings. It was their case that the Court would not have ordered the stay of execution if the suit was closed.
12. Further to the foregoing, the Intended Interested Defendants submitted that they were no longer interested Defendants since by the Court of Order of 02/08/2023 they were joined to the suit as Defendants in Order Number 2.
13. In claiming locus standi before this Court, the Intended Defendants submitted that the Plaintiff and the 1st, 2nd and 3rd Defendants failed to disclose to the Court that they were before the Court as officials of Kenya Good News Outreach Church and that the suit land was not in their personal names. It was their case further that ownership was in dispute and overtly not in the name of the defendants for which they unlawfully consented to give.
14. The Intended Defendants submitted that they were members and spiritual leaders of Kenya Good News Church and the church building is on the suit property.
15. It was their claim that for the Court to adopt any agreement made by church leaders on behalf of its members, especially one that deals with lands it must be shown that the said members agree with such decisions.
16. The intended Defendants submitted that had the 1st - 3rd Defendants disclosed that they had moved to Court as representatives of membership group, the Court would not have entertained the Consent without calling for either minutes or express authority from members of Kenya Good News Church.
17. It was their case that the 1st - 3rd Defendants failed to show that they obtained authority from the Church members to compromise the suit land. To buttress their case, they relied on the decision in Presbyterian Foundation v Charles Ndungu & 3 Others [2016] eKLR where it was observed:

“But I think the interested party has raised an important issue, which is, that it is nit agreeable to the consent and that it ought first to have been informed of the consent and given its go ahead before the same could be entered into”.
18. In conclusion, the Intended Interested Defendants submitted that the 1st to 3rd Defendant were not acting on behalf of the members of the church and therefore, their actions cannot be said to be one representing the members. Accordingly, they urged the Court to dismiss the Preliminary Objection with costs.



Issues for Determination

19. From the foregoing, the issues that arise for determination are as follows:
- i. Whether the Preliminary Objection is Proper in law.
 - ii. Depending on (i) above, whether the Preliminary Objection is merited.

Analysis and Determination

i. Whether the Preliminary Objection is Proper in law

20. It is incumbent upon every Court to, in the first instance, satisfy itself that a Preliminary Objection before it is crafted in a manner that conforms with established principles.
21. In Constitutional Petition No. E043 of 2021, Gladys Omato v The Independent Electoral and Boundaries Commission, 2021 eKLR, the Court, in reference to various decision of the Superior Court comprehensively discussed the parameters that define a proper Preliminary Objection. It observed as follows:

“ 14. Law, J.A. in Mukisa Biscuits Manufacturing Company Limited v West End Distributors [1969] EA 696 had the following to say: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.

15. In John Musakali v Speaker County of Bungoma & 4 others [2015] eKLR, the Court held that: -

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law”.



16. Ojwang, J (as he then was) in *Oraro v Mbaja* [2005] KLR 141 where after quoting the statement of Law, JA. in the *Mukisa Biscuits* case (supra) went on to state that: -

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

17. In *Omondi -vs- National Bank of Kenya Ltd & Others* [2001] KLR 579; [2001] 1 EA 177, it was opined that, while Courts are cautioned against the purported use of contested facts in determining preliminary objections, they are at liberty to look at the pleadings and other relevant in documents on the record. It was observed thus: -

“...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion....”

22. The foregoing elaborate discussion sets the stage for this Court to consider the issue whether the 1st - 3rd Defendants Preliminary Objection is sustainable.
23. The first limb of the Objection states as follows:

“The suit herein was already heard, determined, judgment entered and decree issued and as such no proceedings are alive for the applicant to be joined.”
24. A close reading of the foregoing Objection reveals that the 1st -3rd Defendants' challenge is that this Court is *Functus Officio* as such cannot re-open the case afresh.



25. The Court of Appeal discussed the doctrine of *Functus Officio* in the case of *Telcom Kenya Ltd v John Ochanda* [2014] eKLR I the following way:

“*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 Nazaire Co*, (1879), 12 Ch. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”

26. The doctrine of *functus officio* is a jurisdictional bar on a court to have a second bite at the merits of a case.

27. It is therefore a legal principle that if successfully demonstrated disposes off a matter at a preliminary stage. To that extent therefore, I find that the first limb satisfies the threshold required of Preliminary Objections.

28. The 1st - 3rd Defendants’ second limb was crafted in the following manner:

“The intended defendant/Applicants have officials of the Organization and can only champion their grievances through the officials who are the Defendants in the instant suit”

29. It is clear from the foregoing that the information on whether the Intended Defendants have officials is one that can only be ascertained by way of evidence. It is not a pure point of law that this Court can consider and at once dispose of the suit. In the premises, the second limb fails the test.

30. That said this Court will only consider the merits of the first limb.

ii Whether the claim that this is Court is *functus Officio* is merited

31. In *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, The Supreme Court referred to the scholarly works of Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” [2005] 122 SALJ 832 where the doctrine of *Functus officio* was discussed in the following manner;

“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.”

32. Further to the foregoing, in the case of *Leisure Lodge Ltd Vs Japhet Asige and another* [2018] EKLR the Court, in reference to the decision in *Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others* [2018] and the Court of Appeal decision in *Telkom Kenya Ltd v*



John Ochanda (supra) elaborated on the operational dynamics of the doctrine. It observed as follows;

“On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act. In *Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others* [2018] eKLR, this court said of the doctrine of *functus officio*:-

“I understand the doctrine, like its sister, the *res-judicata* rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.

As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.

I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment -debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become *functus officio*. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before”.

33. Deriving from the foregoing excerpt, it is evident that what operationalizes the doctrine of *functus officio* is a consideration of whether the dispute has been considered on ‘merit’.
34. It can be distilled therefore that, if a Court has not exercised its adjudicative authority over a matter on merit, such court cannot be said to be *Functus Officio*. In the words of the Court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, ‘the bar is only upon merit-based decisional engagement’.
35. It is not in contest that the Court herein adopted a consent by the Plaintiff and the 1st - 3rd Defendant. The merits of the dispute therefore remain untouched.



36. As guided by the decision in *Omondi v National Bank of Kenya Ltd & Others* [2001] KLR 579; [2001] 1 EA 177, I have taken the liberty to peruse the joinder Application and it would be unjust, on the face of it, to block the Intended Defendants from accessing justice in the name of this Court being *Functus Officio*.
37. My finding is buttressed by the finding of the Court in the above reference case (*Leisure Lodge Ltd v Japhet Asige and another*) where it further observed:
- “...in any event a Court of Law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a judgment. To do that would be an abdication of duty and a license for parties to do the unimaginable then shout from rooftops that the court is *functus officio* because there is a final judgment”
38. In the premises, I do find and hereby hold that the Preliminary Objection dated 23/08/2023 is not merited and is hereby accordingly dismissed with costs to the Intended Defendants.
39. The Application dated 24/05/2023 is fixed for mention on 17/0/2024 for further directions. Interim orders extended till then.
40. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 13TH DAY OF DECEMBER , 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE

