REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ELC APPEAL NO. 4 OF 2021

(FORMERLY KAKAMEGA HC CIVIL APPEAL NO. 177 OF 2010)

HESBON OBOTE VIKIRU.....APPELLANT/APPLICANT

VERSUS

MICHEL MUGERA KAHUNGA.....RESPONDENT

RULING

A. Introduction

1. This Ruling is in respect of the Appellant's Notice of Motion Application dated 12th July 2021 brought under certificate of urgency pursuant to the provisions of Section 3A of the Civil Procedure Act, herein called the Application.

2. The Application seeks the following orders:

a) That service of the Application hereto be dispensed with in the first instance

b) That the restriction registered on the suit parcel of land L.R NO. KAKAMEGA/KEGOYE/35 be removed and withdrawn

c) That the District land Registrar Vihiga and the District Land Surveyor Vihiga be directed to visit and reinstate boundary between the Appellant's L.R NO. KAKAKMEGA/KEGOYE/35 and the Respondent's L.R NO. KAKAMEGA /KEGOYE/32

d) That an order for eviction be issued to forcefully remove the Respondent from the suit L.R NO. KAKAMEGA/KEGOYE/35 by himself his family members and/or relatives agents and/or servants, and/or anybody else claiming under him from the suit land and all illegal structures build on the said parcel of land be demolished.

e) That the officer commanding Mbale police state be directed to provide security during the execution of the orders herein.

f) That costs of this suit be paid by the Respondents.

3. **The grounds on which the** Application is based are contained in the Application and the Supporting Affidavit.

4. The Respondent opposes the Application vide the grounds contained in his Replying Affidavit sworn on 29th September 2021 and annextures thereto.

5. The parties agreed to canvass the application by way of written submissions pursuant to which both parties filed their written submissions.

Background of the case

6. The court record shows that the genesis of this matter was a dispute initiated under the now repealed Land Disputes Tribunals Act No. 18 of 1990 by the Respondent herein against the Applicant in the Land Disputes Tribunal at Vihiga over ownership of a parcel of land known as KAKAMEGA/KEGOYE/35, herein called the suit land.

7. The Tribunal at Vihiga adjudicated the dispute and made a decision dated 10th June 2010 in favour of the Respondent to the effect that the suit land be subdivided into 2 equal portions so that both the Applicant and the Respondent get 0.16 Ha each. The decision was filed in court and a decree issued in terms thereof on 15th February 2012.

8. The Applicant being aggrieved by the decision of the Tribunal, filed an appeal to the Provincial Appeals Committee which upon hearing, upheld the decision of the Tribunal and dismissed the Appeal.

9. Consequently, the Applicant appealed to the High Court at Kakamega vide his Memorandum of Appeal dated 31st December 2010 which set down six (6) grounds of Appeal all challenging the propriety of the decision of the Provincial Appeals Committee.

10. The High Court heard the Appeal and rendered its judgment on 18th June 2015 wherein it allowed the Appeal and ordered that the suit land shall remain in the name of the Applicant.

11. No further action took place in the file since the date of the judgment till about 6 years later on 15th July 2021 when the present Application was filed.

12. With the establishment of the Environment and Land Court at Vihiga, the matter was transferred by the High Court at Kakamega to the Environment and Land Court at Vihiga for hearing and disposal of the Application.

13. Apart from the Appeal herein, it would appear, the parties initiated other actions namely KAKAMEGA ELC NO. 82 OF 2019, VIHIGA PMCC NO. 140 OF 2018 and KAKAMEGA ELC 68 OF 2014 (OS).

The Applicant's case

14. The Applicant's case is that vide its judgment delivered on 18th June 2015, the court decided the Appeal herein in his favor and ordered that the suit land remains in his name. That the Respondent has refused to move out voluntarily and deliver up vacant possession of the suit land to him. That the Respondent and his agents destroyed the original boundary features between the suit land and the Respondent's land parcel known as KAKAMEGA/KEGOYE/32.

15. The Applicant who appears in person filed his written submissions dated 7th October 2021. He outlines the background of the dispute, reiterates the averments in the Supporting Affidavit and denies that the matter is *res judicata*. He makes additional prayers in the submissions including a prayer for damages for trespass amounting to Kshs 1.4 million and special damages of Kshs 500,000 and prays that the Application be allowed.

The Respondent's case

16. The Respondent's case is contained in the Replying affidavit and annextures thereto. It is his case that the Application is tainted with falsehoods, is res judicata, that the Applicant is guilty of laches and non-material disclosure.

17. He contends that the Application cannot stand on its own without a substantive suit or appeal and that no court has ever issued orders for his eviction from the suit land which he has occupied since he was born in 1974 to date. That the Application is unmeritorious and prays that the same be dismissed.

18. Written submission were filed by the firm of Osango & Company advocates on behalf of the Respondent who submitted that the Application is *res judicata*, misconceived, bad in law, incompetent and an abuse of the court process. That orders of eviction sought cannot be granted vide an application. The Respondent relies on a reported decision between the same parties over the suit land herein namely: **Michael Mugera Kihugwa & Another vs Hesbon Obote Vikiru [2021] eKLR** and prays that the Application be dismissed.

Issues for determination

19. I have read the Application, Supporting Affidavit, Replying Affidavit and the Submissions filed by the parties and I identify the following as the issues for determination:

a) Whether or not the Application is properly before the court.

b) Whether or not the Application is res judicata.

c) Whether or not the Application has merit

d) ***What orders should be made on costs.***

Analysis and determination

20. In deciding the issue of whether the Application is properly before the court I will consider whether the court has jurisdiction to entertain the application or not.

21. The Applicant submitted that since the Appeal was determined in his favour and a decree issued accordingly, the Respondent has not preferred any appeal against the judgment but has nonetheless refused to move out of the suit land voluntarily. He further submits that since the issue of eviction has not been canvassed in any of the cases that have taken place between the parties over the same subject matter, the same is not *res judicata* and that the court has jurisdiction to grant the orders sought.

22. It was submitted on behalf of the Respondent that the prayers sought cannot be granted. That the court cannot grant orders of eviction through an Application. The Respondent submitted further that there is no substantive suit filed by the Applicant to warrant the court to hear and determine the same on merit.

23. The intervention of this court herein was invoked through an appeal challenging the decision of the Provincial Appeals Committee under the provisions of the now repealed Land Disputes Tribunals Act. The Court heard the Appeal and made a final decision in favour of the Appellant on 18th June 2015 and ordered that:

> ***"the suit land, KAKAMEGA/KEGOYE/35 shall remain in the names of the Appellant. Each party shall meet his own costs."***

24. Once the issues in the appeal were canvassed and a final decision made thereon nothing remained for further engagement of the court. The kind of orders made did not require execution or further proceedings. In my view the court became *functus officio.*

25. The Supreme Court of Kenya observed in the case of **Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR** 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 judicial power over the same matter, save as provided by law."***

26. The Court of Appeal discussed the principle of *functus officio* in the case 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** as follows:

> ***"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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th century. In Canadian case of Chandler v Alberta Association of Architects [1989] 2 S.C.R 848 Sopinka J traced the origin of the doctrine as follows:***
>
> ***'The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re St. Nazaire Co., (1979)12Ch D 88***
>
> ***The basis of it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The Rule applied only after the formal judgment had been drawn up, issued and entered and was subject to two exceptions:***
>
> ***1. Where there had been a slip in drawing it up***
>
> ***2. Where there was an error in expressing the manifest intention of the court."***

27. The Court of appeal in the **Telkom case** (supra) proceeded to clarify that:

> ***"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 a final judgment has been entered and a decree issued.***
>
> ***There do exist certain exceptions and these have been captured in Jersey Evening Post Ltd v-Ai Thani [2002] JLR 542 at 550 thus:***
>
> ***"a court is functus officio 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."***

28. Black's Law Dictionary 11th edition Bryan A. Garner Thomson Reuters 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."***

29. Applying the forgoing precedents to the present case I do find that the court in this case fully performed the original commission that was placed before it vide the Memorandum of Appeal.

30. I also do find that what the Application is asking the court to do is beyond the exceptions to the *functus officio* doctrine. The Application seeks for three substantive prayers namely: removal of a restriction placed on the suit land, reinstatement of the boundary between the suit land and the Respondent's land and an order of eviction of the Respondent and his agents from the suit land. These are not matters that can be said to be incidental or natural consequence of the court's decision. They are new matters that have never been part of the long history of this case either before the Tribunal, Provincial Appeals Committee or the Appeal herein.

31. I further find that the judgment dated 18th June 2015 being the final decision of the court herein rendered the court *functus officio* and

divested it of jurisdiction to entertain the issues in the Application.

32. If it were that this court had jurisdiction to determine the application, then it could have been guided by the following law and authorities to determine the application as follows:

33. On the issue of whether or not the Application is *res judicata* the guiding law is the provisions of Section 7 of the Civil Procedure Act.

34. The Court of Appeal while discussing the doctrine of res judicata in the case of **Accredo AG & 3 Others vs Steffano Uccelli & Another [2019] eKLR** quoted the Supreme Court and stated that

> ***"the test for determining the application of the doctrine of res judicata in any given case is spelt out under section 7 of the Civil Procedure Act. In Independent Electoral and Boundaries Commisssion vs Maina Kiai & 5 Others[2017]eKLR the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:***
>
> ***i) The suit or issue was directly and substantially in issue in a former suit***
>
> ***ii) That former suit was between the same parties or parties under whom they or any of them claim***
>
> ***iii) Those parties were litigating under the same title***
>
> ***iv) The issue was heard and finally determined in the former suit***
>
> ***v) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.***

35. The Applicant submitted that the Application is not *res judicata* as the matters raised therein have never been decided by a court of competent jurisdiction before.

36. The Respondent, on the other hand, contended that the Application was *res judicata* and provided a list and copies of previous court decisions which, according to him, render the present Application *res judicata*.

37. I have keenly read all the previous court decisions annexed to the Replying Affidavit and the Respondent's submissions. The decisions are:

a) The Judgment in the Appeal herein namely: **KAKAMEGA H.C CIVIL APPEAL NO. 177 OF 2010** (annexed to the Replying Affidavit and marked MMK1(a) which is a judgment on an appeal challenging the decision of the Provincial Appeals Committee. The issues in the application were not part of the Appeal and are not mentioned in the judgment.

b) Judgment in KAKAMEGA ELC 82 OF 2019 (annexed to the Replying Affidavit and marked MMK 1(b) wherein the Respondent herein and another person claimed ownership of the suit land sought, *inter alia*, for transfer of the suit land in their favour on the basis of a trust. The court found that the suit was *res judicata* KAKAMEGA H.C CIVIL APPEAL No. 177 OF 2010 because the issue of ownership of the suit land had been determined in the said Civil Appeal. The court struck out the suit. The issues of eviction, reinstatement of boundary or removal of restriction were not part of the claim.

c) Ruling in VIHIGA PMCC NO. 140 OF 2018 (annexed to the Replying Affidavit and marked MMK1(c)) being a ruling on an application by the Applicant herein for orders of injunction to restrain the Respondent herein and two other people from interring the remains of a deceased person on the suit land. Nothing in the ruling suggests that the issues in the present Application were issues in the matter or that they were finally decided in the Ruling.

d) A court order issued on 1st December 2014 in **KAKAMEGA ELC NO. 68 OF 2014 (O.S**) (annexed to the Replying Affidavit and marked MMK1 (c)) contains no evidence to show that the issues in the present Application arose or were decided therein.

e) Ruling relied on in the Respondent's written Submissions namely **MICHAEL MUGERA KIHUGWA & ANOTHER V HESBORN OBOTE VIKIRU [2021] eKLR**. The court dismissed the Application because it lacked basis as the suit in which it was filed did not exist, the same having already been dismissed for being *res judicata*.(see (b) herein above)

38. From the foregoing it is clear that although there have been several court actions involving the suit land and the parties herein, the issues in the present application have not been heard and finally decided as envisaged by Section 7 of the Civil Procedure Act.

39. For the above stated reasons, the court would find that the Application is not *res judicata.*

40. As to whether or not the Application has merit, the existing decision of the court on ownership of the suit land (the judgement dated 18th June 2015) is that the suit land remains in the name of the Applicant. It is not in dispute that the suit land is registered in the name of the Applicant. It is also not in dispute that the Respondent is in occupation of the suit land the aforementioned judgement notwithstanding. Though the Respondent avers that he has always remained in actual occupation and utilization of the suit land since 1974 when he was born (see paragraph 11 of the Replying Affidavit) the court already decided the issue of ownership in favour of the Applicant who in any event is

the title holder. The Respondent's suit seeking to be declared the owner on the basis of trust was struck out for being res judicata.

41. The court being guided by the overriding objective of substantive justice and the principle of equity as contained in the article 10 of the constitution would have proceeded to allow the Application. Equity will frown at a situation where a party has the title to land and a judgement of the High Court in his favour reinforcing his rights over the suit land but cannot access the land itself due to procedural technicalities. Equity will suffer no wrong without a remedy.

42. The Court of Appeal in the case of **Willy Kimutai Kitilit vs Michael Kibe [2018] eKLR** held that-

> ***"By article 10(2)(b) of the Constitution of Kenya, equity is one of the national values which binds the Courts in interpreting any law…Further by article 159(2) (e) the courts in exercising judicial authority are required to protect and promote the purposes and principles of the constitution.***

43. And in ***Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri [2014] eKLR*** the court of Appeal upheld substantive justice.

44. However, as this court is *functus officio* and in view of the foregoing analysis, I proceed to strike out the Notice of Motion Application dated 12th July 2021. Costs of the Application are awarded to the Respondent.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT VIHIGA THIS 28TH DAY OF OCTOBER 2021.

E. ASATI

JUDGE

In the presence of

Applicant in person

N/A for the Respondent

Ajevi Court Assistant.

E. ASATI

JUDGE.