



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO 203 OF 2013(OS)

IN THE MATTER OF AN APPLICATION UNDER THE REGISTRATION OF

TITLES ACT CHAPTER 281 LAWS OF KENYA

IN THE MATTER OF LAND REFERENCE NUMBERS 209/2753/2/

KIPANDE ROAD & 209/3350 HIGHRIDGE NAIROBI

PRABHUDAS DHANJI.....1ST APPLICANT

JAYANTILAL DHANJI.....2ND APPLICANT

KISHORLAL DHANJI

(suing as the Administrators of the Estate of the Late CHANDULALDHANJI)....3RD APPLICANT

KISHORLAL DHANJI.....4TH APPLICANT

VERSUS

MANSUKHLAL DHANJI.....RESPONDENT/APPLICANT

RULING

1. By a Notice of Motion dated the 28th September, 2021, the Respondent herein(*Applicant*) seeks the following reliefs;

i. That this Honourable Court grant leave for the firm of M/S Mwaniki Gachoka & Company Advocates to come on record on behalf of the Respondent in place of M/S LJA Associates LLP pursuant to the consent signed on the 1st September 2021 between the two law firms.

ii. That pending interpartes hearing and determination of this Application, the Applicants by themselves and/or their agents, employees, assigns and or successors and/or any person acting on their behalf be and are hereby restrained from evicting or interfering in any way with the Respondent's peaceful & quiet possession of the house located on Land Reference L.R 209/3350.

iii. That pending the hearing and determination of this Application, the Applicants by themselves and/or their agents, employees, assigns and or successors and/or any person acting on their behalf be and are hereby restrained from evicting or interfering in any way with the Respondent's peaceful & quiet possession of the house located on Land Reference L.R 209/3350.

iv. That this Honourable Court be pleased to adopt the consent signed between Ibrahim Issack & Company Advocates & LJA Advocates dated 27th June, 2019 as an order of the court.

v. That the costs of this application be in the cause.

2. The Application is premised on the grounds on the face of the Motion and supported by the Affidavit of Mansukhal Dhanji, the

Respondent/Applicant herein dated the 27th September, 2021.

3. The Respondent/Applicant deponed that the Applicants are his brothers; that the 1st and 4th Applicants' have since died; that he together with the Applicants are the co-owners of the properties known as L.R 209/2753/2 situate at Kipande Road and L.R 209/3350 situate at Highridge and that on 18th February, 2019, a decree was issued by this court directing the parties to facilitate the sale of the aforementioned properties and the proceeds thereof to be distributed among the parties.

4. According to the Respondent/Applicant, pursuant to the aforesaid order, he was allowed to stay on the property known as L.R 209/3350 (*hereinafter the suit property*) until the property was sold and vacant possession issued thereof and that it was a further term of the decree that during his stay on the suit property, he would grant access to valuers and potential purchasers.

5. According to Mr Dhanji, it was further a term of the decree that he would be given the first option to purchase L.R No. 209/3350 and if he was unable to purchase the suit property, the purchaser or Knight Frank Limited would be at liberty to evict him and that vide a consent dated 27th June, 2019, the decree was amended to include Dunhill Consultants Limited as the Real Estate Agents to take over the management and collection of rental proceeds from L.R No 209/2753/2 from Knight Franks Limited.

6. It is the Respondent's/Applicant's case that the said firm was to also market the two suit properties until a potential buyer is found; that the consent further provided that the sale proceeds for the two properties together with the rental proceeds from the developments located on L.R No 209/2753/2 were to be deposited in a joint escrow account at Standard Chartered Bank and that the signatories of the said accounts were counsel for the Applicants and the Respondent.

7. It was deponed that although the consent has been signed, the same has not been adopted as an order of the court to enable variation of the order and subsequent implementation; that efforts to engage the Applicant's Advocates to ensure compliance with both the decree and the consent have been futile and that the Applicants hired auctioneers to try and evict him from the suit property on 25th August, 2021 without a court order, which incident he reported to the Parklands Police Station.

8. It was his further deposition that it was a term of the decree that any eviction was to be done through a court order; that his counsel sent a letter dated 20th September, 2021 to the Applicants' counsel attaching the account opening forms for opening of the joint escrow account and that the latter has neglected to facilitate the opening of the joint account.

9. It was the deposition of the Respondent/Applicant that the Applicants are further in breach of the consent as they have bypassed the appointment of Dunhill consultants to try and market the properties without involving him; that the Applicants' Advocates have also sent unknown people/goons purporting to be buyers whose sole intent is to intimidate him.

10. In response, the Applicants/Respondents filed Grounds of Opposition in which they averred as follows:

i. The matter has been fully heard and judgment was delivered on 26th November, 2018, as against the Respondent allowing sale of the suit properties pursuant to which execution proceedings have commenced. Subsequently the Respondent has no claim or cause of action warranting the grant of an injunction.

ii. The Application amounts to an application for stay of execution whereas the Respondent has not appealed against the decision of 26th November, 2018.

iii. The Application amounts to an appeal against the Judgment of the court delivered on the 26th November, 2018.

iv. The Respondent is in gross contempt of the orders of 26th November, 2018 having failed to deposit rent from the proceeds of the suit property from 1st October, 2018, and has further resisted the viewing and sale of the property.

v. The Respondent is not in occupation of the suit property having fully vacated the same in October, 2020 and handed over the keys thereof.

vi. The Respondent has irregularly filed a Notice of Change of Advocates contrary to Order 9 Rule 9 of the Civil Procedure Rules purporting to have instructed the firm of Mwaniki Gachoka & Co Advocates without revoking the appointment of the firms of Ashitiva Advocates LLP and LJA Associates LLP.

vii. The Respondent has not established a prima facie case with a probability of success.

viii. The alleged consent of 27th June, 2019 has been disowned by both parties.

11. The Respondent/Applicant's counsel submitted that **Order 9 Rule 9** of the **Civil Procedure Rules** sets out the procedure for engaging an advocate after Judgment has been passed; that **Order 9 Rule 9(b)** thereof states that the same can only be done upon a consent being filed between the outgoing and incoming advocates and that in line with the above requirement, the firm of LJA Advocates and Mwaniki Gachoka & Co Advocates signed a consent dated 1st September, 2021 a copy of which was forwarded to the Applicants.

12. The Respondent's/Applicant's counsel submitted there is no valid response to the Application; that the Grounds of Objections are essentially general averments of facts and that subsequently the Respondents' averments remain un rebutted. Reliance was placed on the cases of *Kennedy Otieno Odiyo & 12 Others vs Kenya Electricity Generating Company Limited [2010] eKLR* and *AG & Another vs*

Mohamed Balala & 11 Others [2014] eKLR where the courts reiterated that Grounds of Opposition only address issues of law and as such cannot pass as evidence.

13. It was submitted by counsel that the decree of the court issued on 18th February, 2019 was varied by the consent entered into by the parties on the 27th June, 2019; that despite the consent aforesaid not having been adopted as an order of the court, it's terms were mutually agreed between the parties who signed and filed it and that as no vitiating factor has been proved, the consent ought to be adopted as an order of the court.

14. The Respondent's/Applicant's counsel relied on the case of Protus Hamisi Wambada & another vs Eldoret Hospital [2020] eKLR where the court cited Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485, in which the court held that a consent entered into between the parties cannot be set aside or varied unless it is proved that the same was obtained by fraud, collusion or by an agreement contrary to the policy of the court. Counsel submitted that the Applicants and their counsel have refused to abide by the terms of the consent.

15. According to counsel, the Respondent/Applicant is entitled to the injunctive orders sought because the Applicants are attempting to evict him and his family without an order of the court and supervision of the area police; that the Respondent has at all times been ready and willing to comply with the terms of the decree and the consent of 27th June, 2019 and that it is imperative that injunctive orders are issued to ensure compliance with the decree and protect the dignity of the court.

16. The Applicants/Respondents did not file submissions.

Analysis and Determination

17. Before delving into the merits of the application, the court notes that the applicants responded to the application through Grounds of Objection. Indeed, as correctly submitted by the Respondent/Applicant's counsel, Grounds of Objection/Opposition only address issues of law. It is trite that where issues of fact are disputed, they are best addressed by way of a Replying Affidavit or oral evidence. This was appreciated by the Court of Appeal in the case of Daniel Kibet Mutai & 9 others vs Attorney General [2019] eKLR where the learned judges observed as follows:

“The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flows from this. First, by the mere fact of the affidavits not having been controverted there is an assumption that what was averred in the affidavit as factual evidence is admitted...”

18. It is the Respondent's/Applicant's contention that this court is *functus officio* having already made a final determination on the matter. In discussing the concept of *functus officio*, the Supreme Court in Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, cited with approval a passage in an article by Daniel Mala Pretorius entitled “The Origins of the functus officio Doctrine, with Special Reference to its Application in Administrative Law”, in South African Law Journal, (2005) 122 SALJ 832, where the concept was discussed in the following terms:

“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 taken, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision-maker.”

19. Similarly, the Court of Appeal in Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, discussed this concept thus;

“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.”

20. By way of a brief history, this matter was instituted by the Applicants against the Respondent by way of Originating Summons seeking, *inter alia*, an order of eviction of the Respondent/Applicant from L.R 209/3350 Highridge; an order for the appointment of a management company to collect rent from the suit properties and deposit the same in court; an order for the original titles for the suit properties to be deposited with counsel for the Applicants in trust for all the co-owners; and an order for the sale of the suit properties by the appointed management company and the proceeds of the sale be deposited in court.

21. It was the Applicants'/Respondents' case that despite being tenants in common with the Respondent, the Respondent had failed to share rental income from the properties, one of which he occupied (the suit property). They contended that they were entitled to equal benefits from the properties.

22. After hearing the parties, the Court (Obaga J) made a determination on 26th November, 2018 as follows:

i. The properties known as L.R No. 209/3350 at Highridge and L.R No. 209/2753/2 along Kipande Road shall be valued by a suitable valuer to be identified by Knight Frank Limited who shall be in charge of selling the properties. Priority to L.R No 209/3350 shall be given to the Respondent and if the Respondent is unable to purchase it, it should be sold to any other

suitable buyer through a method to be determined by Knight Frank Kenya Limited

ii. The rental income from L.R 209/2753/2 shall be collected by Knight Frank Kenya Limited or their appointed agents with effect from 1st October, 2018, and the same shall be deposited in court until the property is sold and the proceeds of the sale deposited in court. The proceeds of the sale in respect of L.R No 209/1130 shall be deposited in court once the same is sold.

iii. The Respondent is allowed to stay in the house on L.R No 209/3350 if he is still there until the property is sold and vacant possession is given to the purchaser. The stay of the Respondent on the house is on the condition that he will co-operate and give access to the valuers, and potential buyers for purpose of inspection and valuation. The Respondent shall give vacant possession to the purchaser if he is unable to purchase the property upon completion of the sale failing which the purchaser or Knight Frank Kenya Limited shall be at liberty to evict the Respondent upon application to that court to that effect.

iv. The original titles to L.R No 209/2753/2 and L.R No 209/3350 held by the Respondent shall be deposited in court within 14 days from the date hereof and shall be available on request for purposes of carrying out transfer of the properties in the course of the sale transaction upon request to the court.

23. The Respondent is seeking for injunctive orders on the basis that the Applicants are attempting to evict him before resorting to the court as stated in the decree and further that the Applicants are resisting any attempts to engage and ensure compliance with the decree. Taking into account the terms of the judgment, and the basis upon which the Respondent has moved this court, the court is of the opinion that it is not *functus officio*.

24. Clearly, the Judgment of this Court has not been perfected or executed. Further, the judgment in itself dictates that some actions can only commenced upon having further resort to the court. Courts have warned against a rigid interpretation of the concept of *functus officio*. In the case of *Bellevue Development Company Limited vs Vinayak Builders Limited & Another [2014] eKLR*, the court held as follows:

“... care should be taken not to inadvertently or otherwise overstretch the application of the concept of *functus officio*; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court.”

25. Indeed, as succinctly expressed by the Supreme Court in the *Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others* case(supra);

“It follows that the Court’s jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the Court is satisfied and it declares as much. Even though, therefore, the Court concluded the hearing of the Petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the Petition, remained uncompromised.”

26. In the court’s considered view, the orders being sought herein are incidental to, and are a direct consequence of the orders made by this court and the court is vested with jurisdiction to determine the same.

27. The Respondent/Applicant has sought for leave for his counsel, M/s Mwaniki Gachoka & Company Advocates to come on record in place of LJA Associates LLP pursuant to a consent executed between the advocates on the 1st September, 2021.

28. The regulatory legal framework on change of advocates post-judgment is contained in **Order 9 Rule 9** of the **Civil Procedure Rules, 2010** which provides:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

29. It is apparent that before there can be a change of counsel after Judgment has been delivered, there must be either an application wherein an incoming advocate seeks leave to come on record for a party or a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be.

30. In this case, prior to the filing of the present application, the firm of M/S Mwaniki Gachoka & Co Advocates and the Respondent’s former counsel LJA Associates filed a consent on 1st September, 2021 in which it was agreed that the firm of M/S Mwaniki Gachoka & Co Advocates would take over the conduct of the matter on the Respondents’ behalf. This consent has not been disputed.

31. That being the case, it is the finding of this court that the Respondent’s counsel is properly on record. Indeed, a consent has been filed between the advocates pursuant to the law.

32. The Respondent seeks to have the consent of 27th June, 2019 adopted as an order of the court. It is his contention that despite the consent not having been adopted as an order of the court, the terms therein were mutually agreed between the parties and the court should therefore proceed to adopt it as an order of the court. Counsel for the Applicants maintains that he is a stranger to the consent and denies having executed the same.

33. The Black Law Dictionary, 9th edition, defines “a consent” as:

“Agreement, approval or permission as to some act or purpose, given voluntarily by a competent person; legally effective assent.”

34. It is trite that a consent order only acquires force of law once it is adopted as an order of the court. This was affirmed by the Supreme Court in the case of Geoffrey M. Asanyo & 3 others vs Attorney-General [2020] eKLR where the learned justices stated as follows:

“Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court.”

35. The consent order dated 27th June, 2019, though on record, has not yet attained the legal character of an order of the court and remains a mere intention by the parties to enter into an agreement on the set out terms. By its very nature, a consent should be an agreement where parties have a *consensus ad idem* and are willing to be bound. Where one party is clearly against it, it will be contrary to the policy of this court to adopt it.

36. In any event, having perused the terms of the consent sought to be adopted *vis a vis* the Judgment of the court, it would appear that the consent seeks to amend and/or vary the terms of the Judgment. For instance, the consent seeks to replace the firm of Knight Franks Kenya Limited with Dunhill Consultancy Limited and whereas the court ordered the rental incomes and proceeds from any sale of the suit properties to be deposited in Court, the consent seeks to have the sums deposited into a joint escrow account.

37. The procedure for setting aside or varying a Judgment is clearly set out under **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules** which provide for review.

38. Having failed to so move the court, the parties cannot purport to vary the terms of the decree by way of a consent. The prayer to have the consent adopted as an order of the court is therefore declined.

39. The Respondent’s prayer for an injunction will be weighed against the principles applicable to applications for temporary injunctions as set out in the case of Giella vs Cassman Brown (1973) EA 358 wherein it was stated as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

40. These considerations are sequential so that the second condition can only be addressed if the first one is satisfied, and when the court is in doubt, the third condition can then be addressed. This was the holding by the Court of Appeal in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 Ors [2014] eKLR.

41. **Order 40 Rule 1** and **2** of the **Civil Procedure Rules**, upon which this application is predicated, relates to and/or concern the grant of temporary injunction, for purposes of preserving and/or conserving the status of a property, which is in dispute, pending the determination of the suit.

42. In the instance case, there is no suit upon which the application is predicated upon, the same having been concluded by the court, and a Judgment rendered. Indeed, the existence of a *prima facie* case anticipates that a party seek injunctive orders has a pending suit which raises *prima facie* issues that should be dealt with at trial.

43. Indeed, the futility of seeking interim injunctive orders without a suit is ably demonstrated by this application where the substantive order being sought is “an injunction restraining the Applicants from interfering with the Respondent’s quiet possession of the suit property L.R 209/3350 *pending the hearing and determination of this application*”. It would appear then that strictly speaking, as at the time of determining this application, the orders sought would have been spent.

44. From the above discussion, it is apparent that the prayer for a temporary injunction has been made in vacuum and the same is incapable of being granted. In any event, the manner in which the prayer for injunction has been framed is a keen to having the court stay the implementation of its own Judgment which is not permissible in the absence of an appeal.

45. In the circumstances, other than the prayer for leave to allow the firm of M/S Mwaniki Gachoka and Company advocates to come on record on behalf of the Respondent/Applicant, the application dated 28th September, 2021 is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF MARCH, 2022

O. A. ANGOTE

JUDGE

In the Presence of:

Mr. Kamau Muturi for Applicants/Respondents

Mr. Athuok for Respondent/Applicant

Court Assistant: Okumu