Karumba v Manyeki (Environment & Land Case 78 of 2017)
[2022] KEELC 3123 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3123 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 78 OF 2017

LN GACHERU, J

JUNE 30, 2022

BETWEEN

MWANGI MBUTHIA KARUMBA .... PLAINTIFF

AND

HELLEN WANJIKU MANYEKI .... DEFENDANT

RULING

1. Vide a Notice of Motion Application dated February 28, 2022, the Plaintiff/Applicant sought for orders that:
    1. This suit be revived
    2. That the Defendant her agents and/ or servants or anybody claiming through or under her be ordered to restore the boundary between land parcel No Loc 15/ Kimathe/165 And Loc.15/ kimathe/1031 failing which she be cited for contempt of Court
    3. The Defendant be ordered to restore the beacons erected by the Plaintiff between the suit lands by re-erecting the fencing posts
    4. The costs of this application be borne by the Defendant
2. The application is premised on the grounds stated in its face and the Supporting Affidavit of the Plaintiff sworn on the February 28, 2022. It is the Plaintiff's case that the Defendant has encroached on his parcel of land and his uprooted the beacons and fences he erected. He avers that in compliance with the orders of Court of September 29, 2017, he erected fencing posts and put up beacons as shown by the surveyor. Further that the Defendant having uprooted the fence, he should be cited for contempt.
3. The Application is contested by the Defendant vide a Replying Affidavit sworn on theMay 5, 2022. The Defendant denied uprooting the fence as deponed to by the Plaintiff and avers that the Plaintiff has not properly laid out a case for contempt. That the nature of Orders sought in prayers No 2 & 3,

are in the nature of mandatory injunction and this Court cannot grant as there is a Judgment already on the record.

4. The Court directed that the application be canvassed by way of written submissions. The Plaintiff filed his submissions dated June 7, 2022, wherein he reiterated the contents of his application. He urged this Court to allow the application and sought that he be granted costs for the application.

5. The Defendant also filed her submissions dated June 7, 2022 and submitted on each prayer of the application. It is her submissions that the prayer for reviving of the suit cannot be sustained as it is unsupported and even so, the same seeks to bring new cause of action.

6. On prayers No 2 & 3,the Defendant submits that the Court is functus officio and the Plaintiff ought to move this Court appropriately for contempt and not seek mandatory injunction in the disguise of contempt. The Defendant submitted that the Plaintiff ought to follow the procedure for instituting contempt proceedings as was described in the case of *Samuel M. N Mweru & Others vs National Land Commission & 2 Others*{2020} where the Court enunciated the procedure for moving Court for contempt proceedings. She submitted that the Plaintiff has not led evidence to the averments contained in the Application and the same is not well supported. In the end, she urged this Court to dismiss the motion with costs.

7. It is evident from the record that this Court pronounced itself vide a Judgment delivered on the 28th September, 2017. It issued orders that

   i. The Land Registrar Murang'a and the District Surveyor Murang'a are hereby ordered to rectify the boundaries between the parcels No Loc.15/ Kimathe/ 165 And Loc.15/kimathe/1031.

   ii. Parties being relatives, each party to bear their own costs.

8. A decree was issued on the October 4, 2017. As to whether the same has been executed or not is not known to this Court. The Plaintiff has now after close to five years moved this Court with the instant application. This Court has looked at the Application, the Response, the attachments thereto and the rival submissions and the issue for determination are

   i. Whether this suit can be revived

   ii. Whether orders No 2 and 3 of the Notice of Motion are merited

   iii. Who shall bear costs for the application

i. Whether this suit can be revived

9. It is trite that after judgment and issuance of decree, a Court becomes functus officio.As well stated by the Supreme Court in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR Petition 5 of 2015

   (18) We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept:

   > " 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."

(19) This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani [2002] JLR 542* at 550:

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 on adjudication must be taken to a higher court if that right is available" [emphasis supplied].

10. Therefore, it follows that a Court's order has to be dully perfected for the Court to be said to be *functus officio*. Additionally, this Court can entertain any further application, as a matter of law a party can move Court to set aside, review, vary or stay such orders.

11. Presently the Applicant seeks to revive the suit on the basis of non-compliance with orders of Court. The law on reviving of suits is provided for under Order 24 Rule 7(2), but the suits contemplated thereunder are the ones that have abated or dismissed. The Applicant has invoked the provisions of Section 3A of the *Civil Procedure Act* and this Court is alive to the inherent powers donated therein. To revive means to basically restore something, if the instant suit is restored, it will mean that the Court would have rendered its judgment.

12. Even so, the Applicant has not led any evidence before this Court that warrants this Court to revive the suit. A party desiring of the orders of Court should lead evidence. To this end, the Applicant has failed to demonstrate why the Court should revive the suit.

ii. Whether orders 2 and 3 of the Notice of Motion are merited

13. The Applicant wants this Court to issue orders restoring the boundaries. It was an express order of the Court that boundaries of the suit properties be rectified. The Applicant has not demonstrated to this Court whether there was compliance or not. Issuing the orders sought would be equivalent to enforcing the Orders of this Court of September 28, 2017. Importantly, this Court pronounced itself on the issue of boundaries and compliance of the orders of parties was incumbent on both parties to the suit.

14. It is trite that court orders cannot be issued in vain. Judicial authority is derived from the Constitution and the orders issued must be obeyed, unless they have been set aside, varied or reviewed. As rightly put by J.B Ojwang J (as he then was) in Nairobi Misc App No 1609 of 2003 *B v Attorney General* [2004] eKLR

" "The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

15. If there was non-compliance with the orders of Court, the Applicant ought to have been well guided on the procedure to move this Court. While prayer 2 makes reference to contempt proceedings, the

same has not been well laid out in this Court. Justice Ringera, as he then was, in *_Microsoft Corporation v Mitsumi Computer Garage Ltd & another_ [2001] eKLR held:

> " Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it"

16. Article 159(2) (d) of the _Constitution_ and the oxygen principles as drafted were meant to cure technicalities in the process of administration of justice. Some Courts have held that these provisions should not be used as a means of avoiding observance to procedure. (See Nairobi CoA Application No 228 of 2013 _Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others_ [2013] eKLR).

17. However, the Supreme Court in Nairobi Pet No 1 of 2015 _Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others_ [2016] eKLR held that;

> " Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the Constitution, which proclaims that, "... Courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts."

18. Guided above, this Court has not found any reason as to why it should exercise its discretion and entertain the issue of contempt as raised in the application therein. Therefore, the Court finds that prayer 2 & 3 of the instant Motion are not merited and the Court proceeds to dismiss them entirely.

19. Having found as above, the Court finds and holds that the instant Application dated February 28, 2022 and filed in Court on March 3, 2022, lacks merits and is ripe for dismissal and the same is dismissed entirely.

iii. Who should bear the cons of this application?

20. Section 27 of the _Civil Procedure Act_ gives this Court the discretion to award costs. Also costs follow the events. The Defendant herein being the successful party shall therefore have the costs of the application.

21. In the end, the Court dismiss the instant Notice of Motion Application dated February 28, 2022 with costs to the Defendant/Respondent.

    It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 30TH DAY OF JUNE,2022.

L.GACHERU

JUDGE

Delivered online in the presence of;

Joel Njonjo - Court Assistant

Plaintiff/Applicant – Absent

Mr Mbuthia for the Defendant/Respondent

L.GACHERU

JUDGE