



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC No. 7 OF 2012

MARY WANJIKU.....PLAINTIFF

VERSUS

ALLAN KIMANI.....DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 27th July 2017, filed by Joyce Wanja Kimani who describes herself as an intended defendant. The application seeks the following orders:

1. Spent.

2. That this honourable court do order that Joyce Wanja Kimani intended defendant/interested party be enjoined in this proceedings as a defendant.

3. That this honourable court be pleased to order stay of the order made on the 30th May 2017 until the case is heard and determined and or until further orders of the court.

4. That the order issued on 30th May, 2017 be set aside and the intended defendant be granted leave to file her defence and or defend the suit.

2. The application is supported by an affidavit sworn by the applicant. Before I go into the contents of the supporting affidavits, it is important to give a brief background of the matter.

3. This suit was filed on 9th October 2012 through plaint dated the same date. It is averred in the plaint that the plaintiff is the registered proprietor of all that parcel of land known as Naivasha/Mwachiringiri Block 4/3567. That sometime in the year 2012 the defendant entered on to the plot without the plaintiff's consent, erected some buildings and structures thereon, interred a body on it and was also cultivating it. The plaintiff therefore sought an eviction order against the defendant and an order that the remains interred on the land be exhumed.

4. Upon being served with summons the defendant entered appearance and filed a defence. The defendant denied that the plaintiff is the registered owner of the plot and averred that any title that the plaintiff is holding was obtained through fraud. The defendant further averred that he settled on the suit property in the year 1987 and that he has developed it without any interruption for a period of 25 years. That he stands to suffer irreparable harm as he has built a permanent six roomed house on the plot, planted many trees on it and even buried his son on it. He therefore urged the court to dismiss the suit.

5. There was no appearance for the defendant when the main suit came up for hearing. Being satisfied that the defendant's advocates on record had been duly served with a hearing notice, I allowed the hearing to proceed.

6. Upon hearing the case I delivered judgment on 30th May 2017 in the following terms:

(a) The defendant, his servants/agents and/or any other persons acting under him are hereby ordered to vacate and hand vacant possession in respect of the parcel of land known as Naivasha/Mwachiringiri Block 4/3567 to the plaintiff within 60 (sixty) days from the date of delivery of this judgment.

(b) The defendant, his servants, agents and/or any other persons acting under him are hereby ordered to exhume the body interred by the defendant on the parcel of land known as Naivasha/Mwachiringiri Block 4/3567 within 60 (sixty) days from the date of delivery of this judgment and bury it elsewhere. The County Public Health Officer, Nakuru County to supervise the exhumation process.

(c) In default of the defendant complying with orders number (a) and (b) above within the stated period, the plaintiff shall be at liberty to enforce compliance under the supervision of the County Public Health Officer, Nakuru County and with the aid of the police.

(d) The plaintiff is awarded costs of the suit and interest thereon.

7. We can now return to the affidavit in support of the present application. The applicant states therein that she was the wife of the defendant but the defendant deserted her and went to live elsewhere with his first wife. She further states that she has been in occupation and possession of the suit property for the last 35 years and that she has therefore acquired rights over it by adverse possession. That when the defendant was served with pleadings in this case, she was not living with him and she only became aware of the existence of the suit when she was served with an order extracted pursuant to the judgment herein. She therefore prays that her application be allowed. She annexed a copy of a proposed defence and counterclaim.

8. The plaintiff opposed the application through a replying affidavit wherein she deposed that the court is *functus officio* in view of the judgment. She thus urged the court to dismiss the application. The defendant did file any response to the application.

9. Parties agreed, and the court ordered, that the application be heard by way of written submissions. The applicant filed submissions on 22nd February 2018. The rest of the parties did not file any submissions.

10. I have considered the application, the affidavits and the submissions. The applicant seeks to be joined to the case a defendant or an interested party. As can be seen from the annexures to the supporting affidavit, she intends upon being joined to file a defence and counterclaim. As has already been pointed out, this court rendered a judgment on 30th May 2017 upon hearing the main suit. A decree was issued on 2nd June 2017. I have seen on record a letter dated 1st December 2017 from the Officer Commanding Naivasha Police Station seeking to verify the authenticity of the decree. The applicant was not party to the suit from inception to judgment. She wants to join at this stage. If her application is allowed, the court will have to reconsider the merits of the case. The court having delivered a judgment herein, it is *functus officio* and cannot re-open the proceedings; worse still at the behest of a person who was not a party to the case.

11. The Court of Appeal stated as follows in **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR** as regards the principle of *functus officio*:

Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. ...

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” (2005) 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 once 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. ...

12. In view of the foregoing discussion, Notice of Motion dated 27th July 2017 clearly lacks any merit. It is dismissed with costs to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 31st day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Murimi holding brief for Mr Gichuki for the applicant/proposed interested party

Mr Ondieki holding brief for Mr Kimani for the plaintiff/respondent

No appearance for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi