



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL CASE NO. 7 OF 2018

NELLIE BENIGNUS WAMALWA.....PLAINTIFF/APPLICANT

VERSUS

RAFIKI DEPOSIT TAKING

MICRO FINANCE LTD.DEFENDANT/ RESPONDENT

RULING

The case before me was commenced by way of an Originating Summons, which was lodged at the Environment and Land Court in the year 2015.

1. By a Judgment dated 13th July 2016, Kibunja J. declared that the Respondent, **RAFIKI DEPOSIT TAKING MICRO FINANCE (K) LIMITED** had prematurely commenced the process to realize the charged property. For that reason, the learned Judge stopped the process.

2. The Court made a finding that the Respondent had not properly served the Applicant with a Notice pursuant to **Section 90** of the **Land Act**.

3. Notwithstanding the said finding, the Court made the following order;

“(c) That for the avoidance of doubt the Respondent is at liberty to commence the process to realize the charged property in accordance with the law if the loan facility is still in arrears.”

4. On 7th March 2018, the Applicant filed an application seeking an interlocutory injunction to stop the transfer of the charged property **L.R. NO. KISUMU/KONYA/4949**.

5. According to the Applicant, the sale by public auction, which was conducted on 14th December 2017 was null and void, for not complying with the court orders made on 13th July 2016.

6. The Respondent’s first reaction to the application was in the form of a Preliminary Objection.

7. It was the contention of the Respondent that the Court is functus officio and that therefore the Court was devoid of jurisdiction to hear and determine the application.

8. By an order dated 16th May 2018, the suit was transferred from the Environment and Land Court, to the High Court. Thereafter, the parties canvassed the preliminary objection by way of written submissions.

9. Whilst the Defendant asserted that it had started the process of realizing the security afresh, after the court’s judgment dated 13th July 2016, the Plaintiff faults the Defendant for introducing matters of fact through submissions.

10. Of course, the question as to whether or not the Defendant had issued fresh Notices to the Plaintiff, after July 2016 is a matter of fact.

11. It is a cardinal rule governing preliminary objections, that they must be based on facts that are agreed upon or on the facts which the party raising the objection is deemed to have accepted as having been accurately set out by the other party.

12. If there was any dispute on the facts upon which the preliminary objection is founded, the said objection would not be sustainable.
13. If the facts upon which the preliminary objection is based have to be, first, established through evidence, the said objection would not be sustainable.
14. It is however notable that the Plaintiff was asserting that the application before me was brought as a means of ensuring that there was compliance with the orders which the court had granted.
15. She says that the reason why the application was brought is to confirm whether or not the Defendant was complying with the Court orders.
16. In order to determine whether or not the Defendant had complied with the judgment of the court is a matter of fact.
17. If the Defendant were to demonstrate to the Court that it did give a fresh Notice pursuant to **Section 90** of the **Land Act**, the Court would have no hesitation in permitting the Defendant to go forward with steps to realize the security.
18. But, as already pointed out, that is a matter of fact.
19. The principle of *Functus Officio* prevents the re-opening of a matter before the Court which had already rendered its final decision on the said matter.
20. This Court had already made a decision on the issue about the non-service of a valid **Section 90** Notice, prior to the auction which had been scheduled for 2nd September 2015.
21. If the Plaintiff sought to re-open that issue, this Court would not have jurisdiction to entertain such an application, as the Court would be *functus officio*.
22. If the Plaintiff were dissatisfied with the initial decision rendered by the Court, she could only have sought to challenge the decision through an application for review of the decision.
23. In this case, the Plaintiff has not said that she was dissatisfied with the decision made on 13th July 2016.
24. If anything, the Plaintiff is saying that that decision ought to have been complied with by the Defendant, but the Plaintiff adds that the Defendant violated the Court's decision.
25. In so far as the Plaintiff was not asking the Court to re-visit the judgment, the current application is not barred by the doctrine of *functus officio*.
26. In the case of **BELLEVUE DEVELOPMENT COMPANY LIMITED Vs VINAYAK BUILDERS LIMITED & ANOTHER, HCCC NO. 571 OF 2011**, Gikonyo J. made it clear that the doctrine of *functus officio*;

“..... 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.”

27. I am in full agreement with the said view expressed by my learned brother.
28. The Preliminary Objection is overruled, with costs to the Plaintiff.

Dated, Signed and Delivered at Kisumu This 8th day of November 2018.

FRED A. OCHIENG

JUDGE