



Grieve v County Government of Machakos; Mutua & another (Interested Parties) (Both Suing as Legal Representatives of the Estate of the Late Benedict Mutua Kithumbi) (Environment & Land Case 189 of 2016) [2025] KEELC 3483 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 189 OF 2016
NA MATHEKA, J
APRIL 29, 2025**

BETWEEN

FREDRICK MUROKI GRIEVE PLAINTIFF

AND

COUNTY GOVERNMENT OF MACHAKOS DEFENDANT

AND

VICTORIA MWENDE MUTUA INTERESTED PARTY

FAITH KANINI MUTUA INTERESTED PARTY

**BOTH SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
BENEDICT MUTUA KITHUMBI**

RULING

1. The application is dated 22nd July 2024 and is brought under Section 3A of the *Civil Procedure Act* Cap 21 of the Laws of Kenya, Order 3 Rule 3, Order 10, Order 12 Rule 7 of the Civil Procedure Rules, 2010: Articles 40, 47 and 50 of *the Constitution* seeking the following orders;
 1. That on the grounds contained in the Certificate of Urgency and the Affidavit in support of the Certificate of Urgency, this Application be certified urgent and be heard ex parte in the first instance.
 2. That the firm of Matheka Oketch Advocates LLP of P.O. Box 6332-00100 located in Nairobi at Bishops Garden Tower 2nd Floor be granted leave to come on record for the 1st and 2nd Interested Party herein.



3. That pending the hearing and determination of this Application, there be a stay of execution of the Decree issued by this Honourable Court on 28th February, 2023.
 4. That upon the hearing and determination of this Application, there be a stay of execution of the Decree issued by this Honourable Court on 28th February, 2023.
 5. That the Judgment issued by this Honourable Court on 30th July, 2021 be set aside.
 6. That the 1st and 2nd Interested Party herein be granted leave to join the suit to file a Defence and accompanying documents and the matter be set down for hearing.
 7. That the costs of this Application be provided for.
2. It is based on the following grounds that on or about 2016, the Plaintiff instituted ELC Case No. 189 of 2016 claiming ownership of Plot 49 Kithendu Market and the same was heard and determined on 30th July, 2021. In its Judgment, the court proceeded and gave the following order: An order be hereby issued that the Defendant updates its register to reflect the existence of Plot 49 Kithendu Market and the Plaintiff's name as the owner of the said Plot No. 49. The Plaintiff proceeded to extract a Decree dated 28th February, 2023 which affirmed the Judgment of the court. The Plaintiff in its case failed to disclose to the court that he sold the suit land to the Interested Party on or about 11th January, 1993 and that the 1st and 2nd Interested Party have been in occupation and even erected structures.
3. That the Plaintiff deliberately failed to serve and procure summons to enter appearance against the 1st and 2nd Interested Party when it instituted the case knowing very well any orders flowing from the case would affect the property interest of the 1st and 2nd Interested Party over the suit land. The Plaintiff has proceeded to instruct his Advocates to issue to the Interested Party an eviction notice requiring them to vacate the suit property. The 1st and 2nd Interested Party are aggrieved by the Judgment and Decree of the court the same having been passed without allowing them to be heard and to present their case in the matter. The Judgment of the court is a gross violation of the 1st and 2nd Interested Party constitutional rights and in particular; the right to property as enshrined in Article 40; the right to fair administrative action as enshrined in Article 47; and the right to be heard as enshrined in Article 50. The 1st and 2nd Interested Party prays that the Judgment given by this Honourable Court be set aside and the Decree emanating from the Judgment be stayed. The 1st and 2nd Interested Party be joined in this case and be given leave to file their Defence and accompanying documents. Unless the prayers sought are awarded, the 1st and 2nd Interested Party shall suffer irreparable loss besides having their constitutional rights violated by this Honourable Court.
4. The Plaintiff/Decree Holder raised a Preliminary Objection on the following points of law that;
1. The Application is incompetent, fatally defective, inept, frivolous and amounts to a gross abuse of the court process and the same should be struck out in-limine and ex-debito-justitiae.
 2. This suit was concluded over three (3) years ago on 30th July, 2021 before the filing of the present Application and the Decree arising therefrom has been perfected/fully executed.
 3. Any claim by the Proposed Interested Parties is time-barred by the *Limitation of Actions Act* and is therefore moot. The same cannot form the basis of re-opening of a case which has been fully heard and determined by this Honourable Court.
 4. The Interested Parties have no legitimate, valid, legal, or probable claim over the suit property capable of being re-litigated after Judgment as they are criminal trespassers and the purported Administration of the Estate of late Benedict Mutua Kithumbi (deceased) who died on 3rd



January, 1997 (27 years ago) and a Limited Grant issued on 24th January, 2024 after 27 years is therefore untenable.

5. There is no provision in law and the Civil Procedure Rules for joinder of Interested Parties to a suit after Judgment.
 6. If the Intended/Proposed Interested Parties have a valid claim in law over the suit property, the only option is to commence a fresh suit and not seek to re-open a suit where Judgment had been delivered over three (3) years ago after a full hearing on merits.
 7. The undated Application should therefore be struck out with costs to the Plaintiff/ Respondent.
5. This court has considered the application and submissions therein. Order 12 Rule 7 which is discretionary depending on the circumstances of the case states as follows;

Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just”.

6. By virtue of Order 12 Rule 7 this Court has discretion to set aside any orders upon terms that it considers just. The principles that guide the Court in its exercise of discretion are set out in the case of *Patel vs East Africa Handling Services Limited (1974) E.A* where the Court stated that in setting aside judgements/orders the main concern for the Court is to do justice to the parties.
7. In the case of *Shah vs Mbogo & Anor (1967) E.A 470* the Court of Appeal for Eastern African held;

applying the principle that the Court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.
8. Also, the case of *Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) vs Hannah Wanjiru Kiniti & another (2021) eKLR* explains it even further.
9. For the Court to exercise its discretion in favour of the Applicant, he or she has to satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the judgement and reopen the suit. Sufficient Cause was defined by the Supreme Court of India in *Parimal vs Veena* which was cited with approval in the case of *Wachira Karani vs Bildad Wachira (2016) eKLR*. In the case, the said Supreme Court stated that;

sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case



must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

10. The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”
11. Be that as it may, in the instant case the Applicants were not parties during the hearing. I have perused the court file and find that in 2016, the Plaintiff instituted ELC Case No. 189 of 2016 claiming ownership of Plot 49 Kithendu Market and the same was heard and determined on 30th July, 2021. In the Judgment, the court proceeded and gave the order that the Defendant updates its register to reflect the existence of Plot 49 Kithendu Market and the Plaintiff’s name as the owner of the said Plot No. 49. The Plaintiff proceeded to extract a Decree dated 28th February, 2023 which affirmed the Judgment of the court and confirms that the decree has been executed. The Applicants claim that the Plaintiff in its case failed to disclose to the court that he sold the suit land to the Interested Party on or about 11th January, 1993 and that the 1st and 2nd Interested Party have been in occupation and even erected structures.
12. I am satisfied that the order was carried out as per the judgement and the matter concluded. I concur with the Plaintiff’s preliminary objection in this matter. Order 12 Rule 7 is not applicable in this case and the court cannot reopen the case which was decided three years ago and decree executed. The Applicants could as well file a fresh suit as Plaintiffs. This court is now functus officio. In the case of Telkom Kenya Ltd vs John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd (supra), the Court of Appeal held as follows on the functus officio doctrine;
13. 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. 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. ---”

14. 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.”

15. Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of functus officio in the following terms-

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.”

16. 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 as is the case herein. Having discharged its duty on this suit this court is therefore functus officio, defined in Black's Law Dictionary, Ninth Edition 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.” In the circumstances, the court is wary of the Applicants' invitation to re-engage with this dispute by reopening the case and hearing it afresh. Having found that this court is functus officio, this application before me must fail. I uphold the preliminary objection and find that the application is not merited and I dismiss it with costs to the Respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

