



**Mathu v Shilo Tabernacle Church & another (Environment & Land Case
277 of 2017) [2024] KEELC 623 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 277 OF 2017**

TW MURIGI, J

FEBRUARY 7, 2024

BETWEEN

KARIUKI MATHU PLAINTIFF

AND

SHILO TABERNACLE CHURCH 1ST DEFENDANT

PETER MUTHAMA 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 19th January 2023, brought under Article 159 of *the Constitution* of Kenya 2010, Sections 1A, 3, 3A and 80 of the *Civil Procedure Act*, Order 22 Rule 22, Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules* the Defendants/Applicants seek the following orders:-
 1. That the Honourable Court be pleased to issue an order for stay of execution of the ruling of this Honourable Court delivered on 28th September 2022 and all consequential orders pending the hearing and determination of this application inter partes and ostensibly issues an order for status quo pending the determination of the application herein.
 2. That the Honourable Court be pleased to set aside, review and/or vary the judgment and decree of this Honourable Court delivered on 11th May 2021.
 3. That leave be granted to enjoin Kenya Forest Service as an Interested Party in this case.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Peter Kavita Muthama sworn on even date.
3. The Plaintiff filed grounds of opposition together with a Notice of Preliminary Objection dated 25th January 2023 in response to the application. The Plaintiff cited the following grounds of opposition:-



- i. The application as drawn is frivolous, vexatious, illogical, incompetent and an afterthought as the Applicant lacks locus standi.
 - ii. The Applicants have not demonstrated proximity cause on the issue of ownership of the suit property.
 - iii. The Applicants were all along aware of the suit and therefore they cannot come back when the same has been heard and determined and tend to sneak documents whose sources cannot be authenticated.
 - iv. It is more than 18 months since the judgment was delivered and the only remedy the Applicants have was to appeal against the Judgment which they never did.
4. As regards the Notice of Preliminary Objection dated 25th January 2023, the Plaintiff opposed the application and raised the following grounds:-
- i. The court is functus officio thus it cannot entertain the application.
 - ii. The matter is res judicata having been heard and determined by a court of competent jurisdiction.
 - iii. The application is vexatious, bad in law, an afterthought and an abuse of the court process.
 - iv. The Applicants have not demonstrated any sufficient interests either proprietary or otherwise to warrant any orders.
5. The preliminary objection was canvassed by way of written submissions.

The Plaintiff/respondent's Submissions

6. The Plaintiff's submissions were filed on 27th February 2023. On his behalf, Counsel outlined the following issues for the court's determination:-
1. Whether the court is functus officio to entertain the application.
 2. Whether the matter is res judicata having been heard and determined by a court of competent jurisdiction.
 3. Whether the application is vexatious, bad in law, an afterthought and an abuse of the court process.
 4. Whether the Applicants have demonstrated any sufficient interest in the suit property.
7. On the first issue, Counsel submitted that the doctrine of funtus officio prevents the re-opening of a matter before a court that rendered the final decision. In defining a judgment of the court, Counsel relied on the definition set out in the Black's law Dictionary.
8. Counsel submitted that Section 99 of the *Civil Procedure Act* provides for exceptions to the doctrine of funtus officio. Counsel argued that in the present case the Applicants were not seeking to rectify any clerical or arithmetical mistakes or errors in the judgment but to have the suit heard afresh. Counsel submitted that the Defendants failed to file documents in support of their case despite being granted time to do so.
9. On the second issue, Counsel submitted that the principle of res judicata is enumerated under Section 7 of the *Civil Procedure Act*. Counsel submitted that the instant application is res judicata since the court has already dealt with the issues in respect of ownership of the suit property.



10. On the third issue, Counsel submitted that the court should not entertain the present application as doing so will amount to the court sitting on its own appeal.
11. On the fourth issue, Counsel submitted that the Applicants do not have an identifiable interest in the suit property since they have admitted that the suit property does not belong to them. It was contended that the Applicants have not adduced any new evidence except the allegation that the suit property is public land. It was submitted that the Applicants cannot purport to hold brief for the Attorney General
12. Concluding his submissions Counsel urged the court to dismiss the application with costs.

The Defendants/applicants Submissions

13. The Defendants submissions were filed on 7th November 2023.
14. Counsel submitted that that the court is not functus officio in respect of the instant application. Counsel further submitted that under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules the Applicants can apply for review of a judgment if there is discovery of new and important evidence which was not within the knowledge of a party.
15. On whether the application is res judicata, Counsel cited the provisions of Section 7 of the *Civil Procedure Act* as read together with Section 28 of the *Environment and Land Court Act*. Counsel insisted that the instant application is not res judicata as it seeks review of the judgment delivered on 11th May 2021.
16. Concluding his submissions Counsel urged the court to dismiss the preliminary objection as it is meant to deprive the Applicants of their right to a fair trial.

Analysis and Determination

17. Having considered the Preliminary objection in light of the pleadings and the rival submissions, the following issues arise for determination:-
 - i. Whether the Court is functus officio.
 - ii. Whether the Application is res judicata.
18. As regards the first issue, the Respondent argued that the instant application is functus officio since the court has already pronounced itself and delivered a judgment in respect of the suit property
19. The doctrine of functus officio was stated by the Court of Appeal in the case of *Telkom Kenya Limited Vs John Ochanda* (2014) e KLR as follows;

“functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”
20. In the case of *Jersey Evening Post Limited v Al Thani* (2002) JLR, which case was cited by the Supreme Court in the case of *Raila Odinga & 2 Others Vs Independent Electoral and Boundaries Commission & 3 Others* 2013 eKLR the Court held as follows: -

“...A court is functus officio 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...”

21. Based on the above authorities which are binding on this court, it is clear that when a Court has already pronounced itself on a matter, it is deemed to have performed all its duties in the case and it becomes *functus officio*. In the matter at hand, the Court has not pronounced itself on the application dated 19th March 2023 where the Applicants are seeking for review of the judgment delivered on 11th May 2021 and as such, this court is not *functus officio*.

22. As regards the second issue, the doctrine of *res judicata* is anchored in Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya which provides as follows:-

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it...

Explanation. - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit...

Explanation. -(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

23. The elements which must be present to succeed on a defence of *res judicata* were enunciated in [Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others](#) [2017] eKLR where the Court of Appeal held that: -

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

24. From the foregoing, it is clear that for *res judicata* to suffice, a Court should look at all the four elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under



the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

25. This Court has not heard and determined the application dated 19th January 2023 and as such it cannot be said that it is res judicata. The application dated 19th January 2023 though filed has not been heard and determined.
26. The principles of natural justice stipulate that each party ought to be heard before the Court can pronounce itself on the matter being res judicata.
27. The upshot of the foregoing is that the preliminary objection dated 25th January 2023 is devoid of merit and the same is dismissed with costs to the Applicants.

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HON. T. MURIGI

JUDGE

RULING DATED SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF FEBRUARY, 2024.

IN THE PRESENCE OF:

Court assistant Kwemboi.

Mulandi for the Plaintiff

Kioko for the Defendatnts

