



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of the Late Joab Odero Odero (Deceased) (Succession Cause
227 of 1993) [2025] KEHC 6404 (KLR) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 6404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 227 OF 1993**

JM OMIDO, J

MARCH 17, 2025

IN THE MATTER OF THE ESTATE OF THE LATE JOAB ODERO ODERO (DECEASED)

BETWEEN

JANE ADHIAMBO ODERO APPLICANT

AND

MARK OPIYO ODERO RESPONDENT

RULING

1. Before me is the 2nd Administratrix's application dated 27th February, 2023 seeking the following orders:
 - a. That this honourable Court be pleased to order and direct that the Respondent Mark Opiyo Odero, his agents, servants and/or representatives be evicted from the suit property known as Kisumu/Pandpieri/833.
 - b. That the eviction order be executed/effected by the Court Bailiff with the assistance of the Officer Commanding Central Police Station Kisumu, supervising and providing security.
 - c. That the Respondent be ordered to pay costs of the application and all other attendant costs that the Applicant shall incur whilst executing the eviction order.
2. It is to be noted from the record that on 24th November, 2022 an order was granted by this court (Kamau, J) vide the court's ruling on the Notice of Motion dated 29th September, 2021, (which was allowed in its terms), inter alia that the Respondent Mark Opiyo Odero, his agents, servants and/or representatives do forthwith vacate the property Kisumu/Pandpieri/833.
3. The grounds upon which the 2nd Administratrix has presented her application are on the face of the Motion and are that:



- a. That the Respondent herein has refused to vacate the suit property despite being served with the court order of 24th October, 2022.
 - b. That the Respondent has refused to comply with the terms of the ruling delivered on 24th October, 2022.
 - c. That the Respondent was ordered to vacate the said suit property.
4. The application is supported by the affidavit of the 2nd Administratrix/Applicant sworn on 5th February, 2024, which expounds on the above grounds. The 1st Administratrix Anne Atieno Odero supports the application through her affidavit sworn on 5th February, 2024.
 5. The application is resisted by the Respondent Mark Opiyo Odero, who to that end filed Grounds of Opposition dated 28th January, 2024. The response is three-pronged and is in precis to the effect that; the court lacks jurisdiction to issue the order sought; the court is in any event functus officio; and that the procedures of statute under Sections 152B, 152E and 152F of the *Land Act* must be strictly followed when effecting an eviction. The Respondent thus urges that this court cannot in the circumstances issue orders of eviction against the Respondent.
 6. The court directed that the application be canvassed by way of written submissions. The 2nd Administratrix/Applicant and the Respondent filed their respective submissions and were allowed to highlight the same.
 7. It is instructive from the record that the Respondent's applications before this court and even the Court of Appeal in Civil Application No. E051 of 2023 seeking to stay the order of 24th November, 2022 were unsuccessful. Thus then, whereas Kamau J's order remains in place, the Respondent has failed to obey and/or comply with its terms by vacating the property in question, as ordered.
 8. As above stated, the first ground that the Respondent urges is that this court lacks the jurisdiction to grant the orders sought as it is presently constituted as a probate court and cannot issue an order of eviction. The Respondent relied on the authorities of *In Re Estate of Laban Mogire Magogo (Deceased) [2020] eKLR* in which the court dismissed an application by a party for an order that sought to compel the Deputy Registrar to execute conveyance instruments so as to enable transmission of land, on the reason that the High Court had no jurisdiction to delve into matters of transmission of land.
 9. The court in that case associated itself with the reasoning in *In Re Estate of Reuben Mugesami Bulimu (Deceased) [2020] KLR*.
 10. The second reason upon which the application is resisted, as proffered by the Respondent is that this court having already pronounced itself in judgement, is functus officio and therefore not clothed with jurisdiction to issue further orders, particularly the order that the 2nd Respondent seeks.
 11. On that argument, the Respondent relied on the authorities of *John Gilbert Ouma v Kenya Ferry Services [2021] eKLR*, where the court cited with approval the authority of *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited [2014] eKLR* in which a holding was made that:

“...functus officio is an enduring principle of law that prevents the reopening of a matter before a court that rendered the final decisions thereon...”



12. The Respondent further placed reliance on the authority of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR in which the court observed as follows:

“....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 to the same matter....the principle is that once such decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive.”

13. The third argument that the Respondent presents is that the law that applies to evictions from private land in Kenya is to be found under Sections 152B, 152E and 152F of the *Land Act*, whereby an elaborate procedure is outlined on effecting such evictions. It is urged by the Respondent, while relying on the authorities of *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 245 and *Peter Muturi Njuguna v Kenya Wildlife Service* [2017] eKLR that the procedures laid down in the above sections must be strictly followed in effecting evictions.

14. I will proceed to address seriatim the three grounds raised by the Respondent.

15. On the point that this court is a probate court and cannot issue an order of eviction, I have carefully read the decisions of *Re Estate of Laban Mogire* (sic) and the quoted text in *In Re Estate of Reuben Mugesami* and it is clear to me that the decisions are distinguishable in that the court’s in the cases were dealing with situations where applications had been presented to the High Court for the Deputy Registrar to transmit property by executing documents to that end.

16. In the present case, the application before me is not one seeking an order that would amount to the property in question being transmitted from one person or entity to another by way of a conveyance. The authorities are therefore not apt in opposing the 2nd Respondent’s application.

17. The second ground presented by the Respondent is that this court, having entered judgement, is *functus officio* and therefore not clothed with jurisdiction to issue further orders, particularly that sought in the application subject to which this ruling is made. I will consult case law on what superior courts have said on the *functus officio* principle.

18. In the case of *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR, the court held that:

“It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein.”

(Underlined emphasis).

19. In *Morris Kiruja Mpungu & another v Margret Ngiri Muchiri & another* [2021] eKLR, the court observed as follows:

“Similarly in *Raila Odinga v IEBC & 3 Others* Petition No. 5 of 2013 the Supreme Court of Kenya cited with approval the following passage from “*The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law*” by Daniel Malan Pretorius:-

...“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.”

In addition, the Supreme Court also referred to the case of Jersey Evening Post Limited v 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.”

Having regard to the above authorities I humbly opine that the court is not functus officio. This is because the application as framed seem to seek orders to enforce the judgement and decree of the court.”

(Underlined emphasis).

20. The Court of Appeal in Telkom Kenya Limited v John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR 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.”

21. The court proceeded to render itself as follows:

“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550: also cited and applied by the Supreme Court;

“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 or adjudication must be taken to a higher court if that right is available.”

(Underlined emphasis).

22. Lastly, in Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others [2018] eKLR, the court observed on the doctrine of functus officio that:

“I understand the doctrine, like its sister, the res judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the



merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.”

(Underlined emphasis).

23. The jurisprudence that emerges from the authorities above, in my understanding is that the doctrine of *functus officio* does not prevent a court from taking further proceedings towards facilitating and/or supplementing its processes, as long as such further proceedings are not merit based. The court is not barred from taking further proceedings towards ensuring that its decision is realized and that proceedings are only fully concluded when judgement or order of the court has been perfected.
24. In the present case which was filed in 1993, the court on 24th November, 2022 ordered that the Respondent vacates the property known as Kisumu/Pandpieri/833. The Respondent has for a period of about two and a half years, continued to disobey the said order of this court. Frustrated, the 2nd Administratrix has come back to this court to seek an eviction order against the Respondent, whose effect, if granted, will be to give effect to the order of the court issued on 24th November, 2022.
25. As we have seen above, the doctrine of *functus officio* only bars a merit based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. The order sought for eviction cannot be said to be merit based as it has the effect of realizing the order of the court directing the Respondent to vacate the property. As such, taking guidance from the decisions above, the prayer sought in the 2nd Administratrix's application cannot be said to be *functus officio*, least so as argued by a party that has continued to disobey the orders of this court requiring him to vacate from the said property.
26. The third and last point taken by the Respondent is that under Sections 152B, 152E and 152F of the *Land Act*, there is an elaborate procedure of effecting evictions and that the same has not been followed by the 2nd Administratrix in pursuing her application.
27. In that respect, the decision of *Pasha Enterprises Ltd v Kenya Farmers Association & another; County Government of Machakos (Interested Party)* (Environment & Land Case 130 of 2015) [2023] KEELC 22131 (KLR) (6 December 2023) (Ruling) addressed the three provisions of the *Land Act* as follows:

“Therefore, the import of the provisions of the *Land Act* above is that where a person is in unlawful occupation of another's land and where the owner wishes to take vacant possession without filing suit, they must comply with procedures for eviction as per the *Land Act* by among other matters, issuing a 90 day notice to the person said to be in an unlawful occupation, so that the latter can have the opportunity to seek redress from court if they dispute the eviction. On whether a party who has a judgment requiring vacant possession from the opposing party and in default, eviction orders to issue, like in the instant case should comply with *Land Act*, my view is that the provisions of the *Land Act* cited by the applicant do not apply. This is because a judgment declares the parties rights and requiring a decree holder granted vacant possession to comply with the above provisions of the *Land Act* is akin to placing impotence on the judgment. In this case, the applicant has since January 2019 been made aware that they need to grant the plaintiff vacant possession, yet



they have refused to comply. I therefore hold and find that the decree holder is not under duty to comply with sections 152B, 152 E and 152 F of Land Act as the court has already pronounced itself on the matter and issued eviction orders, hence the said provisions do not apply in the circumstances herein.”

(Underlined emphasis).

28. It is to be noted that from the decision above, and I am persuaded to that effect, that the procedures under the above provisions of the Land Act relate to situations where an owner of land or the person in charge thereof seeks to evict unlawful occupiers of the land in question without first filing suit. The procedures do not relate to situations where the rights of the parties have been determined through court orders or decrees. As I have stated above, the purport of the 2nd Administratrix’s application is to give effect to the court order issued on 24th November, 2022, which the Respondent has blatantly continued to disobey.
29. Being of the above persuasion regarding the application and the objections to the same, I reach the result that the 2nd Administratrix’s application is merited. There is need to uphold the sanctity of court orders and guard against disobedience of the same and abuse of the process of the court by litigation, as has been exhibited by the Respondent.
30. To that end, I make the following orders on the Motion dated 27th February, 2023:
 - a. An order is hereby issued for the eviction of the Respondent Mark Opiyo Odero, his agents, servants or representatives from the suit property known as KISUMU/PANDPIERI/833.
 - b. The eviction order issued in (a) above shall be executed and or effected by the Court Bailiff upon the expiry of seven (7) days from the date of service of this order and/or ruling upon the Respondent Mark Opiyo Odero and further that the Officer Commanding Central Police Station, Kisumu shall provide security during the eviction exercise. For avoidance of doubt, the role of the Officer Commanding Central Police Station shall be limited to providing security.
 - c. The Respondent Mark Opiyo Odero shall bear the costs of this application and the eviction exercise.
 - d. This file is hereby closed.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 17TH DAY OF MARCH, 2025.

JOE M. OMIDO

JUDGE

For 1st Administratrix: Mr. Rakoro For Mr. Owino.

For 2nd Administratrix: Mr. Rakoro.

For Respondent: Mr. Ogenga.

Court Assistants: Mr. Ngoge & Mr. Juma.

Mr. Ogenga: I seek stay of execution for 60 days.

Court: Order no. (b) is express that there is a window period of at least 7 days from the date of service of the order or ruling.

The Respondent shall however be at liberty to make a formal application for stay.

Mr. Ogenga: I seek leave to appeal.



Mr. Rakoro: No objection.

Court: Leave to appeal is granted to the Respondent.

JOE M. OMIDO

JUDGE

