



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Bundi v Kangethe & 17 others; Mwangi & 5 others (Interested Parties) (Environment & Land Case 411 of 2017) [2024] KEELC 789 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 789 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 411 OF 2017**

**JG KEMEI, J**

**FEBRUARY 16, 2024**

**BETWEEN**

**BARUTHI BUNDI ..... PLAINTIFF**

**AND**

**IBRAHIM KANGETHE ..... 1<sup>ST</sup> DEFENDANT**

**ISAAC KAMAU KABUE ..... 2<sup>ND</sup> DEFENDANT**

**PETER NJOROGE KABOGO ..... 3<sup>RD</sup> DEFENDANT**

**JOSHUA NJOROGE ..... 4<sup>TH</sup> DEFENDANT**

**PETER MWANGI ..... 5<sup>TH</sup> DEFENDANT**

**DANIEL WATUKU ..... 6<sup>TH</sup> DEFENDANT**

**JOEL KINUTHIA WANDUA ..... 7<sup>TH</sup> DEFENDANT**

**PETER MURIGI NJUGUNA ..... 8<sup>TH</sup> DEFENDANT**

**JOSEPHAT WANGEKA ..... 9<sup>TH</sup> DEFENDANT**

**MUCHIRI NDIRANGU ..... 10<sup>TH</sup> DEFENDANT**

**PETER KINUTHIA ..... 11<sup>TH</sup> DEFENDANT**

**SAMUEL WAWERU ..... 12<sup>TH</sup> DEFENDANT**

**GABRIEL KAMAU WAWERU ..... 13<sup>TH</sup> DEFENDANT**

**ZACHARIA MUCHIRI ..... 14<sup>TH</sup> DEFENDANT**

**MWANGI KAMAU ..... 15<sup>TH</sup> DEFENDANT**

**FRANCIS WAWERU ..... 16<sup>TH</sup> DEFENDANT**

**DAVID NDIRANGU ..... 17<sup>TH</sup> DEFENDANT**



NDOGE NGUGI ..... 18<sup>TH</sup> DEFENDANT

AND

BENSON MAINA MWANGI ..... INTERESTED PARTY

DANIEL KINYANJUI MUIRURI ..... INTERESTED PARTY

BIBIYANA WAMBUI (SUED AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF KARIUKI WAITITU) ..... INTERESTED PARTY

SABINA WANJIRU IRUNGU ..... INTERESTED PARTY

JAMES NJUGUNA MWANGI ..... INTERESTED PARTY

LYDIA NJERI MAINA ..... INTERESTED PARTY

### RULING

1. On 6/12/2018 this Court (Angote J) allowed the Plaintiff's claim against the Defendants by inter alia granting a permanent injunction restraining the 1<sup>st</sup> to 18<sup>th</sup> Defendants from trespassing on the Plaintiff's land known as Thika Municipality Block 11/863 and eviction of the Defendants and/or their agents, servants and employees from the said parcel of land. Determined to enjoy the fruits of his Judgment, the Plaintiff commenced execution process by issuing eviction notices as affirmed by the Ruling of this Court dated 23/6/2022.
2. Aggrieved with the eviction notices, the 1<sup>st</sup> – 6<sup>th</sup> Intended Interested Parties filed a Notice of Motion Application dated 27/9/2022 seeking in the main joinder as Interested Parties in the suit and temporary injunction against the Plaintiff from carrying out eviction on specified plot numbers said to belong to the Interested Parties.
3. Resisting the Motion, the Plaintiff filed his Replying Affidavit and raised a Preliminary Objection dated 23/5/2023, the subject of this Ruling. The Preliminary Objection is based on grounds that;
  - a. The Court is *functus officio* having delivered Judgement and disposed off this matter way back in 2018.
  - b. The applicants have never been parties in this suit.
  - c. The Application herein is a gross abuse of the Court process.
4. With the authority of all the Interested Parties, the 5<sup>th</sup> Interested Party James Njuguna Mwangi swore his Replying Affidavit on 24/7/2023. He averred that the Interested Parties take issue with the decree being used to evict them yet they were not parties in the instant suit. That the report by Plaintiff's surveyor annexed as JNM shows that the Plaintiff intends to demolish the Interested Parties buildings despite dismissal of the suit between the Interested Parties and the Plaintiff namely Nbi ELC Case No. 346 of 2011 and dismissed appeal in Nbi Civil Application No. E334 of 2020 – see JNM1.
5. The Preliminary Objection was canvassed by way of submissions.
6. The Plaintiff through the firm of Karanja Kang'iri & Co. Advocates filed submissions dated 3/10/2023 in support of the Preliminary Objection. A singular issue was drawn for determination to wit whether the Court herein is *functus officio* and therefore barred from hearing the Applicant's Application. It was submitted that the Court having made a final determination and rendered its Judgment, the Court is



*functus officio*. Reliance was placed on the Court of Appeal case of *Telcom Kenya Ltd vs John Ochanda (suing on his behalf and on behalf of 996 Others)* [2014] eKLR as quoted in the case of *Brian Muchiri Waihenya vs Jubilee Hauliers Ltd & Anor; Geminia Insurance Co. Ltd (Interested Party)* [2018] eKLR that *functus officio* is a principle that prevents the re-opening of a matter before a Court that rendered a final decision. That the prayers contained in the impugned Application require this Court to re-engage itself and interrogate whether the IPs can be enjoined in the suit and whether the suit is *res judicata*.

7. Conversely, the firm of Jesse Kariuki & Co. Advocates filed the Interested Parties submissions dated 6/10/2023. They contend that the Interested Parties are not seeking reopening of the case for fresh hearing rather they wish to stop the Plaintiff from wrongly using the decree issued in this Court to evict them from their premises in light of the outcome of previous proceedings pitting the Plaintiff and Interested Parties – Milimani ELC No. 346 of 2010. That the said suit was dismissed on 25/10/2018 and the appeal to Court of Appeal was similarly dismissed. They accuse the Plaintiff for abusing the Court process and trampling their rights if the eviction is allowed without following the due process.
8. The *Black's Law Dictionary*, 10<sup>th</sup> Edition defines a Preliminary Objection as; -

“... in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”
9. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:-

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion ...”
10. 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. See the case of *David Karobia Kiiru vs Charles Nderitu Gitoi & Another* [2008] eKLR.
11. The gist of the present Preliminary Objection is that this Court is *functus officio*. It is commonly agreed by the parties that this suit is already concluded and therefore no live proceedings. Indeed, the intended Interested Parties admit as much in both their Replying Affidavit and para. 2 of their written submissions.



12. The Supreme Court in the case of *Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR while discussing the doctrine *functus officio* stated thus;

“We, therefore, have to consider the concept of “*functus officio*,” as understood in law. Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“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.”

13. The Court of Appeal in the case of *Telkom Kenya* (*supra*) emphasized 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.”

14. Similar position was held in the case of *John Gilbert Ouma vs Kenya Ferry Services Limited* [2021] eKLR where the Court stated that;

“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.” (emphasis is mine)

15. This Court has previously acknowledged that the Judgment herein giving rise to the impugned eviction decree was delivered way back on 6/12/2018. It is also trite that execution of such a decree is a lawful process. The Plaintiff has a right to enjoy the fruits of his Judgment. The law envisaged objections to such executions and provided adequate mechanisms to ventilate any dissatisfaction. The path opted by the intended Interested Parties is surely not one of them. I say no more.

16. The upshot of the foregoing is that the Preliminary Objection is merited. It is upheld with costs in favour of the Plaintiff.

17. Orders accordingly.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Kang'iri for the Plaintiff

1<sup>st</sup> – 17<sup>th</sup> Defendants - Absent

Jesse Kariuki for 1<sup>st</sup> – 6<sup>th</sup> Interested Parties



