



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 4 OF 2014 (OS)**

PIUS MUSIMBA MUASYA.....1<sup>ST</sup> APPLICANT  
GABRIEL MUTUKU NZUKI.....2<sup>ND</sup> APPLICANT  
MALITA NDILA MUASYA.....3<sup>RD</sup> APPLICANT  
BERNARD KYALO NZAU.....4<sup>TH</sup> APPLICANT  
FRANCIS MAKAU MUASYA.....5<sup>TH</sup> APPLICANT  
MONICAH MUENI MUTUA.....6<sup>TH</sup> APPLICANT  
ROBERT MUIINDE MUINDI.....7<sup>TH</sup> APPLICANT  
CONSOLATA MUENI MUTIE.....8<sup>TH</sup> APPLICANT  
SYOMBUA MUTUA MATINA.....9<sup>TH</sup> APPLICANT  
ALPHONCE MULI MBUVI.....10<sup>TH</sup> APPLICANT  
SALOME NDUNGE MATHEKA.....11<sup>TH</sup> APPLICANT  
MICHAEL NZUKI MUTUA.....12<sup>TH</sup> APPLICANT  
JUSTINA NGONYO NDOLO.....13<sup>TH</sup> APPLICANT  
JOSEPH MUTINDA NDOLO.....14<sup>TH</sup> APPLICANT  
ANCIENT KAVUU MUASYA.....15<sup>TH</sup> APPLICANT  
DAMION PETER MUASYA.....16<sup>TH</sup> APPLICANT

**VERSUS**

ONESMUS NDOLO NGETA .....1<sup>ST</sup> RESPONDENT  
BERNARD ARUBANUS NDURA.....2<sup>ND</sup> RESPONDENT  
JOHN KIBAI KIKOLE.....3<sup>RD</sup> RESPONDENT  
STANLEY MUNYAO KIKOLE.....4<sup>TH</sup> RESPONDENT

**RULING**

1. What is before me is the Notice of Motion dated 5<sup>th</sup> March, 2019 and the Notice of Preliminary Objection dated 9<sup>th</sup> July, 2019. In the Notice of Motion dated 5<sup>th</sup> March, 2019, the Defendants/Applicants have sought for the following orders:

**a. That an order of eviction do issue against the Respondents herein for them to be evicted from the suit land known as Kangundo/Kitui/1313.**

**b. That the Officer Commanding Kangundo Police Station (OCS) do oversee the exercise of eviction and demolition of structures and provide security for law and order to be maintained.**

**c. That the cost of eviction and demolition be borne by the Respondents.**

**d. That the cost of this Application be borne by the Respondents in any event.**

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Defendant who has deponed that him, together with the other Defendants, are the registered owners of land known as Kangundo/Kitwii/1313; that the suit land belonged to their late father Elijah Kikole and that the Plaintiffs filed a suit by way of an Originating Summons.

3. According to the Defendants, the Plaintiffs/Respondents' suit was dismissed on 13<sup>th</sup> April, 2018 and that after the dismissal of the suit, the Plaintiffs/Respondents should be evicted from the land.

4. The Plaintiffs/Respondents filed a Replying Affidavit through the 1<sup>st</sup> Plaintiff/Respondent in which they deponed that after the dismissal of the suit, they filed a Notice of Appeal in the Court of Appeal; that an Application for stay of execution of the Judgment of this court is pending in the Court of Appeal and that if this Application is allowed, they stand to suffer.

5. The Plaintiffs/Respondents also filed a Notice of Preliminary Objection in which they averred that this court is *functus officio* having rendered its Judgment.

6. In his submissions, the Defendants/Applicants' advocate submitted that the Defendants/Applicants are the absolute proprietors of the suit property; that the Defendants/Applicants are entitled to exclusive possession of the suit property and that the continued occupation of the suit land by the Plaintiffs/Respondents is illegal.

7. Counsel submitted that an Appeal does not operate as stay of execution; that they are not aware of the Application for stay of execution that is pending and that litigation must come to an end.

8. The Plaintiffs/Respondents' advocate submitted that the doctrine of *functus officio* bars a court from entertaining a case it has already decided; that procedural interlocutory Applications are not allowed after Judgment and that the Preliminary Objection should be dismissed.

9. This suit was commenced by the Plaintiffs vide an Originating Summons dated 15<sup>th</sup> January, 2014. In the said Originating Summons, the Plaintiffs/Respondents sought for an order that they have acquired prescriptive rights over all that parcel of land known as Kangundo/Kitwii/1313. The court dismissed the suit on 13<sup>th</sup> April, 2018.

10. The Defendants/Applicants are now seeking for the eviction of the Plaintiffs/Respondents from the land, not by way of a suit, but by way of an Application. Having dismissed the Plaintiffs/Respondents suit, and in the absence of a cross-suit in this matter, this court cannot grant the Defendants/Applicants' Application. Indeed, the Defendants/ Applicants only available option is to either file a fresh suit for eviction, or to comply with the provisions of Section 152B and 152E of the Land Act which provides the mode of having the Plaintiffs/Respondents evicted from the suit land.

11. In the circumstances, I find the Defendants/Applicants' Application dated 5<sup>th</sup> March, 2019 to be unmeritorious. The Application is therefore dismissed without costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF APRIL, 2020.**

**O.A. ANGOTE**

**JUDGE**