



REPUBLIC OF KENYA



**KENYA LAW**

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**Matingwony (Suing as the Administratrix of the Estate of the Late Kimalel Matingwony (Deceased) v Rop & 5 others (Environment & Land Case 24 of 2007) [2024] KEELC 1001 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1001 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**  
**ENVIRONMENT & LAND CASE 24 OF 2007**  
**MC OUNDO, J**  
**FEBRUARY 29, 2024**

**BETWEEN**

**LUCIA MATINGWONY (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE KIMALEL MATINGWONY (DECEASED)) ..... PLAINTIFF**

**AND**

**KIPKEMOI ROP ALIAS SERONEY ROP ..... 1<sup>ST</sup> DEFENDANT**  
**JEREMIAH KIPRONO CHIRCHIR ..... 2<sup>ND</sup> DEFENDANT**  
**ERICK CHIRCHIR ..... 3<sup>RD</sup> DEFENDANT**  
**GEOFFREY CHIRCHIR ..... 4<sup>TH</sup> DEFENDANT**  
**THE CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**  
**THE HONOURABLE ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. In an application by way of a Notice of Motion dated the 30<sup>th</sup> August 2023, and brought under the provisions of Section 1A, 1B, 3, 3A, and 79G of the *Civil procedure Act* Order 51 Rule 1 of the Civil procedure Rules 2010, Article 50(1) of *the Constitution* of Kenya, 1<sup>st</sup> Defendant/Applicant sought for review of the court's order dated 6<sup>th</sup> July, 2016 and thereafter order the Plaintiff/Respondent Lucio Matingwony to pay in damages Kshs. 20,000/= per month wherefrom the date indicated in the court order.
2. The Application was supported by the grounds set on its face as well as on the supporting affidavit of the Applicant sworn on the 30<sup>th</sup> August 2023 to the effect that whereas he was the registered owner of land parcel No. Kericho/Kabianga/2407 (suit land), the Plaintiff/Respondent, who is the administrator and beneficiary of land parcel No Kericho/Kabianga/1129, had filed suit claiming



ownership of his (Applicant's) land and had refused to comply with the court's order dated 6<sup>th</sup> July 2016. That the matter had since been concluded wherein he (1<sup>st</sup> Defendant, Applicant) had filed an Appeal which was yet to be determined. That the Plaintiff/Respondent had since evicted him from the suit land and his attempt to get help from Provincial Administration and the police have been futile. That the court should allow the review to enable him get justice since he stood to suffer prejudice.

3. The said Application was opposed vide the Plaintiff/Respondent's Replying Affidavit dated the 18<sup>th</sup> September 2023 in which she deposed that the instant application was totally misconceived and an abuse of the process of court since the order sought to be reviewed had been an interim order which had been issued pending the hearing and determination of the instant suit and which suit had proceeded to full hearing, and judgement rendered on 14<sup>th</sup> September, 2018 wherein the register had been duly rectified as ordered by court.
4. That since the Applicant had lodged a Notice of Appeal against the Judgement and Decree of the court, this court was functus officio. That there had not been discovery of a new matter to warrant the orders sought hence the instant application was fundamentally and fatally defective.
5. Whereas the 4<sup>th</sup> and 5<sup>th</sup> Defendants' Replying Affidavit dated 3<sup>rd</sup> October, 2023 in opposition to the application also reiterated the contents of the Plaintiff/Respondent's Replying Affidavit, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not participate in the Application.
6. On 2<sup>nd</sup> November 2023, directions were taken for the disposal of the application by way of Written Submissions. Accordingly, while the Applicant and the Plaintiff/Respondent filed their respective submissions. The 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents did not comply.

#### **1<sup>st</sup> Defendant/Applicant's Submissions.**

7. The Applicant, vide his man made submissions dated 16<sup>th</sup> November 2023 submitted that vide the court order of 6<sup>th</sup> July, 2016, the Plaintiff/Respondent had been directed to continue plucking the tea in the disputed 3 acres portion of the land with an undertaking that she would pay in damages a monthly sum of Kshs. 20,000/= to the Applicant which order the Plaintiff/Respondent had refused to honor, obey and/or acknowledge. That not only had he not been served with any response by the Plaintiff/Respondent on the instant Application, but the Plaintiff/Respondent had also destroyed his maize and banana crops by grazing her cows thereon on the suit land.

#### **Plaintiff/Respondent's submissions**

8. The Plaintiff/Applicant summarized the factual background of the matter before hinging her reliance on the decided case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR to submit that in the instant application, the Applicant neither produced the order that he was seeking to review nor did he prove that such order requiring the Plaintiff/Respondent to pay money to him existed.
9. That indeed the purported order which the Applicant sought the court to review was non-existent since it had been a conditional order issued by the court to the effect that in the event that the Applicant herein had succeeded in his claim for the suit property, then Respondent (Plaintiff) would have to pay him a sum of Kshs. 20,000/= per month for each month that she had plucked tea from the suit land.
10. That the said order had emanated from an undertaking on the part of the Respondent in a bid to expedite the court process as the Applicant had riddled the court with application upon application with a view of dragging the main suit. Further that it was trite that a conditional order could only be enforceable subject to attached conditions which condition in the instant case was that the Applicant ought to have been successful in his counterclaim.



11. That the conditional order had since been rendered superfluous after the court delivered Judgment in her favour on 14<sup>th</sup> September, 2018 wherein it had among other things decreed that the suit property rightfully belonged to her and the Applicant's counterclaim had been dismissed accordingly.
12. She relied on the provisions of Order 45 (1) (a) and (b) to submit that even if such an order had ever existed, the Applicant herein had not met the threshold for the grant of review since he had neither proved that there had been additional evidence nor had he shown that there had been an error in the said order if any, to warrant the review. The Respondent thus submitted that even if there had existed a valid order and the Applicant had met the threshold for review, the court had become *functus officio* on delivery of judgement and decree which had been extracted, and which the Applicant had preferred an Appeal on when he duly filed a Notice of Appeal and which Notice had been struck out. Reliance was placed on the Supreme Court of Kenya Decision in the case of *Odinga v. Independent Electoral & Boundaries Commission & 3 others* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013).
13. Subsequently, the Respondent submitted that the instant Application was bad in law, a waste of precious judicial time and an abuse of the court process and should be dismissed with costs.

### Determination

14. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law herein. In summary the Applicant has sought for review of the interim court order dated 6<sup>th</sup> July, 2016 issued in the proceedings of 27<sup>th</sup> April 2016, wherein the Hon. Justice Munyao Sila had issued interim directions that the Plaintiff/Respondent Lucio Matingwony could continue plucking tea on her undertaking that she shall pay damages of Kshs. 20,000/= per month to the 1<sup>st</sup> Defendant/Applicant in the event that she loses her suit. The undertaking was with effect from the 27<sup>th</sup> April 2016. It is evident that the matter had subsequently proceeded to full hearing and determination where judgment had been delivered on 14<sup>th</sup> September 2018 in favour of the Plaintiff/Respondent.
15. An application by the Applicant herein dated 11<sup>th</sup> October 2018 for temporal stay of execution of the judgment and Decree of the court had been dismissed vide the court ruling of 19<sup>th</sup> December 2018. Subsequently the Respondent sought for eviction orders against the Applicant in his application dated 7<sup>th</sup> February 2019 which Application had been allowed vide a Ruling dated the 21<sup>st</sup> June 2019. Not to be deterred, the 3<sup>rd</sup> Defendant herein vide an application dated the 13<sup>th</sup> August 2019, unsuccessfully sought to set aside the said ruling and orders of the 21<sup>st</sup> June 2019, as well as the judgment and decree of 14<sup>th</sup> September 2018 and thereafter review orders made against him. The application was dismissed by the court's ruling of 28<sup>th</sup> October 2020. The Applicant having preferred an Appeal by duly filing a Notice of Appeal dated 17<sup>th</sup> September 2018 which had been struck out, there is no Appeal pending against the judgment and Decree of the court of 14<sup>th</sup> September 2018 which was duly executed. The issue that arises for determination therefore is whether having discharged its duty, the court had become *functus officio*.
16. *Functus officio*, is 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.” I
17. The Supreme Court of Kenya expounding on the doctrine of *functus officio* in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others v. 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: and held that’;

“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.”

18. The Supreme Court of Kenya had also relied on the holding in the case of [Jersey Evening Post Limited v 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.”

19. In the same vein, the Court of Appeal in the case of [Telkom Kenya Limited v. John Ochanda](#) [2014] eKLR, had 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...

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. 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.”

21. Whilst it is clear from the above provisions of law that the doctrine of functus officio does not bar a court from entertaining a case it has already decided, the said doctrine prevents the court 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. Further, the order which the Applicant herein seeks to be reviewed had been an interim order pending the hearing and determination of the case wherein hearing had proceeded culminating into delivery of judgement on 14<sup>th</sup> September 2018, which in effect disposed of the said interim order.

22. From the foregoing, this court having pronounced itself vide the judgement dated 14<sup>th</sup> September, 2018, it marked the instant matter settled thus it cannot revisit and or re-open the matter. Accordingly, it is my finding that the instant application has nothing to lean on as there is no substantive suit in place. A court cannot be approached through an application without a substantive suit. Even though the Applicant had filed a Plaint seeking for the review of the orders in the instant matter,



it should be noted that a substantive suit cannot be filed for the purposes of seeking review of an order from another substantive suit. Subsequently, the Applicant has no recourse under this matter as it had been fully determined by this court and therefore cannot be re-opened unless the legality of the judgement entered therein had been in question. Accordingly, I agree with the Counsel for the Plaintiff/Respondent that this court is *functus officio* with the effect that the application dated 30<sup>th</sup> August, 2023 is hereby dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

