



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC JR NO. 9 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN LAND DISPUTES

TRIBUNAL KAKAMEGA MUNICIPALITY.....RESPONDENT

AND

ALFRED N. ANDATI.....1ST INTERESTED PARTY

ESTHER B.U. MUHONJA.....2ND INTERESTED PARTY

STANLEY M. LIJINGA.....3RD INTERESTED PARTY

ELIJAH’S FOUR SONS.....4TH INTERESTED PARTY

AMINA ABDI PFIZER.....5TH INTERESTED PARTY

JOHN OTIENDE MASIMBA.....6TH INTERESTED PARTY

EX PARTE APPLICANT: JAMES SAKWA MUKOLWE

RULING

1. This matter has had a chequered history. The suit was commenced by way of Notice of Motion seeking an order of certiorari to quash a decision of the Land Disputes Tribunal Kakamega Division made on 14th April 2009. Upon hearing the application on its merits, Said J Chitembwe J dismissed it with no order as to costs through a ruling delivered on 12th June 2014. The ruling was for all intents and purposes a judgment in the matter since it conclusively determined the suit.

2. The matter was later transferred to this court and parties have filed several applications which have led to rulings delivered by my predecessor on 14th December 2017, 25th September 2019 and 27th October 2020. The parties are now back with a new application: the 5th Interested Party’s Notice of Motion dated 6th October 2021.

3. The application seeks the following orders:

1. [Spent]

2. THAT: This honourable court be pleased to review the orders made on 12/6/2014 by Hon SAID J. CHITEMBWE empowering the deputy registrar High court Kakamega to execute and or sign in place of exparte applicant herein James Sakwa Mukolwe all related documents necessary to facilitate subdivision and transfer of land parcel Known as BUTSOTSO /SHIKOTI/4464 curving a portion thereof measuring 0.1 Ha to be registered into the names of the 5th interested party/applicant herein AMINA ABDI PFIZER and re order/empower the deputy registrar High court Kakamega to execute and or sign in place of exparte applicant herein JAMES SAKWA MUKOLWE all related documents necessary to facilitate subdivision and transfer of land parcel Known as

BUTSOTSO/SHIKOTI/ 1859 curving a portion thereof measuring 0.1 Ha to registered into the names of the 5th interested party/applicant herein AMINA ABDI PFIZER and re order/empower.

3. THAT: this honorable court be pleased to cancel and or revert back any new titles created from the original title number BUTSOTSO/SHIKOTI/4464 by rectifying the certified copy of the register of the said title and further remove any encumbrances on the said title to enable the land Registrar Kakamega County to effect new subsequent subdivision of land parcel No BUTSOTSO/SHIKOTI/1859, Transfer and registration of the said portion of 0.1 Hectares into the names of the 5th interested party/applicant.

4. THAT: Court order for cancellation of land Title BUTSOTSO/SHIKOTI/ 1859 which was obtained as a result of subdivision of land parcel no BUTSOTSO/SHIKOTI/4464 and the 5th interested party/applicant be issued with another title deed from parcel no BUTSOTSO/SHIKOTI/ 1859.

5. THAT: Costs be provided for.

4. The application is supported by an affidavit sworn by the 5th Interested Party. She deposed that she has been in occupation and utilization of a portion of the parcel of land known as Butsotso/Shikoti/ 1859 measuring 0.1 hectares for a period in excess of 12 years and that she has extensively developed it. She added that the ex parte applicant is the proprietor of the said property and that he has never been successful in evicting her. She concluded by stating that she is claiming her interest and title in the portion measuring 0.1 hectares.

5. At the hearing of the application, the 5th Interested Party relied entirely on the application and urged the court to grant her the orders. The 1st and 2nd Interested Parties who were present stated that they do not oppose the application.

6. Although the 5th Interested Party presented evidence of service of the application, the ex parte applicant, the respondent and rest of the interested parties neither attended court nor filed responses.

7. I have considered the application and the material on record. Prayer 2 of the application seeks review of the orders made by Said J. Chitembwe J on 12th June 2014.

8. Ordinarily, an application for review ought to be heard by the judge who made the order sought to be reviewed. Said J. Chitembwe J is no longer stationed at Kakamega and as noted earlier, this matter was transferred from the High Court to this court. In the circumstances, I will consider and determine the application.

9. Pursuant to **Section 80** of the **Civil Procedure Act**:

Any person who considers himself aggrieved -

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

10. Further, **Order 45 Rule 1** of the **Civil Procure Rules** provides as follows:

Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

11. Thus, the grounds upon which a litigant can seek review are the discovery of new and important matter or evidence, mistake or error apparent on the face of the record or a sufficient reason. The application must be made without unreasonable delay. The order sought to be reviewed was made on 12th June 2014, almost eight years ago. No explanation has been offered as to that lengthy delay. I find the delay to be unreasonable. That alone would in the circumstances be sufficient cause dismissal of the prayer for review.

12. Besides the unreasonable delay, the applicant has not identified any limb of **Order 45 Rule 1** upon which she seeks review. She has neither cited discovery of new and important matter or evidence nor any mistake or error apparent on the face of the record. In short, no sufficient reason has been given to warrant review.

13. Under prayers 3 and 4 of the application, the applicant seeks cancellation of title. That is a substantive relief which was neither sought nor granted in the ruling of 12th June 2014 which as I have already noted, was the judgment in this matter.

14. 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 have been determined. The court is *functus officio* and does not have jurisdiction to consider or even grant the prayers 3 and 4 of the application in this suit.

15. While discussing the doctrine of *functus officio* 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."

16. 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**. In view of the foregoing, prayers 3 and 4 of the application are for striking out.

17. Before I conclude, I must remind the parties that litigation in this matter ended on 12th June 2014 when the judgment was delivered. Any party who was dissatisfied ought to have appealed. As my sister N A Matheka J lamented in her ruling of 25th September 2019:

... this court cannot now go back and forth and repeat the orders issued was back in 2014 when the subject matter has substantially changed. The interested parties have been indolent and would need to present a fresh matter to enforce their rights if at all. ...

18. The parties must desist from filing endless and aimless applications in this matter. If they have any claim that can stand the relevant tests, they should bring and prove those claims as fresh suits.

19. In the result, I make the following orders:

- a) **Prayer 2 of Notice of Motion dated 6th October 2021 is dismissed.**
- b) **Prayer 3 and 4 of Notice of Motion dated 6th October 2021 are struck out.**
- c) **Each party shall bear own costs.**

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF DECEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Ex Parte Applicant

No appearance for the Respondent

1st, 2nd and 5th Interested Parties present

No appearance for the 3rd, 4th and 6th Interested Parties

Court Assistant: E. Juma