



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC NO. 218 OF 2012

JAMIN KIOMBE LIDODO.....PLAINTIFF

VERSUS

EMILY JERONO KIOMBE.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL

(On behalf of the Soy Land Dispute Tribunal

and District Registrar Uasin Gishu County).....2ND DEFENDANT

JAMES KEMEI & 14 OTHERS..... APPLICANTS

RULING

[NOTICE OF MOTION DATED 25TH JUNE, 2020]

1. The applicants filed a notice of motion dated 25th June, 2020 seeking for the following orders *inter alia*:

- i. THAT there be a stay of execution of the eviction order in this suit pending the hearing and determination of this motion.
- ii. THAT the court be pleased to find that the claimants/ applicants are in possession of the land parcel known as MOI'S BRIDGE/MOI'S BRIDGE BLOCK 8 (NARWANA) ADC/68 in good faith on their own account and/or account of the 1st defendant/decree — holder and it makes an order that they ought not to be evicted in the interests of justice.
- iii. THAT the court be pleased to make a finding that the claimants/applicants are not bound by the eviction decree/order and they ought not to be evicted from the land parcel known as MOI'S BRIDGE/MOI'S BRIDGE BLOCK 8 (NARWANA) ADC/68 since they were not parties to this suit.

The application is based on the five (5) grounds on its face and supported by the affidavit sworn by James Kemei, the 1st applicant, on the 25th June, 2020.

2. The in opposition to the aforesaid application, the 1st defendant filed the replying affidavit sworn on the 7th July, 2020 wherein she depones that the application has been overtaken by events as the eviction exercise has already been executed.
3. That the 2nd defendant responded to the application through their notice of preliminary objection dated the 22nd of April 2021, stating that it is defective, an abuse of court process and the applicants are without *locus standi*.
4. That on the 21st July, 2020 and 10th May 2021, directions were taken to the effect that the application and preliminary objection be canvassed together through written submissions. The learned counsel for the 1st defendant filed their submissions dated the 28th October, 2020 and 13th April 2021, while that for the applicants and the 2nd defendant filed theirs dated the 19th march 2021 and 22nd April 2021 respectively. The submissions are as summarized hereinbelow;

A. That the 1st defendant submitted that this court is *functus officio* thus it cannot entertain the applicants' application. To buttress this submission the 1st defendant relied on the definition of *functus officio* approved by the Supreme Court in **RAILA ODINGA & 2 OTHERS V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS [2013] eKLR**, cited with

approval by 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** as follows:

“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.”

That the 1st defendant further submitted that the application is *res judicata* and it should not be entertained by the court since it contravenes **section 7 of the Civil Procedure Act**. The learned counsel relied on the decision in the case of **OMONDI & ANOTHER V NATIONAL BANK OF KENYA LTD & 2 OTHERS [2001] eKLR** where it was held thus:

“Parties cannot evade the doctrine of res judicata by merely adding other parties of causes of action in a subsequent suit.”

The 1st defendant submitted that the eviction has already taken place, and that the court has already made a determination that she is the lawful owner and proprietor of the suit land in issue herein. That therefore, the applicants’ claim for entitlements on the basis of overriding interests, and or on the basis of sale agreements annexed to their supporting affidavit, filed alongside this claim cannot be sustained in law. The 1st defendant reiterated that the court has already made a determination of an application seeking for stay and therefore, this matter is *res judicata*. That the application offends **Order 9 Rule 1(a) and (b)** and **Rule 2** as no notice of appointment was filed by counsel on record for the applicants. That the application should be dismissed with costs.

B. The applicants submitted that their application is made on the basis of **Order 22, Rule 84 of the Civil Procedure Rules**, and **Sections 1A, 1B, 3 and 3A of the Civil Procedure Rules**. The applicant relied on the provisions **section 30 of the Registered Land Act, Chapter 300 of Laws of Kenya, (Repealed)**, as saved by **section 107 (1) of the Land Registration Act No. 3 of 2012**. That they are bona fide occupants of the suit land for over 23 years with the knowledge of the 1st defendant. The applicants relied on the decision in **GRACE WANJIKU NDIRANGU V NDIRANGU JUMA KERU (2017) eKLR**, where *Waithaka J*, held as follows;

“28. Although the Tribunal found the applicant to have been the owner of the suit property, it clearly did not order that he be given possession. Although possession is a necessary incidence of ownership of immovable property, given the fact that possession of land belonging to another is an overriding interest to ownership, the trial court ought to have satisfied itself that the appellant had no legally recognizable interest in the suit property before issuing the orders against her.

29. Such a course is inescapable from a reading of order 22 rule 82 sub-rule 2 with rule 84 and 86 of the Civil Procedure Rules. By dint of the said provisions of the law, the trial magistrate ought to have satisfied herself that the appellant had no justifiable claim to the suit property before issuing any adverse orders to her.

30. A review of the ruling of the court shows that the trial magistrate did not carry out the investigation contemplated under the said provisions of the law but merely proceeded on the basis that there existed a decree of the court that the applicant had been unable to execute because of what he termed legal technicalities.

31. In the absence of any evidence that the appellant had no bonafide claim to the suit property, I find and hold that the decision of the trial court was unjustified.

32. The upshot of the forgoing is that the appellant's appeal has merit and is allowed as prayed.”

That the applicants submit that the court cannot be *functus officio* when the law provides a right and a remedy that is exercisable by a person. More so the Court has never made a pronouncement on the motion filed by the applicants with finality. In **JERSY EVENING POST LIMITED -VS- ALTHANI [2002] JLR 542 AT 550** it was held that:

“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.”

That their application should therefore, be allowed with costs.

(C) The 2nd defendant submitted that the applicants have no *locus standi* to make an application in a claim that they are not parties to, and that they did not apply to be enjoined in the matter when it was still on going. The learned counsel for the 2nd defendant referred to the case of **JUSTUS ALOO OGEKA & 7 OTHERS V REGISTRAR OF TRADE UNIONS 2 OTHERS [2017] eKLR**, where the Court of Appeal held thus:

“Besides, and as pointed out by both counsel for the 1st and 3rd respondents, the fact that the union was not enjoined in the proceedings means that they have no locus standi... Having failed to be enjoined in the proceedings, we too are of the considered view that the Union has no loci standi to file the motion before us.”

That as the applicants have not applied to be enjoined in this suit, their instant application is therefore irregular and wanting. That the

applicants are strangers to this finalised suit, and their application should be struck out with costs.

5. That I have considered the grounds on the application, the affidavit evidence filed by the parties, grounds on the notice of preliminary objection, the written submissions filed by the parties' learned counsel, the superior courts decisions cited therein, the record and come to the following conclusions:

(a) That it is necessary to start by determining whether the applicants have the requisite *locus standi* to file the instant application. That *Locus standi* is defined in the **Black's Law Dictionary, 8th Edition (page 960)** as **"the right to bring an action or to be heard in a given forum"**.

That in the case of **SISILIA NYAKOE & ANOTHER V ATTORNEY GENERAL & 4 OTHERS [2021] eKLR**, the Court held as follows:

"It is clear that locus standi is the right to appear and be heard in court or other proceedings and literally, it means 'a place of standing'. Therefore, if a party is found to have no locus standi, then it means he or she cannot be heard even on whether or not he has a case worth listening to."

And in the case of **JULIAN ADOYO ONGUNGA & ANOTHER V FRANCIS KIBERENGE BONDEVA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF FANUEL EVANS AMUDAVI, DECEASED) [2016] eKLR**, the court held;

".. a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings."

(b) That I have perused the record and it confirms the submission of the defendants that the applicants were not parties to the suit; they did not seek to be enjoined in the suit while it was still ongoing; and have not sought in the instant application to be enjoined as parties to the suit. That they therefore have no *locus standi* to file the instant application in this suit that has already been heard and determined on its merits vide the judgement delivered on the 20th December, 2018. That subsequent to the said judgement, the 1st defendant filed the application for security during execution dated the 26th April 2019, while the plaintiff filed the one dated the 23rd July 2019, seeking for stay of execution orders. That the two applications were heard together and determined through the ruling delivered by this court on the 9th April, 2020. That it is clear from the said ruling that the plaintiff's application was dismissed with costs while that of the 1st defendant was allowed with costs in the following words;

"That the OCS, Moi's Bridge Police Station, do provide security during the eviction of the plaintiff, his servants and or agents from L. R. Moi's Bridge/Moi's Bridge block 8 (Natwana ADC)/68, upon the usual payment of fees made by the 1st defendant"

That the applicants were also not parties to the aforesaid two applications. That I therefore find that the applicants have no *locus standi* to file the application herein as they are strangers to the suit.

(c) That the orders that the applicants seek if granted, would adversely affect the 1st defendant's enjoyment of the fruits of the judgement delivered on 20th December, 2018 which is still in force. That the matters that were for determination in this suit have been determined with finality by this court, and I agree with the defendants' submissions that this court is *functus officio*.

(d) That as the application is evidently unmeritorious, the respondents are entitled to costs under **section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

6. That in view of the foregoing conclusions, I find that the application herein lacks merit and is hereby dismissed with costs to the 1st and 2nd defendants.

It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JUNE, 2021.

S. M. KIBUNJA

ENVIRONMENT & LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFF: ABSENT

DEFENDANTS: ABSENT

APPLICANTS: ABSENT

COUNSEL: MR. NGIGI FOR PLAINTIFF

MR. MENGICH FOR 1ST DEFENDANT,

MR. KURIA FOR 2ND DEFENDANT AND

MR. KISUYA FOR MOGAMBI FOR APPLICANTS

COURT ASSISTANT: CHRISTINE