



Karanja & 6 others v County Government of Nakuru; Chomba (Interested Party) (Suing in a representative capacity as a trader and on behalf of 117 other Traders) (Petition 5 of 2015) [2024] KEHC 378 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION 5 OF 2015
HM NYAGA, J
JANUARY 24, 2024**

BETWEEN

**WILLIAM NJOROGE KARANJA 1ST PETITIONER
SAMUEL MBUGUA IKUMBI 2ND PETITIONER
SAMUEL MBUGUA NJENGA T/A VICMARK 3RD PETITIONER
NAKURU COSMETICS CENTRE LIMITED 4TH PETITIONER
FARMERS WORLD LIMITED 5TH PETITIONER
IBRAHIM MOHAMED OSMAN T/A EAGLE 6TH PETITIONER
P.G.S ENTERPRISES LIMITED 7TH PETITIONER**

AND

COUNTY GOVERNMENT OF NAKURU RESPONDENT

AND

**SAMUEL MAINA CHOMBA INTERESTED PARTY
SUING IN A REPRESENTATIVE CAPACITY AS A TRADER AND ON BEHALF
OF 117 OTHER TRADERS**

RULING

1. Before me is an application by way of Notice of Motion dated 15th June 2023 expressed to be brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Articles 48 and 159 of *the Constitution* of Kenya, Order 1 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicant seeks the following prayers;



- i. Spent.
 - ii. That the Honourable Court be pleased to join the Applicants herein as interested parties.
 - iii. Spent.
 - iv. Spent.
 - v. That judgement entered herein on 20th December, 2021 and the consequential orders/decrees subsequently issued to be set aside unconditionally and the suit be re-opened to allow the proposed interested parties to participate as they were never made party to the petition.
 - vi. That the costs of this Application be provided for.
2. The Application is premised on the grounds on its face and is supported by an affidavit of Samuel Maina Chomba sworn on his behalf and on behalf of his co-traders/Applicants on the even date.
 3. He deponed that he is a trader behind Naivas Supermarket and one of the representatives of the hawkers and traders within the said area covering Vicmark, Eastmark and Naivas Supermarket.
 4. That in the year 2013, the County Government of Nakuru saw it fit to have them stationed within the cited areas and had everyone licensed for such initiative. That then, the said areas were bushy, filthy and full of waste materials that it took their effort as traders and hawkers to conduct a serious clean up, thereby making them suitable for occupation.
 5. He asserted that as diligent traders and patriotic citizens of the nation and residents of Nakuru County, they duly paid, and continue to pay for the licenses and any relevant levies to the county as was and still is required.
 6. He averred that they have over time carried on their business in peace without any form of disturbance or impression that they were occupying spaces which they were not supposed to and that their business has varied net-worth as follows; operation with kiosks have stocks valued at over Ksh. 300,000 while the hawkers have stocks averaging Ksh. 150,000/=
 7. He contended that despite being within reach, it is unfortunate that a case was filed calling for the County Government to evict them from their said premises without their knowledge and participation in the suit yet they are directly affected by the court decision that indeed they ought to be evicted.
 8. He stated that it is so sad that they only came to know of the suit herein when the County Government served them with a seven days' notice of eviction on 12th June, 2023 which notice is actually not tenable as they have nowhere to put up their business.
 9. He stated that the Court's decision and the County Government's move to serve them with the eviction notice have devastating impacts on their lives and those who depend on them, bearing in mind the harsh economic situation they currently find themselves in.
 10. He prayed that the orders sought be granted in the interests of justice.
 11. The application is opposed by the petitioners. The 1st petitioner William Njoroge Karanja swore a replying affidavit on his behalf and on behalf of his co-petitioners on 13th July, 2023 wherein he deponed that the application is incompetent, misconceived, devoid of merit and an abuse of the court process.
 12. He averred that the Applicant has no locus standi or written or verbal authority to institute this application as the alleged traders are part of an association known as Nakuru Street Traders and Hawkers Association that has a chairperson, secretary and treasurer who would have a legal mandate



to represent the traders in such proceedings and as such the purported representation by the deponent is unfounded warranting dismissal of this application.

13. He averred that notwithstanding the aforesaid, the instant constitutional petition was instituted on 29th January, 2015 primarily challenging the respondent's process and decision of relocating the Nakuru Street traders and Hawkers from the Nakuru Central Business District Area to the service lane behind Oginga Odinga Road as the same infringed on the petitioners' rights and fundamental freedoms as enshrined in the Constitution of Kenya 2010. That the same was heard and determined on merit and judgment entered on 20th December, 2021 declaring that the respondent's decision to relocate Nakuru Street Traders and Hawkers from Nakuru Central Business District was a violation of the petitioners' constitutional rights and an order was consequently issued that the respondent do relocate the Nakuru street traders from the petitioners backyard along the service land behind Oginga Odinga Road and or any place adjacent to the petitioner's premises.
14. In view of the above, he asserted that there is no pending issue for determination and thus court is functus officio.
15. In addition, the 1st respondent stated that the respondent herein had lodged an appeal vide Notice of Appeal dated 19th January, 2022 and therefore this courts lacks jurisdiction to entertain the instant application.
16. It was his deposition that the proposed interested party/applicant has failed to demonstrate how the current judgement has failed to settle all issues arising or how their presence in the matter would have convinced the court to arrive at a different judgement/decree.
17. He averred that the applicant herein has come to court with unclean hands by failing to disclose to this court that Nakuru Street Traders and Hawkers Association, through their representatives, and an organization the traders herein are presumed to be members of, instituted a constitutional petition known as NAKURU HIGH COURT PETITION NUMBER 66 OF 2014 in which the said street traders are challenging the respondents' decision of relocating them from Nakuru central business district without being heard and without being accorded alternative designated places to carry on their business.
18. He thus believed that the only pending issue for determination is a suitable alternative area for the said traders to carry out business and that the same can be dispensed with in Nakuru High Court Petition No. 66 of 2014 and as such there is no justifiable ground for setting aside the judgement in the instant petition.
19. The Applicant swore a further affidavit in response to the aforestated Replying Affidavit on 13th October, 2023. He deponed that there is neither a provision in law restricting participation of members of a society in a suit nor a law limiting participation of a society in a suit to its officials only.
20. He contended that the petitioner has not demonstrated the existence of the acclaimed society and the purpose for which it was registered as well as the membership thereof, and that this assertion by the petitioners justifies the necessity for joinder of the interested parties herein since despite the knowledge by the petitioners of the alleged and acclaimed society, they failed to make them parties to this petition for their contribution.
21. He asserted that petitioner's annexed report of the court visit is another justification that the alleged parties to the suit do not include the Applicants herein who nonetheless have a right to be heard before any action is taken.



22. That without prejudice the mere fact that there exists another suit in itself does not bar them from seeking to participate in the suit herein, especially now that the orders that were pronounced are adverse and in potential collision with their rights and fundamental freedoms as traders carrying on business on the highlighted zones.

23. The application was urged through written submissions

Applicant's/Proposed Interested Party's Submissions

24. The Applicant submitted that pursuant to Order 1 Rule 10 of the Civil Procedure Rules, 2010 the court may join in a suit any party whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

25. In regards to the definition of an interested party, the applicant referred this court to Black's Law Dictionary, 9th Edition, and the case of Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others [2014] eKLR,

26. The Applicants also cited the case of Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR which discussed the test to apply when determining whether a party should be joined as an interested party.

27. The applicant argued that while an interested party must divulge the factual basis upon which they claim to derive an interest in the proceedings, it is irrelevant to the court at that point, whether that factual basis is merited or not. In support of this proposition, reliance was placed on the case of Catherine Nyambura v Director of Public Prosecutions & 3 others [2018] eKLR.

28. The applicant further relied on the case of Francis Kariuki Muruatetu & Another v Republic & 5 Others Petition No. 15 & 16 of 2016 [2016] eKLR where the Supreme Court set out the principles applicable in considering the question of whether a person qualifies to be joined as an interested party.

29. The Applicant thus submitted that they have identifiable and proximate stake in this proceedings for reasons that the genesis of this petition relates to the question of their relocation by the respondent post judgment.

30. Regarding the prejudice that they may suffer in the event orders sought are not granted, the intended interested parties contended that they have plied their trade on and along the subject lanes/spaces from the year 2013 upon approved allocation by the respondent, religiously paying for trade licenses and other levies and therefore it was against the principles of natural justice to have the petition determined and have adverse orders affecting them issued without being granted a chance to be heard; should the respondent be allowed to effect the orders granted, there is real fear that huge population shall have their sources of income cut off and jobs lost and many condemned to destitution owing to the current economic situation in the country; and unless such orders are granted, he is apprehensive that the respondents are bound to proceed with eviction of the traders and hawkers from their premises and places of carrying out trade, being subjects of the petition.

31. Lastly, the intended interested party submitted that they have set out facts of their case in their supporting affidavit and further affidavit and as such it would be unjust if this court was left to decide this case on account of incomplete facts as to the core issue at play in these proceedings.

Petitioners/Respondents' Submissions

32. On whether the applicants are entitled to be enjoined as interested parties in this matter, the petitioners submitted in the negative for the following reasons :-



33. First, the petitioners argue that the court is functus officio since this matter was heard on merit and judgement issued and in addition the Respondents have preferred an appeal against the decision of this honourable.
34. In support of this position, the Petitioners relied on the *Mathenge Gitonga & Co Advocates v Kabatia & Co Advocates; Charles SC Kiberut & 41 others (Interested parties)* [2019] eKLR where it made reference to the case of *Telkom Kenya Ltd v John Ochanda* [2014] e KLR, the Court of Appeal, while relying on *Jersey Evening Post Ltd v AI Thani* [2002] JLR held as follows:
- “A court is functus when it has performed all its duties in a particular case.....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.”
35. In further support of the above proposition reliance was also placed on the court of appeal decision in *Nyeri Civil Application No. 21 of 2013 – Dickson Murichu Muriuki Versus Timothy Kagondu Muriuki & Others*.
36. Secondly, the petitioners argue that the prayer to be enjoined as an interested party is not automatic right and the applicants have not satisfied the court how their enjoinder is so necessary that lack thereof this honourable court was not able to address all issues arising. In support of this proposition reliance was placed in the case of *Skov Estate Ltd & Others vs Agricultural Development Corporation* [2017] eKLR which the court explained the circumstances under which a person can be joined as an interested party in a matter.
37. On whether or not the Applicant is entitled to orders of re-opening the suit for hearing and determination afresh, the petitioners submitted that reopening of the instant suit would amount to asking this honourable court to seat on an appeal of its own judgement. Reliance was placed on the case of *Raila Odinga & 2 Others vs IEBC & 3 Others* [2013] eKLR for the proposition that according to the functus officio 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.
38. The petitioners urged this court to dismiss the application with costs to them.

Analysis & Determination

39. The issues that crystalize for determination are as follows: -
- i. Whether this court is functus officio or not.
 - ii. Whether the Applicants should be joined as Interested Parties in the proceedings herein.
40. Before I consider the first issue, let me restate the law on joinder of parties to a suit.
41. Order 1 Rule 10(2) of the Civil Procedure Rules states as follows: -
- “The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant



or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”

42. Thus a party may be joined to a suit either as a plaintiff, a defendant or as an interested party. The applicants have sought to be joined as interested parties.

43. Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 also describes who an interested party is. It provides as follows;

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;

44. Black’s Law Dictionary defines an Interested Party as “a party who has a recognizable stake (and therefore standing) in the matter.”

45. The Supreme Court of Kenya in *Communications Commission of Kenya and 4 Others ...Vs... Royal Media Services Limited & 7 Others* Petition No. 15 OF [2014] eKLR relied on its earlier decision in the MUMO MATEMO case where the Court in defining who an Interested Party is, and held as follows:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:

- a) what is the intended party’s state and relevance in the proceedings and
- b) will the intended interested party suffer any prejudice if denied joinder?”

46. The law on joinder of interested parties to suits was also extensively considered by the Supreme Court of Kenya in the case of *Francis K. Muruatetu and another v. Republic & 5 others* (supra). The court set out identifiable key elements for consideration in an application for joinder as an Interested Party. The elements are as follows: -

- “a. The Personal interest or stake that the party has in the matter must be set out in the application. The Interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- b. The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.



- c. Lastly, a party must, in its application, set out the case and/or submission it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”

47. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* (supra), the court explained circumstances when an interested party ought to be joined in a proceeding. He stated thus;

“A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty”.

48. Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be joined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

49. The said Order 1 Rule 10(2) clearly provides for joining parties at any stage of the proceedings. In this instant case Judgment has already been rendered, and the Applicants have sought in this application for the setting aside of the impugned judgement.

50. It is now well settled that there is no law that bars the Applicants from seeking to be joined in the suit after Judgment has been delivered as a court can always order a suit to start de novo, if the Applicants establish legal interest in the suit. In the case of *Jeremiah Mghanga Msafari –vs- Millicent Zighe Mwachala & 3 Others* [2021] eKLR, the Court held as follows:-

“From the above quoted provisions and case law, it is not correct for Mr. Nyange to claim that there is no provision known in law that provides for an interested party more so after judgment has been delivered. In the case of *Elton Homes vs Davis & others* (2019) eKLR, the court allowed joinder of an Interested Party after Judgment had been entered between two principals without involving him yet he was in occupation of the property from which he was being evicted. The court recognized that the Intended Interest Party had a constitutional right to be heard;

The court observed that; “*the constitution* of Kenya is very clear on the right to protection of one’s property and the said property cannot be arbitrary(sic) be taken away from such an owner without being heard or accorded an opportunity to ventilate his case”



It is trite that joinder of an Interested Party is meant to safeguard parties who may otherwise be ignored or side lined by a malicious party/s with the sole purpose of disenfranchising a party's inalienable right of being heard before being condemned. Further, it is cost saving as it avoids multiple suits when one suit can solve the claim once and for all. It is my finding that the appellant is entitled to a hearing as an interested party being the registered owner of the property in question. His claim should not be dismissed prematurely by being denied the right of hearing. There is no greater prejudice in starting the case denovo than denying the appellant the right to be heard.”

51. Having set out the law it is important to look at the objection raised by the petitioners, namely that this court is functus officio in so far as the dispute between them and the respondent is concerned.
52. The petitioners submitted that the court became functus officio after it delivered its judgement on 20th December,2021. It was also their position that this court lacks jurisdiction to handle this application as the Respondent has already filed a Notice of Appeal against the entire judgement of this court and as such this matter is no longer available before this court.
53. Functus officio is a principle of law that prevents the reopening of a matter before the same Court that rendered the final decision. If a party establishes that the court is functus officio, the court will have no business determining the matter further.
54. Blacks Dictionary defines functus officio as having performed his or her office without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.
55. The Supreme Court of Kenya in the case of Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, 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 which reads: -

“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.”
56. In Jersey Evening Post Ltd vs Ai Thani (2002) JLR 542 at 550, it was held thus:

“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”.



57. As per the decision of the Court of Appeal in *Telkom Kenya Limited vs John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, the *functus officio* doctrine does not allow;

“ a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

58. It is not in dispute that a judgement was delivered by this court on 20th December, 2021.

59. So what was the nature of the claim by the petitioners? Their position was that the decision by the Respondent to relocate the hawkers to the premises in question was unconstitutional as they, as affected parties, were not involved in the process that led to the Respondent’s decision. In his judgment, Ngugi, J. (as he then was) held as follows;

“While I am not persuaded, on the material provided, that a case has been made out that the relocation of the traders had led to the infringement of the Petitioners’ right to a clean environment, I easily find that the relocation has led to the severe denudation of the economic value of the Petitioners’ Property. Besides, it was done without subjecting it to the required public participation and consultation and in clear violation of various Acts of Parliament including the Physical Planning Act and the County Government Act.”

60. The ratio decidendi of the said judgment was simply that the decision to relocate the hawkers to the premises in question was unconstitutional for want of public participation, including the petitioners, in the process that affected them. All the issues between the petitioners and the respondent herein were fully determined by the court.

61. In my view this court is *functus officio* in the determination of the constitutionality of the respondent’s decision to relocate the traders is concerned. There is nothing that the application will do to change that decision. Since the Respondent preferred an appeal, the mandate to rescind that decision now lies with the Court of Appeal, not this court.

62. While the applicants contend that the instant application does not purport to re-litigate the issues raised in this petition, I think that this is exactly what will happen if the application is to be allowed. The question is, will their participation change the finding that there was no public participation in the decision to relocate the applicants to the premises in question? I do not think so.

63. Although touted as an application brought by a new set of applicants and whose only interest is to protect their proprietary rights under certain business agreements entered into between them and the Respondent, there is nothing that they can bring to the suit that will change the course of the decision already made.

64. Accordingly, I agree with the petitioners’ argument that the Court is *functus officio*.

65. The decision by this court was based on the lack of public participation in the process to relocate the hawkers. The Respondent was dissatisfied with this Court’s judgement and it preferred an appeal vide a Notice of Appeal dated 19th January, 2022. That position further fortifies the finding that this court is *functus officio*. I think that this court ought to down its tools and let the appeal proceed, and not engage in an exercise in futility.

66. In my opinion, the Respondent must be held culpable for the situation the applicants find themselves in. It was fully aware of the decision of the court. It lodged a Notice of Appeal but apparently, no further steps were taken to prosecute the intended appeal. Neither did it take steps to remedy the



situation since the decision was delivered in December 2021. Nothing prevented the Respondent from engaging all stakeholders in the process of relocation of the hawkers. As a result, it now faces two unwanted situations- the application for contempt of court by the petitioners for not removing the hawkers from the premises and the opposition to the removal of the hawkers from the said premises by the applicants. I do not envy the Respondent. It has to find a way to disentangle itself from the mess it finds itself in.

67. While I appreciate the concerns by the applicants, I don't think that their joinder will alter the position that there is a lawful judgment of the court that is subject to an appeal.
68. Having considered the submissions by both parties, it is my considered opinion that although the Applicants have a recognizable stake in the matter at hand, as far as the suit between the petitioners and the respondent is concerned, this court has already rendered a decision.
69. In conclusion, I find that in so far as the determination that the Respondent's decision in question was unconstitutional, this court is functus officio. It can only be set aside by the appellate court.
70. Consequently, the application dated 15th June 2023 is disallowed.
71. Given the nature of the dispute and recognizing that the applicants had a legitimate concern over the intended eviction, there shall be no orders as costs.
72. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Tanga for applicants

Mr. Muriithi for petitioners

