Mbugua & 3 others v Turi Gardens Limited (Environment and Land Case Civil Suit E363 of 2024) [2024] KEELC 6824 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6824 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT E363 OF 2024

JO MBOYA, J

OCTOBER 16, 2024

BETWEEN

ELIZABETH NYAWIRA MBUGUA ..... 1ST PLAINTIFF

SOPHIA WANJIRU MBUGUA ..... 2ND PLAINTIFF

JOHNSON KAGUA MBUGUA ..... 3RD PLAINTIFF

IAN WAHOME MBUGUA T/A MOWAKA AUTO CENTRE ..... 4TH PLAINTIFF

AND

TURI GARDENS LIMITED ..... RESPONDENT

RULING

1. On 14th October 2024, this court rendered and delivered a ruling pertaining to an application for temporary injunction dated 2nd September 2024. The court found and held that the application was devoid of merits and proceeded to and dismissed same.

2. Following the dismissal of the application [details in terms of the preceding paragraph], learned counsel for the Plaintiffs/Applicants, namely, Dr. Gibson Kamau Kuria SC made a further application to court to grant an order of temporary injunction on similar terms as the court had hitherto granted during the ex-parte stage. In this regard, learned counsel contended that the court was seized of jurisdiction to do so with a view to preserving the substratum of the suit property.

3. Arising from the invitation by learned counsel for the Plaintiffs/Applicants, the court enquired from learned counsel for the Defendant/Respondent whether same was amenable to the order[s] sought. However, learned counsel for the Defendant/Respondent opposed the request and contended that the court was divested of jurisdiction to grant the order sought. Furthermore, learned counsel posited that the grant of such an order would be tantamount to the court sitting on appeal on its own decision.

4. Arising from the divergent positions taken by the respective counsel for the parties, the court ordered that either party proceed to render substantive submissions. Nevertheless, because the court still had other hearings to deal with, the court ordered that the arguments be made on 15th October 2024.

5. Suffice it to point out that the counsel for the respective parties obliged and same returned to court on the 15/10/2024.

Parties Submissions:

a. Applicants' Submissions

6. Learned counsel Dr. Gibson Kamau Kuria SC submitted that this court is seized of the requisite jurisdiction to grant an order of temporary injunction even though the court has since found and held that the formal application for injunction is not meritorious. In this regard, learned counsel contended that the grant of such an order would not amount to this court sitting on appeal in respect of its own decision.

7. To this end, learned Senior Counsel cited and referenced the decision in Madhupaper International Ltd v Kerr[1985] eKLR. In particular, learned counsel contended that the decision in Madhupaper adopted and endorsed the principle in the case of Erinford Properties Limited v Chesire County Council 1974 All England wherein the court underscored that a court which has dismissed an application for injunction is possessed of jurisdiction to grant an order of temporary injunction pending appeal.

8. Additionally, learned Senior Counsel submitted that the principle which was highlighted and underscored in Madhupaper International Ltd v Kerr[1985] eKLR has since been applied in various cases including Emma Muthoni Mombasa High Court No. 274 of 2009 (unreported) and Technology Today & 2 Others v Norwell Kavalo, Milimani Commercial HCCC No. 627 of 2012 (unreported).

9. Premised on the foregoing, learned Senior Counsel implored the court to find and hold that same [court] is bestowed with residual jurisdiction to preserve the substratum of the suit property during the pendency of the intended appeal.

10. Secondly, learned Senior Counsel submitted that the doctrine of functus officio does not apply taking into account the principle in Erinford Properties case. In particular, it was contended that the doctrine of functus officio has exceptions.

11. Notwithstanding the foregoing, learned Senior Counsel admitted and conceded that the Plaintiffs/ Applicants have not filed any Notice of Appeal arising from and attendant to the ruling rendered on 14th October 2024.

12. Finally, the Senior Counsel submitted that unless the Court grants the orders sought, the substratum of the intended appeal will be defeated and the Applicants will be driven away from the seat of justice. In particular, Learned counsel posited that the court ought to intervene and preserve the intended appeal.

b. Respondent's Submissions

13. Learned counsel for the Respondent submitted that though Erinford Properties case allows the grant of an injunction by a court which has dismissed a formal application for injunction, it was contended that there are instances where such an endeavour would occasion undue prejudice and grave injustice. In particular, learned counsel posited that the case beforehand is one such instance and hence the orders sought ought not to be granted.

14. It was the further submission by learned counsel for the Respondent that the Defendant herein has since been issued with a foreclosure notice by a bank and wherein the bank is seeking to realise the suit property. Nevertheless, learned counsel posited that in an endeavour to salvage the suit property and another property situated at Kilimani within the city of Nairobi, the Defendant procured a purchaser and has since entered into and executed a sale agreement.

15. Based on the foregoing, learned counsel for the Respondent submitted that if the orders of injunction were to be granted, the sale agreement which has since been entered into and executed between the Defendant and the purchaser shall be frustrated.

16. Thirdly, learned counsel for the Respondent has submitted that the Applicants herein have neither established nor demonstrated that same are disposed to suffer any substantial loss, unless the orders sought are granted. For good measure, it was contended that the Applicants herein have not satisfied the ingredients underpinning the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, which relates to the grant of orders pending appeal[s].

17. Fourthly, learned counsel for the Respondent has submitted that to the extent that the court has since dealt with and disposed of an application for temporary injunction, the court is thus functus officio. In this regard, it was posited that the court cannot disingenuously purport to have a second bite on the issue of temporary injunction. In short counsel contended that such an endeavour will amount to this court assuming appellate jurisdiction over its own decision. ‘

18. Finally, learned counsel for the Respondent has submitted that the decision in Madhupaper International versus Kerr [1985]eklr; which has been cited and referenced by Senior Counsel was explained and distinguished in the case of *Eustace Kagau Kangerwe v Wiyathi Embu Services Station (K) Ltd & another [1996] eKLR - Civil Appeal 163 of 1996*.

19. In view of the foregoing, learned counsel for the Defendant has implored the court to find and hold that the invitation by and at the instance of the Applicants is intended to clothe the court with appellate jurisdiction over its own jurisdiction. For coherence, counsel submitted that the current application is therefore pre-mature and misconceived.

Issues for Determination :

20. Having reviewed the submissions by and on behalf of the parties and upon consideration of the facts and the law, the following issues crystalise [emerge] and are thus worthy of determination.

    i. Whether the court is seized of the requisite jurisdiction to grant orders of injunction shortly after dismissing a formal application seeking temporary orders of injunction or otherwise.

    ii. Whether the doctrine of functus officio applies to and in respect of the instant matter.

Analysis And Determination

Issue Number One

Whether the court is seized of the requisite jurisdiction to grant orders of injunction shortly after dismissing a formal application seeking temporary orders of injunction or otherwise.

21. Learned Senior Counsel for the Applicants invited the court to find and hold that the court is possessed of the requisite jurisdiction to grant the orders of temporary injunction on the same terms as the ones which the court had granted during the ex-parte stage. For good measure, it was contended that the grant of such orders falls within the discretion of the court.

22. To buttress the foregoing submissions, learned Senior Counsel for the Applicants cited and referenced the holding in Madhupaper International Ltd v Kerr [1985] eKLR. On the other hand, learned counsel for the Respondent submitted that even though the decision in Madhupaper International Ltd v Kerr [1985] eKLR adopted and applied the principle in Erinford Properties case, the said principle has since been explained and distinguished in the case of *Eustace Kagau Kangerwe v Wiyathi Embu Services Station (K) Ltd & another [1996] eKLR - Civil Appeal 163 of 1996*.

23. Having considered the rival submissions by the respective parties, I beg to take the following position. Firstly, it is true that the decision in Erinford Properties case provided that a judge who has dismissed an application for temporary injunction can very well proceed to grant orders of temporary injunction with a view to preserving the substratum of the appeal. Furthermore, it suffices to reiterate that the principle in Erinford Properties case was adopted and applied in Madhupaper International Ltd v Kerr [1985] eKLR.

24. However, it is not lost on this court that the principle in Erinford Properties case resurfaced in the case of *Eustace Kagau Kangerwe v Wiyathi Embu Services Station (K) Ltd & another [1996] eKLR - Civil Appeal 163 of 1996*, where the Court of Appeal considered the jurisdictional question attendant to whether the high court and by extension the environment and land court [being a Superior Court] can proceed and issue an order of temporary injunction in exercise of its appellate jurisdiction.

25. Suffice it to point out that the Court of Appeal in the decision [supra] was considering whether the high court was still possessed of jurisdiction to grant an order of temporary injunction in exercise of its appellate jurisdiction pending the hearing of an intended appeal.

26. While engaging with and addressing the issue, the Court of Appeal stated as hereunder:

> It is correct to say that the holding in Western College case insofar as it relates to the question of the High Court having no power to issue a temporary injunction after it has given judgment in a suit stands overruled in Madhupaper International case but the principle that the High Court has no power to issue an injunction in its appellate jurisdiction still stand good. Order 41 would have to be amended if the High Court was to have such powers.

27. Furthermore, the court ventured forward and stated as hereunder:

> Mr. Kamau Kuria's argument is attractive, that is to say, that the High Court in its appellate jurisdiction, can preserve the status quo pending appeal. Mr. Kuria was, to our minds, seen to be interchanging the word `injunction' with the word `stay' or the words "preserve the status quo". This cannot be correct. Mr. Kuria argued that the court was not dealing with a simple issue of language but broad jurisprudential issue and that the learned judge had recognized the jurisdiction to preserve the subject-matter of the appeal during its pendency.
>
> But what did the learned judge do? After concluding that she had no jurisdiction to grant the injunction, she granted it by reference to preservation orders. So effectively she made orders which she herself had stated she had no jurisdiction to make.

28. My understanding of the ratio decidendi in the decision [supra] is to the effect that the high court and be extension, the environment and land court cannot arrogate unto itself jurisdiction to grant orders of temporary injunction pending the intended appeal or otherwise. In addition, the Court of Appeal underscored that if any such orders were to issue, same would have been issued without jurisdiction.

29. At any rate, it suffices to recall that the court of appeal proceeded to and observed that there would be need to undertake amendments of the provisions of order 41 [now Order 42] of the Civil

Procedure Rules, so as to include the question of temporary injunction being granted by the high court [environment and land court] in exercise of its jurisdiction pending the intended appeal.

30. I am aware that the provisions of Order 42 of the Civil Procedure Rules were duly amended and Rule 6 (6) was included. However, there is no gainsaying that the cited provisions cover instances where an appeal has arisen from a decision of the subordinate court and not otherwise.

31. For ease of reference and appreciation, it suffices to reproduce the provisions of Order 42 Rule 6(6) of the Civil Procedure Rules. Same stipulate as hereunder:

> (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

32. Notwithstanding the foregoing, no corresponding provision has been brought on board to cover or deal with instances pertaining to appeals from the high court and courts of equal status to the court of appeal. In this regard, the position of the law remains exactly where it was at the time when the court of appeal rendered itself in the case of Eustace Kagau Kangerwe v Wiyathi Embu Services Station (K) Ltd & another [1996] eKLR.

33. For coherence, no statutory provision has been introduced to anchor and/ or premise the jurisdiction of this Court to grant an Order of Temporary Injunction in favour of an applicant, whose application for similar remedies has been dismissed. In the absence of statutory anchorage, I am afraid that this Court is divested of jurisdiction.

34. Secondly, it is also important to state and underscore that where an Applicant seeks to procure any interim orders, whether same be temporary injunction or stay of execution pending appeal, the applicant must demonstrate that same has filed a notice of appeal. It is the notice of appeal, if any, that would provide the court with jurisdiction to grant any interim protection pending appeal or intended appeal. [See Order 42 Rule 6(4) of the Civil Procedure Rules].

35. Thirdly, I hasten to state that courts of law, the court herein not excepted can only proceed and grant orders if the orders sought are expressly provided for under stature. In cases where jurisdiction is not provided for by *the constitution* or statute then the court must be reluctant to assume jurisdiction in matters not expressly provided for.

36. To this end, it is apposite to reference the holding of the Supreme Court in the case of S. K Macharia & another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR where the court stated thus:

> (68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or

tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

37. Arising from the foregoing analysis, my answer to issue number one [1] is twofold. Firstly, this court is not seized of the requisite jurisdiction to grant orders of temporary injunction pending the hearing of an intended appeal or appeal to the Court of Appeal. In any event, such an order would amount to the court sitting on appeal on its own decision dismissing a formal application for temporary injunction.

38. Secondly, even assuming that this court is seized of jurisdiction to grant temporary injunction after dismissing a formal application, such jurisdiction cannot be exercised in the absence of a notice of appeal. [See Order 42 Rule 6(4) of the Civil Procedure Rules 2010].

Issue Number Two

Whether the doctrine of functus officio applies to and in respect of the instant matter.

39. The Applicants herein filed an application seeking orders of temporary injunction to restrain the Respondent from interfering with their [Applicants'] occupation, possession and use of the suit property. Upon the filing of the application, same was set down for hearing and ultimately disposed of vide ruling rendered on 14th October 2024.

40. It is instructive to note that the court considered the various perspectives touching on and concerning the grant of an order of temporary injunction. In particular, the court found that though the applicants had established a prima facie case, same [applicants] had not demonstrated a likelihood of irreparable loss arising.

41. Based on the finding that the Applicants had neither established nor demonstrated a likelihood of irreparable loss being suffered, the court proceeded to and dismissed the application. To this end, there is no gainsaying that the court engaged with the application and thereafter found same [application] to be devoid of merits.

42. Be that as it may, the Applicants are yet again asking the court to issue and grant similar orders like the ones dismissed by the court. To my mind, in the course of engaging with the formal application, the court made firm findings on questions of facts and law. Simply put, the court pronounced itself on the merits of the application.

43. In the circumstances, I hold the view that the Applicants herein cannot now be heard to implore the court to have a second bite on the cherry and in particular, to grant the orders of temporary injunction. To do so would create a muddled-up situation and in particular, it would manifest a situation where a court of law is having two bites on the cherry.

44. Other than the foregoing, there comes forth the implications of the doctrine of functus officio. The question that arises is whether in dismissing the application for temporary injunction, the court stands discharged from hearing a further application for similar orders, namely, temporary injunction.

45. In my humble view, the invitation made on behalf of the Applicants will certainly constitute a violation of the doctrine of functus officio. In this regard, I beg to reference the holding in the case of Telkom Kenya Limited v John Ochanda (Suing on His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR.

46. For coherence, the Court of Appeal considered the doctrine of functus officio and stated as hereunder:

> 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. It is a doctrine that has been

recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of Chandler vs Alberta Association Of Architects [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

> "The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> > Where there had been a slip in drawing it up, and,
> >
> > Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"

The Supreme Court in Raila Odinga v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in which the learned author stated;

> ..."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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

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. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd Vs Ai Thani [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

> "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 or adjudication must be taken to a higher court if that right is available."

It seems quite clear to us that as at the time the respondents made their application dated 31st January 2012, the proceedings respecting the dispute between the parties had been finally concluded before Mwera J. His judgment and decree had been perfected and, as we have seen, had subsequently been the subject of an appeal to this Court as well as a number of applications including for stay. The respondents themselves had proceeded to attempt to execute the same. There was finality as to the proceedings, merits and decision in the matter.

And the High Court had become functus officio so that any issues of grievance could only be dealt with by escalation to this Court on appeal.

47. Flowing from the exposition of the law in terms of the preceding paragraph[s], I am constrained to find and hold that the invitation to grant orders of temporary injunction in the current circumstances, will constitute a violation of the hackneyed doctrine of functus officio.

Conclusion:

48. Though the Senior Counsel for the Applicants cited and referenced the decision in Madhupaper International, it is my humble view that the said decision must be read alongside the very latest, namely, Eustace Kagau Kangerwe v Wiyathi Embu Services Station (K) Ltd & another [1996] eKLR.

49. Furthermore, my reading of the decision in the Wiyathi Embu Petrol Station case drives me to the conclusion that the ratio decindendi in the Madhupaper case was distinguished. Besides, the Court decreed the necessity to re-consider the provisions of the Law and amend same, with a view to providing legal anchorage for the issuance of orders of injunction pending an appeal to the Court of Appeal.

50. In a nutshell, it is my finding and holding that the Application by and on behalf of the Applicants is not meritorious. In any event, there is also a jurisdictional question founded on lack of the requisite notice of appeal in terms of Order 42 Rule 6 (4) of the Civil Procedure Rules.

Final Disposition:

51. In the upshot, the request for temporary orders of injunction after the dismissal of a formal application for same orders, be and is hereby declined. Simply put, the request for the court to grant further orders of temporary injunction be and is hereby dismissed.

52. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF OCTOBER 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson - Court Assistant

Dr. Gibson Kamau Kuria SC for the Plaintiffs/Applicants

Mr. Miller & Ms. Winnie Wambui for the Defendants/Respondents