



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 97 OF 2014

PETER MAKONGO AMWAYI.....PLAINTIFF

VERSUS

ISAAC SIVITARI.....DEFENDANT

BEATRICE NGESA.....INTERESTED PARTY

RULING

1. Judgment was delivered in this matter on 17th December 2019. The plaintiff's case was dismissed with costs. Subsequently, two applications were filed: Defendant's Notice of Motion dated 11th March 2021 and Plaintiff's Notice of Motion dated 3rd May 2021. This ruling is in respect of both applications.

2. The following orders are sought in Notice of Motion dated 11th March 2021:

1. *[Spent]*

2. *[Spent]*

3. *[Spent]*

4. *The Plaintiff be ordered to immediately move out and remove any structures and or buildings that the plaintiff has unlawfully erected on the portions of land occupied by the Defendant and the third party comprising part of L.R. No. Isukha/Lubao/1112 and in default the Defendant and the third party to evict the plaintiff and the said structures and buildings be removed from the portions of land occupied by the defendant and third party comprising L.R. No. Isukha/ Lubao/1112.*

5. *The costs of this application be provided for.*

3. The application is supported by an affidavit sworn by the defendant. He deposed that on 6th March 2021, the plaintiff entered into the portion of the suit property which the defendant and the interested party are occupying and started constructing a semi-permanent house. According to him, the plaintiff's conduct was in violation of the judgment. He urged the court to allow the application.

4. The plaintiff filed a replying affidavit in which he deposed that the application is an attempt at rewriting or changing the judgment. That the defendant and the interested party did not file any counterclaim and that the court did not award the suit property to them. He denied constructing any new structures on the land as alleged and urged the court to dismiss the application since, according to him, the court is *functus officio*.

5. On the other hand, Notice of Motion dated 3rd May 2021 seeks the following orders:

1. *[Spent]*

2. *THAT this honourable court be pleased to extend the time for requesting for a certified true copy of the proceedings, judgement and decree by the appellants for purposes of filing an appeal by the Plaintiff/applicant and the letter dated 12/04/2021 and received on 13/4/2021 requesting the certified true copy of the proceedings, judgement and decree be deemed as duly filed from the date of granting the leave herein.*

3. THAT this honourable court be pleased to extend the time for filing the Memorandum of appeal together with the record of appeal against the judgement of this court delivered on 17/12/2019.

4. THAT costs of this application to abide the outcome of the main appeal.

6. Notice of Motion dated 3rd May 2021 is supported by an affidavit sworn by the plaintiff. He deposed that he filed a Notice of Appeal against the judgment on 30th December 2019 but did not file a Memorandum of Appeal and a Record of Appeal within 60 days of filing the Notice of Appeal as is stipulated. He urged the court to allow the application.

7. In response, the defendant filed a replying affidavit in which he deposed that the plaintiff's Notice of Appeal as served on his advocates on record on 2nd January 2020 and that a period of over one year had passed between that date and the time of filing Notice of Motion dated 3rd May 2021. That the delay is inordinate and that the plaintiff had been indolent. He urged the court to dismiss the application.

8. The defendant and the interested party filed written submissions while the plaintiff relied entirely on the material on record. I have considered the applications, the affidavits and the submissions. The issues that arise for determination are whether this court is *functus officio* in regard to orders sought in Notice of Motion dated 11th March 2021 and whether the court has jurisdiction in regard to the prayers sought in Notice of Motion dated 3rd May 2021.

9. Jurisdiction, as has often been stated, is everything. Without it, the proceedings come to a certain end and the court cannot make any further step. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the Supreme Court emphasised the importance of jurisdiction as follows:

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...

10. The adage "litigation must come to an end" remains valid and has been refined in the doctrine of *functus officio*. While discussing the doctrine in **Raila Odinga & Others vs. IEBC & Others [2013] eKLR**, the Supreme Court of Kenya cited, with approval, a paper by **Daniel Malan Pretorius**, titled **The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law**, (2005) 122 SALJ 832, where the author discussed the concept 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."

11. Judgment in this matter having been delivered, the matter is concluded and the parties' respective claims as pleaded in their respective pleadings and as advanced before the court at trial have been determined. The plaintiff's case was dismissed. The defendant and the interested party were content to defend the plaintiff's case and seek its dismissal. They did not plead any counterclaim. The court did not make any order that the plaintiff vacates the suit property or that any structures erected by him thereon be removed. Having determined the case placed before it by the parties, this court is *functus officio* and does not have jurisdiction to consider or even grant the prayers sought in Notice of Motion dated 11th March 2021. The application is for striking out.

12. Notice of Motion dated 3rd May 2021 is stated to be brought under **Section 7** of the **Appellate Jurisdiction Act**. The section provides:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

13. The section gives the High Court and this court jurisdiction to extend the time for giving notice of intention to appeal. There is no dispute that the plaintiff timeously filed and served a Notice of Appeal against the judgment. Indeed, Notice of Motion dated 3rd May 2021 concerns extension of time for filing Memorandum of Appeal and record of appeal against the judgement as opposed to Notice of Appeal. Both Memorandum of Appeal and record of appeal are to be filed in the Court of Appeal and not this court. To that extent, it is the Court of Appeal which has jurisdiction to determine whether or not to enlarge time for filing those documents. This court has no jurisdiction in the matter. The plaintiff should move the correct court. A suit or application filed in a court devoid of jurisdiction is dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**. That is the fate which must befall Notice of Motion dated 3rd May 2021.

14. In the result, both Notice of Motion dated 11th March 2021 and Notice of Motion dated 3rd May 2021 are struck out. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF NOVEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff

No appearance for the Defendant and the Interested Party

Court Assistant: E. Juma