



Chula & 134 others v Cleary & another (Environment & Land Case 97 of 2010) [2023] KEELC 22002 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22002 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 97 OF 2010
SM KIBUNJA, J
DECEMBER 6, 2023**

BETWEEN

COSMAS SAFARI CHULA & 134 OTHERS PLAINTIFF

AND

BRYAN DANIEL MC CLEARY 1ST DEFENDANT

MICHAEL GEORGE MC CLEARY 2ND DEFENDANT

RULING

1. Cosmas Safari Chula, the 1st plaintiff, moved the court through the application dated the 1st March 2023 seeking for the following prayers:
 1. “That this application be certified urgent and service be dispensed with in the first instance.
 2. Temporary injunction restraining the defendants either by themselves, their servants, agents or howsoever, from encroaching, construction, commencing, undertaking and/or related works on the parcel of land known as No 13088/11/MN/CR 58432 waste or damage pending inter parties hearing of this application.
 3. Temporary injunction restraining the Defendants, their servants or Agents from cancellation of title, delineating, subdividing, selling or otherwise disposing of the parcel of land known as No 13088/11/MN/ CR 58432 pending inter parties hearing of this application.
 4. Permanent Injunction restraining the Defendants either by themselves, their servants, agents or howsoever from encroaching, construction, commencing, undertaking and/or related works on the parcel of land known as No. 13088/II/MN CR. 58432 waste or damage pending the hearing and determination of this application.



5. Permanent Injunction restraining the Defendants, their servants or Agents from cancellation of title, delineating, subdividing, selling or otherwise disposing of the parcel of land known as NO. 13088/II/MN CR 58432 pending the hearing and determination of this application.
6. Cost of this Application be in the cause.”

The application is based on the nine (9) grounds on its face and supported by the affidavit of Cosmas Safari Chula sworn on the 1st March 2023 deposing *inter alia* that he was the lawful and rightful owner of the suit property having bought it from Constance Jumwa Lazaro; that the court on the 6th November 2013 directed him to surrender the title document to the suit property to be cancelled and be registered with Titus Siema Harambee, without considering that he was an innocent purchaser for value; that in the order of 22nd April 2022, Munyao J, had stated that if Titus Siema Harambee wanted the title of the 1st plaintiff to be cancelled, then he should file a suit to that effect; that the said judge also stated that the 1st plaintiff is the registered proprietor of the suit land and has indefeasible title; the defendants are likely to dispose of the suit property and the court should issue the prayers sought to preserve it.

2. The 118th plaintiff/respondent opposed the application through the replying affidavit sworn by Titus Siema Harambee, the 118th plaintiff, on the 14th April 2023 *inter alia* deposing that the court entered judgement for the plaintiffs on the 29th November 2010; that there has been several applications that have since been decided; that in the ruling in respect of contempt proceedings, Munyao J, observed in passing that in order to cancel the title issued to Cosmas Safari Chula, it was necessary to file another suit against him; that the order of injunction restraining the 1st plaintiff and others from dealing with the suit property that was issued on the 24th September 2013 was still in force; that the application should be dismissed with costs.
3. The learned counsel for the 118th plaintiff/respondent and the 1st plaintiff filed their submissions dated the 29th June 2023 and 22nd September 2023 respectively that the court has considered.
4. The issues for the court’s determinations are as follows:
 - a. Whether the 1st plaintiff application has prayers that capable of being considered or granted at this stage.
 - b. Whether the suit herein is pending or already determined.
 - c. Whether the application is *res judicata*.
 - d. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions filed, the record and come to the following determinations:
 - a. The record shows that this proceeding was commenced through the originating summons dated the 6th April 2010 and filed on 7th April 2010 by the 135 plaintiffs seeking to be declared the proprietors of Plot No. 216/Section 11/MN, the suit property, through adverse possession. The defendants herein never entered appearance in the entire duration of the proceedings up to delivery of judgment by Maureen Odera J, on the 29th November 2010.
 - b. I have perused the record and not seen any evidence of an appeal or review of the said judgment having been filed and or prosecuted to date. Rather it has been a myriad of applications which has made this matter appear before several learned judges and for all manner of issues, except adverse possession. It is no wonder that the learned Omollo J, ordered that the filed be closed on



23rd March 2017. Other applications were however filed including the one dated the 12th July 2021 that was determined through the ruling delivered by Munyao J, on the 22nd April 2022.

- c. The present application by the 1st plaintiff is for both temporary and permanent injunction on the basis that the parcel of land known as Plot No. 13088/II/MN CR 58432 hereafter known as the suit property was declared as legally registered to the 1st Plaintiff, and not the 118th plaintiff, one Titus Siema Harambee. The 1st plaintiff has relied on the ruling of 22nd April 2022 by Munyao J. The 1st plaintiff/applicant has a firm belief that the 118th plaintiff may dispossess him of his indefeasible right to the suit property and wants legal protection. It is important to point out from the onset that the last sentence in prayers (2) to (5) indicates the orders sought if granted would remain in force “pending the hearing and determination of this application.” This ruling is the culmination or the end of the inter parties hearing and the orders sought were not to last beyond today. That even without going to the merits of the application, the orders sought as phrased cannot be granted.
- d. That even if the prayers sought in the current application were properly coached, and capable of being granted, it would have amounted into a new suit probably for trespass disguised as a notice of motion application. It presupposes that there is a pending suit upon which the prayers sought are predicated, which is not the case.
- e. The application by the 1st plaintiff for all intents and purposes seem to negate the judgement entered in favour of the plaintiffs on the 29th November 2010. If the 1st plaintiff was dissatisfied with the judgement entered in their favour, then the application he filed is not a known legal route to challenge a validly entered judgement. In case he has a claim against one or more of the plaintiffs, he would be better off seeking legal advice on how to pursue such a claim. This application is bad in law and is standing on stilts rather than on its legs and it has only one fate, which is to fail.
- f. By the time the current application was filed, this suit had been decided and the file ordered closed as shown above. Further proceedings, other than the usual post judgement ones, had been stopped under the doctrine of the court being *functus officio*. In the case of [*Telkom Kenya limited v John Ochanda \(suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited\)*](#) [2014] eKLR, the court 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.”

- g. The *functus officio* doctrine brings to the fore the element of finality in litigations. In the Supreme Court of Kenya case of [*Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others*](#) [2013] eKLR, the court 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.”

- h. As pointed out above, this court rendered its decision in the suit filed by the plaintiffs, including the 1st plaintiff, and against the defendants on the 29th November 2010. That judgement has never been appealed against or reviewed or set aside. This court is therefore *functus officio* on the question of ownership of the suit property herein as between the parties in the suit. Having found that the application has no legal basis and is without merit, the same is to be dismissed.
6. From the foregoing determinations, the court finds and orders as follows:
 - a. That the 1st plaintiff’s notice of motion dated the 1st March 2023 be and is hereby dismissed with no orders as to costs.
 - b. That all parties to take note that this file is hereby closed.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 6TH DAY OF DECEMBER 2023.

S. M. Kibunja, J.

ELC MOMBASA.

In the presence of:

Plaintiffs : 1st Plaintiff & Mr. Mkomba for Mutugi for 118th Plaintiff.

