



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 797 OF 2015 (FORMELY HCCC NO. 63 OF 1987)

SAMSON ISAAC OTIENO OSINO

STEPHEN RANGAR OSINO

COLLINS OYOO OSINO

THE ADMINISTRATORS OF THE

ESTATE OF JACTON OSINO OYOO.....DECREE HOLDERS

VERSUS

ODHIAMBO OWUOR.....1ST JUDGEMENT DEBTOR

DEDE OWUOR.....2ND JUDGEMENT DEBTOR

DANDA OWUOR.....3RD JUDGEMENT DEBTOR

DORSILA AJWOGA.....4TH JUDGEMENT DEBTOR

LUKA AGUMBI OWUOR.....5TH JUDGEMENT DEBTOR

ANDITI OJWANG.....6TH JUDGEMENT DEBTOR

JOSHUA ADA.....7TH JUDGEMENT DEBTOR

ODINDO ORWA.....8TH JUDGEMENT DEBTOR

OKUMU OKODO.....9TH JUDGEMENT DEBTOR

RULING

1. The Judgment Debtors moved the Court through M/s Akolo Wanyanga & Company Advocates vide the notice of motion dated 3rd November 2016 and filed on the 4th November 2016 seeking for the following orders;

1. “ SPENT

2. That the firm of Akolo Wanyanga & Company be given leave to come on record for the Judgment Debtors.

3. (Overtaken by events).

4. That the Judgement, Decree and all consequential orders herein be set aside and the National Land Commission be allowed to investigate the Historical Injustice in regard to the Registration of the suit property and present its findings to this Honourable Court in the quickest time possible.

5. That the costs of this application be provided for.”

The application is indicated to be brought under **Sections 1A, 1B and 3A of the Civil Procedure Act** and **Order 22 Rule 22, and Order 51 Rule 1 of the Civil Procedure Rules**. It is based on the five (5) grounds set out herein below:-

- (i) “That there was a Historical Injustice perpetuated in regard to the registration of one Jacton Osion Oyoo as the first owner of the suit property yet he came into occupation way after the late Petro Owuor Oyoo.**
- (ii) The Historical Injustice must be investigated first before the orders are executed as the execution thereof may result in an injustice that will result in irreparable loss that cannot be recovered by way of damages.**
- (iii) Natural justice demands that the Judgment Debtors must be heard.**
- (iv) The Judgment Debtors should not be condemned unheard.**
- (v) The Judgment Debtors will be greatly prejudiced if the orders sought are not granted.”**

The application is supported by the affidavits of Dorsila Owuor, the 4th Judgment Debtor, and Agripa Oluoch Abunga, the Chief of West Sakwa Location, both sworn on the 3rd November 2016.

2. The application is opposed by the Decree Holders through the replying affidavit sworn by Samson Isaac Otieno Osino, the 1st Decree Holder, on the 31st May 2017.

3. The application came up for mention on the 12th June 2017 when directions on filing and exchanging written submissions were given. The Counsel for the Decree Holders then filed their written submissions dated the 7th September 2017. Thereafter the matter was mentioned on the 18th October 2018 and today’s date for ruling fixed.

4. The issues for the Court’s determination are as follows;

- a) Whether Akolo Wanyanga & Company Advocates should be granted leave to come on record for the Judgment Debtors.**
- b) Whether the Judgment Debtors have established reasonable case for setting aside of the Judgment, decree and orders so far issued in this case.**
- c) Who pays the costs.**

5. The Court has carefully considered the grounds on the application, affidavit evidence by both sides, written submission, the decided case and the provisions of the law cited therein, the court record, and come to the following findings;

a) That this suit was filed in 1987 by Jackton Osino Oyoo, the initial Plaintiff/Decree Holder seeking for possession of North Sakwa/Maranda/7, the suit land, and general damages for trespass. The Judgment Debtors/Defendants denied in their defence that they were illegally occupying the suit land and alleged that it was Jackton Osino Oyoo who had fraudulently registered the land in his name. The Suit was heard and Judgment delivered by Mango J, in favour of the Decree Holder on 21st July 1993. That in that Judgment, the court observed that the dispute between Jackton Osino Oyoo and the Judgment Debtors on the issue of ownership of the suit land had previously been adjudicated and ruled in favour of Jackton Osino Oyoo in Bondo Land Case No. 61 of 1967, Kisumu Resident Magistrate Land Appeal No. 56 of 1971 and a further appeal in the High Court Kisumu. The court also observed that even before the court cases began, the issue of ownership of the land had been dealt with through the adjudication process when the 1st Defendant/Judgment Debtor objection was dismissed and Jackton Osino Oyoo consequently become the first registered proprietor.

b) That the Defendants/Judgment Debtors not being satisfied with the Judgment of Mango J, of 21st July 1993 filed the Appeal No. 41 of 1994 before the Court of Appeal. The Court of Appeal dismissed the appeal in the Judgment of the 28th March 1995. That eviction orders against the Judgment Debtors have been issued in the past as is evinced by the court order issued by the High Court on the 21st July 1993 and 7th November 1995 and another one by this court on the 26th September 2016. That the Judgment Debtors had earlier also moved this court vide their motion filed on the 3rd August 2012 seeking to stop the execution of the orders issued herein among others which was heard and dismissed on the 8th May 2014. The Judgment Debtors then moved to the Court of Appeal Kisumu, in Civil Application No. 58 of 2014 [UR42/2014] seeking for leave to file a notice of appeal out of time. The Court of Appeal heard the application and dismissed it through the ruling dated the 19th May 2015.

c) The Decree Holders have clearly shown that the Judgment Debtors have since the Land Adjudication process, and the subsequent court litigations before the lower court, High Court and the Court of Appeal lost in their claim of ownership of the suit property or a portion thereof. That though they have been evicted from the suit land severally, like in 1996, 2004 and 2010, they have kept on returning back to the land. The court record confirms that indeed the Judgment Debtors have all along lost in their claim to challenge the Decree Holders title to the suit land and that despite their being evicted from the land three times, they have after each eviction returned and retaken possession.

d) That though the Judgment Debtors must be aware that they have lost their claim of ownership of the suit property up to the Court of Appeal, they now seek vide the notice of motion dated the 3rd November 2016 to have the Judgment, decree and orders issued in

the suit set aside ostensibly, to allow the National Land Commission to investigate how the suit property got registered with the Decree Holders and file their report with the court. The Decree Holders have submitted that the Judgment Debtors are trying to circumvent the law and have their claim revived when it has already been adjudicated through the various determinations from the Adjudication process to the Court of Appeal. That this court is in agreement that the issue of ownership of the suit property, as between the Decree Holders and Judgment Debtors, has already been determined. That even if the court was to grant the Prayer sought of setting aside its judgment, decree and orders, the Court of Appeal decision of the 28th March 1995 would still remain. The court further agrees with the Decree Holders submission that the Judgment Debtors, having in the past attempted to stop the execution of the decree/orders and failed, their current attempt is to say the least *res judicata* and runs a foul to **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

e) That the Judgment Debtors claim that their dispute with the Decree Holders over the suit property amounts to a historical injustice and that the matter should be referred to the National Land Commission, appear not to have any basis. That **Section 15 (2) of the National Land Commission Act No. 5 of 2012** require a historical injustice to be dealt with by the Commission to be one that **“has not been sufficiently resolved.”** The Commission under **Section 15 (3) (b) of the Act** is allowed to entertain a claim of historical injustice if it has not, or is not capable of being addressed through the ordinary court system. The dispute of ownership of the suit property between the parties herein and or their predecessors in title has been sufficiently addressed through the entire dispute resolution system from the Land Adjudication Objection Board to the Court of Appeal, which was then the highest court in the Country’s legal system. The court therefore find that there is no pending claim that has not been legally determined already over the ownership of the suit property, as between the parties, that can be considered for referral to the National Land Commission. That to do so would be an exercise in futility as the Judgment Debtors perceived claim is not one that the National Land Commission can entertain under **Section 15** of the said Act. That if anything, the Judgment Debtors option of challenging this court ruling/orders of the 26th September 2016 could only be through an appeal.

f) That apart from the court executing its decree/orders, it is otherwise *functus officio* on the issue of who between the parties in this suit is the legal proprietor of the suit property and the finding that the Judgment Debtors are therefore trespassers. That Learned Counsel for the Decree Holders referred the court to the decision in **Dickson Muricho Muriuki –v- Timothy Kagundu Muriuki & 6 others [2013] eKLR**, where the Court of Appeal held as follows;

“20. On the issue of whether this court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its Judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is *functus officio* and must down its tools. In the absence of statutory authority, the principle of *functus officio* prevents this court from re-opening a case where a final decision and judgment has been made.”

That the Court of Appeal expounded on the principle of *functus officio* in the case of **Telkom Kenya Limited –v- John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya United [2014] eKLR** as follows;

“Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereof. It is a doctrine that has been recognized in the common law tradition as long ago as the latter part of the 19th Century. In the **Canadian case of Chandler –vs- Alberta Association of Architects [1989] 2 SCR 848**, Sopinka J, traced the origins of the doctrine as follows (at P. 860).

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in *re St. Nazaire. (1879) 12 Ch. D. 88*. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal Judgment had been drawn up, issued and entered, and was subject to two exceptions;

1. Where there has been a slip in drawing it up, and

2. Where there was an error in expressing the manifest intention of the court. See *Paper machinery Ltd –vs- J. O. Rose Engineering Corp. [1934] S.C.R 186*.”

The Supreme Court in **Raila Odinga –v- IEBC** cited with approval an excerpt from an article by Daniel Malan Pretorius entitled,

“The origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2006) 122 SALJ 832 in which the learned author stated;

“The *functus Officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, 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....The (principle) is that one such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

That as the court rendered itself with finality through its Judgment on the 21st July 1993, and declined to stay the execution of the decree

through its ruling of the 8th May 2014, and that the Court of Appeal has affirmed the court's position in their Judgment and ruling of 28th March 1995 and the 19th May 2015 respectively, this court is indeed *functus officio* and cannot be legally moved to make another decision on the ownership of the suit land. The court can only be moved for other matters like execution.

g) That the prayer for Counsel to be granted leave to come on record for the Judgment Debtors not having been opposed is hereby granted. That however, the Judgment Debtors will pay the Decree Holders the costs of the application.

6. That having held as above, the court orders as follows;

a) That save for allowing prayer 2 for M/s Akolo Wanyanga & Company Advocates to come on record for the Judgment Debtors, the notice of motion dated 3rd November 2016, and filed on the 4th November 2016 is without merit and is dismissed with costs.

b) That the file be closed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 13TH DAY OF FEBRUARY 2019

In the presence of:

Decree Holders Absent

Judgment Debtors Absent

Counsel Mr. Okero for the Decree Holder/Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE