



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO. 21 OF 2015

RASSUL N. MWADZAYA.....PLAINTIFF

VERSUS

1. THE SECRETARY, COUNTY GOVERNMENT OF KILIFI

2. THE COUNTY GOVERNMENT OF KILIFI.....DEFENDANTS

RULING

1. By this Notice of Motion dated 25th April 2019, Rassul N. Mwadzaya (the Plaintiff/Applicant) prays for an order of injunction to issue restraining the Secretary County Government of Kilifi and the County Government of Kilifi (the Defendants/Respondents) from demolishing the Plaintiff's buildings and establishments on Plot No. LR 11492/350 Mariakani or in any manner whatsoever interfering with the Plaintiff's quiet use, occupation and ownership thereof pending an appeal arising from the decision of this Court made on 14th March 2019.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds that:

i) The Court dismissed the Plaintiff's suit by a Judgment and decree dated 14th March 2019;

ii) The Plaintiff has filed Civil Appeal No. 46 of 2019 against the said dismissal in the Court of Appeal;

iii) The Defendants have threatened to demolish the Plaintiff's buildings pursuant to a demolition notice issued on 4th February 2015;

iv) The Plaintiff's appeal has triable issues with a good chance of success; and

v) Unless the orders sought are granted, the Plaintiff's houses will be demolished hence rendering the appeal nugatory and the Plaintiff stands to suffer substantial loss and damage.

3. The Plaintiff's application is opposed. By a Notice of Preliminary Objection dated 27th May 2019 and filed herein on 28th May 2019, the two Defendants object to the same on the grounds:

1. That the Court is functus officio as final Judgment had already been rendered on 14th March 2019 against the Plaintiff wherein the Plaintiff's case was dismissed;

2. That it is a general principle of law that a Court after delivering Judgment, becomes functus officio and cannot revisit the Judgment on merits, or exercise a Judicial power over the same matter;

3. That the Plaintiff's application offends the provisions of order 42 Rule 6 of the Civil Procedure Rules;

4. That the Plaintiff's application is therefore incurably defective, bad in law and incompetent and ought to be struck out with costs.

4. In addition to the Notice of Preliminary Objection, the Respondents have by a Replying Affidavit sworn by the 2nd Respondent's County Attorney Bibi Fondo and filed herein on 3rd June 2019 reiterated the averments made in the objection and asserted that this Court lacks jurisdiction to grant the injunctive orders sought.

5. The Respondents further aver that the Plaintiff did not ask for a stay of execution of the Judgment when this Court delivered the same and that as such the Respondents are at liberty to execute the Judgment which was in their favour.
6. I have perused and considered the Plaintiff's application and the response thereto by the Defendant. I have equally looked at the written submissions placed before me by the Learned Advocates for the parties.
7. The Plaintiff's application is expressed to be brought among others under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules. A perusal of the said Rules would reveal that the same relate to applications for stay of execution pending an appeal. The Applicant before me does not however pray for an order of stay of execution. Instead the Plaintiff has urged this Court to grant an order of injunction restraining the Defendants from demolishing the Plaintiff's buildings or in any way interfering with the Plaintiff's quiet use and occupation of the suit property.
8. It is not in dispute that the Plaintiff's case was heard and was dismissed by this Court on 14th March 2019. Aggrieved by that decision, the Plaintiff lodged a Notice of Appeal against the said decision on 15th March 2019 and a Memorandum of Appeal in the Court of Appeal at Malindi on 10th April 2019.
9. According to the Plaintiff, by this application, it is not challenging any orders issued by this Court in its Judgment dated 14th March 2019 but is only seeking to stop the Respondents from demolishing the Plaintiff's buildings on the suit property. As it were, those were the same matters that this Court determined in the Judgment delivered herein on 14th March 2019 when it declined to issue orders of injunction stopping the Defendants from demolishing the same.
10. In this respect, I am in agreement with the Defendants that this Court had already pronounced itself on the matter and is now *functus officio*. The doctrine of *functus officio* is one of the mechanisms by means of which the law gives expression to the principle of finality. It demands for good measure that, 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. Once such a decision is made, it is (subject to any right of appeal to a superior body or functionary) final and conclusive.
11. Having pronounced itself on the matter, the dispute is no longer before this Court but in the Court of Appeal to which the Plaintiff has now moved. That Court has discretion under Rule 5(2) (b) of its Rules to grant an injunction in such proceedings where it deems appropriate and I am unable to discern why the Plaintiff would burden this Court with the present application.
12. In the premises, I am not persuaded that there is any proper basis for the application before me. I will strike it out to give the Plaintiff a chance to take it to the right forum if need be.
13. The Respondents shall have the costs thereof in any event.

Dated, signed and delivered at Malindi this 31st day of July, 2020.

J.O. OLOLA

JUDGE