



**Ong'ondo v Ndirangu (Environment & Land Miscellaneous Case
2A of 2023) [2023] KEELC 20327 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20327 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE 2A OF 2023**

JA MOGENI, J

OCTOBER 2, 2023

BETWEEN

ISAAC NYAMWEYA ONG'ONDO TENANT

AND

RACHAEL WAKONYO NDIRANGU LANDLADY

RULING

1. I have before me an application and a Notice of Preliminary Objection for determination. The Landlord/Applicant filed a Notice of Motion Application dated 4/06/2023 which was brought pursuant to Article 40 and 159 of *the Constitution* of Kenya 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 45 Rules 1 and Order 10 Rule 11 of the *Civil Procedure Rules* 2010. The Landlady/Applicant is seeking for the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to review and set aside the decision issued on 27/04/2023 pending hearing and determination of this Application.
 3. That the costs of this Application be provided for.
2. The Application is premised on the grounds cited at the foot of the application and it is further grounded on the Supporting Affidavit of Rachael Wakonyo Ndirangu, the Landlady/Applicant sworn on 4/06/2023.
3. Before the Application could be heard, the Tenant/Respondent filed a Notice of Preliminary Objection dated 16/06/2023 objecting to the application on the following grounds: -
 1. The Court is functus officio as far as this matter is concerned.
 2. The Application is frivolous and thus an abuse of the Court process.



3. The Application lacks merit and deserves to be dismissed with costs.
4. On 19/06/2023, the Court directed that both the Preliminary Objection dated 16/06/2023 and the Application dated 4/06/2022 be canvassed together through written submissions and a Ruling date was reserved. Both parties duly submitted which I have considered. The Landlady/Applicant filed her written submissions dated 25/06/2023 and the Tenant/Respondent filed his written submission dated 30/06/2023.

Issues For Determination

5. I have given full consideration to the application before me as well as the Notice of Preliminary Objection. I have equally perused and considered the submissions as filed by the parties in regard thereto. I find the following issues arise for determination: -
 - i) Whether the Preliminary Objection is merited.
 - ii) Whether the Application dated 4/06/2023 is merited.

Analysis And Determination

Whether the Preliminary Objection is merited

6. I need to dispose of the preliminary objection first before considering the application on merit should it become necessary. Counsel for the Tenant asserts that this Court is functus officio as far as this matter is concerned.
7. It is the Tenant's submission that the decision reached by this Court on 28/03/2023 and issued on 27/04/2023 amounts to a judgment and should not be disturbed at all.
8. The doctrine of 'Functus Officio' was stated by the Court of Appeal in the case of *Telcom Kenya Ltd -vs- John Ochanda [2014]* eKLR 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-

The general rule that 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. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”

9. In expounding on the functus officio doctrine, the Supreme Court in Raila Odinga -vs- Iebc & 3 Others Petition No. 5 of 2013 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, which is in the following words: -

“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.”



10. In addition, the Supreme court also referred to the case of Jersey Evening Post Limited –vs- A. Thani [2002] JLR 542 at pg. 550 where the Court stated: -

“ 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.”

11. The landlady submits that the Preliminary Objection should be struck out as it is the same tenant and his advocates after realizing that their mischief has been defeated, have responded alleging that the court is functus officio. That the miscellaneous proceedings proceeded undefended and this was a miscellaneous application and not a main suit and thus the issue of functus officio does not apply. The court only becomes functus officio only after a judgment or award has been perfected by a decree or formal order. Which had not been done in this case.

12. It is not in dispute that this Court granted prayer 1 of the Tenant’s application dated 30/01/2023 wherein it ordered that there be a stay on the execution of the ruling issued on 19/01/2023. The file was thereafter closed. The landlady thereafter filed an application seeking to have the Order of this Court given on 28/03/2023 and issued on 27/04/2023 set aside. The decision by the Supreme Court in Raila Odinga –Vs- the IEBC & 3 others (Supra) apply in the circumstances of this case.

13. It is my considered view that the doctrine of functus officio is not closed in an application for review. On the issues of jurisdiction, Section 80 Civil Procedure Act as read with Order 45 Civil Procedure Rules gives court jurisdiction to review a judgment or an order on the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or account or could not be produced by him at the time the decree was passed or the order made or an account of some mistake or error apparent on the face of the record or for any other reason, decision to obtain a review of the decree or order. As such, the Tenant’s preliminary objection dated 16/06/2023 does not succeed on this ground.

14. It is therefore the finding of this Court that the Preliminary Objection dated 16/06/2023 is devoid of merit and the same is hereby dismissed.

Whether the Application dated 4/06/2023 is merited

15. The disposal of the preliminary objection takes me back to the Landlady/applicant’s application. The landlady/applicant has filed the current Application for review and setting aside of the decision of this Court dated 28/03/2023 in which a stay on the execution of the ruling issued on 19/01/2023 by the Tribunal was granted.

16. The landlady/applicant is seeking for an order that this Court sets aside the Ruling as she claims that she was never served with any application by the Tenant/Respondent. She avers that she has never appointed the firm of E.S Ochieng & Company Advocates as indicated by the Applicant in their application to represent her. Further, she contends that she was not accorded a right to fair hearing having not been served with the Application and given a right to reply.

17. Having given that brief history, the question will be, whether under the circumstances of this case, the landlady/applicant has met the threshold for review orders.



18. The law governing review orders is Order 45 rule (1) of the *Civil Procedure Rules*. For such orders to issue, the applicant must prove that there is discovery of new or important matter or evidence, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was made or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons.
19. It is incumbent upon the applicant to prove the above ingredients before this court can exercise its unfettered discretion to grant the orders in his favour. In the case of *Asset Recovery v Charity Wangui Gethi and 3 Others (2020)* eKLR, the Court of Appeal had this to say: -

“In an application for review, as envisaged under Order 45 of the Civil Procedure Rules, the grounds which ought to be established are conclusive. An applicant must establish: that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made; that there has been a mistake or error apparent on the face of the record or: any “other sufficient reason”. The ground “other sufficient reason” has been held to be consonant with the first two grounds: See *Kuria v Shah* [1990] KLR 316. Additionally, the applicant must exhibit that he acted expeditiously.”
20. The landlady/Applicant has essentially maintained that she was never served with any application by the Tenant or the Advocate for the tenant. The Landlady/ Applicant submits that she has never appointed the Firm of E.S Ochieng & Company as indicated by the tenant in their application to represent her. This is the reason the said firm never entered appearance nor replied to the application if they were ever served.
21. It is her case that the Affidavit of service dated 17/03/2023 alleging serving the Advocates is misplaced as the said firm never even had instructions from the applicant herein. The Tenant/Advocate appeared in this court and lied not twice but four (4) times indicating the application was served on the Landlady/ Respondent which is a fabricated lie. A quick perusal of the affidavit does not show the proof of email service was effected upon. She submitted that she was only served with the Order dated 28/03/2023 in person by the tenant Advocate on 5/05/2023 at her home.
22. From the record, the landlady filed her application dated 6/09/2022 in the Tribunal in an attempt to demonstrate that she filed her reference in person and not through any representation by any advocate. The order given on 21/03/2023 by the Tribunal that she has adduced before this Court also shows that it given in the presence of the Landlady in person. But I also note that there is a Tribunal Order given on 19/01/2023 in the presence of Opiyo for the landlady and the Ruling of the Tribunal also confirms that the landlady was represented by the firm of E.S Ochieng & Company Advocates. There is no evidence that the Ruling was ever disputed by the landlady on the grounds that it stated that the landlady was represented by counsel as opposed to self-representation as she now alleges.
23. Landlady submitted that the Tenant did not even adduce a notice of appointment to support his allegations. She also relied on Order 5 Rule 6 of the Civil Procedure Rules on Mode of Service which indicates that Service on a defendant shall be made in person unless he has an agent/Advocate on record.
24. I wish to draw the attention of the landlady/applicant to the ruling of the Tribunal filed as evidence before this Court which indeed mentions that the landlady was represented by the law firm of E.S Ochieng & Company Advocates. The affidavit of service filed by the Tenant dated 17/03/2023 shows that the Tenant served the landlady through her advocates on record on her behalf in the Tribunal matter. The email address used to effect service upon the firm of E.S Ochieng & Company Advocates



was eopiyo94@gmail.com. Furthermore, I note that the Order issued on 3/02/2023 but given on 19/01/2023 by Hon. A. Muma, Vice Chair of the BPRT indicates that one Opiyo was present for the landlady. The Ruling given by the Tribunal also states that the judgement was delivered virtually by Hon. A. Muma on 19/01/2023 in the presence of Opiyo for the landlord. For these reasons I am not inclined that the Landlady/Applicant has met the threshold to warrant review or setting aside orders.

25. Aside from the above, on the face of the application, the Landlady/Applicant has not proved any of the ingredients under Order 45 (1) of the *Civil Procedure Rules* to warrant review of the order given on 28/03/2023. From the face of the record, there is no error apparent nor mistake or discovery of any new evidence or material facts or any other sufficient reason to warrant review or setting aside of the stay of execution orders.
26. In the result, it is my finding that the Application dated 4/06/2023 is not merited and the same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF OCTOBER 2023.

MOGENI J

JUDGE

In the virtual presence of

Mr Kuria Ndegwa for the Applicant

Mr. Mwambi for the Respondent

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

