



**Begum (Suing as the personal Representative of the Estate the Late Mehboob Mohamed Abdul Gafoor Mohamed Mullah also known as Mehboob Mohamed Adbulgafoor and Mehboob Mullah) v Vescon Properties Limited & another (Environment & Land Case E142 of 2022) [2024] KEELC 284 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 284 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E142 OF 2022**

**NA MATHEKA, J  
JANUARY 30, 2024**

**BETWEEN**

**SHAKILA BEGUM ..... PLAINTIFF**

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE THE LATE  
MEHBOOB MOHAMED ABDUL GAFOOR MOHAMED MULLAH ALSO  
KNOWN AS MEHBOOB MOHAMED ADBULGAFOOR AND MEHBOOB  
MULLAH**

**AND**

**VESCON PROPERTIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application is dated 16<sup>th</sup> February 2023 and is brought under Section 1A and 3A of the [Civil Procedure Act](#) Order 2 Rule 15(1)(d) and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;
  1. That the Honourable court be pleased to strike out the suit herein for being otherwise an abuse of the process of the Court.
  2. That costs of the suit and of the instant application be borne by the Plaintiff.
2. It is based on the grounds that the Plaintiff herein filed suit against the same Defendants as herein in Mombasa ELC Land Case No. 171 of 2014 seeking similar reliefs as herein, among them being the nullification of a transfer in favour of the 1<sup>st</sup> Defendant of the same suit property herein being Subdivision Number 3427 section III/M. N (C.r. No. 34109) on grounds that the transfer was



fraudulent, having been made after the death of the deceased who was allegedly the registered owner. The 1<sup>st</sup> Defendant herein consequently entered appearance and subsequently filed defence, witness statement and list of documents as stipulated under the pertinent rules. Thereafter, and with the Plaintiff having failed to take any steps to prosecute the suit, the matter was listed for hearing on 1<sup>st</sup> November 2018 for the Plaintiff to show cause why the suit should not be dismissed for want of prosecution. At the hearing aforesaid, and despite the Plaintiff's Advocate appearing and showing cause why the suit should not be so dismissed and explaining the alleged reasons for the delay in not prosecuting the suit, the Learned Judge was not impressed and thus proceeded to dismiss the suit for want of prosecution. With the suit having been dismissed on the 1<sup>st</sup> November 2018 as aforesaid, the Plaintiff returned to the ELC Court with an application dated the 22<sup>nd</sup> November 2018 for reinstatement of the suit, and after hearing the application, the Learned Judge in a ruling delivered on the 28<sup>th</sup> November 2019 dismissed it with costs on the grounds that the court was functus officio and lacked the jurisdiction to entertain the application for reinstatement. Upon delivery of the ruling aforesaid, on the 28<sup>th</sup> November 2019, the advocate for the Plaintiff sought and was granted leave to appeal the decision.

3. Despite leave to appeal the ruling of 28<sup>th</sup> November 2019, being granted, the Plaintiff did not do so and instead, over 1 year later, the Plaintiff returned to the ELC with an application dated 6<sup>th</sup> December 2019 seeking leave of the Court to Appeal against the ruling of 1<sup>st</sup> November 2018. Having heard the parties on the aforesaid application, the Learned Judge proceeded to dismiss the same vide a ruling delivered on the 16<sup>th</sup> November 2020 whence he observed that it was incumbent upon the Plaintiff to offer valid and clear reasons in the form of a plausible and satisfactory explanation for the delay to warrant the exercise of the court's discretion in her favour, but which onus she unfortunately failed to discharge. On the 19<sup>th</sup> January 2021, and over a month later the Plaintiff lodged an application dated 14<sup>th</sup> December 2020 in the Court of Appeal being Mombasa Civil Application No. 6 of 2021 in which the Plaintiff sought extension of time within which to file a Notice of Appeal in respect of the decision of 1<sup>st</sup> November 2018 dismissing her suit for want of prosecution. Despite the application aforesaid having been lodged on the 19<sup>th</sup> January 2021, the same was only served upon the 1<sup>st</sup> Defendant's Advocates on 17<sup>th</sup> March 2022 after directions on hearing had been given. In a ruling delivered on the 23<sup>rd</sup> September 2022, the Court of Appeal dismissed the said application dated 14<sup>th</sup> December 2020 and lodged on 19<sup>th</sup> January 2021 with costs to the 1<sup>st</sup> Defendant, and observed, inter alia, that the indolence displayed by the Plaintiff in the course of entire proceedings militated against allowing the application. In a nut-shell therefore, the orders of the court issued by Hon. L Justice Matheka on 1<sup>st</sup> November 2018 dismissing the suit in ELC 171 OF 2014 still stand undisturbed and have not been appealed against. It is trite law that there is only one High Court of Kenya, albeit with different divisions, and once one High Court makes a final order such as dismissing a suit for want of prosecution, the court as a whole becomes functus officio, and a similar suit by the same parties and seeking similar reliefs cannot be entertained by the same court, even where it is differently constituted. In the premises, the instant Court lacks the requisite Jurisdiction to entertain the suit herein.
4. The 1<sup>st</sup> defendant filed an application seeking striking out of the suit as it was an abuse of court process. The history is that the plaintiff first filed suit no 171 of 2014 in this same court where this court struck out the suit for want of prosecution on 1<sup>st</sup> November 2018. The plaintiff had failed to give a satisfactory explanation as to the delay in prosecuting the case. In the supporting affidavit sworn on 16<sup>th</sup> January 2023 by one Halai Praful Velji Shamji, a director of the 1<sup>st</sup> defendant it can be seen that various attempts were made to revive the suit above but all the attempts were not successful. The plaintiff filed a replying affidavit on 16/2/2023 stating that the previous suit (171 of 2014) was not concluded but was dismissed for want of prosecution and not want of merit. The plaintiff further argues that this court is



functus officio on ELC 171 of 2014 and not the instant suit and therefore prayed for this application to be dismissed for being misconceived.

5. Having perused the application and the reply thereto, the issue that arises is whether the court is functus officio and if there is an abuse of the court process. The Supreme Court of Kenya discussed the doctrine of *functus officio* in Election Petitions Nos. 3, 4 & 5 [\*Raila Odinga & Others vs. IEBC & Others\*](#) (2013) eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832:

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 once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

6. In [\*Wanjala Mutonga vs. William Barasa Wanjala\*](#) (2016) eKLR Mukunya, J held *inter alia*: -

The suit was dismissed by the court under Order 17(2) of the [\*Civil Procedure Rules\*](#). Under that Order, it is the court that summons the parties to show cause why their suit should not be dismissed for want of prosecution for pending for over one year without any action being taken. If no cause is shown the suit is dismissed. In this case a Notice went out to the Applicant asking him to come and show cause on 1/7/2015. The Applicant did not come to show cause why his case could not be dismissed. It was therefore dismissed. At that stage the court’s order was perfected. Under order 17(2) there is no provision for varying or setting aside the order, the court becomes functus officio once the suit is dismissed. The only option open to the party is to appeal against the dismissal.

7. After having not succeeded in seeking leave to appeal this court’s ruling of 1<sup>st</sup> November 2018, the plaintiff filed this suit suing the same parties as the previous suit of 171 of 2014. The subject matter is an allegation of a forged transfer of the suit property also known as L.R No. 3427/III.MN to the 1<sup>st</sup> defendant. This is my opinion violates the principle of res judicata.
8. Res judicata is described in Sec 7 of The [\*Civil Procedure Act\*](#) as;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

9. [\*Edwin Thuo vs Attorney General and Anor\*](#) Petition No. 212 of 2012, it was stated that the Court must be vigilant and guard against evading the doctrine of *res judicata* by introducing new causes of action. It was stated as follows;

The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction”



10. In the case of *Kenya Hotel Properties Limited vs Willisden Investments Limited & 4 Others* (2013) eKLR the purpose of *Res judicata* doctrine was discussed. It was held to be a doctrine of law founded on public policy and aimed at ensuring two objectives, namely, there must be a finality to litigation and that parties who have gone through litigation should not be subjected to the same tests.
11. Despite the plaintiff not being able to properly show cause under Order 17 rule 2, he made several attempts to revive the suit upto the Court of Appeal level. This court became functus officio at the time of the said ruling and the attempt to revive the same issues in this suit is vexatious and abuse of the court process. I find the application is merited and I grant the orders as prayed.
12. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

