



Cove Investments Limited v Rono & another (Sued as the Legal Representatives of the Estate of Mathias Kimnyole Langat) & 5 others (Environment and Land Petition 360 of 2017) [2024] KEELC 86 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 86 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND PETITION 360 OF 2017
MAO ODENY, J
JANUARY 24, 2024**

BETWEEN

COVE INVESTMENTS LIMITED PETITIONER

AND

JOHANA KIPROTICH RONO & JOSEPH RONO LANGAT (SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MATHIAS KIMNYOLE LANGAT) 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

THE LAND REGISTRAR, NAKURU COUNTY 1ST PROPOSED RESPONDENT

ROYAL SIAN LIMITED 2ND PROPOSED RESPONDENT

JOSHUA CHELELGO KULEI 3RD PROPOSED RESPONDENT

KENNEDY KIPRUTO KULEI 4TH PROPOSED RESPONDENT

RULING

1. This ruling is in respect of a preliminary objection dated 31st October 2023 by the 1st respondent on the following ground:
 - a. That this court has no jurisdiction to hear or entertain the Notice of Motion dated 5th October 2023 and this court is now ‘functus officio’.



1st Respondent's Submissions

2. Counsel for the 1st respondent relied on the cases of *Geoffrey M. Asanyo & 3 others v Attorney-General* [2020] eKLR, *HMI v KBH* [2022] eKLR, *Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR and submitted that the preliminary objection raises a pure point of law.
3. Counsel submitted that the court is functus officio and cannot re-open the petition just because the Petitioner realized that it ought to have joined the 3rd and 4th respondents. It was counsel's further submission that the 1st Respondent has already appealed against the judgement of this court and it is awaiting a case management session to take directions before the Court of Appeal.
4. Mr. Karanja Mbugua therefore urged the court to uphold the preliminary objection as prayed.

Petitioner's Submissions

5. Counsel for the petitioner relied on Section 34 of the Civil Procedure Rules and the case of *James Wainaina Imunyio & 6 others v Karanja Mbugua & Co. Advocates* [2012] eKLR and submitted that the existence of a pending appeal does not make this court functus officio.
6. Mr. Kairaria gave a background to the case and the orders that had been granted before judgment was delivered on 18th May 2021 and relied on the cases of *Raila Odinga v IEBC & 3 others* [2013] eKLR, *Kenya Deposit Insurance Corporation (as liquidator of Dubai Bank Kenya Limited) v Rapid Communications Limited & 2 Others; Bank of Africa Kenya Limited & 2 others (Interested Party)* [2019] eKLR.
7. On the meaning of the doctrine of functus officio, counsel relied on the case of *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 "the doctrine of functus officio does not command that the moment the court delivers its judgement in a matter then it becomes an abomination to handle all and every other consequent, complimentary, supplementary and necessary facilitative processes, the bar is only upon merit- based decisional engagements" and submitted that to say otherwise would leave litigants with impotent decision incapable of realization towards closure of the file.
8. It was counsel's submissions that the judgement of this court is yet to be executed and so this court is not functus officio and further submitted that the petitioner only came to know that the suit property had been fraudulently transferred to the 4th respondent after conducting a search on 16th May, 2022.
9. Counsel relied on the cases of *Jeremiah M'njogu v Martha Naitore M'murithi & 5 others* [2021] eKLR, *Kennedy Ooko Jacob t/a Ssebo Intel. Co. Auctioneer v John Abich Ochanda* [2021] eKLR and submitted that the application dated 5th October 2023 only seeks to enforce the judgment of the court that was delivered on 18th May, 2021 as per Section 34 of the *Civil Procedure Act* and that it cannot seek the said enforcement in any other court through a fresh suit.
10. Mr. Kairaria also submitted that the 4th, 5th and 6th proposed respondents in their submissions raised issues that were not related or disclosed in the Notice of Preliminary Objection. He relied on the case of *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* 91/2002 as was cited by the Court of Appeal in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others* [2014] eKLR and submitted that those other issues cannot be argued under the Notice of Preliminary Objection.



11. Counsel further relied on *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR and submitted that a preliminary objection must be stated with certainty and cannot be an omnibus device to import other issues. Counsel nonetheless submitted that the 4th, 5th and 6th proposed respondents contend that the petitioner aims to prosecute a fresh cause by changing the petition and adding new parties but in the real sense, since judgment in the matter has already been delivered, what was remaining was giving effect to it.
12. Counsel relied on Sections 34(2) and 38(a) of the *Civil Procedure Act* and submitted that the 4th, 5th and 6th proposed respondents herein are at liberty to opt out of the proceedings and this will not prevent this court from executing the decree. That the 4th, 5th and 6th proposed respondents have been properly joined to the suit for the purposes of execution of the decree.
13. Mr. Kairaria faulted counsel for the 1st Respondent that the Notice of Preliminary Objection amounts to professional misconduct because the advocate's name is prominently related to the locus classicus decision of this Honourable Court regarding the meaning and application of S 34 of the *Civil Procedure Act*, being a substantive party in the case of *James Wainaina Imunyio & 6 Others -v- Karanja - Mbugua & Co. Advocates* (2012) eKLR.
14. It was counsel's assertion that the firm of M/S Karanja-Mbugua & Co Advocates has distinguished itself as the leading authority in asserting that matters related to the execution of a decree cannot be litigated in separate proceedings but in the very same suit from which the decree was first extracted.
15. Counsel submitted that an advocate is not permitted in law to approbate and reprobate at the same time and to deceive the Court as was held in the case of *Kibaki v Moi* [2000] 1 EA 115 at page 133, where a five-bench of the Court of Appeal stated as follows:

“We would, however, state that once a party has, in a previous case, taken a particular stand on an issue of law (and succeeded on the point) then good practice would demand that if the position previously taken is being changed, the party ought to disclose that a contrary view had been previously taken and argued, but that there had been a change and the reason or reasons for the change stated.”
16. On this issue counsel argued that, M/S Karanja-Mbugua & Co Advocates were legally, professionally, and ethically obligated to explain to this Honourable Court why they are taking a different stand with regard to S34 of the *Civil Procedure Act* when the firm has successfully asserted a different stand previously.
17. On the issue whether the preliminary objection has merit, counsel submitted that the Respondent did not file a replying affidavit to the application as there were admissions of which counsel stated that would have amounted to contempt of court and a court cannot issue orders to a contemnor.
18. Counsel urged the court to dismiss the preliminary objection with costs

Proposed 4th 5th and 6th Respondents'submissions

19. Counsel for the proposed 4th, 5th and 6th Respondents relied on the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR and submitted that the Petitioner's Notice of Motion Application was not framed as a procedural interlocutory application but was seeking orders which were oblivious to the fact that judgement had already been entered.
20. Mr. Lagat submitted that the orders sought were meant to alter the character of the proceedings from a constitutional petition to a normal suit as some of the orders sought that the certificate of lease issued



to the proposed 4th respondent be cancelled. It was counsel's submissions that this court was functus officio and that it did not have the jurisdiction to hear and determine the entire Notice of Motion application as prayed as judgment had already been delivered.

21. According to counsel, the petitioner in its application is seeking to re-open the matter before the same court. That the orders sought are not in execution and satisfaction of the decree and relied on the case of *Musa Angira v Industrial and Commercial Development Corporation* [2015] eKLR and submitted that the court cannot be moved vide a Notice of Motion application to determine issues of fraud against other parties after judgement in the matter has been delivered.
22. Counsel further relied on the cases of *ICEA Lion General Insurance Co. Ltd v Julius Nyaga Chomba* [2020] eKLR, *Frashia Njeri Mutbaka v Gladys Wangui Peris & 2 Others* [2020] eKLR and reiterated that the petitioner seeks to litigate a new course of action against completely new parties.
23. In conclusion counsel relied on *Brian Muchiri Waihenya v Jubilee Hauliers Ltd & another; Geminia Insurance Co. Ltd (Interested Party)* [2018] eKLR and urged the court to allow the preliminary objection as prayed.
24. Counsel for the 2nd and 3rd Respondents the AG, did not file any submissions as they were in support of the preliminary objection.

Analysis And Determination

25. The main issue for determination is whether or not this court is functus officio hence cannot hear and determine the Petitioner's Notice of Motion dated 5th October, 2023.
26. The Supreme Court of Kenya discussed the doctrine of functus officio in *Raila Odinga & Others v IEBC & Others* [2013] eKLR where it cited with approval from 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.”
27. The preliminary objection filed by the 1st respondent is based on the ground that this court does not have jurisdiction to hear the Notice of Motion dated 5th October 2023 because it is functus officio.
28. In response, the petitioner argued that the application dated 5th October 2023 was filed to facilitate the execution of the judgment of the court that was delivered on 18th May 2021 and therefore this court has the jurisdiction to hear and determine the said application.
29. 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 held 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 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. In the Canadian case of *Chandler v Alberta Association Of Architects* [1989] 2 SCR 848, Sopinka J traced the origins of the doctrines 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 Co.*, (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 had 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. v J.O. Rose Engineering Corp.*, [1934] SCR 186”

30. As was held above, the *functus officio* doctrine prevents the re-opening of a matter before a court that had already rendered a decision on it. The Court of Appeal in the case of [*Telkom Kenya Limited v John Ochanda \(Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited\)*](#) (*supra*) further held as follows:

“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. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd v Ai Thani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“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 or adjudication must be taken to a higher court if that right is available.”

31. Section 34 of the [*Civil Procedure Act*](#) provides as follows:

- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.”



32. The above section bars the filing of separate proceedings to determine issues that emanate from the execution of decrees to a suit. The orders sought are in respect of execution of the judgment delivered by this court on 18th May 2021.
33. By a ruling dated 17th June 2021 the court gave a conditional stay where the 1st Respondents were to deposit Kshs.8 million as security within 21 days in an interest bearing account in the joint names of counsel on record for the Petitioner and the 1st Respondent. Further that the stay orders were to be in force for a period of one year from the date of delivery of the ruling unless otherwise extended by the Court of Appeal .
34. The execution was stayed for one year, which lapsed, and currently there is no stay of execution granted by the Court of Appeal. It is trite that filing of an Appeal is not equated to stay of execution unless a stay is specifically sought and granted by the court or a consent by the parties on a status quo to be maintained pending the hearing and determination of an Appeal.
35. The Applicant is still within its right to pursue the execution of a decree issued by the court and this would be the appropriate court to deal with the application for execution as provided for under Section 34 of the *Civil Procedure Act*. The court will not go into the merits of the application as it was to determine first the preliminary objection that the court is functus officio.
36. A preliminary objection must raise a pure point of law and where there exist contested facts requiring determination, a Preliminary Objection cannot be upheld. The tests to determine whether a matter raises a true Preliminary Objection was summarized in the case of *David Karobia Kiiru v Charles Nderitu Gitoi & Another* [2008] eKLR as follows:
- “For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.”
37. A valid preliminary objection should dispose off the suit. In this particular case, disposing off this suit without finality of execution would be a travesty of justice. Should the Applicant be locked out of the seat of justice by way of preliminary objection without following the provisions of Section 34 of the *Civil Procedure Act* on the ground that the Court is functus officio? I beg to disagree with the submissions of counsel for the 1st Respondent that this court is functus officio in respect of the execution of a decree issued by this court.
38. In the case of *Jersey Evening Post Limited v A. Thani* [2002] JLR 542 at pg. 550 the Court stated:
- “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.”
39. The doctrine of functus officio is a principle of law that prevents the reopening of a matter before a court that has rendered a final decision on the matter. It is to ensure that there is finality in litigation and if a person is aggrieved by an order of the court then they have a right of appeal. The court only becomes functus officio if the judgment or order has been perfected. In this case, I find that the judgment or order has not yet been perfected hence the court is not functus officio.



40. In the case of *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR, the court held that:

“Regarding this court’s jurisdiction to hear this motion, we must state without any doubt, that a court of law cannot shirk its duty to deal with a matter presented before it for resolution, on some pretext or excuse that it has no jurisdiction. Jurisdiction is the core mandate of the court to determine cases or disputes presented before it.

47. In *Samuel Kamau Macharia & another v Kenya commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court restated the position in *Re The matter of Interim Independent Electoral and Boundaries Commission*, [2011] eKLR, that jurisdiction of a court of law flows from the *Constitution* or statute, and that a court cannot arrogate to itself jurisdiction through judicial craft or innovation. It cannot do so by way of endeavours.

48. In the same vein, and in our view, except where jurisdiction is expressly limited by the same constitution, or specific law, the court cannot, through some interpretive approach, oust or limit its own jurisdiction. Declining jurisdiction is a serious matter that cannot be taken lightly. For the foregoing reasons, we do not agree with the respondent that this court is functus officio or lacks jurisdiction to deal with the motion before it. We find no merit in the preliminary objection and we accordingly overrule it.”

41. I have considered the preliminary objection by the 1st Respondent, the submissions by counsel and the relevant judicial authorities and find that the preliminary objection lacks merit and is therefore dismissed with costs to the Petitioner. Petitioner to set down the application for hearing within 14 days.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure

