



**Ogutu & another v Tamia (Environment and Land Appeal
17 of 2021) [2023] KEELC 22575 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 17 OF 2021
AY KOROSS, J
DECEMBER 7, 2023
ORIGINALLY KISUMU ELCA CASE NO. E051 OF 2021**

BETWEEN

BEDINA AKELLO OGUTU 1ST APPELLANT

EFFIE AKINYI MISACHI 2ND APPELLANT

AND

MARGARET NANJALA TAMIA RESPONDENT

RULING

1. Having considered the application filed by the respondent dated 30/05/2023 that is the subject for determination, it is momentous for this court to contextualise this case.
2. Being dissatisfied with the judgment of the trial magistrate in Bondo PM ELC Case Number E1 of 2020, the appellants lodged an appeal before this court. However, the 2nd appellant withdrew her appeal and consequently, the appeal proceeded between the 1st appellant and respondent.
3. In his decision, the trial magistrate entered judgment for the respondent as follows; (a)injunctive orders were issued against the appellants, their agents, assignees and any person acting under their authority from selling or in any way dealing in a portion measuring 2 acres out of South Sakwa/Barkowino/682 and now South Sakwa/Barkowino/9198, (b) issued a declaration that the respondent was entitled to 2 acres from South Sakwa/Barkowino/682 (c) an order for the land registrar Bondo to cancel the title to land parcel no. South Sakwa/Barkowino/9198 and for the land registrar to restore South Sakwa/Barkowino/682 in the name of the 1st appellant (d) It ordered the 1st appellant to transfer 2 acres out of South Sakwa/Barkowino/682 to the respondent and in default, the court administrator to transfer the same to the respondent and lastly, (e)costs to the respondent. (Emphasis added).



4. Accordingly and after hearing all parties by written submissions, this court ultimately found the appeal was partly merited and substituted the judgement of the trial magistrate in the following terms;
 - a. The Land Registrar, Bondo is hereby directed to revoke/cancel the title deed for land parcel number South Sakwa/Barkowino/9198 in the name of the 2nd appellant Effie Akinyi Misachi and register the name of the respondent Margaret Nanjala Tamia as the proprietor;
 - b. The 2nd appellant Effie Akinyi Misachi do execute all documents of transfer in respect of land parcel number South Sakwa/Barkowino/9198 in favour of the respondent Margaret Nanjala Tamia failure to which the Deputy Registrar of the Court to execute the requisite documents in place of the 2nd appellant;
 - c. Three quarters of the costs of this appeal are awarded to the respondent; and
 - d. Costs of the lower court suit are awarded to the respondent. [Emphasis added]
5. It is apparent the respondent is dissatisfied with the decision of this court and notwithstanding she acts in person and her application lacks want of form which is curable by Article 159(2)(d) of the [Constitution](#), it obviously emerges she is aggrieved by this court's decision in overturning a particular portion of the decision of the trial magistrate which ordered the 1st appellant to transfer 2 acres out of South Sakwa/Barkowino/682 to the respondent and in default, the court administrator to transfer the same to the respondent.
6. Hence, in the respondent's perception, this court erred in overlooking the trial magistrate's decision and should review its own decision and revert some of the orders that were issued by the trial magistrate in particular the prayer that ordered the 1st appellant to transfer 2 acres out of South Sakwa/Barkowino/682 to the respondent and in default, the court administrator to transfer the same to the respondent.
7. The application is unopposed and it is canvassed by the respondent's written submissions dated 3/07/2023 and since they reiterate averments made in the application, this court need not repeat the contents therein.
8. In view of the application and submissions which this court has considered, the single issue for determination is whether the application dated 30/05/2023 has merits.
9. Statutory backing for review of court decisions is derived from Section 80 of the [Civil Procedure Act](#) which states that:

“ 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.”
10. Further, Order 45 of the Civil Procedure Rules fleshes out Section 80 of the [Civil Procedure Act](#) by stating;-

“ 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.”

Additionally, Order 45 Rule 3 reveals that:

“(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

11. In assessing the respondent’s prayer, it therefore follows that the question this court seeks to answer is whether by substituting the judgment of the trial magistrate with its own decision, this court erred. In so doing, this court has to interrogate the role of an appellate court.
12. In this regard, consideration has to be made to Section 78 (1) of the *Civil Procedure Act* which states the role of an appellate court is either to determine a case with finality, to remand a case, frame issues and refer them for trial or take additional evidence or to require the evidence to be taken or order a retrial. In the circumstances of this case, the court determined this case with finality on 19/01/2023. In other words, there is no other judgment subsisting over this dispute except the judgment of this court. See also *Selle vs. Associated Motor Boat Company Ltd*, [1968] EA 123.
13. In considering the appeal, this court examined several grounds of appeal including the ground of whether the trial court erred in restoring South Sakwa/Barkowino/682 in the name of the 1st appellant without considering the interests of other 3rd parties and at paragraph 28 of its judgment, it found as follows: -

“It is my finding that the trial magistrate erred in restoring the suit property.”
14. Consequently, this court having rendered an independent decision which is well within its purview, the respondent cannot now contend the court erred. Having rendered its final decision, it follows this court is *functus officio*. It must be noted the doctrine of *functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision.
15. This doctrine is highlighted in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR which 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.”
16. As a result, the respondent has not satisfied the ingredients for review and if at all the respondent is dissatisfied with the decision of this court as it appears she is, the only avenue that is available to her is an appeal to the Court of Appeal and not otherwise.
17. Ultimately and for the reasons stated above, I find the application dated 30/05/2023 lacks merit and it is hereby dismissed with no orders as to costs.



DELIVERED AND DATED AT SIAYA THIS 7TH DAY OF DECEMBER 2023.

HON. A. Y. KOROSS

JUDGE

07/12/2023

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

1st appellant present

Respondent present

Court assistant: Ishmael Orwa

