



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CIVIL APPEAL NO. 13 OF 2019

HABIBA SHARUHIRBO.....APPELLANT/APPLICANT

VERSUS

IBRAHIM SHARU HIRBO.....1ST RESPONDENT/RESPONDENT

ABDI SHARU HIRBO.....2ND RESPONDENT/RESPONDENT

RULING

The Appellant/Applicant has filed a notice of motion dated 10th September 2020 seeking for orders that:-

- 1. That the Hon. Court be pleased to appoint the Government Surveyor Marsabit County to conduct survey and subdivisions of suit properties Title No. Marsabit/Mountain/22 and Sagante Farm in accordance with judgement of court within 60 days from the date of issuance of the court orders hereof and to file in court his report within the said period.**
- 2. That an order of mandatory injunction do issue compelling the Respondents and/or and other party to surrender title documents of Estate properties Title No. Marsabit/Mountain/22 and Sagante Farm in court on or before lapse of 7 days from the date of issuance of the court orders hereof.**
- 3. That costs and/or incidentals on survey and sub-division process be shared equally and in default a portion of Sagante Farm be sold to cater for the same.**
- 4. THAT the OCPD Marsabit County do ensure compliance with court orders provide security during the process and/or maintenance of peace.**

The application was supported by the affidavit of the applicant wherein she deposes that the court had delivered a judgment on the appeal on the 11/3/2020 and made orders that:

- i) The appeal is merited and is hereby allowed.**
- ii) The appellant is entitled to the matrimonial home where she has been residing and that the matrimonial house shall form part of her 12.5% (1/8) share.**
- iii) All the daughters and widows shall share equally with the sons the Sagante Farm as ordered by the trial court**
- iv) The appellant is hereby appointed as the administrator of the deceased's estate and a certificate of confirmed grant.**

That after the delivery of the judgment the advocates for the applicant tried to engage the advocates for the respondent with a view to engaging a surveyor to subdivide the land so as to implement the orders of the court but the advocates for the respondent failed to co-operate. That this necessitated the applicant to file the instant application. That it is in the interests of justice that the court appoints a surveyor to subdivide the land.

The Respondents opposed the application vide grounds of opposition dated 1st April 2021 where they contend that;

- (1) The court is *functus officio* there being a judgment delivered already.**
- (2) The High Court lacks the jurisdiction to determine the matter which now falls within the jurisdiction of the Kadhi Court at Marsabit.**

The applicant was represented by the firm of **Ali & Company Advocates** while the Respondents were represented by the firm of **Ogolla Okello & Company Advocates**. The application was canvassed by way of written submissions.

The advocates for the applicant submitted that the law is that after a decree has been issued and execution ensues a party aggrieved by the process of execution can approach the court for appropriate orders. That it is the court that issued the execution process that has jurisdiction to facilitate the process of execution. That in this case the court is yet to issue a certificate of confirmation of grant. That as long as the same has not been issued the court is not *functus officio* and therefore that this court has the jurisdiction to determine the application. Counsels relied on the case of **Thunder Plumbing & Construction Ltd V Ravasm Development Company & another (2020) ECLR**, where the court cited the Court of Appeal decision in **Telkom Kenya Limited v John Ochanda** (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) (2014) ECLR, where it was 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.....

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 final judgement has been entered and a decree thereon issued.”

The advocates also cited the decision in the case of **Bellevue Development Company Limited v. Vinayak Builders Limited & another (2014) eCLR**, where the court warned against overstressing the principle of *functus officio* by holding that:-

“.....care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgement has already been rendered by the court”.

It was further submitted that as the parties have failed to agree on the appointment of a private surveyor it is important that the court issues an order for appointment of a government surveyor. That considering that the original title documents necessary for subdivision are in the custody of the respondents it is necessary that the court directs the respondents to surrender the documents of the subject land to court. That the process of execution can be impaired by costs involved in the subdivision. That the court should direct parties to share equally the costs of subdivision and if they cannot agree a portion of the estate be sold to cater for the costs.

The advocates for the respondents on the other hand submitted that the prayers being sought are unjustified as the applicant has not taken any action to effect the orders of the court. That the applicant has not informed the court of any difficulties she has encountered in enforcing the order nor has she attributed any wrongdoing on the part of the respondents.

It was further submitted that the court is *functus officio* in the matter as it has already delivered a judgment (Chitembwe J). That the prayers ought to be sought at the Kadhi's Court. Counsels relied on the holding in the case of **In re Estate of Kinuthia Mahuti (Deceased) (2018)eCLR** where the court observed that:

“ While this court is vested with adjudicative powers, once a court becomes functus officio, the only orders it can grant are review orders which are an exception to the functus officio doctrine. This was aptly summarized in the case of Jersey Evening Post Ltd vs. AlThani (2002) JLR 542 at 550 which was cited and applied by the Supreme Court in Raila Odinga & 2 others vs. Independent Electoral & Boundaries Commission & 3 others (2013) eCLR that:

“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 judgement 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.”

Analysis and Determination –

The issue before me is whether this court is *functus officio* over the matter and whether it lacks jurisdiction to entertain the instant application having already delivered a judgment in the appeal. The applicant submits that the application is pertinent to the process of execution of the court's order and therefore that the court has jurisdiction over the matter. That it is the court that issues the execution process that has jurisdiction to facilitate the execution process. The respondents on the other hand argue that this court is *functus officio* over the matter as it has already delivered its judgment over the appeal. That it is the Kadhi's Court that has jurisdiction to entertain the application.

Jurisdiction goes to the core of every proceeding that comes before a court of law. A court is required to down its tools in respect of a matter the moment it holds the opinion that it is without jurisdiction - see **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989)eCLR**.

The Black's Law Dictionary 8th Edition defines the term *functus officio* as –

“(having performed his or her office”) (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

The principles underlying the application of the doctrine of *functus officio* are ably elucidated by the authorities cited above by the respective counsels for the parties. The principles which emerge from these authorities are that the doctrine of *functus officio* does not foreclose proceedings that are incidental to or natural consequence of the final decision of the court such as execution proceedings or any other matter that the court can exercise supplementary jurisdiction – see **Bellevue Development Company Limited v Vinayak Builders Limited & Another** (supra). It is clear that what the doctrine bars is merit-based decisional re-engagement with the case once final judgment has been entered and a decree issued -see **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission** (2013)eKLR. Moreover, it is also pertinent that proceedings in a matter can only be said to be concluded with finality and the court *functus officio* when its judgment or order has been perfected -see **Raila Odinga case** (supra).

I have considered the application and the arguments from both sides. The applicant is not seeking for review of the judgment nor is she seeking to rectify any errors in the judgment. She is instead seeking for orders that will assist her in implementing the orders that were issued by this court during the appeal after she experienced difficulties in executing the orders. The applicant has explained in her supporting affidavit that her advocates wrote to the advocates for the respondents suggesting the appointment of a surveyor to sub-divide the subject land as per the orders of the court but that the advocates never made a response. A letter to the said advocates was exhibited to the application as “HS-4”. The respondents did not file an affidavit disputing the contents of the letter. I then have no reason to doubt that the applicant has attempted to engage the respondents with a view to exploring the way forward towards the implementation of the court order to no avail. The contention by the advocates for the respondents that the applicant has not taken any action to effect the orders of the court is not true.

In my considered view, the orders being sought are incidental to and direct consequence of the orders made by this court to which this court has supplementary jurisdiction to handle even after it has delivered its judgment. The orders being sought herein are not seeking any merit-based re-engagement with the case in terms of changing anything in the judgment but only to perfect the judgment over something that the court may have inadvertently overlooked. It cannot be said that the proceedings in the matter are fully and finally concluded before this court when a final decree has not been issued in the matter in the form of a confirmed grant. I hold the view that it is the court that delivers a judgment that has the power to deal with any issues that may be an impediment to the full execution of its orders. I therefore hold that it is this court that has jurisdiction to entertain the instant application and not the Kadhi’s Court. I do not subscribe to the view that this court is *functus officio* over the matter.

The upshot is that there is no merit in the grounds of opposition to the application. The grounds of opposition are thus dismissed and the application is allowed as prayed.

Orders accordingly. Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 13TH DAY OF OCTOBER, 2021.

JESSE N. NJAGI

JUDGE

In the presence of:

N/A for Appellant/Applicant

Mr. Ochieng for Respondents

Parties:

Appellant/Applicant - Present

Respondents - Absent

Court Assistant - Mr. Kashane

30 days Right of Appeal.