



REPUBLIC OF KENYA



**Marete v Kanja & 3 others (Miscellaneous Case E005 of 2023)
[2024] KEMC 127 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEMC 127 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
MISCELLANEOUS CASE E005 OF 2023
AT SITATI, SPM
MARCH 8, 2024**

BETWEEN

VENENDETTA NCHOGA MARETE APPLICANT

AND

JOANINA KANJA 1ST RESPONDENT

DAVID MUTWIRI MUTUERANDU 2ND RESPONDENT

STELLA NKATHA KIMATHI 3RD RESPONDENT

OCS KARIENE POLICE STATION 4TH RESPONDENT

RULING

1. On 20th September, 2023 the Applicant filed a Motion on Notice dated 18th September, 2023 supported by an affidavit of similar date under a certificate of urgency by Ms. Caroline Karwitha, Advocate praying for the following reliefs:
 1. (spent).
 2. The Honourable Court be pleased to issue Orders of eviction of the Respondents from all that parcel of land known as Abothuguchi/Gitie/716 and for vacant possession of the property to be delivered to the applicant forthwith.
 3. An Order be issued directing the Officer Commanding Station Kariene Police Station to effect the Orders 1 & 2 above.
 4. The costs of this Application be borne by the respondents.
2. The Applicant relied on the following summarized main grounds:



- a. The applicant was the registered owner of Abothuguchi/Gitie/716 which had previously been fraudulently obtained by one Beatrice Mwendwa, the Applicant's elder daughter, through fraudulent succession proceedings and subdivided into Abothuguchi/Gitie/1143 and Abothuguchi/Gitie/1144 and transferred to the respondents who evicted the Applicant and her family.
- b. That the Applicant herein successfully reclaimed the said land on 16th December, 2022 vide High Court Succession Cause No. 78 of 2001 wherein the High Court ruled and ordered the following:
 - i. That the preliminary objection is hereby dismissed.
 - ii. That the Sub-division of Abothuguchi/Gitie/716 into Abothuguchi/Gitie/1143 and Abothuguchi/Gitie/1144 is hereby cancelled.
 - iii. That Abothuguchi/Gitie/716 shall be registered in the name of the Applicant.
- c. That despite being served with eviction notices the respondents had refused to peacefully hand over the land back to the Applicant hence the present suit.

Annexed to the supporting affidavit were the following exhibits:

1. Title deed Abothuguchi/Gitie/716
 2. Judgement and Order in Meru High Court Succession No. 78 of 2001 in the Matter of the Estate of M'Marete M'Imwere wherein Abothuguchi/Gitie/1143 and Abothuguchi/Gitie/1144 were cancelled.
 3. Eviction notice dated 8th May, 2023 giving the respondents 90 days to move out of the property.
3. The respondents through their advocates C.M. David & Company opposed the application by filing 2 Replying Affidavits dated 19th October, 2023. In those Replying Affidavits, the 3rd and 4th Respondents told the court that the 3rd Respondent was the registered owner of Abothuguchi/Gitie/1144 having bought it from one Beatrice Mwenda who was one of the beneficiaries of the subject estate. She added that she conducted due diligence before entering into the purchase of that plot from the mentioned Beatrice Mwenda.
 4. In her further deposition, she admitted that the Applicant herein served them with the eviction notice on 15th May, 2023 but they resisted the notice because they regarded it as intimidation of a purchaser of land. In closing her averments, the 3rd respondent told the court that she was unaware of the proceedings which nullified or revoked the root of the title. She thus prayed for a dismissal of the application herein.

Accompanying the Replying Affidavit were:

1. Certificate of Confirmation of Grant dated 16th April, 2002 showing Beatrice Mwenda as one of the estate beneficiaries.
2. Mutation Form fated 10th September, 2014 showing Beatrice Mwenda as the beneficial owner of the subject Abothuguchi/Gitie/716.
3. Certificate of Confirmation of Grant dated 24th January, 2002 showing that the said Beatrice Mwenda was the beneficial owner of the subject plot.



5. After the parties exchanged their respective pleadings, this Honourable Court directed the parties to file and exchange written submission to tackle the contested issues.
6. The Court also directed the parties to address the question of the court's jurisdiction in the light of the mention of the Orders made by the High Court in Succession Cause No. 78 of 2001.

The Applicant's Written Submissions

7. On 3rd November, 2023 the Applicant lodged written submissions dated 2nd November, 2023 contending that the court had the jurisdiction to entertain this application and order the eviction of the respondents. 3 main reasons were advanced for these submissions:
 - a. The High Court became functus officio when its orders in Succession Cause No. 78 of 2001 i.e. cancelling title number Abothuguchi/Gitie/1143 and Abothuguchi/Gitie/1144 and reverting them back to the Applicant in the original number Abothuguchi/Gitie/716, were effected and the titles reverted to the applicant herein.
 - b. It was further contended that the matter left the Succession Court after the title was reverted to the Applicant and the provisions of Order 22 rules 1 to 6 of the Civil Procedure Code would not come into play as far as execution was concerned.
 - c. Following the re-acquisition of Abothuguchi/Gitie/716 after the High Court orders were effected, the Applicant was entitled to approach this Honourable Land Court for eviction orders under sections 152A, 152B, 152E and 152F of the Land Act.
 - d. It was also argued that this court was duly gazetted as an Environment and Land Court and had the jurisdiction to hear and determine this suit.
 - e. It was contended that following the service on the respondents with an eviction notice and its expiry after 3 months without any suit by the respondents, the respondents had no cause of action and ought to be evicted from the subject land.

The Respondents' Written Submissions

8. The 3 respondents filed joint written submissions dated 19th October, 2023 contending as follows:
 - a. This Court lacked jurisdiction because, first, it had not been gazetted in the Kenya Gazette Vol. 166 of 19th August, 2022 vol. CXXIV as Notice no. 9777 dated 8th August, 2022 to be a Land and Environment Court.
 - b. The second reason for lack of jurisdiction was that Order 22 rule 6 of the Civil Procedure Rules required the Applicant to return to the High Court to enforce the decree which gave her the land but not to approach the Magistrates Environment and Land Court.
9. The Court was then called upon to determine the contest.

Undisputed Issues

1. The Applicant is the registered owner of Abothuguchi/Gitie/716.
2. The Respondents were, at one point in time, the registered owners of Abothuguchi/Gitie/1144.
3. The High Court in Meru (E. Muriithi J.) in Succession Cause No. 78 of 2001 cancelled and revoked the titles deeds in Abothuguchi/Gitie/1143 and Abothuguchi/Gitie/1144 and reverted the ownership



to the Applicant who subsequently re-acquired Abothuguchi/Gitie/716 which was the parent title to the 2 cancelled titles.

4. The Respondents were served with an eviction notice which they disregarded.

Disputed Issues

- 1.

Jurisdiction of this Honourable Court.

- 2.

(De)merits of the application for eviction.

Determination

A. Jurisdiction

10. On the first limb of the Respondents' contention that this court has not been gazetted, this Honourable Court wishes to draw the attention of the parties to Gazette Notice No. 1745 of 14th March, 2016 – CXVIII No. 28 published on 18th March, 2016 by the Honourable Chief Justice & President of the Supreme Court Willy Mutunga. In that Gazette Notice this Honourable Court was gazetted as an Environment and Land Court from 18th March, 2016 and the result is that the objection is dismissed on this point.

11. On the second limb of the objection, the Court has considered the submissions of the parties on the effect of the provisions of Order 22 rules 1 to 6 of the Civil Procedure Rules regarding the proper court for the execution of orders. For this issue, the general rule regarding the proper court for executing a decree is to be found in section 30 of the [Civil Procedure Act](#) which states:

30. Court by which decree may be executed

A decree may be executed either by the court which passed it or by the court to which it is sent for execution.

12. Section 30 aforesaid is to be read with Order 22, rule 6 of the Civil Procedure Rules providing:

6. Application for execution Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.

13. In law, therefore, only the court which passed the decree is empowered to execute that decree unless it transfers that decree to another court of competent jurisdiction to execute it on its behalf. The question that arises is this: were the Orders of the High Court in Meru Succession Cause No. 78 of 2001 executed or they are still pending execution? If the orders have not been executed, then naturally, only the High Court which passed that decree would be legally empowered to execute the orders.

14. Conversely, if the orders have been executed, then the High Court became functus officio and the Applicant was entitled to approach the nearest Environment and Land Court to protect their property.



This position is well supported on the authorities. In *Silvanus Kizito –versus- Edith Nkirote Mwiti* [2021] eKLR (P.J. Otieno J.) the learned Judge held as follows:

11. It was thus incorrect for the trial court to have held as she did that the court had become *functus officio*. The court does not become *functus officio* merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file.

In *Leisure Lodge Ltd v Japhet Asige and another*(2018)eKLR the court said and held:

“On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act. In *Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others* [2018] eKLR, this court said of the doctrine of *functus officio*:-

“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.

As was held by the Court of Appeal in *Telkom Kenya Ltd v John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.

I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment -debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become *functus officio*. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before.

The following are just but examples:

Application for stay; Application to correct the decree Application for accounts Application for execution including garnishee applications Applications for review Application under section 34 of the Act

If one was to accede to the position taken by the judgment debtor that the court is *functus officio* then it would mean that the provisions of law providing for such proceedings are otiose



or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed”.

This court has not changed its views on the point and reiterates that here it has become functus officio as far as application for review is concerned. In any event a Court of Law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a judgment. To do that would be an abdication of duty and a license for parties to do the unimaginable then shout from rooftops that the court is functus officio because there is a final judgment.”

15. The Applicant has provided the High Court Decree annexed as “VNM2” dated 20th January, 2023 containing the following orders:
 1. That the Preliminary Objection dated 11/2/2022 is dismissed.
 2. That the sub-division of Abothuguchi/Gitie/716 into Abothuguchi/Gitie/1143 and Abothuguchi/Gitie/1144 is hereby cancelled.
 3. That Abothuguchi/Gitie/716 shall be registered in the name of the Applicant.
16. Furthermore, the Applicant furnished the Court with a title deed marked as “VNM 1” for Abothuguchi/Gitie/716 issued on 24th February, 2023 and submitted that as a result of the High Court orders above, the Applicant had executed the High Court’s decree and obtained the registration of the title into her name. The Applicant contended that following the issuance of the title deed, there was nothing further for execution by the High Court and so the High Court became functus officio. To these contentions, the Respondents insisted that only the High Court was the proper court to enforce its orders.
17. The Court is persuaded that the Applicant has correctly submitted on the status of the execution of the High Court decree. That decree was a self-executing decree. Once the decree was executed by the Lands Registrar by the issuance of the new title deed on 24th February, 2023 to the Applicant herein, there was nothing more for the High Court to execute and it was correct for the Applicant to approach the present Environment and Land Court to start fresh proceedings to protect her land interests.
18. The also court agrees with the Applicant that the full implementation of the High Court Orders rendered the High Court functus officio. In the result, the objection by the Respondents on this question fails and is dismissed. In arriving at this result, the court was guided by the superior court’s authority of *Florence Cherugut v Cheptum Murei Annah* [2022] eKLR (Nyangaka J.) pronounced the following legal position:
 13. This court then interrogates the question: what is then the procedure of executing a decree? It has been the procedure of courts that once a court delivers its judgment under Order 21 of the Civil Procedure Rules, execution commences immediately as provided by Order 22 of the Rules.

Execution takes different forms on a case to case basis and depending on the mode the decree holder applies for permission to use. However, in some cases, the decree is self-executing. That is to say when the orders of the decree are directed to a certain person or body to perform a task, then the person so directed must do perform that duty in satisfaction of the decree.

B. Eviction

19. Going to the eviction, the court is also satisfied that as a registered owner who had issued the relevant eviction notices which had expired, the Applicant was entitled to the reliefs sought.



20. As ordered by the High Court's decree, the Respondents' two title deeds Abothuguchi/Gitie/1143 and Abothuguchi/Gitie/1144 ceased to exist by the cancellation of the superior court in Meru Succession Cause No. 78 of 2001. The Respondents are essentially chasing a phantom because the 2 titles are no longer existing in law and there is nothing to be protected. A court of law should not act in vain to protect non-existent title deeds.
21. This Honourable Court has been guided by 2 binding authorities on a similar issue : Margaret Karwira Mwongera v Francis Kofo [2019] eKLR (Munyao J.) and James Mathura Makewa v Nzari Nguli [2021] eKLR (Mbogo J.) wherein the 2 superior courts allowed the eviction to issue where it was proved that the Applicant was the registered proprietor and held title to the land.
22. In the final orders, this Honourable Court makes and issues the following orders:
 - a. The Honourable Court be pleased to issue Orders of eviction of the Respondents from all that parcel of land known as Abothuguchi/Gitie/716 and for vacant possession of the property to be delivered to the applicant forthwith.
 - b. An Order be issued directing the Officer Commanding Station Kariene Police Station to effect the Orders 1 & 2 above.
 - c. The costs of this Application be borne by the respondents.

It is so ordered.

DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 8TH DAY OF MARCH , 2024

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HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

