



Mungai v Wairimu & 2 others; Karomba & 6 others (Applicant) (Environment & Land Case 385 of 2017) [2023] KEELC 18065 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 385 OF 2017**

JG KEMEI, J

JUNE 8, 2023

BETWEEN

HOTENGA NJERI MUNGAI PLAINTIFF

AND

CELINA WAIRIMU 1ST DEFENDANT

WANGUI JOSEPH 2ND DEFENDANT

GEORGE NDOTONO 3RD DEFENDANT

AND

JOSEPH THIRU KAROMBA APPLICANT

PETER NJOROGE KAGWIMA APPLICANT

JANE WANJIRU KARANJA APPLICANT

MARIAM SELEINA APPLICANT

NANCY WAIRIMU NDUNGU APPLICANT

ABSOLOM NYAMBURA MWANGI APPLICANT

JOSEPH KAMANDE KIBE APPLICANT

RULING

1. There are two applications the subject of this Ruling; the Motion dated the 2/8/2022 filed by the Defendants and the one dated the 7/10/2022 filed by the 1st - 7th Applicants.

The Motion dated the 2/8/2022

2. The Motion seeks the following orders;



- a. That the application is certified as extremely urgent and be heard ex-parte in the first instance.
 - b. That this Honourable Court be pleased to stay execution, varying and/or reviewing of the Judgment of the ELC CASE NO. 385 OF 2017 delivered on 24TH September, 2020 and the subsequent decree issued on the 29th November, 2021 by the Hon. Justice L. Gacheru in Thika in the Environment and Land Court Case No. 385 of 2017 pending the filing, hearing and determination of the application.
 - c. That upon granting the above (2) order, the matter be set down for urgent hearing de novo.
 - d. That the new Advocates be deemed to be properly on record.
 - e. That the cost of this application be borne by the Respondent.
3. It is based on the grounds set out as thus;
- a. The Applicants have built permanent structures on the suit property and have been living there for over 15 years.
 - b. The Applicants previous Advocate after having been instructed by the Applicants failed and/or neglected to attend and/or update the Applicants on the date of the hearing and any subsequent progress on the case.
 - c. The mistakes of an Advocate should not be visited upon the Client.
 - d. The Applicants herein were unaware the matter had been heard, Judgment delivered and Decree issued.
 - e. The application is further supported by the annexed Affidavit of George Ndotono and other grounds to be adduced at the hearing thereof.
4. The application is supported by the affidavit sworn on the 2/8/2022 by George Ndotono, the 3rd Defendant Applicant herein. That they are aggrieved by the judgement of the Court issued on the 24/9/2021 and therefore seek review of the same. That they seek stay of execution of the judgement; that the case be heard denovo to allow them to defend the suit; the review raises pertinent issues of law which are meritorious; that execution shall render their review nugatory; they have lived on the suit land for several years; they blame their advocate for failure to notify them of the hearing date leading to the case being heard exparte.
5. In response the application is opposed vide the grounds of objection filed on the 21/10/2022. The Plaintiff/Applicant states that the application is misguided, mischievous, unmerited and vexatious and an outright abuse of the process of the Court; the application is resjudicata in view of the one dismissed on the 14/10/2021 filed by the same parties; the application fails the threshold of review given there are no new and important matters or evidence adduced, no error apparent on record and no sufficient reasons have been adduced to warrant review.
6. Further the Plaintiff contends that the judgement has been partially executed by the payment of mesne profits save for eviction due to unwillingness of the police to provide security for the exercise. The Court was urged to dismiss the application.

The 1st - 7th Applicants Motion dated the 7/10/2022

7. The application seeks the following orders;



- a. That the application herein be certified urgent, service thereof be dispensed with and the same be heard ex parte in the first instance.
 - b. That there be a stay of execution of the Judgment delivered on 24th September, 2020 and the subsequent Decree issued on 29th November, 2020 as against the Applicants herein as they were never parties to the suit pending the hearing and determination of this application.
 - c. That the Honourable Court be pleased to set aside the Judgment entered on 24th September, 2020 and the subsequent decree issued on 29th November, 2021 in the interests of justice.
 - d. That the Plaintiff/Respondent to join the Applicants herein as Defendants to the suit and they be granted leave to file and serve their Statements of Defence pursuant to the amended Plaint.
 - e. That the costs of this application be in the cause.
8. The application is based on the grounds as follows; That Judgment was obtained by the Plaintiff ex parte and execution has commenced; they were not aware of the existence of the suit hence not party to it; They own and occupy for the last 19 years the land having purchased from Teresia Wangui Nganga t/a Wamuki Enterprises Limited in 2003 and were issued with share certificates. That the said Teresia Nganga purchased 0.5 acres of the land vide an agreement dated the 20/2/2002 from Elizabeth Wairimu Maina and Hannah Wanjiru Ndotono who were members of the Nyakinyua Investments Limited.
 9. That the suit having proceeded ex parte and in their absence they now face imminent eviction. That they will be condemned unheard and will suffer irreparable loss and prejudice as they have a defence that raises triable issues. They urged the Court to set aside the Judgment and hear them.
 10. The application is supported by the affidavit of Joseph Thiiru Karomba sworn on the 18/10/2022 where he deponed on his behalf and that of the 1st - 7th Applicants. He reiterated the grounds aforesaid and added that the Court is vested with inherent powers to set aside its judgement in the interest of justice so that they may be heard on their defence which raises triable issues. He faulted the plaintiff for material non-disclosure in failing to disclose to the Court the presence of the Applicants in occupation of the suit land. In addition, that they have approached the Court without delay.
 11. The Plaintiff opposed the application vide the Replying Affidavit dated the 4/11/2022 where she deponed that the current suit was filed in 2016 and the Defendants were served and acknowledged by the Defendants on the 26/9/2016. See the Affidavit of Service dated the 26/9/16 and 17/10/16. The Defendants entered appearance through the firm of Kimani Kahete & Co Advocates on 3/10/16. Joseph Thiiru Karomba, the 1st Applicant swore an affidavit on 31/10/16 on behalf of the 1st - 3rd Defendants stating that he and others not enjoined in the suit are owners of half of the parcel of land having purchased the same from one Teresia Wangui t/a Wamuki Enterprises Limited in the year 2003 after completion of subdivision and have developed the land by building houses thereon.
 12. That the Defendants filed a defence but were absent at the hearing of the suit despite service having been duly effected.
 13. That immediately the judgement was issued the 4th and 5th Applicants filed an application dated the 16/12/2020 seeking to set aside the Judgment and to defend the matter on grounds that they are purchasers of the suit land. That the application was heard and in its Ruling of the 14/10/2021 the Court allowed them to defend the suit on payment of throw away costs of 30,000/-. That they defaulted and the said orders lapsed.



14. Thereafter that she proceeded to execute the judgement which is currently partially satisfied by the Defendants who have duly paid Kshs 300,000/- being mesne profits. On the 16/5/2022 the Court issued orders for police assistance to evict the Defendants.
15. That the application dated 2/8/2022 seeking orders for stay of execution and setting aside is unmerited given that there are no new and important matters which the application seeks to introduce and no mistakes has been shown on the face of the record among others.
16. That the application dated the 7/10/2022 is sponsored by the 4th and 5th Applicants. The Court was urged to dismiss the Applicants' application as the said Applicants were aware of the suit all along as demonstrated above. That the Applicants alleged occupation of the land was in willful disobedience of the Court orders which they have been aware of.
17. That the applications are incompetent, issues raised are resjudicata and the decree and the judgement of the Court has been partly executed and the Court is now functus officio.

The written submissions

18. The firm of Mburu Machua & Co Advocates filed on behalf of the 1st – 3rd Defendants. The firm of Obat Wasonga & Co Advocates filed submissions for the 1st – 7th Applicants while the Plaintiff filed written submission through the firm of Muturi S K & Co Advocates. I have read and considered the written submissions of the parties on record.

Analysis and determination

19. The key issues for determination are; whether the application dated the 2/8/2022 is merited; whether the application for joinder of the 1st – 7th Applicants is merited; who meets the costs of the applications.
20. This suit was filed on the 20/9/2016 and the 1st and 2nd Defendants filed defence on the 17/11/2016.
21. The suit proceeded exparte and the judgement was entered on the 24/9/2020 in favour of the Plaintiff against the 1st - 3rd Defendants jointly and severally as prayed in the plaint dated the 20/9/2016. In addition, the Plaintiff was awarded general damages for trespass to the tune of Kshs 300,000/- which the Plaintiff states has been fully paid. The judgement therefore is partially executed.
22. With respect to the application brought by the Defendants dated the 2/8/2022 the Defendants seek orders to stay vary and review the judgement rendered on the 24/9/2020 and its subsequent decree of the 29/11/2011 to allow them be heard. This application is similar to the application dated the 30/10/2020 filed by the said Defendant seeking the setting aside of the judgement delivered on the 24/9/2020 to enable the Defendants to participate in the case.
23. In its Ruling delivered on the 14/10/2021 the Court allowed the application as follows;
 - a. The Judgement delivered on the 24/9/2020 and all its consequent orders be and are hereby set aside in its entirety.
 - b. The parties are directed to take steps to fix the matter for hearing on a priority basis.
 - c. The Applicants shall pay throw away costs in favour of the Respondent in the sum of Kshs 30,000/- payable within a period of two weeks from the date hereof. In default the orders shall lapse automatically.
24. In view of the decision of the Court aforesaid, the Plaintiff has urged the Court to find that the current application is resjudicata.



25. Resjudicata is defined as:-

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties.”

26. The legal framework governing resjudicata is found in Section 7 of the [Civil Procedure Act](#) which states as follows:-

“No Court shall try any suit or issue in which the matter directly and substantively in issue has been directly and substantively 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” Emphasis added.

27. For an objection raised on resjudicata to succeed, the following must be demonstrated:-

- a. There is a former judgement or order which was final.
- b. The judgement or order was rendered by a Court having jurisdiction over the subject matter and the parties, and
- c. There must be between the first and second action identical parties, subject matter and cause of action.

28. The rationale of resjudicata is found in the case of Henderson Vs Henderson which states as follows:-

“... where a given matter becomes the subject of litigation in, and adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

29. The Court finds that the subject of the application is similar, between the same parties, urged by the same Applicants over the same subject matter for which application was heard and determined by a Court of competent jurisdiction. I may add that the said Ruling has not been appealed, vacated and or set aside. On this score the application is unmerited and is hereby dismissed.

30. The second issue is whether the application dated the 7/10/2022 brought by the 1st - 7th Applicants is merited. This application in the main seeks joinder of the 1st – 7th Applicants to the suit on grounds that the Applicants are proprietors of half of the suit land having purchased from one Teresia Wangui Nganga and that they have been in occupation since 2003 and have developed the property and constructed their homes thereon and yet they were not enjoined as interested parties with an identifiable stake therein. Further it is their case that they were not aware of the suit and that the exparte judgement in favour of the Plaintiff is affecting them with the possibility of imminent eviction.



31. The Plaintiff has urged the Court to dismiss the application on grounds that the Court is functus officio; the judgement is partially satisfied; the Applicants were aware of the suit; ne new and important reasons have been advanced by the Applicants to warrant review of the Judgment; the intended interested parties are merely trespassers.
32. Is joinder of the Applicants merited? Order 1 Rule 10(2) of the Civil Procedure Rules (CPR) provides that;
- “The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
33. This order requires the Court to evaluate the importance of such a party to the suit and their relevance to the just determination of the suit.
34. Rule 7 of *the Constitution* of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules 2013 provides that an interested party can apply to be enjoined or the Court can move suo moto and enjoin a party to proceedings before it. Rule 2 thereof defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation.
35. Similarly, the elements that guide a Court in enjoining a party were well settled in the Francis Kariuki Muruatetu & Another Vs. Republic & 5 others (2016)eKLR. In this case the Court held that; the Applicant must demonstrate the personal interest that he has in the matter by laying sufficient grounds before the Court; the prejudice he would suffer if he is not enjoined as interested party; he must set out the case that he intends to make before the Court and demonstrate the relevance of the evidence being proffered to the Court in determining the issue in controversy.
36. It is not in dispute that the Judgment of the Court issued on the 24/9/2020 remains in force, the same having been partially satisfied. I have perused the record and the Court wishes to agree with the Plaintiff that the Applicants were aware of the existence of this suit. This is captured in the 1st Applicants affidavit sworn on the 31/10/2016 in particular para 4 where he deponed that “we and others not Defendants herein are the owners of half of the parcel of the suit land.” Infact the deponent described himself as one of the Defendants to the suit. It is not clear when he withdrew from the suit. The averment therefore that the Applicants were not aware of the suit is misleading.
37. Is the Court functus officio? What is the meaning of functus officio? In the case of Raila Odinga & Others Vs. IEBC & Others [2013] eKLR the Court 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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”



38. In the case of Jersey Evening Post Limited Vs Al Thani [2002] JLR 542 at 550 it was observed 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.”

39. Similarly, 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

40. Saving other procedural processes envisaged under section 34 of the Civil Procedure Act, the Court on delivery of Judgment became functus officio.

41. Having held that the Court is functus, strictly speaking there is no necessity to determine the question of review of the judgement.

42. Final orders;

a. The application dated the 2/8/2022 is resjudicata. It is dismissed

b. The application dated the 7/10/2022 is unmerited. it is dismissed

c. I order costs in favour of the Plaintiff payable by the Defendants and the intended Applicants.

43. It is ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 8TH DAY OF JUNE, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Maina for the Plaintiff

Ms. Nabuta HB Mburu Machua for 1st – 3rd Defendants

Wesonga for 1st – 7th Applicants

Court Assistants – Kevin & Lilian

