



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 117 OF 2006

DAVID MUASYA MUKEKU.....1ST PLAINTIFF/RESPONDENT

PATRICK MUSAU KAVITHI.....2ND PLAINTIFF/RESPONDENT

JACKSON MAWEU MULATYA.....3RD PLAINTIFF/RESPONDENT

VERSUS

PHILIP MUASYA MBALUTO.....DEFENDANT/APPLICANT

RULING

1. Vide an application dated 5th October 2021, the Defendant/Applicant sought the following orders;

- a. **THAT the Honourable Court be pleased to issue an order for eviction against the Plaintiff/Respondents from suit land known as IVETI/MUNGALA/1300 measuring 6.3 HA or thereabouts.**
- b. **THAT the officer in charge Machakos police station do provide security during the process to maintain law and order.**
- c. **THAT the cost of the eviction and demolition be borne by the Plaintiffs/Respondents first instance.**
- d. **THAT costs of this application be borne by the Plaintiffs/Respondents.**

2. The application is premised on the grounds on its face as well as the affidavit of the applicant sworn on 5th October 2021, where he deposed that the Defendant is the registered owner of land parcel No. IVETI/MUNGALA/1300- (suit property), that the Plaintiffs herein sued the defendant seeking for several orders but on 4th October 2021, that this court dismissed the Plaintiffs' suit with costs; that the Plaintiffs have denied the Plaintiffs access to the suit property; that the defendant has demanded that the plaintiffs vacate the suit land in vain and that it is only fair and in the interests of justice that the orders sought are granted.

3. The application is not opposed, despite the Plaintiffs' counsel being duly served. The application was canvassed by way of written submissions. On record are the Applicant's submissions dated 4th December 2021.

Submissions

4. Counsel for the Defendant/Applicant submitted that Order 22 Rule 29 of the Civil Procedure Rules provide that where there is a decree for delivery of immovable property, its possession shall be delivered to the party to whom it has been adjudged and if necessary by removing any person bound by the decree who refuses to vacate the property. Counsel contended that as the Plaintiffs' suit was dismissed on 4th October 2021 and the suit property being registered in the Defendant's name, and the Plaintiffs continue in its occupation, then the only remedy for the defendant is an order of eviction. To buttress this argument counsel relied on the case of *Lengare Ole Ngape v Mpaia Ole Damo & Another [2021] eKLR*, where the court issued eviction orders in favour of the Plaintiff as against the defendants on the basis of Order 22 Rule 29 of the Civil Procedure Rules. Counsel was of the view that as the Plaintiffs did not file any reply to the application, the orders sought ought to be granted.

Analysis and determination

5. I have considered the application as well as the submissions filed by the applicant. The sole issue that emerge for determination is whether

the orders sought by the Defendant should be granted.

6. It is not in dispute that the only suit herein was filed by the plaintiff who sought inter alia that land parcels number IVETI/MUNGALA/1300, 1312,1314, 1315, 1322, 1301, 1299,1297,1326,1328, and 1331 belong to the family of Mulatya Mukeku Mbaluto (deceased) and an order directed to the District Land Registrar Machakos to rectify the register accordingly. It is also not in dispute that the Plaintiffs' suit was dismissed by this court vide its judgment dated 4th October 2021.

7. The Applicant relies on Order 22 Rule 29 of the Civil Procedure Rules. That rule provides that where a party has a decree in their favour which requires that immovable property be delivered to them, then a party who refuses to vacate the property may be removed, so as to deliver possession to the party in whose favour a decree for such delivery of immovable property has been made. My understanding of that provision is that there must be a decree in positive terms in favour of the applicant, requiring delivery of the immovable property to them. In the instant case, the decree merely dismissed the plaintiffs' suit and did not state any positive orders in favour of the Defendant. In short, the decree herein did not order for the delivery of the suit property to the Defendant. Therefore, in my view, Order 22 Rule 29 of the Civil Procedure Rules is not applicable in these proceedings. In any event, the Defendant never filed a counterclaim and the order for dismissal of the Plaintiffs' suit did not confer any rights on him capable of translating into an eviction order in his favour. The case of **Lengare Ole Ngape v Mpa Ole Damo & Another [2021] eKLR**, cited by the Defendant/Applicant is distinguishable in the circumstances of this case because in that case, the judgment specifically made a positive order directing the 1st Defendant therein to give vacant possession of the suit land to the Plaintiff. The Plaintiff having refused to vacate the suit property; therefore Order 22 Rule 29 was applicable to that case on all fours, unlike in the instant suit.

8. It is my considered view that as this court has already pronounced itself in this matter on the issues that were brought before court, it is now *functus officio*. The prayers sought in the application are new matters that were not among the issues canvassed before this court, before judgment was pronounced. They are matters that can only be dealt with in a fresh suit and not in this suit and certainly not by way of notice of motion. The **Black's Law Dictionary 9th Edition** defines *functus officio* as follows;

(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.

9. In **Election Petition Nos. 3, 4 and 5 Raila Odinga & Others v IEBC & Others 2013 eKLR**, the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius in "**The Origins of the functus officio doctrine, with specific reference to its application in administrative law**" (2005) 122 SAJ 832:

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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker.

10. Similarly in the case of **Telcom Kenya Limited v John Ochanda [2014] eKLR**, the court of Appeal stated as follows;

Functus officio is an enduring principle of law that prevents the reopening of a matter before a court that rendered the final decision thereon...

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.

11. As this court discharged its duty with finality on 4th October 2021, vide its judgment, I find that it is *functus officio*, and it will not entertain an invitation to determine fresh matters between the parties herein. In the end, I find and hold that the application dated 5th October 2021 lacks merit and the same is dismissed with no order as to costs.

12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27TH DAY OF APRIL 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Kavita for the Respondent

Mr. Langalanga for the Applicant

Ms Josephine Misigo – Court Assistant

