



Shunkur v Rigogo Chonjo Company Ltd & 3 others (Being former Chairperson, Current Chairperson and former member .respectively, of Chepnyaliliet Self Group) (Environment & Land Case 9 of 1993) [2024] KEELC 3555 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 9 OF 1993
MC OUNDO, J
APRIL 11, 2024**

BETWEEN

DAVID KAPOLONTO SHUNKUR PLAINTIFF

AND

RIGOGO CHONJO COMPANY LTD 1ST DEFENDANT

JOSEPH KITUR 2ND DEFENDANT

SAMUEL KIPLANGAT 3RD DEFENDANT

JOSPHAT NGETICH 4TH DEFENDANT

**BEING FORMER CHAIRPERSON, CURRENT CHAIRPERSON AND
FORMER MEMBER .RESPECTIVELY, OF CHEPNYALILIET SELF GROUP**

(Being former Chairperson, Current Chairperson and Former member. respectively, of CHEPNYALILIET SELF HELP GROUP)

RULING

1. By a Notice of Motion dated 24th November 2023 brought under the provisions of Sections 1A & 1B and 3A of the [Civil Procedure Act](#), Order 22, Rule 22 and 51 Rule 1 of the [Civil Procedure Rules](#), article 159 of the [Constitution](#) and all enabling provisions of law, the Respondents/Applicants herein sought that there be stay of execution of the order of 9th November 2023 that had ordered the Officer Commanding Olulunga Police Station and /or DAPC, Olulunga Police Post to provide adequate security to M/s Indomitable Auctioneers and or his agents to evict, and demolish all structures and also restrain them and all the members of Chepnyaliliet Self-help group and their agents, servants, representative, assigns, workers and/or employees from the Plaintiff/Respondent's parcel of



land namely Narok/CIS Mara/Olulunga/134 pending the hearing and determination of the Review application that was pending before the Court of Appeal sitting in Nakuru.

2. The said application was pegged on the grounds therein as well as on the Supporting Affidavit by the 3rd Defendant/Applicant sworn on 24th November 2023 to the effect that the Plaintiff/Respondent had unlawfully obtained the eviction orders from the court on 10th November 2023, without service, which eviction orders were likely to be executed and their houses demolished and or washed away by the raging floods from the Elnino rains. That there was pending before the Court of Appeal an application for review of its own judgment and if successful, would render the eviction superfluous but the damage would already have irreversibly occurred.
3. That there had been no notification of the 90 days as is stipulated by the law. That the Court of Appeal in Appeal No. 223 of 2014 had made it's determine on the 27th March 2017 but had not upheld the court's judgment delivered on 26th June 2014. That thereafter they had applied for removal of the restriction placed on the property so as to have the same lawfully registered under their name. They then embarked on the process of subdividing the property but were stopped by the Plaintiff/ Respondent who claimed that he was the rightful owner of the suit property as per the terms of the judgment of 27th March 2019.
4. That the Applicants had now moved the Court of Appeal to Review its judgment delivered on 27th March 2019 via Court of Appeal at Nyeri in Civil Appeal No. 223 of 2014 between Chepnyaliliet Self Help Group vs. Pushati Ole Shungur, *vide* a Notice of Motion Application dated 23rd October 2023 wherein they had sought a determination of the rightful owner of the land comprised in LR. No. Narok CIS —Mara /Olulunga/134.
5. That it was only fair in the interests of justice that the execution herein be allowed so as to forestall the Plaintiff/Respondent's malicious, unlawful and offensive conduct before the unlawful eviction of the suit property takes place.
6. The application was opposed by the Plaintiff/Respondent's Replying Affidavit and Notice of Preliminary Objection both dated the 22nd January 2024, for reasons that pursuant to a rectification of a wrongly drafted Decree by the Court of Appeal upon delivery of their judgment of 27th March 2019, the Narok Land Registrar had on the 11th October 2023 restored the registration of the suit property to his name wherein he had been issued with a title deed, thus endorsing him as proprietor of the suit land. That the land dispute between him and the Applicants had therefore been conclusively and finally determined by the Court of Appeal in its judgment of 27th March 2019.
7. That the Applicants having conceded that they had moved to the Court of Appeal seeking a review of its judgment delivered on 27th March 2019, that indeed it was the Court of Appeal that was seized with jurisdiction to weigh the merits and demerits of stay of its own Decree and not this honorable court.
8. The Application was disposed of by way of written submissions to which the Applicants framed their issues for determination as follows;
 - i. Whether the honorable court has jurisdiction to hear and determine this application.
 - ii. Whether the Applicant is entitled to the prayers sought.
9. On the first issue for determination, the Applicants submitted that the application was in reference to the orders issued by this court on the 9th November 2023 ordering for their eviction and therefore this court was seized with jurisdiction to hear and determine this application.



10. On the second issue for determination, the Applicants submitted that the Plaintiff/Respondent had unlawfully obtained the impugned orders of eviction against them on the 10th November 2023 after misrepresentation to the court that the Court of Appeal in its judgment of 27th March 2019 had upheld this Court's decision in the judgment of 26th June 2014, yet in effect the said Court of Appeal had only dismissed their Appeal against the said judgment.

Determination.

11. I have considered the application herein and the submissions by the Applicants. I have also noted that there were no submissions by the Respondent as directed by the court. In consideration of the settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law, that a party who fails to file their submissions on an application as ordered by the court is deemed as a party who has failed to prosecute the application, the filing of submissions having been ordered and the failure by the Respondent to exercise the leave granted to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on his part in the prosecution of the matter. Although this matter would then be deemed as unopposed in view of the absence of the Respondent's submissions yet not all unopposed matters should be allowed as prayed.
12. Indeed the Supreme Court of Kenya in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR had held as follows;
- “Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter.”
13. Since the Application herein has raised an issue on jurisdictional impediment of the court, I shall consider it on its merit, despite the same having not been opposed, wherein I find the issue that arises for determination herein being whether the court has jurisdiction to stay eviction orders herein granted on 10th November 2023.
14. Indeed it is not disputed that this matter, between the parties herein had been heard and determined vide the court's judgment of the 26th June 2014 wherein the court had held as follows;
- “I enter judgment in favor of the Plaintiff as against the 1st and 2nd defendants in terms of prayers (a) A, (b) AA, (c) and (e) of the further amended Plaint dated 29th April 2005.”
15. To put the decision of the court in context for better understanding, I have shall produce the prayers sought in the said further amended Plaint in verbatim to wit;
- “(a) A,.....a declaration that the first defendant obtained registration of LR No. Narok CIS -Mara /Olulunga/134 fraudulently.
- (b) AA, an order that the Chepnyaliliet Self Help Group do deposit the title deed relating to LR No. Narok CIS -Mara /Olulunga/134 in court the said be



nullified as against the said group and the said land be registered in favour of the Plaintiff's name.

- (c) a declaration that Chepnyaliliet Self Help Group represented by the second, third and fourth defendants is a trespasser on the aforesaid land and an eviction order be issued against the group.
- (e) costs of this suit”

16. The Applicants herein being dissatisfied with the said judgment, filed an appeal to the Court of Appeal *vide* Civil Appeal No 223 of 2014 wherein the Court of Appeal *vide* its judgment of 27th March 2019 dismissed their appeal stating as follows;

F Sichale (JA)

“The upshot of the above is that we find the Appellants registration of title in their favour on 29th September 1993 was unlawful in view of the fact that this was done notwithstanding the existence of a caveat place on 11th June 1993.

Accordingly the appeal is herein dismissed with costs to the Respondent.”

R N Nambuye (JA)

“I have an advantage of reading in draft the judgment of Sichale, JA I am in full agreement with the reasoning and conclusion reached by Sichale, JA.

The final orders are as indicated in the said judgment.”

S. ole Kantai (JA)

“I have also seen no evidence in the record that the purchase price for the sale of the land was made. The land could not be transferred without consideration. The trial judge arrived at the correct decision in the matter.

The appeal should be dismissed as proposed by Sichale, JA”

17. By the Court of Appeal dismissing the Applicants’ appeal, the orders of 10th November 2023 where therefore issued in perfection of the court’s judgment and/or order thus making the court *functus officio*.

18. Functus officio, is defined in *Black’s Law Dictionary*, Ninth Edition as

“Having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

19. The Supreme Court of Kenya expounding on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*,” (2005) 122 SALJ 832: and held that’;

“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.”

20. The Supreme Court of Kenya had also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that:

“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.”

21. In the same vein, the Court of Appeal in the case of *Telkom Kenya Limited vs. John Ochanda* [2014] eKLR, had held that: -

“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...

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

22. The court having delivered itself wherein its order had been perfected by an eviction orders, I find that the court is now functus officio and the Applicants lack the locus to bring the current Application. The Application dated the 24th November 2023 is herein dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 11TH DAY OF APRIL 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

