Kubuta & 2 others v Kubuta & 7 others (Environment & Land Case 37 of 2018) [2022] KEELC 15678 (KLR) (3 June 2022) (Ruling)

Neutral citation: [2022] KEELC 15678 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT & LAND CASE 37 OF 2018

EC CHERONO, J

JUNE 3, 2022

BETWEEN

JOHNSON MACHARIA KUBUTA ..... 1ST PLAINTIFF

ESTHER KAGONDU KUBUTA ..... 2ND PLAINTIFF

JANE WANJA KUBUTA ..... 3RD PLAINTIFF

AND

WINFRED WANJIKU KUBUTA ..... 1ST DEFENDANT

WILSON WACHIRA KUBUTA ..... 2ND DEFENDANT

MADARINE WANJIRA KUBUTA ..... 3RD DEFENDANT

WINSTONE MBURU MURIITHI ..... 4TH DEFENDANT

GRISHON KARIUKI MURIUKI ..... 5TH DEFENDANT

SAMUEL GITAU MBAU ..... 6TH DEFENDANT

EPHANTUS NURIUKI MUGO ..... 7TH DEFENDANT

EDWARD NYAGAH GICHACHI ..... 8TH DEFENDANT

RULING

1. The plaintiffs filed a notice of motion dated February 2, 2022 on February 15, 2022 whereby they seek the following orders: -

    a. That the Honourable Court be pleased to grant leave to the 1st plaintiff/applicant to remove his trees on title number Baragwe/Kariru/794 within thirty days from the date hereof.

b. That the Honourable Court be pleased to grant leave to the 2nd plaintiff/applicant to remove her trees on title number Kabare/Kiritine62 and Kabare/Kiritine/72 within thirty days from the date hereof.

c. That the officer in charge Kianyaga Police Station do ensure compliance.

d. That the costs of this application be provided for.

2. The application was opposed by way of a Replying Affidavit sworn by the 2nd defendant on February 24, 2022.

3. The application was canvassed by way of affidavit evidence.

Applicants' Case:

4. The applicants' case is that the main suit was settled by way of a consent which was recorded on October 25, 2019 and rectified on November 16, 2021 due to typographical errors.

5. They stated that the 1st plaintiff ought to be allowed to remove his trees on areas of title number Baragwe/Kariru/794 which he does not occupy.

6. They stated that the 2nd Plaintiff should also be allowed to remove her trees planted on land parcel no. Kabare/Kiritine/62 and 72.

7. They stated that the orders sought are not prejudicial to other parties as the 1st and 2nd plaintiffs/ applicants seek to reap where they had not sowed.

Respondents' Case

8. The Respondents case is that all parties herein had a meeting that addressed all the issues in controversy and a comprehensive consent order was recorded on October 25, 2019.

9. They stated that the plaintiffs were attempting to amend the terms of the consent through the back door and that the issue of developments was captured in paragraph 3 of the consent order.

10. They stated that the trees growing on the said parcels of land were planted by their parents and that the 2nd Plaintiff had already cut down the trees that fell on her portion.

11. They stated that the 1st and 2nd plaintiffs are seeking to sanitize their attempted trespass to other persons' parcels of land which can easily precipitate into a breach of peace.

12. They urged that the court to have the application dismissed with costs.

Analysis:

13. I have considered the application, the replying affidavit and the applicable law.

14. I have also perused the court record and confirm that indeed on October 25, 2019, the parties herein through their advocates on record compromised this suit by a consent which was adopted as an order of the court.

15. The 1st and 2nd Plaintiff are now seeking to remove trees on land parcels Baragwe/Kariru/794, Kabare/ Kiritine/ 62 and Kabare/Kiritine/72. Photographs of the said trees have been annexed as annexures EKK3 and EKK4A & 4B.

16. The respondents have opposed the application on grounds that the same amounts to amending the consent that had been entered by the parties through the back door and that the trees were planted by their parents.

17. It is this court's view that once it adopted the consent order mentioned herein above, the court became functus officio as the consent disposed of the suit with finality. 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] e KLR the Court of Appeal held that: -

> " 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
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> 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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> 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. v J.O. Rose Engineering Corp*., [1934] S.C.R. 186"
>
> The Supreme Court in Raila OdingaVs 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."

18. I agree with the above decision by the superior court which is evident that a court can only review and/or interfere with its final decision where there is a slip in drawing it up, or where there is an error manifest on the face of the record.

19. The applicants have not proved any of the above exceptions and there is therefore, no justification to interfere with the consent order by allowing the application herein.

Conclusion

20. In view of the aforesaid matters, I find the application dated February 2, 2022 without merit and the same is hereby dismissed with costs. It is so ordered.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 3RD DAY OF JUNE, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of-;

1) M/S Amba H/B for Ngigi Gichoya for Plaintiffs

2) Mr. Mugo H/B for Maina Kagio for Defendant

3) Kabuta – Court Assistant.