



**Ngari v Ireri (Environment & Land Case 75 of 2015)  
[2023] KEELC 22546 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22546 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 75 OF 2015  
A KANIARU, J  
OCTOBER 5, 2023  
(FORMERLY ELC 792 OF 2013)  
FORMERLY EMBU CC 256 OF 1991**

**BETWEEN**

**HORINDA WANJUKI NGARI ..... APPLICANT**

**AND**

**EDWIN NJERU IRERI ..... RESPONDENT**

**RULING**

1. The focus of this ruling is a Notice of Motion dated 20.09.2022 and filed on 21.09.2022. It is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 rule 25 of the *Civil Procedure Rules*, and all enabling laws. The applicant – Horinda Wanjuku Ngari – is the plaintiff in the suit while the respondent – Edwin Njeru Ireri– is the Defendant. It is an application for stay of execution and the prayers sought are as follows:
  - a. Spent
  - b. Spent
  - c. That there be a stay of execution of the judgement delivered on 1<sup>st</sup> March 2018 together with all consequential orders arising therefrom pending the hearing and determination of the Nyeri Court of Appeal no. 235 of 2018.
  - d. That the cost of this application be provided for.
2. The application is premised on the grounds inter alia, that the respondent has taken out warrants with intent to execute in this matter and the police have communicated this to the applicant. That though the respondent has not issued the requisite notice, he has confirmed that he shall proceed to evict the applicant anytime now. That the applicant has been living on this land for over 40 years together with



her family and has extensively developed it. That the applicant believes she has an arguable appeal and if evicted, her appeal shall be rendered nugatory. Further that the respondent shall suffer no prejudice if this application is allowed while the applicant shall suffer gravely if this application is not granted.

3. The application came with a supporting affidavit in which the applicant deponed that she filed an appeal against the judgement entered on 01.03.2018 herein at the Court of Appeal in Nyeri, which is civil appeal no. 235 of 2018. That she was granted a stay of execution of the said judgement by this court for a period of 24 months from the date of judgment under the presumption that the appeal could be determined within that time. That the said appeal is still pending before the court of appeal at Nyeri and that on 22.08.2022 she received communication from the Court of Appeal that the appeal was coming up for case management on 23.08.2022. However the same was taken out of the causelist. That on 01.09.2022 the respondent obtained warrants to give vacant possession, which warrants were issued to Giant Auctioneers. On Monday 12.09.2022, she received a call from the OCS Siakago Police Station through his mobile number and was informed that he was going to evict her from land parcels Nthawa/Riandu/1947 and Nthawa/Riandu/1948. That she informed her advocate of this development and the advocate called the OCS in her presence and the OCS confirmed it. She says that though the said Auctioneers have not issued the necessary notice, she was informed by her advocates on record that they had spoken to the Auctioneers and the auctioneers confirmed they would proceed with the execution not later than 23.09.2022. That the appeal shall be rendered nugatory if the application is not granted and that she will be evicted alongside her family and this would render her destitute as the suit land is where she has lived with the family for over 40 years and has no other home. She prays that the application be allowed.
4. The application was responded to vide a replying affidavit dated 06.10.2022 and filed on 11.10.2022. The affidavit was drawn by the Respondent - Edwin Njeru Ireri. He deposed inter alia, that the Applicant's application lacks merit, is frivolous and does not meet the requirements for granting orders of stay of execution. That the said application is Res Judicata since this court determined the issue of stay in the Applicant's application dated 04.04.2018. That it is his belief that the Applicant should have sought for extension of the stay orders issued on 25.10.2018 before they lapsed instead of filing the instant application which seeks similar orders as sought in the application dated 04.04.2018. That the matter between the parties herein was resolved by the court vide the judgement dated 01.03.2018 and the subsequent decree dated 26.03.2018 and the court has since become functus officio. That the instant application was filed in the wrong court and it ought to have been filed in the appellate court since the applicant claims that she has an active appeal before the court of appeal against the decree issued herein. That the law is clear that the court cannot be called upon to issue similar orders in the same matter involving the same litigants over the same issue under similar circumstances. That the applicant has not demonstrated that she will suffer any substantial loss if execution of the decree is not stayed or that the appeal will be rendered nugatory and neither has she made a reasonable offer for security for grant of orders of stay of execution. Further, he depones that the subject matter of this suit is land. The same cannot be dissipated if the decree herein is implemented and that the applicant can recover the suit property if the appeal is successful. That the applicant has not attached a draft memorandum of appeal to his application to demonstrate that the intended appeal is arguable or has good chances of success. That as the successful litigant, he is entitled to the fruits of the judgement and the instant application is intended to delay his enjoyment of the fruits of the judgement. That the applicant is merely intent on protracting this matter unnecessarily and therefore litigation must come to an end. He prays for the application to be dismissed with costs to him but that if the court is inclined to grant any stay orders, the applicant be ordered to deposit security for costs of Kshs. 30,000,000/= which is the current market value of the suit lands.



5. The applicant filed a further affidavit on 04.11.2022 in response to the Respondent's replying affidavit in which he reiterates the content of his supporting affidavit and mainly dismisses the content of the Replying affidavit.
6. The application was canvassed through written submissions. The applicant's submissions were filed on 29.03.2023. In her submissions, the appellant highlighted the background to her application and reiterated the content of her Supporting affidavit while urging the court to allow her application.
7. The Respondent's submissions were filed on 29.05.2023. According to the Respondent, this court lacks the jurisdiction to entertain the applicant's application for being Res Judicata as the applicant had previously sought similar orders in this suit in an application dated 01.04.2018, which application was determined on 25.10.2018. That in the earlier application, the applicant was granted stay of execution orders which ran for 24 months from 25.10.2018 and at that point the issue of stay of execution was fully determined and the court became functus officio. He urges the court not to entertain the instant application for a second time since the court lacks jurisdiction to do so. He opines that since the applicant has filed her appeal, the relevant court to file the application herein is the Court of appeal. He has submitted further that the applicant has not met the threshold for grant of orders of stay of execution and therefore the application herein lacks merit and is a total abuse of the court process. The Respondent sought to rely on the following decided cases to support his claim; *Musili Kivungo & Anor vs Kitili Kilonzo* (2022) eKLR which quoted the case of *John Florence Maritime Services Ltd & Anor vs Cabinet Secretary for Transport & Infrastructure & 3 Others* (2021) eKLR; *James Wangalwa & Anor vs Agnes Naliaka Cheselo* ELC Misc No. 42 of 2012 as well as the provisions of Section 7 of the *Civil procedure Act*.
8. I have considered the Notice of Motion as filed, the Respondent's Replying affidavit, applicants further affidavit, and the rival submissions. I find that two issues are for determination:
  - i. Whether this Court is functus officio;
  - ii. Whether the applicant herein has satisfied the conditions to warrant grant of an order for stay of execution pending appeal to the Court of Appeal.
9. The Respondents have urged that the application before the Court is Res Judicata as the Applicant's filed a similar application which was heard and determined. Thus this court is functus officio. The Applicant admittedly filed an application dated 04.04.2018 seeking stay of execution and the Court indeed allowed the same. The orders sought were as follows;
  1. Spent
  2. That there be a stay of execution of the judgment delivered on 01.03.2018 together with all consequential orders arising therefrom pending the hearing and determination of this application.
  3. That there be a stay of execution of the judgement delivered on 1<sup>st</sup> March 2018 together with all consequential orders arising therefrom pending the hearing and determination of the intended appeal.
  4. That costs of this application be provided for.
10. The Court (Justice Y.M. Angima) on 25.10.2018 in his ruling held as follows;
  - a. The Notice of Motion dated 04.04.2018 is allowed in terms of prayer No. 3 thereof for a period of 24 months.



- b. ....
- c. ....
- d. Costs of the application abide by the order for costs to be made in the intended appeal.
11. From the foregoing, it is clear that the Court pronounced itself on the issue of stay of execution of the judgement delivered on 01.03.2018. It is also clear that the instant application is similarly touching on stay of execution. I agree with the Respondents 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. This Court would therefore not allow any attempts to reopen the matter for stay of execution. This would have the Court re-hear the application and this is not acceptable. The essence of the doctrine of functus officio is to give finality to the adjudication of matters.
12. In the case of *Jersey Evening Post Limited v Al Thani 7 4 others* (2002) JLR 542, 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...”
13. In the Court of Appeal decision of *Telkom Kenya Limited Vs John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)* 2014 eKLR, cited by LA Achode J. in the case of *Re Estate of Kinuthia Mabuti (Deceased)* Miscellaneous Application P&A No. 158 of 2017, 2018 eKLR, the Court of Appeal (Githinji, Karanja and Kiage JJAS) observed 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. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19<sup>th</sup> Century...”  
Emphasis mine.
14. From the foregoing, I find that I cannot re-open the matter for an application for stay of execution as this court has finally determined the issue of stay and is therefore res judicata. This means the court is functus officio. I agree with the Respondent that the best approach would have been to seek an extension of the stay orders herein or in the alternative seek the orders for stay of execution in the Court of Appeal.
15. Therefore, in view of the fact that the Court had already pronounced itself on the application for stay of execution, this Court will not deliberate on the same again. It has no jurisdiction to do so. The Court is functus officio on the issue of stay of execution and its terms. Consequently, I find that the application dated 20.09.2022 is devoid of merit and therefore I dismiss it with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023.**

In the presence of Mageto for Momanyi for Appellant and defendant present in person.

Court assistant: Leadys



Interpretation: English/Kiswahili

**A.K. KANIARU**

**JUDGE**

