



Customer Self Service and General Contractors Company Limited v Mugambi (Environment & Land Case 17 of 2018) [2022] KEELC 15038 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15038 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 17 OF 2018**

CK NZILI, J

NOVEMBER 23, 2022

BETWEEN

CUSTOMER SELF SERVICE AND GENERAL CONTRACTORS COMPANY LIMITED PLAINTIFF

AND

EVANGELINE NKATHA MUGAMBI DEFENDANT

RULING

1. This ruling relates to two applications dated August 10, 2022 and August 26, 2022 respectively. In the 1st application, the court is asked to allow the applicant to liquidate the decretal amount in 120 days. It is based on the affidavit sworn on August 10, 2020 by Evangeline Nkatha, the applicant. The grounds are that the applicant has opted to honor the 2nd limb of the judgment by refunding the purchase price together with interest. She stated that she made an offer in writing; that the rectification of the size of the suit land was required on the ground; her children had offered to dispose of their land to help her repay the purchase price as per an annexed land sale agreement and in 120 days, she would be in a position to fully repay the amount with no prejudice to the respondent.
2. The application was opposed through an affidavit sworn on August 22, 2022 by Festus Muriungi Kinoti, on the basis that the same is overtaken by events since a title deed was issued on August 22, 2022 following the expiry of the ninety days on August 8, 2022 without compliance; the deputy registrar had executed the documents on August 11, 2022; there was no appeal against the judgment or decree; the application was an afterthought, brought too late and in bad faith; the court was *functus officio* and could not sit on an appeal of its own judgment; no compelling reasons have been disclosed for the court to exercise its discretion in the manner sought and that the applicant was merely out to waste the courts time by bringing frivolous, vexatious and unmeritorious applications.
3. The court in the 2nd application is asked to restrain the decree holder from demolishing the houses on a portion of LR no Nkuene/Uruku/762 belonging to the applicant; to order for the cancellation



- of the title deed issued on August 22, 2022, to issue an order for a land survey to be conducted for 7 acres decreed to the respondents and lastly, to order for the title deed to be processed correctly and the balance therein to revert to the applicant.
4. The application is supported by affidavits sworn on August 26, 2022 and September 23, 2022 respectively. The applicant stated that she sold 7 acres of her land to the plaintiff out of her land measuring 7.4131 acres. However, she has realized that pursuant to the decree, the decree holder has taken her entire land, processed a title deed and now threatens to demolish her structures on the suit land, which has highly prejudiced her.
 5. For an applicant to be entitled to be allowed to liquidate a decretal sum in instalments, the consent of the respondent is paramount. The court must consider the bonafides of the applicant, circumstances leading to the debt, past antecedents of the applicant, financial status of the applicant and the interest of justice in the matter.
 6. Order 21 rule 12 [Civil Procedure Rules](#) provides that a court may allow for payment of decretal sum in instalments when sufficient cause is shown, the consent of the decree holder has been sought though not a necessity and where security has been offered by the applicant. The applicable principles were set out in [Botanic Kenya Ltd vs Ensign Food \(K\) Ltd](#) (1959) E A and [A Rajabali Alidina vs Rehmtulla Alidina & another](#) (1961) E A 565 as *interalia*, the circumstances under which the debt arose, conduct of the debtor, his financial position and bonafides.
 7. In [Freight Forwarders Ltd vs Elsek & Elsek \(K\) Ltd](#) (2012) eKLR the court held that sufficient cause includes if the debtor is unable to pay in lumpsum, ability to pay in reasonable monthly instalments and if the application is made in good faith. In [Keshvaji Jethabbai & Bros Ltd vs Saleh Abdalla](#) (1959) E A 260 the court held that a mere inability to pay in full at once was not sufficient reason and the hardship of the debtor might be a factor.
 8. In [African Banking Corp Ltd vs Florence Wangari Wangai](#) (2012) eKLR the court held an applicant must be candid with the court and present sufficient material to show her financial status or means, explain why the proposal was the best option available so as to deserves the discretion of the court.
 9. Similarly, in [E Muiuru Kamau & another vs NBK](#) (2009) eKLR the court held it must consider the overriding objectives such as the need to act justly in every situation, regard to proportionality, the creation of a level playing ground for all the parties coming to court by placing of all parties on an equal footing.
 10. Coming to the 2nd application, the court is being asked to issue restraining orders, recall or cancel a title deed and order for the resurvey of the suit land.
 11. These prayers are being sought for post judgment. The doctrine of *functus officio* was expounded by the Court of Appeal in [Telcom Kenya Ltd vs John Ochanda](#) (2014) eKLR as an enduring principle of law that prevents the reopening of a matter before court that rendered a final decision .In [Raila Odinga & 2 others vs IEBC & 3 others](#) (2013) eKLR the court cited with approval *Malam Petroleum the originals of the functus officio* (2005) IL2 SALJ 832 that 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 and that such a decision cannot be reviewed or varied by the decision maker.
 12. Order 21 Rule 3 (3) of [Civil Procedure Rules](#) provides that a judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the [Civil Procedure Act](#) or on account of an application for review. The court held that what the court is barred from is a merit based decisional re-engagement with the case once a final judgment has been entered and a decree issued.



13. The application before the court is neither brought under sections 80 and 99 of the *Civil Procedure Act* nor under order 45 of the *Civil Procedure Rules*. The issues raised go to the merits of the suit and the decision. In my view the court pronounced itself on the merits of the pleadings, evidence and law as presented by each side. The court is therefore barred from re-opening the merits or demerits of each side's case at this juncture.
14. On the issue of the liquidation of the judgment summons by way of instalments, the court has been shown a title deed which was processed after the applicant failed to satisfy the alternative prayers. The request was made inordinately late and is already overtaken by events.
15. In the circumstances, I find the two applications lacking merits. The same are dismissed with costs. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 23RD DAY OF NOVEMBER, 2022.

In presence of:

C/A: Zamzam

No appearance

HON C K NZILI

ELC JUDGE

