



**Kaunda v Wambua (Environment & Land Case 196 of 2014)
[2022] KEELC 13640 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 196 OF 2014
CA OCHIENG, J
OCTOBER 19, 2022**

BETWEEN

TABITHA NGINA KAUNDA APPLICANT

AND

FRANCISCO KAUNDA WAMBUA RESPONDENT

RULING

1. What is before court for determination is the applicant's notice of motion application dated the February 23, 2022 brought pursuant to order 40 rule 2(3) of the [Civil Procedure Rules](#). The applicant seeks the following orders:
 1. Spent
 2. That the honourable court be pleased to call upon the defendant and any other person claiming under him as purchasers of Plot No 887 Kiboko "A" to show cause why punishment for contempt of court orders issued on January 27, 2017 namely Patrick Maii and Dominic Musyoki.
 3. That once the defendant and the purchaser are found guilty of contempt of court orders, be sentenced to a term not exceeding six (6) months and or their properties be attached for compensation or any other order that the court may deem fit and just to grant in the circumstances.
 4. That the court be pleased to issue an order of injunction restraining the defendant whether by himself or other persons claiming under him from alienating, disposing and or interfering with the peaceful use and occupation of all that land parcel known as Plot No 887 Kiboko "A".
 5. That a declaration do issue that any purported sale of any portion of Plot No Kiboko "A" be declared null and void.



6. That costs of the application be provided for.
2. The application is premised on the grounds on the face of it and supported by the affidavit of Tabitha Ngina Kaunda where she deposes that the court issued orders on January 27, 2017 with express terms wherein, one of the orders was that the suit property being the matrimonial home should be held in her sole name. She contends that the respondent by himself or agents/purchasers namely Patrick Maii and Dominic Musyoki have chosen and/or disobeyed the aforementioned court orders, in spite of service. She avers that the respondent has sold the suit property to the purchasers without involving her despite them being served with the court orders and demand letters requiring compliance. She states that the said purchasers have since entered the suit property and commenced developing it. She insists that the alleged sale was done against her wish and the respondent used police officers and their advocate to harass her.
3. The application was opposed by the respondent who filed grounds of opposition dated the March 17, 2022 and a replying affidavit. He contends that this honourable court became functus officio in relation to this matter when it dismissed the application to set aside the *ex parte* judgment delivered on January 27, 2017. He argues that the court lacks jurisdiction to summon persons who were not parties to the suit to answer questions purportedly raised in a suit. He explains that he has filed an appeal to the Court of Appeal, against the *ex parte* judgment and the ruling on the application to set aside that impugned judgment, being Civil Appeal No 438 of 2018 which is still pending. He avers that the suit property being No 887 Kiboko "A" is a large parcel of land measuring ten (10) acres and he only agreed to sell a portion measuring one acre to support his financial needs including paying school fees for their children. He reiterates that he is still married to the applicant and matrimonial home cannot encompass the whole of ten acres of land but is limited to a residential home.
4. The application was canvassed by means of written submissions.

Analysis and Determination

5. Upon consideration of the instant notice of motion application including the grounds of opposition, respective affidavits and rivaling submissions, the only issue for determination is whether the applicant is entitled to the orders as sought. The applicant has sought to cite the respondent including two purchasers for contempt, declaration of the sale as null and void as well as an order of injunction.
6. From perusal of the court record, I note judgment was entered in favour of the applicant on January 27, 2017 where the court directed that the applicant be the sole registered owner of the suit property. I note the respondent having been aggrieved with the said judgment lodged an appeal to the Court of Appeal. From the record, it is not ascertainable whether the respondent did seek for stay of execution of the impugned judgment and orders thereof in the Court of Appeal. This court will hence proceed on the assumption that the orders issued vide the impugned *ex parte* judgment are still in force. I further note that the respondent did not provide the current status of the case pending at the Court of Appeal.
7. As to whether the respondent and Patrick Maii and Dominic Musyoki should be cited for contempt for violating the orders of the court granted on January 27, 2017. The applicant has sought for the aforementioned persons to be cited for contempt and committed to civil jail for six (6) months for contravening the orders of this court granted on January 27, 2017.
8. *Black's Law Dictionary (Ninth Edition)* defines contempt of court as:-

Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”



9. On contempt of court, section 29 of the [Environment and Land Court Act](#) stipulates thus:
10. Any person who refuses, fails or neglects to obey an order or direction of the court given under this act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”
11. While section 4(1) (a) of the [Contempt of Court Act](#) defines civil contempt as “willful disobedience of any judgement, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court.”
12. In the case of [North Tetu Farmers Co Ltd v Joseph Nderitu Wanjohi \(2016\) eKLR](#) where Justice Mativo stated that:

Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows:-

‘there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant’s conduct was deliberate.’

13. It is not in dispute that the court made its order dated the January 27, 2017 in the presence of the applicant but absence of the alleged contemnors. The respondent being aggrieved with the decision of the court sought for the same to be set aside but the court declined. He proceeded to file a notice of appeal dated the December 7, 2018. In the current scenario, I note the applicant has annexed the decree, demand letter and photographs of the suit property. The respondent admits he sold an acre of land but prior to the institution of this suit which fact the applicant has not controverted. From the averments in the applicant’s supporting affidavit, she has not indicated the date the suit property was sold and neither as she demonstrated how she served the two purchasers who are not parties to this suit. Contempt proceedings are criminal in nature and the burden of proof is upon the applicant to prove the same commenced after the court issued its order and is still ongoing. Further, it is incumbent upon the applicant to demonstrate that she indeed served a court order including a penal notice upon the alleged contemnors.
14. However, from the averments in the respective affidavits including annexures, except for the respondent, it is not clear, how the other two persons who are not parties to this suit have violated the court order since the respondent confirms he indeed sold one acre before the institution of this suit.
15. Based on the facts as presented while associating myself with the decision quoted as well as the legal provisions cited above, I find that in the current circumstances, the applicant has not proved her allegations of contempt as against the contemnors and will hence decline to allow this prayer.
16. On the prayer for injunction and declaration that any purported sale of any portion of Plot No 887 Kiboko “A” be declared null and void, I note this matter was already been heard and determined. This brings me to analyse whether this court is *functus officio* or not, to deal with the prayers as sought. In the case of [Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others](#), the Supreme Court of Kenya while dealing with the principle of *functus officio* rendered itself thus:

“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.”

17. Further, in the case of *Arthur Mathitu Nderitu & Another v Settlement Fund Trustees & 2 others; Fredrick Wang’ombe Nderitu & Another (Proposed Interested Parties) [2019] eKLR*, the court held that:

“It is a general principle of law that a court after passing judgment, becomes *functus officio* and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

18. Based on the facts as presented while associating myself with the decisions cited, I find that this court is indeed *functus officio* to deal with the prayer for injunction and declaration that the sale of the suit property is null and void, as this matter had already been determined. It is my considered view that since there is no stay of execution pending appeal, the applicant should first proceed to apply for execution of the decree herein and if she fails, then she can seek to commit the respondent to civil jail.
19. In the circumstances, I find the notice of motion application dated the February 23, 2022 incompetent and will proceed to strike it out.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF OCTOBER, 2022

CHRISTINE OCHIENG

JUDGE

