Njoroge v Embakasi Ranching Co Ltd & another (Environment & Land Case 1071 of 2014) [2023] KEELC 416 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 416 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1071 OF 2014

JO MBOYA, J

FEBRUARY 2, 2023

BETWEEN

JULIUS GITONGA NJOROGE ..... PLAINTIFF

AND

EMBAKASI RANCHING CO LTD ..... 1ST DEFENDANT

SAMUEL NJOGU KAMITA ..... 2ND DEFENDANT

RULING

1. *Vide* Notice of Motion Application dated the 22nd of December 2022, the Plaintiff/Applicant herein has sought the following Reliefs:

    i. That this Application be certified urgent and heard *ex-parte* in the first instance.

    ii. That this Honorable Court through the Deputy Registrar executes the completion/transfer documents on behalf of the Respondents who have declined to do so with respect to Plot numbers 105/1393 and 105/1394 respectively.

    iii. That upon execution by the Deputy Registrar of this Honourable court in order (2) above, the same be deemed as sufficient instrument for completion/ transfer documents.

    iv. That this Honourable Court be pleased to grant an eviction order against the 2nd Respondent from the suit property, Plot numbers 105/1393 and 105/ 1394.

v. This Honourable Court be pleased to grant a demolition order of permanent structures constructed by the 2nd Respondent in the suit property.

vi. The OCS Ruai Police Station be directed to provide security during the eviction and demolition exercise; and

vii. The costs of this Application be borne by the Respondents.

2. The instant Application is premised and anchored on the various grounds which have been alluded to at the foot of the application, namely, grounds (a) to (h), inclusive.

3. On the other hand, the instant Application is supported by the affidavit of the Plaintiff sworn on even date and to which the deponent has annexed four documents, *inter-alia* a copy of the decree issued on the 12th of July 2017.

4. Suffice it to point out that though the Defendants/ Respondents were duly served with the instant Application, same failed and/or neglected to file any response thereto.

5. Be that as it may, the instant Application came up for Hearing on 24th January 2023, when counsel for the Plaintiff/Applicant confirmed that indeed the defendants had been served but same had neither filed a Replying Affidavit nor grounds of opposition.

6. Furthermore, it is appropriate to state that when the matter/Application came up for Hearing, the Defendants/Respondents were duly represented before the court.

7. Premised on the fact that the subject Application had not been opposed, the counsel for the Plaintiff/ Applicant stated and reiterated that insofar as the Application had not been responded to, same ought to be treated as unopposed and be granted as sought.

8. Despite the contention by counsel for the Plaintiff, the court pointed out to counsel that the fact that the Application has not been opposed, dos not *ipso facto* denote that same shall be granted as prayed.

9. Consequently and in the premises, the Honourable court directed that same shall consider the Application and thereafter render a considered Ruling, to be delivered on the return date.

Deposition By The Parties

a. Applicant's Case

10. *Vide* Supporting Affidavit sworn on the 2nd of December 2022, the deponent has averred that same lodged and/or commenced the instant suit *Vide* Plaint dated the 7th of August 2014 and thereafter the suit was heard and concluded *Vide* Judgment rendered and delivered on the 10th of May 2017.

11. In addition, the deponent has averred that upon the delivery of the Judgment, his advocates, proceeded to and extracted a Decree in accordance with the Judgment of the court. For clarity, the deponent has exhibited the decree in question.

12. Nevertheless, the deponent has added that despite being served with the extracted decree, the Defendants/Respondents herein have failed and/or neglected to comply with or adhere with the terms of the decree and by extension the terms of the Judgment of the court.

13. Furthermore, the deponent has also stated that the Defendants/Respondents herein have only complied with limbs three and four of the decree of the court. In this regard, the deponent pointed out

that limb 3 of the judgment related to payment of Kes. 300,000/= only on account of general damages, whilst limb 4 thereof, was in respect of the costs of the suit.

14. To the extent that the Defendants/Respondents have failed to comply with the terms of the decree of the court, the deponent has therefore implored the court to grant the reliefs sought at the foot of the instant Application.

15. In any event, the deponent has added that despite the terms of the decree of the court, the 2nd Defendant/Respondent herein has continued to and remains in occupation of the suit property, which ought to be transferred and registered in his name.

16. Additionally, the deponent has stated that the 1st Respondent on her part has failed to execute the Transfer forms to facilitate and effectuate the transfer and registration of Plot numbers 1393 and 1394, respectively, in his name and in accordance with the judgment of the court.

17. Premised on the foregoing, the deponent has implored the court to find it fit and appropriate to grant the Application and enable the deponent to benefit from the fruits of the suit Judgment.

b. Response By The Respondents

18. Though duly served with the instant Application, none of the Defendants/Respondents filed any response to the Application.

19. Indeed, when the Application came up for Hearing on the 24th of January 2023, Learned Counsel Mr. Maina holding brief for Mr. Ngata Kamau for the 1st Defendant and Mr. Njuguna holding brief for Mr. Macharia Gakuo for the 2nd Defendant, both confirmed that same had not filed any responses.

Submissions By The Parties

a. Applicant's Submissions

20. Learned counsel for the Plaintiff/Applicant submitted before the court that the instant Application had not been opposed by either of the Defendants/Respondents. Consequently, counsel implored the court to find and hold that the Application was meritorious and thus ought to be allowed.

21. In a nutshell, it was the submissions of learned counsel that insofar as the Application is not opposed, then same ought to be dignified with favorable orders without much ado.

b. Respondent's Submissions

22. Though the Respondents were duly represented by counsel at the time when the subject Application was called out, same however indicated that they will leave the matter to court.

Issues For Determination

23. Having reviewed the instant Application together with the Supporting Affidavit thereto and having taken into account the submissions of counsel for the Applicant, I come to the conclusion that the following issues are pertinent and thus worthy of determination:

    i. Whether the Honourable court has jurisdiction to grant orders in a post Judgment Application, whose terms are contrary to and directly at variance with the Decree?

ii. Whether the Court can direct the Deputy Registrar to execute Instruments in respect of Properties which were neither alluded to nor captured in the pleadings?

Analysis And Determination

Issue Number 1. Whether the Honorable court has Jurisdiction to grant orders in a post Judgment Application, whose terms are contrary to and directly at variance with the Decree?

24. It is common ground that the Plaintiff/Applicant herein had filed and commenced the instant suit *Vide* Plaint dated the 7th of August 2014. For clarity, the Plaintiff proceeded to and itemized the various reliefs that were sought at the foot of the named Plaint.

25. Subsequently, the Plaintiff's suit was heard and disposed of on the basis of the pleadings and reliefs that had been enumerated at the foot of the named Plaint.

26. Suffice it to point out that the Honourable court found and held that the Plaintiff herein had duly established and proved his claims in terms of the Plaint.

27. Arising from the holding of the court, the court proceeded to and entered Judgment in favor of the Plaintiff/Applicant. For clarity, the judgment was rendered on the 10th of May 2017.

28. Following the rendition of the named judgment, it is imperative to note that the Plaintiff/Applicant proceeded to and extracted a Decree and which decree was duly signed and sealed by the Honourable court.

29. Be that as it may, it is important to point out at this juncture that a decree extracted and issued by the court must accord with the terms of the judgment and not otherwise.

30. In respect of the statement that a decree must accord with the judgment, it is imperative to restate and reiterate the holding of the Court of Appeal in the case of *Highway Furniture Mart Limited v Permanent Secretary Office of The President & another* [2006] eKLR, where the court observed as hereunder:

> " By Order XX Rule 6 (1) the decree should agree with the judgment and by Order XX Rule 7, in case of dispute the decree is settled by a judge before it is issued by the court. A decree which is not in conformity with the judgment is liable to be reversed and set aside for a party to the suit cannot suffer because of the errors committed by the court. The court would, however, be functus officio if the decree conforms with the judgment, which is not the case here.

31. Having made the foregoing observation, it is now appropriate to return to the decree that was duly extracted and sealed in respect of the instant matter.

32. For coherence, the terms of the Decree that was extracted are as hereunder:

i. That a Permanent Injunction is hereby issued restraining the 1st Defendant from re-allocating the plot allocated against share certificate No. 14227 dated 9th September 1992 to any other person apart from the Plaintiff plus an order that the 1st Defendant regularize the said allocation in favour of the Plaintiff and allocate the Plaintiff a bonus plot already paid for and to release to the Plaintiff's documents forthwith.

ii. That a Permanent Injunction is hereby issued against the 2nd Defendant from trespassing onto the Plaintiff's plot and constructing a perimeter wall thereof or in any other way interfering with the Plaintiff's rights over the suit property.

iii. That the Plaintiff is hereby awarded general damages in the sum of Kshs. 300,000/-.

iv. That the Plaintiff is awarded costs of this suit.

33. Furthermore, the Plaintiff/Applicant admits and avers that the Defendants/Respondents have complied with limbs 3 and 4 of the named decree. In this regard, it then means that what is outstanding is limb 1 and 2 of the decree.

34. Premised on the foregoing, the current Application is therefore geared towards actualizing and effectuating the outstanding limbs of the decree. For clarity, the outstanding limbs of the decree relates to order number 1 and 2 thereof.

35. Now, the question that has to be dealt with and resolved is whether the Honourable Court issued any Decree pertaining to and concerning L.R Block no. 105/1393 and L.R No Block 105/1394, in the manner adverted to on the face of the current Application?

36. Other than the foregoing, there is the ancillary question as to how the Applicant has ascertained and authenticated that these two named plots relates to certificate number 14227 which was the subject of the proceedings before the court.

37. Furthermore, there is also the aspect as to whether the court directed or ordered the Defendants to execute any transfer instruments to and in favor of the Plaintiff and in any event, in respect of the properties named in the Application.

38. Additionally, the Applicant has also sought for an order of eviction against the 2nd Defendant/ Respondent in respect of the two named properties in the Application, but which properties were neither part of the pleadings nor the decree of the court.

39. Finally, the Applicant has also implored the court to decree and grant an order of demolition in respect of (sic) the permanent structures constructed by the 2nd Defendant allegedly on the two named plots, whose details are enumerated on the face of the Application.

40. Though the Application was not opposed, it is common knowledge that the Claimant/Applicant is still called upon to prove his/her claims, in accordance with the prescription of the law.

41. On the other hand, it is also elementary learning that a court of law is not enjoined to grant any suit or reliefs, (irrespective of the merits thereof), merely because same is unopposed.

42. To my mind, the reliefs that are sought at the foot of the current Application are clearly at variance with and contrary to the terms of the Decree that was granted by the Honourable court.

43. Consequently, to grant the reliefs sought at the foot of the Application would effectively mean that this Honourable court would be revisiting the substratum of the suit, undertaking merits review and thereafter impeaching the lawful Judgment of a court of competent jurisdiction.

44. Clearly, such an invitation is tantamount to impressing upon the Court to sit on Appeal on the decision of a court of coordinate jurisdiction and in any event, to grant orders far beyond the reliefs that were contained at the foot of the operative pleadings, which were placed before the Honourable Court by the Applicant himself.

45. I beg to point out that a court of law must act within the confines of the law and not otherwise. In any event, the extent of the mandate, competence and jurisdiction of a court is well provided for both in the *Constitution* and the relevant Statutes.

46. To underscore my observation that this court cannot re-engage with evidence and undertake merit review of the issues articulated at the foot of the current Application, it is appropriate to restate and reiterate the holding of the Court of Appeal 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, where the court stated and observed as hereunder:

> " It is apparent from the record that in ordering that certain materials be placed before him by way of affidavit long after judgment had been entered; the learned judge had the noblest and best of intentions in trying to give effect to the judgment of Mwera J. In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him. He had himself earlier acknowledged that his hands were tied and also noted that he could not amend the judgment as had been sought. The court's only recourse would have been to review the judgment and having refused to do so, it was rendered functus officio.
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> 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 v Alberta Association Of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
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> "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:
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> 1. Where there had been a slip in drawing it up, and,
>
> 2. 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;
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> ..."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."

47. Furthermore, the court went ahead and observed as follows:

> " 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.

48. Duly nourished and guided by the holding of the Court of Appeal in the decision (*supra*), I come to the conclusion that the issues that are raised at the foot of the current Application, constitute an invitation to the court to re-engage the factual controversy in respect of the matter and thereafter to alter, review and amend the judgment rendered on the 10th May 2017.

49. In my humble view, this Honourable court is functus officio and cannot endeavor to undertake yet another journey, whose net effect would to be making orders whose terms and tenor are contrary to and in contravention of the doctrine of departure.

Issue Number 2

Whether the Court can direct the Deputy Registrar to execute Instruments in respect of properties which were neither alluded to nor captured in the pleadings?

50. Other than the limb of the Application which invites the Honourable court to issue and grant orders which had hitherto not been pleaded nor granted *Vide* the judgment, the Applicant has similarly sought for an order that the Deputy Registrar be mandated to execute assorted Transfer documents in respect of the named Plots.

51. Despite the fact that the Applicant is impleading and seeking for an order to direct the Deputy Registrar to execute transfer instrument, there is no gainsaying that the Applicant herein had neither sought for any order against the Defendants/Respondents seeking execution of any instrument or at all.

52. Additionally, it is also worthy to state that there was also no request or prayer that in default of (sic) execution by the Defendants, the court be pleased to direct the Deputy Registrar to act and execute the instruments, in lieu of the Defendants.

53. I must point out that if the Plaintiff/Applicant had hitherto sought such reliefs in the body of the operative pleadings, then it would have been easy to make the consequential directives and ancillary orders sought, inter alia, directing the Deputy Registrar, to execute the named Documents.

54. However, in respect of the subject matter, yet again, the Plaintiff did not seek the relief that same is now seeking to sneak unto the court.

55. Worse still, the Applicant is seeking that the Deputy Registrar execute the Transfer instrument in respect of L.R No. 105/1393 and 1394, respectively, even though the said properties do not form part of the Decree.

56. In my humble view, the Deputy Registrar or such other designated officer of this Honourable court, can be ordered and directed to perform an ancillary duty by the court. However, before such a direction can be issued, the court must cross check whether such an obligation is in tandem with inter-alia the judgment and decree, if any, hitherto granted by the court.

57. Surely, the Applicant herein is seeking to invite the Honourable court to commit an illegality, in the name of directing the Deputy Registrar to execute Transfer instruments in respect of properties for which no Judgment was ever issued.

58. In a nutshell, I am afraid that the Deputy Registrar cannot be directed to execute the Transfer instruments or such other document in respect of L.R No. Block 105/1393 and 1394, respectively in the manner sought or at all.

Final Disposition

59. Before rendering and making the dispositive orders, it is imperative to state that if the Plaintiff/Applicant has since found and established that the Judgment which was issued in his favor is not enforceable, then it behooves the Plaintiff/Applicant to reconsider the entire dispute taking into account the obtaining developments.

60. Certainly, the Plaintiff/Applicant may be called upon to do much more than scratching on the surface on the impugned Judgment.

61. Be that as it may, whatever the Plaintiff may wish to do is subject to the wisdom and advise of his Learned Counsel.

62. Nevertheless and having made the foregoing observations, the current Application which has been filed and mounted by the Plaintiff/Applicant, is no doubt, misconceived, legally untenable and bad in law.

63. In a nutshell, the Application dated the 2nd of December 2022, be and is hereby Dismissed albeit as to no order as to costs.

64. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2NDDAY OF FEBRUARY 2023.

OGUTTU MBOYA,

JUDGE

In the Presence of:

Benson - Court Assistant.

Mrs. Kirui for the Plaintiff/Applicant.

Mr. Maina h/b for Mr. Ngata Kamau for the 1st Defendant.

Mr. Njuguna h/b for Mr. Macharia Gakuo for the 2nd Defendant/Respondent.