



Wahiu & 2 others v Wahiu & another (Environment & Land Case 239 of 2018) [2024] KEELC 90 (KLR) (23 January 2024) (Ruling)

Neutral citation: [2024] KEELC 90 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 239 OF 2018**

**MD MWANGI, J
JANUARY 23, 2024**

BETWEEN

**ALEXANDER ANTHONY WAHIU 1ST PLAINTIFF
SAMUEL MWAI 2ND PLAINTIFF
NICHOLAS MUIRURI 3RD PLAINTIFF**

AND

**JOSEPH KARIHA WAHIU 1ST DEFENDANT
THUMBI KAMAU 2ND DEFENDANT**

RULING

(In respect of the Notice of Motion Application dated 18th October 2023 by the 2nd Defendant seeking an eviction order against the Plaintiffs/Respondents)

Background

1. The application under consideration is dated 18th October 2023 filed by the 2nd Defendant/Applicant seeking inter alia an eviction order against the Plaintiffs from the suit property following a judgement delivered in this matter on 4th May 2023. The application is premised on the grounds on the face of it and on the supporting affidavit of Thumbi Kamau, the 2nd Defendant/Applicant.
2. The applicant asserts that he is the registered proprietor of the suit property having purchased it from the 1st Defendant/Respondent for value. The Plaintiffs herein had instituted this suit challenging the sale of the suit property by the 1st Defendant to the 2nd Defendant on the premise that the 1st Defendant was holding it in trust for them.
3. Judgment was rendered in this case by Hon. Lady Justice K. Bor on 4th May, 2023 dismissing the Plaintiffs’ suit as well as the 1st Defendant’s counter-claim. The 2nd Defendant avers that the said



judgment in essence affirmed his proprietorship over the suit property. It is on that basis that he has brought his application.

4. The Applicant states that on 2nd June, 2023, he wrote to the Plaintiffs through his Advocate Messrs. M.M. Gitonga Advocates LL. P, informing them that he intended to occupy the suit property. The letter was sent to the Plaintiffs' Advocates Messrs. Kingara & Co. Advocates.
5. Again, on 20th June, 2023, the Applicant avers that he issued the Plaintiffs with a three months' notice of eviction pursuant to section 152 E of the Land Act, 2012, requiring them to vacate from the suit property and remove all illegal structures and developments on the suit property. The said notice lapsed on 20th September, 2023. However, the applicant avers that the Plaintiffs have deliberately and knowingly refused, failed and or neglected to comply with the said notice despite having been afforded sufficient time to vacate and remove all illegal structures and developments in the suit property.
6. The Applicant asserts that his efforts to occupy the suit property have been met with brute and violent resistance from the Plaintiffs who are illegally in occupation of the suit property.
7. The 1st Defendant through his Advocate Mrs. Omondi indicated to the court that he was in support of the application.

Response by the Plaintiffs/Respondents

8. The Plaintiffs' response to the application by the 2nd Defendant was by way of a replying affidavit sworn by one Alexander Anthony Wahi on 7th November, 2023, on his own behalf and on behalf of his Co-Plaintiffs.
9. In the said affidavit, the deponent insists that the 1st Defendant sold the suit property behind their backs. He however, admits that judgment has been rendered in this case but it did not include an eviction order. He states that the Applicant is introducing a new dimension to the judgment.
10. The deponent further states that the Plaintiffs have filed a notice of appeal with an intention of challenging the decision of this Court in the Court of Appeal. They too have made an application for stay of execution in that court, which was certified urgent on 28th July, 2023. A date of hearing of the application had not been issued at the time of swearing the replying affidavit. The deponent states that they have subsequently filed the substantive appeal.
11. The deponent urges the court to direct that the application by the 2nd Defendant herein awaits the outcome of the appeal.
12. The deponent further avers that section 152E of the Land Act is inapplicable in this case because the occupation by the Plaintiffs/Respondents is subject to ongoing litigation in which the Applicant's title is contested. The deponent therefore urges the Court to dismiss the application.

Court's Directions.

13. The Court directed that the application be canvassed by way of written submissions. Both the 2nd Defendant/Applicant and the Plaintiffs/Respondents complied and filed their respective submissions. The court has had the opportunity to read the submissions which now form part of its record.

Issues for Determination.

14. The fact that judgment has already been delivered in this matter poses a fundamental issue on the jurisdiction of this court to entertain and determine this application. The court must therefore at this



juncture determine whether it is functus officio before delving into the merits of the 2nd Defendant's application.

15. I have carefully perused the judgement of my sister Judge, Lady Justice K. Bor delivered on 4th May 2023. I have also taken time to peruse the pleadings filed by the parties in this case.
16. I note that in response to the Plaintiffs' case against him, the 1st Defendant filed a statement of Defence and Counter-claim dated 2nd April, 2019. On his part, the 2nd Defendant merely filed a statement of Defence, affirming, as the learned Judge highlighted in her judgment, that he was a bona fide purchaser for value without notice having bought the suit property from the 1st Defendant for valuable consideration without notice of any defect on the title vide the sale agreement dated 12th February, 2008. The 2nd Defendant did not, as has been observed by the Plaintiffs/Respondents in their submissions, file any Counter-claim against them.
17. In its judgment therefore, the Court pronounced itself on the Plaintiffs' claim and on the 1st Defendant's counter-claim only. It did not make any finding on the proprietorship of the 2nd Defendant over the suit property as he insinuates in his application.
18. The question then that begs for an answer is whether this is the right forum for the 2nd Defendant to seek the kind of orders sought in his application under consideration. Secondly, the other issue for determination is whether the Applicant has complied with the provisions of section 152 E of the [Land Act](#), under which his application is grounded.

Analysis and Determination.

A. Whether the Court is Functus Officio

19. In the case of *Telkom Kenya Ltd –Vs- John Ochanda* (2014) eKLR, the Court of Appeal while discussing the principle of functus Officio stated 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. 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.”

20. The court pointed out the various exceptions to the principle of functus officio, notably: - Application for stay (of execution) Application to correct the decree (under the slip rule) Application for accounts; Application for execution including garnishee proceedings; Application for review, and Applications under section 34 of the [Civil Procedure Act](#).
21. In the case of *Raila Odinga -vs- IEBC & 3 others* Petition No 5 of 2013, the Supreme Court of Kenya cited with approval a paragraph from, ‘The origins of the Functus Officio Doctrine With Specific Reference to its Application in Administrative Law’ by ‘Daniel Malan Pretorius’ as follows:-

“.....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.”



22. The Supreme Court also referred to the case of Jersey Evening Post Limited –Vs- A. Thani (2002) JLR 542 at page 550 where 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. 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.”

23. Having regard to the above cited authorities, I have no doubt in my mind that this court is functus officio and lacks the jurisdiction to entertain and determine the application presented by the 2nd Defendant. The 2nd Defendant in his application invites this court to a merit based decisional re-engagement with the case after final judgment has been entered and a decree thereon issued. He seeks to expand the scope of the judgment delivered by the court.

24. I need not over-emphasize that the issue of jurisdiction is weighty and fundamental in any case. Moreover, it is a point of law. The court has a duty to uphold the law in this case, in all other cases and at all times whether the issue is raised or not by any party in the particular case.

25. In the famous case of Owners of Motor Vessel Lilian ‘S’ –Vs- Caltex Kenya Ltd (1989) eKLR, the court stated that: -

“Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

26. The Court of Appeal affirmed the position in the case of Equity Bank Ltd –Vs- Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR where it stated that: -

“It is settled that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the oxygen principle or the overriding objective under the [Civil Procedure Act](#), the [Appellate Jurisdiction Act](#) or even Article 159 of [the constitution](#) to remedy the same.”

27. I need not say any more on that issue. The court lacks jurisdiction to entertain the application by the 2nd Defendant. However, and as good practice demands, I will proceed to the next issue.

B. Whether The Applicant Has Complied With The Provisions Of Section 152e Of The [Land Act](#)

28. The 2nd Defendant’s application as earlier noted is brought under the provisions of Section 152E of the [Land Act](#). Compliance with the provisions of section 152 of the [Land Act](#) is a prerequisite to the grant of orders of eviction.

29. Section 152E of the Land Laws (Amendment) Act No. 28 of 2016 clearly provides that the notice to vacate must be issued not less than three months before the intended date of eviction.

30. The Section provides as follows: -

“Eviction Notice to unlawful occupiers of private land



1. If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve a notice, of not less than three months before the date of the intended eviction.
 2. The notice under subsection (1) shall-
 - a. be in writing and in a national and official language;
 - b. in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - c. specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - d. be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.”
31. The Section was enacted after the observation by Mumbi J (as she then was) in the case of *Mitu-Bell Welfare Society -vs- Attorney General & 2 others* [2013] eKLR, that:
- “.... This country has yet to develop legislation and guidelines for eviction of persons occupying land which they are not legally entitled to occupy. However, as a member of the international community and a signatory to various United Nations treaties and conventions, it is bound by such international guidelines as exist that are intended to safeguard the rights of persons liable to eviction. Article 2(5) and (6) of *the Constitution* make the general rules of international law and any treaty or convention that Kenya has ratified part of the law of Kenya. Consequently, the state, state organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions as enunciated by the United Nations Office of the High Commissioner for Human Rights in General Comment No. 7.”
32. The UN guidelines requires appropriate procedural protection and due process as essential aspects of all human rights and especially in relation to a matter such as forced evictions which directly invoke a large number of rights recognized in the two International Covenants on Human Rights. The procedural protections which should be applied in relation to forced evictions include:
- a. an opportunity for genuine consultation with those affected;
 - b. adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
 - c. information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
 - d. especially where groups of people are involved, government officials or their representatives to be present during an eviction;
 - e. all persons carrying out the eviction to be properly identified;
 - f. evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;



- g. provision of legal remedies; and
- (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

33. In the case of *Solome Naliaka Wabwile vs Alfred Okumu Musinaka* [2022] eKLR, Olao J stated that:

“... It must be remembered that under the *Land Act* 2012, the eviction of persons from private land can take either of the following routes: -

1. By the land owner issuing a notice to the person in occupation of his land without consent to vacate within 3 months. Such notice is issued under section 152 E of the *Land Act*. The person served with such a notice has a recourse under Section 152 F to apply to the Court for relief. The Court may confirm the notice and order the person to vacate or it may vary, alter, suspend or make additions to the notice as it deems equitable and just.
2. By the land owner filing a suit for the eviction of a person who is occupying his land without consent. The Court, after hearing both the land owner and the occupier of the land may issue an order for eviction of the person who is unlawfully occupying the land. That is the route that the defendant herein took by his Counter – Claim. Section 152 A of the *Land Act* provides that no person shall unlawfully occupy private, community or public land.

Whichever route the owner of the land takes in evicting persons who are unlawfully occupying his land, there are mandatory procedures provided under Section 152 G (a) to (i) of the *Land Act* which must be adhered to during the eviction process.”

34. In the case of *Atik Mohamed Omar Atik & 3 others vs Joseph Katana & Another* [2019] eKLR J.O. Olola stated as follows on the procedure for eviction of persons unlawfully occupying private, community or public land:

“In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in court. Under Section 152E of the *land Act*, any person or persons served with such notice may apply to court for relief against the notice.”

35. The Applicant in this case merely attached as an annexure to his supporting affidavit the notice addressed to the Plaintiffs and copied to the Nairobi Region Command or, Nairobi County Commissioner and Office Commanding Station (OCS) Dagorreti North Sub-County. I wonder whether there is an office referred to as ‘Nairobi County Commissioner’. He has not adduced any evidence confirming service on the Deputy County Commissioner in charge of the area as well as the Officer Commanding the Police Division of the area as required by Subsection (2)(d). The Law is crystal clear.

36. Service of the notice means ‘delivery’ of the notice. The Applicant is obligated to provide evidence of service which ordinarily is in the form of an affidavit of service by a process server. Presenting the notice copied to the referred offices does not suffice. It does not meet the requirements of the Law. Accordingly, the court’s finding is that there is no evidence of service of the notice to the Deputy County Commissioner of the area and the Officer Commanding the Police Division of the area where the suit property is situated.



37. The upshot from the foregoing is that the 2nd Defendant's application is dismissed with costs to the Plaintiffs/Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JANUARY 2024

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kingara for the Plaintiffs/Respondents

Mr. Njiru holding brief for Mr. Gitonga for the 2nd Defendant/Applicant

