



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 31 OF 2017**

**FRASHIA NJERI MUTHAKA.....PLAINTIFF/RESPONDENT**

**VS**

**GLADYS WANGUI PERIS.....1<sup>ST</sup> DEFENDANT /RESPONDENT**

**KENNETH KINUTHIA WANJIKU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ALPHAXARD KARAGU WANJIKU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant filed a Notice of Motion expressed under Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law seeking several orders, interalia; restraining orders against the Defendants/Respondents from trespassing into her portion of the suit land LOC/GITURU/72 measuring 6.9 acres; prohibitory orders stopping the Defendants from destroying the Plaintiff's crops and interfering with her quiet user and possession of the portion of the land; directing the District Land Surveyor to survey the land and set the boundary between the portions belonging to the Plaintiff and the Defendants; provision of security to supervise the survey on the land; direct the Land Registrar to register the portion of the land adjudged in favour of the Plaintiff pursuant to the judgement and the decree dated the 25/2/18.

2. The application is supported by the affidavit of the Plaintiff in which she deponed that the Court in its judgement dated 12/4/2018 granted orders in her favour and ordered that a portion of 6.9 acres on the suit land be registered in her name. That the Court found that a customary trust subsisted on the suit land and upon dissolution, the land be shared equally between the Plaintiff and the 1<sup>st</sup> Defendant. She avers that the Defendants have uprooted the boundary between the two respective portions and trespassed onto her portion in disregard of the Court orders. In addition, she states that the Defendants have destroyed her crops and threatened her with bodily harm, the result of which she and her children have been kept out of her portion of the land to the detriment of their livelihoods.

3. Further that the decree of the Court is yet to be effected because the Land Registrar has called for the formal subdivision of the suit land to facilitate the issuance of the titles to both parties.

4. The application was met with a Preliminary Objection by the Defendants on the grounds that;

- a. That the Court lacks the jurisdiction to entertain hear and determine this matter on account of the doctrine of functus officio.
- b. That the application before Court brings new causes of action that cannot be litigated by way of an application but through a fresh suit.
- c. The matter is pending before the Court of Appeal and as such out of the jurisdiction of the honourable Court.

5. When the matter came for hearing on the 26/3/2020 the parties elected to canvass the application and the Preliminary Objection by way of written submissions which have been filed on record.

6. For purposes of good order, I shall determine the Preliminary Objection and if it succeeds there will be no need to determine the Notice of Motion. However, if the Preliminary Objection fails then I shall determine the motion on its merits.

7. With respect to the Preliminary Objection the Plaintiff submitted that the judgement and the orders of this Court have not been stayed or overturned on Appeal and that this Court has not been divested of its power/ jurisdiction and discretion to grant the orders sought on grounds of being functus officio.

8. Further the Applicant contends that the orders being sought are consistent with the orders issued by the Court in the judgement for the reason that the said orders being sought in the application flow from the judgement of the Court. That the Court has power under section 3A of the Civil Procedure Act to guard against injustice and prevent the abuse of the process of the Court. That the Defendants are in contempt of the Court orders.

9. The Plaintiff further argues that since there is no order of stay of execution and that an Appeal cannot act as a stay, the conditional stay granted by the Court has since lapsed and the Defendants have neither obtained stay from this Court or the Court of Appeal. That the Court of Appeal declined to certify the application for stay as urgent and the main Appeal is yet to be admitted and the right thing to do is for the Applicant to seek remedial reliefs from this Court.

10. The Plaintiff terms the Preliminary Objection as a legal misconception which does not meet the threshold of a Preliminary Objection and urged the Court to dismiss it with costs.

11. With regard with the doctrine of *functus officio*, the Defendants have submitted that the Court delivered its judgement on the 12/4/18 and subsequently the Defendants filed an application for stay which was later compromised by a consent of the parties giving the Defendants time to file their Appeal and application at the Court of Appeal. That the Defendants filed an Appeal at the Court of Appeal vide CA No 183 of 2018 at Nyeri. In addition, the Defendant sought orders of stay of execution pending Appeal which Appeal is slated for hearing on the 14/10/2020. That the parties were directed by the Court of Appeal to file their written submissions in the said application. In conclusion that the Court is therefore now divested of jurisdiction to entertain the matter. The Defendants have relied on the cases of **Peterson Ndungu & others Vs Kenya Power & Lighting Limited (2018) eKLR** where the Court while applying the dicta in **Owners of motor Vessel Lilian S V Caltex Oil Kenya Limited (1989) KLR1** that jurisdiction is everything and without it a Court of law has no power to make one more step but to down its tools upon realizing any want of jurisdiction on its part. The case of **Raila Odinga & 2 others Vs IEBC & 3 others (2013) EKLK** was cited by the Defendants. In this case the Apex Court gave guiding principles that the *functus* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.

12. The Defendants contend that the Court having delivered its judgement in the matter and a decree having been drawn then the Court cannot be called upon to determine further issues in the case for the simple reason that the matter is now in the realm of the Court of Appeal.

13. The Defendants further submitted that the orders of injunction (restrain), prohibition et al al sought in the application create a new cause of action which cannot be entertained through an application save for filing of a fresh suit. That they are fresh prayers not included nor contemplated during the hearing of the suit and as such can only be litigated in a fresh suit and not in an interlocutory application.

14. In their further submissions the Defendants contended that since the Court of Appeal is now seized of the matter the same cannot be litigated by this Court without the likelihood of diverse orders being made. That the parties by consent subjected their dispute to the Court of Appeal by agreeing to a stay of execution pending Appeal and now cannot turn around and want to advance parallel litigation in this Court.

15. I have considered the Preliminary Objection and the submissions of the parties and the key issue for determination is whether the objection is merited.

11. A Preliminary Objection must be on a pure point of law. It helps if the point of law is precisely, briefly and clearly defined in the Notice of Preliminary Objection. In the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the locus classicus on Preliminary Objections in this region, Law JA stated:

“So far as I’m aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

12. Still in the same case, **Sir Charles Newbold JA**, stated:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

16. Is the Court *functus officio*? **Blacks Dictionary** defines *functus officio* as having performed his or her office without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

17. *Functus officio* is a principle of law that prevents the reopening of a matter before the same Court that rendered the final decision. Through this principle finality in litigation is manifested. The judge is mandated under the doctrine of *functus* to exercise authority once in relation to the same matter. Once the judge renders a decision the decision is final and conclusive and the decision cannot be reviewed or varied by the same maker.

18. Order 21 Rule 3(3) of the Civil Procedure Rules however provides exceptions to the *functus* rule. A judgement once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review.

19. Section 99 of the Civil Procedure Act provides as follows;

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties”.

20. Similarly, **Section 80 of the Civil Procedure Act** permits the Court to review its decision but under the parameters set under **Order 42 Rule 6** of the Civil Procedure Rules that is to say that the application is filed timeously, the Applicant has demonstrated substantial loss, provision of security for the due performance of the decree and for any other sufficient cause.

21. First it is important to recap the background of this matter which was filed heard and a judgement delivered by this Court on the 12/4/2018 in the following terms;

a. It is hereby declared that the 1<sup>st</sup> Defendant was registered as the owner of LOC 3/GITURU/72 in trust for herself and the Plaintiff.

b. That all the resultant titles arising from the subdivision of LOC 3/GITURU/72 and the subsequent registrations thereof being LOC 3/GITURU/1131, 1132 and 1133 in the names the 2<sup>nd</sup> -4<sup>th</sup> Defendants respectively be and are hereby declared null and void and should be cancelled.

c. The Land Registrar is hereby ordered to cancel the titles and related entries in the register and revert the land back to LOC 3/GITURU/72.

d. That the trust subsisting on LOC 3/GITURU/72 be and is hereby dissolved and the land be divided into two equal portions between the Plaintiff and the 1<sup>st</sup> Defendant along the existing delineations and possession on the ground (easterly and westerly occupation).

e. That the District Land Registrar to sign all the documents required to actualize order No d) above.

f. Costs of the suit are payable by the Defendants.

22. On the 14/5/18 the Defendants filed an application seeking stay of execution of the judgement of this Court delivered on the 12/4/18.

23. On the 31/5/18 the parties recorded a consent and compromised the application of the 14/5/18 as follows;

“That there be a stay of further execution proceedings in relation to the judgment delivered on the 12/4/18 pending the filing of the intended Appeal at the Court of Appeal. That the matter to be mentioned upon the lapse of 60 days to confirm the filing of the said Appeal.”

24. On the 25/2/2020 the Plaintiff filed a Notice of Motion dated on even dated seeking the orders interalia of restraining and prohibiting the Respondents from trespassing on to the portion of the land adjudged to the Plaintiff; prohibiting the Respondents from destroying the Applicants crops or committing acts of damage and destruction on the portion of the land; directing the District Surveyor to visit the land and survey affix and set the boundaries; issue an order for the provision of security by the local police station to keep the peace during the exercise and directing the Land Registrar, Muranga to register the Plaintiff as owner of the 6.9 acres of the land in accordance with the Judgement of the Court issued on the 2/5/2018. It is to be noted in the judgment that the last orders were granted in the said judgement in favour of the Plaintiff.

25. The orders sought by the Plaintiff when juxtaposed with the orders made by the Court are at variance (save for the last orders stated in para 24) so much so that they disclose new causes of action that were not canvassed at the hearing for which the Court concluded the case and pronounced a judgement.

26. I say so because in the case of **Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR**, the Court set out the doctrine of *functus officio* as: -

“I understand the doctrine, like its sister, the *res judicata* rule to seek to achieve finality in litigation. It is a way of a Court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other Court deal with it at a different level’. It is designed to discourage reopening a matter before the same Court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the Court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.”

27. To buttress the point raised in para 26 above, the Court notes that Section 34 of the Civil Procedure Act permits the Court to deal with issues relating to the suit in respect to execution discharge and satisfaction of the decree. It is stated in mandatory terms as follows;

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.”

28. The Plaintiff contends that no orders of stay have been granted by the Appellate Court and that the application for stay was not certified urgent. The Defendants on the other hand have informed the Court that they did file an application for stay of execution which application is scheduled for hearing on the 14/10/2020.

29. From the above submissions of the parties it is clear that an application for Appeal is pending before the Court of Appeal. The prayers being sought by the Applicant are of the nature of injunctive prohibitive and mandatory orders. The consent orders alluded to in para 18 indicate that the parties willingly committed themselves to stay execution proceedings pending the filing of the intended Appeal. The Plaintiff argues that these orders lapsed while the Defendants have a contrary view. Be that as it may, it can be deduced that the parties agreed to submit themselves to the jurisdiction of the Appellate Court for purposes of the determination of the question of stay of execution of the judgement of this Court. Now that the application for stay of execution was scheduled for hearing on the 14/10/2020 it is only in the best interest of justice and good order that the parties be heard in the Appellate Court.

30. With respect to the prayers granted in the judgement vis a vis the orders sought by the Plaintiff I agree with the Defendants that the said orders are anchored on new causes of action which were not before the Court in the first instance. The issues of trespass and damage to property are matters that require evidence and are best left to a fresh suit if so desired by the parties. To that extent the Court is functus officio.

31. For the reason above the Court is satisfied that the Preliminary Objection has merit and it is for allowing.

32. Having allowed the Preliminary Objection, it is unnecessary to determine the notice of motion dated the 25/2/2020. It is dismissed.

33. I make no orders as to costs.

34. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15<sup>TH</sup> DAY OF OCTOBER 2020.**

**J G KEMEI**

**JUDGE**

Delivered in open Court in the presence of;

Kirubi for the Plaintiff

Mutua for the 1<sup>st</sup> – 4<sup>th</sup> Defendants

Njeri & Kuyiki, Court Assistants