



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO 19 OF 2017

PETER MUCHOKI NJUGUNA.....PLAINTIFF/RESPONDENT

VS

ELIAS MWORORO KAMAU.....DEFENDANT/APPLICANT

RULING

1. The Defendant/Applicant filed an application dated 28/11/2018 seeking interalia;
 - a. Spent.
 - b. An eviction order be issued against the Plaintiff/Respondent pursuant to the Judgment delivered in this case on 12/4/18.
 - c. That the Officer Commanding Station Ndakaini Police Station to supervise eviction of the Plaintiff from Loc.16/Mbugiti/2102.
 - d. The Defendant further prays for costs of the application.
2. The application is preferred under the provisions of Section 100 and Section 1(A) & 1(B) of the Civil Procedure Act and all other enabling provisions of the law and is grounded on the averments that the Plaintiff/Respondents' suit was dismissed on 12/4/18 where the Court declined to grant the orders of Adverse Possession against the Defendant. The Defendant now complains that the Plaintiff had declined to vacate the land despite the Court's judgment confirming that he is the bonafide owner of the suit land.
3. Further that the Plaintiff has been served with a notice to vacate but has declined to vacate the land.
4. It is further grounded on the supporting affidavit of Elias Mwororo Kamau, the Defendant herein who has attached a certificate of the title deed, a 3 months' notice to vacate issued to the Plaintiff on 17/9/12, copies of the Originating Summons that were filed after the notice to vacate was issued, a copy of the judgment of the Court and a further notice to vacate issued on 14/5/18.
5. The Defendant/Applicant avers that the Plaintiff declined to vacate when the first notice to vacate dated 17/9/12 was issued and instead filed the present suit to claim Adverse Possession.
6. After the suit was dismissed the Plaintiff was given a further 60 days pursuant to notice to vacate dated 14/5/18, he has not vacated nor has he filed an appeal. The Defence laments that his continued stay is oppressive to him as the Plaintiff already has his land. The Plaintiff has threatened violence and has been abusing the Defendant's workers provoking them to a fight.
7. The application is opposed vide the replying affidavit of J N Kirubi, Counsel for the Plaintiff/Respondent. The Advocate depones that he is competent to swear the affidavit in response to the instant application having being in conduct of the matter on behalf of the Plaintiff. That the application is vexatious, frivolous and an abuse of Court process and ought to be struck out.
8. The Plaintiff vide the said affidavit contends that the Court lacks jurisdiction to issue eviction orders pursuant to judgment in the case. That the suit was dismissed and there was no countersuit by the Applicant. There were no further orders in favour of eviction and the Defendant cannot move the Court for such orders as the Court would be acting out of its scope so far as pleadings are concerned.
9. Further that there is no order capable of being executed in favour of the party herein. The Plaintiff's case is that the Applicant ought to have filed a fresh suit for eviction.

10. The Plaintiff/Respondent reiterated his grounds of opposition in the replying affidavit and contends that the Court is *functus officio* in absence of any other order after the dismissal.

11. The Defendant/Applicant relies on section 1A of the Civil Procedure Act and submits that calling fresh evidence in another suit would not be against the proportionate resolution of disputes as per the overriding objectives of the Court. Also that the issue of ownership had already been determined in this case.

12. The following issues are framed for determination;-

- a. Whether the Court has jurisdiction to issue orders after judgment.
- b. Whether the Court can issue eviction orders in this case.
- c. What orders may be preferred.

13. The Plaintiff/Respondent has opposed the application on the ground that the Court is *functus officio*. In the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** the Supreme Court of Kenya held that a Court becomes *functus officio* only after a judgment or award has been perfected by a decree or formal .The Court rendered itself thus:

“[18] ... Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“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.”

14. In the case of **Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR** the Supreme Court of Kenya further held that:

“It is a general principle of law that a Court after passing Judgment, becomes *functus officio* and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

15. **Black’s Law Dictionary 970 (10th ed. 2014)** states that in law, a judgment is a decision of a Court regarding the rights and liabilities of parties in a legal action or proceeding. A judgment is the final Court order regarding the rights and liabilities of the parties; it resolves all the contested issues and terminates the law suit. It is the Court’s final and official pronouncement of the law on action that was pending before it. A judgment has the effect of terminating the jurisdiction of the Court that delivered the judgment. Save as expressly provided for by law (for example in revisionary jurisdiction or under the slip rule) a judgment makes the Court *functus officio* and transfers jurisdiction to an appellate Court if appeal is allowed. It marks the end of litigation before the Court that pronounced the judgment. When used in relation to a Court, *functus officio* means that once a Court has passed a judgment after a lawful hearing, it cannot reopen the case.

16. In this case the judgement was rendered by the honourable Court on the 12/4/18. The Applicant did not advert any counterclaim in respect to orders of eviction. The orders granted by this Court on 12/4/18 do not include eviction. The Court has no basis on which it can grant such orders. This application cannot be in furtherance of any execution orders granted by the Court in favour of the Applicant.

17. In response to issue a and b, the Court answers in the negative.

18. It is to be noted that the application is brought *inter alia* under section 100 of Civil Procedure Act. The section provides as follows;

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

19. The application under consideration does not relate to an amendment of any pleading. The Notice of Motion is brought under the wrong provisions of the law.

20. In the end the application is for dismissal. It is dismissed with costs payable by the Applicant.

Orders accordingly.

DELIVERED, DATED & SIGNED AT MURANG’A THIS 4TH DAY OF JULY 2019.

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of:

Mr Ndege HB for Mr Kirubi for the Plaintiff/Respondent

Ndegwa HB for Kamau Mwangi for the Defendant/Applicant

Irene and Njeri, Court Assistants