REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 166 OF 2014

(FORMERLY EMBU HCCC NO. 115 OF 2008)

ANNAH MUTHONI IRERI..PLAINTIFF

VERSUS

WILLIAM NJERU MBOGO.....................................DEFENDANT

RULING

1. This ruling is on a motion on notice dated 24/7/2020. It was filed in court on the same date by the applicant – **William Njeru Mbogo.** William is involved in a legal dispute with the respondent – **Anna Muthoni Ireri** – relating to ownership of Land parcel **Ngandori/Kirigi/684** (hereafter “the disputed land”). Anna Muthoni is the plaintiff in the suit while William is the defendant. In the suit, she pleaded, *interalia*, that the applicant got himself registered as owner of the disputed land fraudulently.

2. The matter first proceeded in court without involvement of the applicant and the suit was adjudged in the respondents favour. The respondent wanted the court to make a finding that the applicant was fraudulently registered as owner of the disputed land. She further wanted the applicant deregistered as owner of the disputed land. The first judgement granted the prayers to the respondent. She executed it and the Land register now shows her as the registered owner of the disputed land.

3. But the applicant later successfully contested the first judgement, with the second or subsequent judgement clearly indicating that no fraud was demonstrated against the applicant. The respondent is appealing against the subsequent judgement but the applicant wants a reversal of the entries that were made in the Land register on the basis of the first judgement. That is what impelled the filing of the application now under consideration.

4. More specifically, the applicant wants the following orders:

- **That the Land Registrar, Embu, be ordered to cancel the respondents name from the register of Land parcel No. Ngandori/Kirigi/684 and register the applicant as owner.**
- **That the Land Registrar be ordered to remove the inhibition placed on Land parcel No. Ngandori/Kirigi/684.**
- **That costs of the application be provided for.**

5. The respondent responded to the application vide grounds of opposition filed on 1/11/2020. According to the respondent, the application lacks merit, is frivolous, and is an abuse of the court process. The court was said to be bereft of power or jurisdiction to entertain the application. In the respondent’s view, the applicant should have raised the issue before the matter was heard. The applicant’s remedy, if any, was said to lie in different or separate proceedings and not this suit.

6. The application was canvassed by way of written submissions. The applicant submitted, *interalia*, that the respondent obtained judgement ex parte and proceeded to extract and execute a decree which the Land Registrar acted upon to change ownership of the disputed land into her name. Earlier on, the respondent had caused an inhibition to be placed on the Land register. According to the applicant, the judgement that led to change of ownership was set aside and any action taken as a result of that judgement therefore needs to be reversed.

7. The applicant doubted whether the respondent has an existing appeal given that what he has so far been served with is a mere notice. He seems also to concede to the respondent’s averment that the court is *functus officio* but submits that the court should place reliance on **Article 159 (2) of the Constitution** which enjoin that the court should administer justice without undue regard to procedural technicalities. The court was urged to allow the application.

8. The respondent on her part submitted in a manner and style that captured the substance of her grounds of opposition. She further submitted that granting the application would prejudice her as the applicant is likely to dispose of the disputed land. According to the respondent, the status quo should be maintained.

9. I have had a look at the entire court record generally. I have also considered the application, grounds of opposition and rival submissions. The respondent has alleged that the court is *functus officio.* This is a jurisdictional issue and it is necessary to deal with it first.

10. **The Black's Law Dictionary, Ninth Edition,** defines *Functus Officio* thus:

> **"[having performed his or her office" "(of an officer of official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."**

11. Dr. Maurice A. Owour & Prof. Joseph M. Nyasani (2014) in **Latin Terms & Maxims,** Contextualized in **Court Decisions, Law Africa Publishing House (K) Ltd, Nairobi,** described it as a Latin term meaning **"having performed his or her office."** With the word **"Functus"** said to mean **"having performed"** while **"officio"** refers to **"office"**

12. The case of **Telkom Kenya Limited Vs John Ochanoa & 996 Others [2014] eKLR** captured it as an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision on it.

13. The principle is essentially one that embraces finality in adjudication of a matter. As a general rule, a person vested with adjudicative or decision-making power can only exercise it once in relation to the same matter. The decision rendered is said to be final and conclusive. It cannot be revisited unless as otherwise allowed by law.

14. The question that arises is whether the application by the applicant amounts to revisiting the judgement or decision that was made. It is the respondent's position that the application should have been made before the last judgement of the court. In other words, the application should have come during the pendency of the suit. To my mind, the application made is essentially and properly a post-judgement endeavor meant to effectuate the second judgement. Its raison d'etre is to be found in the outcome of the judgement. It could not therefore have been brought before the second judgement was delivered.

15. I do not agree that the court is functus officio. The court would be functus officio if the applicant was inviting it to tinker or tamper with the judgement. But that is not the case. The applicant is inviting the court to give effect to the judgement. The decision of the court is not sought to be changed or varied. It is sought to be effected. And although the judgement does not contain a positive order or command that can be executed, what is sought in the application is an obvious logical consequence of the decision contained in the judgement.

16. When the respondent obtained the first judgement, she rushed to the Land's office to ensure it was effected. Now that the applicant has obtained the second judgement setting aside the first judgement, what is wrong if he is rushing to the same office to undo what had been done on the basis of the first judgement? I find it ironic that the respondent would find it in order to have the judgement delivered in her favour effected by the Land's office but when another one is delivered that nullified the judgement, she opposes every effort to have it effected by the same office. A court of law is a place of fairness and it would be wrong to apply different standards to parties in the same case.

17. It is also hard to agree that the application should have come during the pendency of the suit. It seems rather obvious to me that the applicant is trying to align the records at the Land's office with the legal reality of the second judgement. When the respondent herself went to the same office to get herself registered as the owner of the disputed land, she was aligning the records at the Land's office with the legal reality manifest in the judgement that she had obtained. The applicant is therefore not doing anything new; he is doing exactly what the respondent had done.

18. And it seems to me clear that the respondent is opposing the application because she has an appeal. But the law is clear. The existence of the appeal perse is not a bar to implementation of the lower court judgement unless a clear and express order is given to that effect. In this regard, it is usual for parties to seek an order of stay of execution in order to forestall implementation. The law – **See Order 42 rule (6) of Civil Procedure Rules** – also envisages issuance of injunction in an appropriate case. But the respondent does not have any such order. As things stand therefore, nothing prevents the applicant from seeking to give effect to the judgement he obtained.

19. The respondent also opposes the prayer to remove the order of inhibition placed on the Land register. The order of inhibition is clearly expressed to be intended to run until determination of the suit. The judgement delivered on 14/5/2020 is that determination. Surely, the order of inhibition has served its purpose. It cannot be said to have a legal existence beyond the period that was expressly stated when it was put on the Land register. The respondent lacks any sound legal basis for opposing its removal. In fact, the order of inhibition is now a dead letter on the land register given that it has served its purpose.

20. The upshot of all the foregoing is that the application herein has merits. I therefore allow it in terms of prayers 2 and 3. Costs of the application shall be in the cause.

RULING DATED and **SIGNED** in Open Court at **EMBU** this **4TH DAY** of **MARCH 2021.**

In the presence of M/s Muriuki for Okwaro for Plaintiff/respondent and in the presence of the Defendant/applicant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

4.3.2021