

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 28 OF 2016

KHADIJA KURIA.....PLAINTIFF

VERSUS

PATRICK WAMBUA NDAMBUKI.....1ST DEFENDANT

LIBAN GUYO.....2ND DEFENDANT

ENOCK MBAI MAILU.....INTENDED INTERESTED PARTY/APPLICANT

RULING

The Applicant filed the application dated 22/3/2018 seeking to be joined to the suit as an Interested Party. He also seeks stay of execution of the decree dated 9/1/2018 against the Defendants as well as a temporary injunction to restrain the Defendants from evicting him or dealing with the Suit Property in satisfaction of the judgment delivered on 13/12/2017. The stay of execution sought is stated to be pending hearing and determination of that application and the suit.

The application is made on the grounds that summons to enter appearance were not served on the Applicant and that the eviction order dated 15/2/2018 was issued against the Applicant's property. The Applicant is apprehensive that unless the Plaintiff is restrained by the court, he stands to suffer irreparable loss and damage. The application is supported by the Applicants affidavit. He states that he has been in occupation and developed a permanent house on L.R. No. 209/10912 ("the Suit Property"), the subject matter of this suit for the last 12 years. He claims that he was served with an eviction order issued by the court and complains that he was not joined as a party to the suit yet he is the one in occupation of the Suit Property. He seeks stay of execution of the judgement and all the orders issued subsequently pending the hearing and determination of the application and suit. He attached a draft defence bearing the title 3rd Defendant Statement of Defence to the application.

The Plaintiff opposed the application through her Replying Affidavit sworn on 26/4/2018. The Plaintiff maintains that this court is *functus officio*. Further, the Plaintiff contends that the Applicant has no valid claim to the Suit Property hence the orders he seeks cannot be granted.

Counsels made oral submissions. The Applicant contended that he has been in occupation without interruption since 2006. The Defendant opposed the application urging that the orders sought cannot be granted since the Applicant has not applied to set aside the judgement. Further, the Plaintiff submitted that it is not indicated what activity is expected to follow if the court were to grant the orders staying execution. The Applicant did not attach any evidence of ownership or interest in the Suit Property.

The Plaintiff relied on the decision of *Roy Mckenzie v. Cartrack Kenya Limited and Another [2014] eKLR* in which Kasango J. made reference to several decisions on the principle of *functus officio* which is grounded on public policy that favours finality of court proceedings. Upon the delivery of judgement, the rights of the parties have been determined and the court is *functus officio*.

The Plaintiff also relied on the case of *Chacha Mwita Mosenda v. Baya Tsuma Baya and 2 Others [2017] eKLR* where the court dealt with the issue of *functus officio* as the principle that prevents the re-opening of a matter before a court which has rendered a final decision. The court also stated that Order 1 Rule 10 (2) of the Civil Procedure Rules contemplates joinder of parties where proceedings are still pending before the court. The rule is inapplicable where a suit has been finally disposed of.

This court agrees with the Plaintiff that it is *functus officio* having made a final determination and given judgement in the case. The court also notes that the Applicant did not attach any evidence to support the claim that he has been in occupation of the land. The application is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 12th day of July 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Wanyama for the Plaintiff

No appearance for the Applicant and the Defendants

