



Juma & 65 others v Abdulla & 3 others (Enviromental and Land Originating Summons 40 of 2016) [2024] KEELC 127 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 127 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 40 OF 2016
NA MATHEKA, J
JANUARY 25, 2024**

BETWEEN

**BIDII JUMA 1ST PLAINTIFF
PHILERIA A. KANZOLO 2ND PLAINTIFF
KARISA LAI & 63 OTHERS 3RD PLAINTIFF**

AND

HABIB ABDULLA DEFENDANT

AND

**ANETTE MUDOLA MBOGOH (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE BENSON C. MBOGOH) 1ST PROPOSED DEFENDANT
FRASER JACKSON UTANJE 2ND PROPOSED DEFENDANT
RAJAB MWADUNGULE KATUMBO 3RD PROPOSED DEFENDANT**

RULING

1. The application is dated 28th August 2023 and is brought under Section 10 and Section 27 (1) and 3 of the [High Court \(Organization and Administration\)](#) and under the ([High Court and Procedure Rules](#) Part 1 Vacation Rule 3 and under Section IA and 3A of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya and Order 1 Rule 3, 5 and 10 of the [Civil Procedure Rules](#) seeking the following orders;
 - a. That service of this application be dispensed with in the first instance, the same be heard *ex parte* and certified urgent.
 - b. That the matter be certified as urgent for hearing during this court vacation.



- c. That there be an interim stay of execution of the judgement of this court dated 6th July 2020 and there be a stay of any further transactions on land title number 846 (Original No. 422/3) of Section I Mainland North measuring 11.6 acres or thereabouts which said piece of land is comprised in certificate of title registered in the Land Titles Registry at Mombasa as CR No. 7912/1 pending the hearing and determination of this application inter-parties.
 - d) That the applicant be joined into the proceedings herein as a defendant/necessary party and the judgement dated 6th July 2020 and all its consequential orders and effects be set aside and the defendant/necessary party/applicant be allowed to defend the suit herein.
 - e) Costs
2. It is based the grounds that the subject matter land number 846 (Original No. 422/3) of Section 1 Mainland North is the place where the proposed defendants/necessary parties have been resident since time immemorial and the court declared them the rightful owners on 12th May 2020 as against the plaintiffs herein. That the late Benson C. Mbogoh and the proposed defendants subsequently continued occupation of the land pursuant to the sale agreement that was not perfected by the then registered owner. That sometimes in the year 2015, the plaintiffs herein invaded the land parcel number 846 (Original No. 422/3) of Section 1 Mainland North. That as a consequent of the invasion, the case of *Benson Mbogoh & 2 Others vs Madonga Kenga Masha & 12 Others*, ELC No. 234 of 2015-Mombasa was filed against the plaintiffs in this case by the proposed defendants/necessary parties. That the plaintiffs advocate herein was also their lawyer in *Benson Mbogoh & 2 Others-vs- Madonga Kenga Masha & 12 Others*, ELC No. 234 of 2015-Mombasa hence was at all times aware that the proceedings herein were sub judice and subsequently *Res Judicata*.
 3. That on 12th May 2020, the learned Judge Omollo rendered a judgment declaring the plaintiffs herein as trespassers on the subject matter parcel of land and ordered them to vacate the land but the plaintiff in contempt of have continued to interfere with the land and have obtained a judgement without full material disclosure so as to sustain their contempt. That this case is Res Judicata the case of *Benson Mbogoh & 2 Others vs Madonga Kenga Masha & 12 Others*, ELC No. 234 of 2015-Mombasa and the Judge pointed it out. That the case herein is an abuse of the court process as plaintiffs failed to make that material disclosures to the court about the first subsisting case and the judgement and the fact that the 1st defendant was at all material times of the filing of this suit dead. That the defendant in this case is deceased and the plaintiffs herein were aware of the fact but failed to make a disclosure to the court. This case was thus null and void ab initio, as it was filed against a dead person and judgement also obtained against a dead person. That the applicant became aware of the judgement herein when he tried to enforce the judgement in *Benson Mbogoh & 2 Others-Vs- Madonga Kenga Hasha 12 Others*, ELC No. 234 of 2015 Mombasa in late July 2023. The interim orders should be granted so as to conserve the subject matter property and avoid it being passed on to other parties. The plaintiffs herein have moved into the defendants' land and are trying to sell off the land. That the deceased Benson C. Mbogoh the first plaintiff in *Benson Mbogoh & Others-Vs- Madonga Kenga Masha & 12 Others*, ELC No. 234 of 2015-Mombasa died on 13th August 2021 after obtaining judgement in the first suit and this application is brought by inter alia the administrator of his estate. The plaintiffs were at all material times aware of the proposed defendants interest in the subject matter land and that they were a necessary party.
 4. The Respondents stated that at no time was Benson C. Mbogoh a party in this suit. That the suit against them was in respect to Plot No. 422/1/MN and for vacant possession. That the plot they are purporting to claim is no longer available because of the subdivision. The same was subdivided into Plots 845 and 846 and currently they are the owners of Plot 846. That they are ready to excise and



have their portion registered in their names if it falls under Plot No. 846. The 1st Respondent in his replying affidavit dated 14th November 2023 stated that they obtained judgement in their favour and the court was now *functus officio*.

5. This court has considered the application and the submissions therein. The doctrine of *functus officio* was considered by the Court of Appeal 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, where the court held that;

"*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."

6. The Respondents stated that the court upon delivering the judgment on became *functus officio* and the issues raised should be raised on appeal and not by way of review.

7. It is not contested that on 6th July 2020 the Court entered judgment in favour of the Respondents. In [Telkom Kenya Ltd vs John Ochanda \(suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd\)](#) (*supra*), the Court of Appeal held as follows on the *functus officio* doctrine;

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--

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

8. The Supreme Court of Kenya in the case of [Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others](#) (2013) eKLR, 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 which reads;

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."

9. Section 99 of the [Civil Procedure Act](#) provides exceptions to the doctrine of *functus officio* in the following terms-

"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

10. It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein.

11. The Supreme Court of Kenya expounding on 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:

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12. The court also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* (2002) JLR 542 at 550 to the effect that:

A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

13. The Applicant’s answer to the plea of *functus officio* raised by the Respondent is that their application raises new issues which have not previously been adjudicated upon. Although this submission appears to conflate the doctrines of *res judicata* and *functus officio*, the Applicants’ could be accurate. Because, issues of the 1st Defendant being dead are new matters. The matter herein having been concluded and the Applicants not having being parties in this suit, it is not tenable for the Applicants to want to be enjoined on a spent cause. If indeed the suit property no longer exists and the judgement has been executed, the Applicants would now be at liberty to take his next course of action.
14. Having discharged its duty on this suit this court is therefore *functus officio*, defined in [Black’s Law Dictionary, Ninth Edition](#) as “having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” In the circumstances, the court is wary of the Applicants’ invitation to re-engage with this dispute in a manner that necessarily involves wading into a new controversy between the parties. The application dated 28th August 2023 is therefore not merited and is dismissed with costs.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

