



LBB v MWW (Civil Suit 5 of 2019) [2024] KEHC 8893 (KLR) (Civ) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT 5 OF 2019
HK CHEMITEI, J
JULY 25, 2024**

BETWEEN

LBB APPLICANT

AND

MWW RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 4th April, 2023 filed by the Applicant, LBB seeking for Orders That:
 - a. This honourable court be and is hereby pleased to compel the Respondent being the party in possession of the suit property, to allow the Applicant access into the suit property known as Sub – division No [Particulars Withheld] in Mombasa County. Further, that the Respondent as joint owner of the property, be compelled to cater for half of the cost of valuation.
 - b. In the alternative, this honourable court be and is hereby pleased to issue an order directing the Respondent herein to carry out a valuation of the suit property known as Sub – division No [Particulars Withheld] in Mombasa County and deposit the resulting valuation report in court within thirty (30) days from the date of this order.
 - c. This honourable court be and is hereby pleased to order the Respondent, being the party in possession of the suit property by paying to her 50% of the suit property’s current value or in the alternative be compelled to offer the property for sale with a view of equally sharing the proceeds thereof with the Applicant as per the judgment of this court dated 30th June, 2022.
 - d. The costs of this application be borne by the Respondent.
2. The application is supported by affidavit sworn by LBB on 4th April, 2023. She avers inter alia that they married under luhya customary law in the year 2004 and the marriage was dissolved on 30th September,



2019. Her application for declaration of matrimonial property was heard and determined through judgment delivered on 30th June, 2022 which held that the suit property is matrimonial property having been acquired during the marriage and registered in the spouses' joint names.

3. The court proceeded to direct that the suit property be disposed off and each party to get 50% of the proceeds of the sale. She accused the Respondent of being uncooperative in settling on a neutral valuer that was proposed to be appointed by the Institute of Surveyors in Kenya, stating that he was in the process of challenging the orders of 30th June, 2022 at the court of appeal. She is not aware however of any case filed in the court of appeal in this regard.
4. She also accused the Respondent of denying her access to the suit property for its valuation which is in his sole possession and he has rented it out to a third party without her consent as joint owner and he is enjoying all the rent alone and to her exclusion.
5. The application is opposed vide replying affidavit sworn by MWW sworn on 20th September, 2023. He avers inter alia that the Applicant is on breach of the court orders of 30th June, 2022 to wit she has refused to surrender the three vehicles which he was buying and were yet to be transferred to his name.
6. That she has not been denied access to the suit property and she was free to take a valuer of her choice to value it at her own cost. He deponed that all the rental income derived from the suit property is used to service the loan that was used for its purchase. He was also willing to hire a valuer and file the latest report in court.
7. The Applicant has filed written submissions dated 9th February, 2024 placing reliance on the following among others:-
 - a. Section 119 of the *Evidence Act* which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, private and public business in relation to the facts of a particular case.”
 - b. *Commission for Human Rights and Justice (CHRJ) & another v Chief Officer, Medical Services County Government of Mombasa & 3 others* (Constitutional Petition No E003 of 2022) [2022] KEHC 12994 (KLR) where the court stated that, “The word “shall” when used in a legal manner imports a form of command of mandate. It is not permissive, it is mandatory. The word “shall” in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation...”
 - c. *Republic v Non – Governmental Organizations Ex Parte Linda Bonyo & 4 others; Philip Opiyo Sadjaj & 5 others (Interested Parties)* [2020] eKLR where the court stated that, “The Longman Dictionary of the English Language states that “shall” is used to express a command or exhortation or what is legally mandatory. Ordinarily the words “shall” and “must” are mandatory and the word “may” is directory...”
 - d. *Njeru & another v Nyakundi* (Civil Appeal E021 of 2021) [2022] KEHC 13963 where the court stated that, “It is not trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averment of the pleadings goes to no issue and must be disregarded...”
 - e. Nairobi High Court Constitutional Petition No 606 of 2014: *L. A. W & 2 others v Marura Maternity & Nursing Home & 3 others* (2023) eKLR where the court observed that, “What a court endeavors to do upon confirming any infringement is to grant an appropriate remedy.



Even in instances where a party fails to ask for a specific relief, a court depending on the nature of the matter ought to craft an appropriate relief.”

8. The Respondent has filed written submissions as well dated 15th April, 2024. He has placed reliance on the following:-

a. *Mitu-bell Welfare Society v Kenya Airports Authority & 2 others: Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) where the court stated as follows:-

“Consequently, the court opined that a court of law should not act in vail and issue orders and directions that it cannot implement... It concluded that post judgment supervision is not a function of the court as implementation and execution of judgment is governed by specific rules and that resort to those rules must be made.”

b. *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR where the court stated as follows:

“17. The doctrine of *functus officio* was considered 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 where the court 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.”

18. The appellant’s counsel asserted in his written submissions that the trial magistrate upon delivering the judgment on 4th October, 2018, became *functus officio*.

...the court of appeal held as follows on the *functus officio* doctrine-

“*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.

The general rule that 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 Acts of Appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions....”

20. The supreme court of Kenya in the case of *Raila Odinga & 2 others v 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.”

21. Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of *functus officio* in the following terms: -

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

22. 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.”

Background

9. The instant application emanates from the judgment on the amended originating summons dated 19th December, 2019 and filed on 20th December, 2019 that was delivered by Hon. Judge A. O. Muchelule on 30th June, 2022. The court decided as follows:-

“ 14. The Nyali home was acquired and built by the Respondent and he registered it in the joint names. Section 14 (b) of the Act states that where property is acquired during the marriage in the names of the spouses jointly, there shall be rebuttable presumption that the beneficial interest in the matrimonial property are equal. Although the Respondent alone bought and developed the Nyali property, he deliberately got it registered it in their joint names. I find that his intention was clear. They each will have an equal stake in the property. I determine that the Applicant’s claim to the Nyali property was 50%. In reaching this decision, I have taken into consideration her non – monetary contribution.

16. The same shall be for the three vehicles which the Respondent was solely buying and which were yet to be transferred to his name.

17. The Nyali property shall be valued and sold and 50% of the proceeds shall go to the Applicant, although either party shall be at liberty to pay off the other.”

Analysis and Determination

10. The issues herein are clear and straight forward, namely, in compliance of the aforesaid court order how should the property be divided into two?
11. There is no appeal filed by the Respondent exhibited herein and if there is one, then it is to his own knowledge. Even if there was one there is no stay of this court’s judgement.



12. The issue of the three vehicles in my view does not concern this application. The Respondent has not raised it and if it is true that the Applicant is holding the same then she as well needs to comply with the judgement of the court which vested the said cars to the Respondent. Nonetheless this court shall concern itself for now with the house.
13. The Respondent has not opposed the idea of valuing the house. All that he has said is that he was also ready to have it valued by a professional valuer.
14. This is the same language spoken by the Applicant.
15. For the above reasons and without belaboring the issue it is directed that:-
 - (a) Within 30 days from the date herein the parties must agree to have a joint registered professional valuer to carry out the valuation of the premises known as [Particulars Withheld] situated at mainland Mombasa county and in the event of any disagreement then each of the parties shall be free to instruct an independent valuer of their respective choice.
 - (b) The said report shall be remitted to this court within 60 days from the date herein.
 - (c) In the event of joint valuation the parties shall share out the costs of the valuer and in case of independent valuers each of the parties shall meet their respective costs.
 - (d) The Respondent or his tenants and or agents shall grant free access to the premises' to the Applicant and the valuers.
 - (e) After the valuations have been done and agreed upon each of the parties shall be at liberty to buy out each other in the first instance and in the event of non-agreement they shall be at liberty to seek an independent purchaser which should be concluded on or before 31st December 2024.
 - (f) This matter shall be mentioned on 5th November 2024 to confirm compliance and further orders.
 - (g) Costs shall be in the cause.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 25TH DAY OF JULY 2024.

H K CHEMITEI

JUDGE

