



Kang’ethe v Mumo ((Sued on behalf of John Mutisya Mumo)) (Environment & Land Case 967 of 2014) [2022] KEELC 2434 (KLR) (12 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 967 OF 2014**

**JO MBOYA, J
MAY 12, 2022**

BETWEEN

HUMPREY HUGO KANG’ETHE APPLICANT

AND

**JOHN MUTISYA MUMO RESPONDENT
(SUED ON BEHALF OF JOHN MUTISYA MUMO)**

RULING

1. Vide Notice of Motion dated the November 25, 2020, the plaintiff/applicant has sought the following Orders:
 - a.(Spent).
 - b. Officer Commanding Station (O.C.S) Jogoo Road Police Station do enforce the decree issued by this honourable court on the October 24, 2017 by forcefully Evicting the defendant/ respondent, his agents and any other persons acting under him from parcel of land known as House No C14- Kimathi Estate, Nairobi, being a portion of L.R No. 209/7383/262.
 - c. The defendant do pay to the plaintiff/applicant their costs of this Application
2. The subject application is premised on the grounds contained on the face thereof and same is further supported by the affidavit of the plaintiff/applicant sworn on the November 25, 2020 and to which the deponent has attached 4 annextures.
3. It appears that upon being served with the notice of motion application herein, the defendant did not deem it fit and/or appropriate to file any response thereto. for clarity, neither grounds of opposition nor replying affidavit have been filed by the defendant/respondent.



Deposition by the parties:

The plaintiff's/applicant's case:

4. Vide supporting affidavit sworn on the November 25, 2020, the plaintiff has proceeded to and averred that same filed and/or lodged the subject suit as against the defendant/respondent sometime on or about the October 16, 2012.
5. Further, it is averred that upon the lodgment of the suit, same was heard and disposed of vide Judgment rendered on the October 24, 2017, whereupon the honourable court found merit in the plaintiff's/applicant's case and thereby entered judgment in favor of the plaintiff/applicant.
6. On the other hand, the applicant has averred that pursuant to the Judgment and decree of the court, the court made the following orders;
 - a. The plaintiff shall pay into court the sum of Kshs.420, 000/= only being the balance of the consideration.
 - b. Upon the deposit of the sum required in (a) above, the defendant shall execute and furnish the plaintiff with all the documents necessary for effecting Transfer of House No C14 Kimathi Estate, Nairobi, being a portion of L.R No. 209/7383/262 measuring 0.0208 Ha and identified as No. C14 on the block plan registered in the registry of documents, Nairobi in volume D1, Folio 38/166d11 Kimathi Estate, in default of which the Deputy Registrar of this court shall execute all necessary documents required to effect the transfer.
 - c. Upon the transfer of the suit property to the plaintiff, the sum of Kshs.420, 000/= only deposited in court as required in (a) above shall be released to the defendant.
 - d. The defendant shall also bear the costs of the suit.
7. The applicant has further averred that following the rendition and/or delivery of the Judgment under reference, same proceeded to and indeed deposited the decreed amount in court.
8. On the other hand, the applicant has further averred that despite the decree of the court, which effectively confirms that the suit property belongs to him, the defendant/respondent, has since failed and/or refused to vacate the suit property and thereby grant vacant possession to and in favor of the applicant.
9. Other than the foregoing, the applicant has further further averred that subsequent to the Judgment and decree, the defendant/respondent has also proceeded to and rented out the suit property in favor of a 3rd party.
10. In view of the foregoing, the applicant has therefore averred that the actions by and/or at the instance of the defendant/respondent, inert-alia failing to handover vacant possession of the suit property to the applicant, amounts to contempt and or disregard of the court order.
11. Based on the forgoing, the applicant has therefore implored the court to grant the reliefs sought at the foot of the subject Application and thereby enable same to benefit from the fruit of the Judgment.

Response by the Defendant/Respondent:

12. As was pointed out herein before, the defendant/respondent neither filed any grounds of opposition nor replying affidavit, in opposition to the application herein.



13. Essentially, the application by the plaintiff/applicant was/is factually not opposed.

Submissions by the parties:

14. The subject Application came up for hearing on the October 12, 2021, on which date counsel for the plaintiff/applicant sought to have the application heard and/or canvassed by way of written submissions.
15. Premised on the request by counsel for the applicant, the honourable court proceeded to and directed that the subject application be heard and disposed of by way of written submissions and thereafter timelines for the filing and exchange of written submissions were prescribed.
16. Be that as it may, the plaintiff/applicant herein only filed his written submissions on the March 1, 2022, while on the other hand, the defendant/respondent failed to file his submissions.
17. According to the plaintiff/applicant, the only issue for determination herein is whether the subject application is meritorious. In this regard, the plaintiff/applicant has made submissions pertaining to and/or concerning the provisions of Order 22 Rule 29(1) of the *Civil Procedure Rules 2010*, which provides as hereunder;
- (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.
18. Based on the foregoing provisions, the plaintiff/applicant has thus submitted that to the extent that the subject decree was one for delivery of an immovable property, the court should proceed and direct the defendant/respondent to deliver the suit property unto the plaintiff/applicant and/or to his appointed nominee.
19. Further, the plaintiff/applicant has similarly submitted that even though the court did not grant an order for Eviction of the defendant/respondent, the failure to grant such an order, should not deprive the court of jurisdiction to entertain and grant the subject application, so as to enable the plaintiff/applicant to actualize the fruit of the judgment.
20. Finally, the plaintiff/applicant has invited the court to take cognizance of the decision in the case of *Grace Maundu Kilungia v Matbeka Makuthi & another* (2019) eKLR, where same contend that this Honourable court (albeit differently constituted) granted orders of Eviction in a post Judgment Application.

ISSUES FOR DETERMINATION:

21. Having reviewed the subject Application, the affidavit in support thereof, the Judgment and decree of the court and having similarly appraised the written submissions by the plaintiff/applicant, the following issues do arise and are germane for determination;
- a. Whether the decree sought to be executed by the plaintiff/applicant is capable of execution without compliance with order 22 Rule 18 of the *Civil Procedure Rules 2010*.
- b. Whether this court can issue and/or grant a substantive eviction order, which was neither pleaded before nor granted by the trial court in a post Judgment Application.
- c. Whether the officer commanding police station Jogoo Road can be ordered and or directed to enforce the decree of the court by evicting the defendant/respondent.



Analysis and Determination:

Issue number 1:

Whether the Decree sought to be executed by the Plaintiff/Applicant is capable of execution without compliance with order 22 Rule 18 of the Civil Procedure Rules 2010.

22. It is common ground that the Judgment and decree, which the plaintiff is keen and intent on executing was rendered on the October 24, 2017.
23. Based on the foregoing, it is evident and/or apparent that the decree in question is more than one year old. Consequently, it is incumbent upon the plaintiff, if same is keen to execute the decree that is more than 1 year old, like the one herein, to extract and serve a notice to show cause why the decree should not be executed.
24. It is only upon the extraction and service of such notice to show cause that the Deputy Registrar of this court shall consider the Application for execution and thereafter make necessary orders and direction, including, but not limited to granting the liberty to proceed with execution.
25. In respect of the foregoing observation, it is imperative to take note of the provisions of Order 22 Rule 18 of the *Civil Procedure Rules* 2010. For clarity, the said Rules provides as hereunder;
 18. Notice to show cause against execution in certain cases [Order 22, rule 18.]
 - (1) Where an application for execution is made—
 - (a) more than one year after the date of the decree;
 - (b) against the legal representative of a party to the decree; or
 - (c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.

26. In respect of the subject matter, I have noted that no Notice to show cause was ever extracted and/or taken out by the plaintiff, prior to and/or before the filing of the subject application.



27. Similarly, I have also noted that there has been no previous execution as pertains to Eviction or otherwise, to warrant a finding that the subject application has been made in furtherance of say, a previous execution.
28. Simply put, the subject Application, which primarily seeks an order of execution by way of eviction of the defendant/respondent, runs contrary to and in contravention of Order 22 Rule 18 of the [Civil Procedure Rules](#) 2010.
29. On the basis of the foregoing, this court would have been disinclined to grant the Application. Clearly, the Application would be premature, misconceived and thus legally untenable.

Issue Number 2

Whether this court can issue and/or grant a substantive Eviction order, which was neither pleaded before nor granted by the trial court in a post Judgment Application.

30. Notwithstanding the foregoing, another pertinent issue that does arise is whether this court can grant a substantive order of Eviction, in a post judgment application, albeit where no such precipitate order was granted by the trial court.
31. The starting point to addressing the subject issue is by understanding the import and tenor of the doctrine of departure. For clarity, the subject doctrine stipulates that parties and/or litigants are bound by their pleadings and that no party is allowed to travel far and outside the scope of the pleadings filed before the court.
32. In respect of the subject matter, I have reproduced elsewhere herein before, the nature of the pleadings that were filed by the plaintiff and by extension the reliefs that the court granted in favor of the plaintiff/applicant.
33. Suffice it to observe, that the plaintiff herein neither sought for nor pleaded an order of eviction in the plaint which was filed before the court on the October 16, 2012. For clarity, the subject plaint was not amended, in any way or at all.
34. Having not pleaded a claim for Eviction, the trial court in her wisdom and in compliance with the established tenets of the law, could not and did not grant any such order for Eviction.
35. Be that as it may, the plaintiff/applicant now has the audacity to beseech this court in a post-judgment application, seeking to attract and/or accrue firstly, a substantive prayer of Eviction and secondly, one which was never granted vide the judgment.
36. In my humble view, the plaintiff herein having set the agenda pertaining to the issues for determination vide the plaint dated October 16, 2012, same is therefore bound by the said pleadings and cannot therefore be allowed to trammel beyond the scope of the pleadings and now accrue an order outside the pleadings.
37. Notwithstanding the foregoing, the court herein is ordinarily guided and bound by the pleadings filed by the parties. Consequently, the court just as the parties, is similarly bound and cannot travel far and yonder, to grant a relief which was never sought.



38. In support of the forgoing statement of the law, this court can do no better than to restate the holding in the case of *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & others* (2014) eKLR, where the honourable Court of Appeal observed as hereunder;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....”

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

39. Further, the significance of pleadings and how same regulates the conduct of business before the court was similarly underscored by the Supreme Court in the case *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, where the court stated as hereunder;

‘Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3rd respondent, a party must be bound by its pleadings and secondly, any scrutiny of either the Forms or the technology must be made for a sufficient reason. Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition would and must be rejected.’

40. Notwithstanding the forgoing, it is also worthy to note that the trial court having not granted an Eviction order and for good reason, the grant of such an order of eviction vide the subject application would be tantamount to reviewing the judgment of this court (differently constituted) or otherwise superseding same, contrary to the established principles of the law.
41. In a nutshell, it is my humble position that the terms of the Judgment which was granted by this court having been fully actualized by the plaintiff, this court is therefore *Functus officio* and cannot re-visit the said judgment and/or alter same.
42. In amplification of the foregoing observation, this court adopts and reiterates the holding of the Court of Appeal in the case of *Telcom Kenya Ltd v John Ochanda (Suing on behalf and on behalf of 996 former Employees of Telkom K Ltd)* (2014) eKLR, where the court stated as hereunder;

‘The Supreme Court in *Raila Odinga v IEBC* 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 in which the learned author stated;

...“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.”

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. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd v Aithani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

43. In a nutshell, given that this Honourable court (albeit differently constituted) had pronounced herself on the merits of the applicant’s suit, this court cannot re-engage with subject case with a view to decreeing Eviction.
44. Notwithstanding the foregoing, I beg to point out that upon execution and appropriation of the Judgment of this court, the plaintiff became the lawful owner of the suit property. Consequently, the issues that are being raised in this application can only be ventilated in New/Fresh suit premised on the new cause of action that has now accrued and/or crystalized in favor of the plaintiff.

Issue Number 3

Whether the Officer Commanding Police station Jogoo Road can be ordered and or directed to enforce the Decree of the court by Evicting the Defendant/Respondent.

45. Pursuant to the Application under reference, the plaintiff/applicant has sought an order that the officer commanding Police station, Jogoo Road Police station do enforce the decree issued by the court and in particular, by forcefully evicting the defendant from the suit property.
46. I beg to point out that decrees and/or orders, which are issued vide civil proceedings are obliged to be executed by Licensed Auctioneers, Class B or where allowed Class A, in accordance with the [Auctioneers Act](#), 1996 and the Rules made thereunder.
47. In any event, the execution of decrees and consequential orders, where appropriate, are required to be carried out and/or undertaken upon observance and compliance with certain legal prescriptions, including but not limited to Rules 12 and 15 of the [Auctioneers Rules](#) 1997.



48. Nevertheless, where there is need and/or necessity for Police protection or better still, assistance, the law provides a window and the executing officer, is obliged to file an appropriate Application for consideration by the Court. For clarity, the provision of Rule 9 of the Auctioneers Rules 1997 would suffice, which provides as hereunder;

9. Police assistance

(1) Where an auctioneer has reasonable cause to believe that—

(a) he may have to break the door of any premises where goods may be seized or repossessed; or

(b) he may be subject to resistance or intimidation by the debtor or other person; or

(c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.

(2) An application under this rule shall be by motion by way of a miscellaneous application support by an affidavit and may be heard ex parte.

49. Be that as it may, even where the intervention of the National Police Service is required, such intervention is merely to provide reasonable security to facilitate the execution, enforcement and/or implementation of the court order and not to undertake the Execution by themselves.

50. Contrarily, the plaintiff herein however requires the National Police service to carry out and/or undertake the actual Eviction, that is, execution of the court decree.

51. In my humble view, the nature of orders sought at the foot of the subject Application, shall amount to inviting and engaging the National Police Service in undertaking a duty that is not statutorily ascribed to same.

52. In a nutshell, the grant of the orders as sought, directing the OCS Jogoo Road Police Station to carry out and undertake the Eviction would be tantamount to sanctioning an illegality.

Final Disposition:

53. Having reviewed the issues for determination herein before outlined, this court comes to the conclusion that the subject Application is not only premature and misconceived, but same is Legally untenable.

54. Consequently and in the premises, the Application dated the November 25, 2020, be and is hereby Dismissed, albeit with No Orders as to Costs.

55. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant



Mr. Musimi h/ b for Mutinda for the Plaintiff
No Appearance for the Defendant/Respondent

