



Kenya Ihenya Company Limited v Chuchu & 2 others; Nyongoina & 146 others & another (Interested Parties) (Environment & Land Case 41 of 2007) [2024] KEELC 1582 (KLR) (21 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 41 OF 2007**

**J OMANGE, J
MARCH 21, 2024**

BETWEEN

KENYA IHENYA COMPANY LIMITED PLAINTIFF

AND

RUTH NYAMBURA CHUCHU 1ST DEFENDANT

ZIPPORAH NYAMBURA CHUCHU 2ND DEFENDANT

FLORENCE NJERI CHUCHU (BEING SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE SOLOMON CHUCHU WATAKU AKA CHUCHU WATAKU GITHIBA ALIAS CUCU WATAKU ALIAS CHUCHU WATAKU) 3RD DEFENDANT

AND

JACKTON ASEWE ANGWET & ISAAC NYONGOINA & 146 OTHERS INTERESTED PARTY

URUTWAGO MWIRUTI WOMEN GROUP INTERESTED PARTY

RULING

1. In the notice of motion application dated 25th September 2023 the Applicant seeks the following orders:
 - a. Spent.
 - b. That the Honourable court be pleased to issue an order compelling the Land Registrar, Nairobi Land Registry to reconstruct the Land Register in respect of Land Parcel Number 7340/91 herein referred to as the suit property within 14 days of the order.



- c. Costs of the application be provided for.
2. The Application is supported by an Affidavit sworn by, Othniel K. Waiguru on behalf of the plaintiff in which he depones that the plaintiff obtained a Judgement delivered by Lady Justice L. Komingoi on the 9th December 2021 declaring Plaintiff the bona fide owner of the suit property herein and directing that the suit property be transferred to it. He avers that the Plaintiff has been unable to execute the Judgement as the land register in respect of the title is said to be missing.
 3. He deponed that the Defendants who are the administrators of the estate of the deceased Solomon Chuchu have been unwilling to effect the transfer or make an application to reconstruct the file to facilitate the transfer. They seek the courts help to execute the court's Judgement.
 4. In response to the application the Defendants filed a notice of preliminary objection dated 3rd October 2023 in which they state that the application is sub judice as there are pending proceedings in the Court of Appeal. Further, that the application is an abuse of the process of the court. In the Replying Affidavit, they contend that there is an application for Stay of Execution pending before the Court of Appeal. As such this application should be stayed pending the determination of the appeal. Lastly, they argue that this court is functus officio hence cannot adjudicate on the application.
 5. In support of the Preliminary Objection the Defendants cite the case of *Daniel Kipkemoi Bett & Another v Joseph Rono* in which the court stated that the matter was subjudice since there was a pending appeal yet to be decided and the execution of judgement could not be enforced and upheld the preliminary objection. It is also their submission that the prayers in the main suit are the same prayers in this instant application hence the doctrine of res judicata applies.
 6. The interested parties opposed the application vide a replying affidavit dated 9th October 2023 arguing that this court lacks jurisdiction to issue the orders as this will be in contravention of the provisions of section 33(5) of the *Land Registration Act* which vests these powers on the Land Registrar. They insist that the Applicant has not followed the procedure for applying for construction.
 7. The Applicant in its submissions concede that there is a pending appeal in the Court of Appeal and an application was made for Stay of Execution but these orders were not granted. As such there is no order barring them from enjoying the fruits of the Judgement. They contended that the principles of sub judice and res judicata do not suffice since the threshold required to prove both was not met by the defendants. They cited the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*. In response to the Defendants' averments that the court is functus officio the Applicant submitted that under Section 38 of the *Civil Procedure Act* the Court has powers to enforce execution on the application of the decree-holder, and in the instant case the courts intervention was needed to execute the Judgement.
 8. On the allegation that they had not followed due process, the Applicant submitted that not being registered proprietors of the suit property they were not bound by Section 33(5) of the *Land Registration Act* as they were not legally registered as proprietors of the suit property. They referred the court to the case of *Republic v County Land Registrar, Makueni Lands Registry Ex-Parte Philes Mwikali Kioko & 2 others* [2021] eKLR.
 9. I have considered the pleadings filed herein by all parties and the submissions. The following are the issues for determination; Is the application sub judice? Should substitution of the Defendants been sought? Is the court functus officio? Does this court have jurisdiction to determine the application?
 10. On the question of sub judice, it is the Defendants case that there is an application for stay of execution pending in the Court of Appeal in respect of which they expect a ruling any day. They therefore argue



that it is an abuse of the process of the court for the Defendants to pursue the application before this court. The doctrine of sub judice is outlined in section 6 of the *Civil Procedure Act* which provides;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

11. For the doctrine of sub judice to lie, it must be proved that the suit relates to the same parties or parties litigating under the same title, and the matter in issue is substantially the same as that in an earlier filed suit. The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties to avoid abuse of the Court process and prevent issuance of conflicting decisions over the same subject matter.
12. In this case the respondents and the interested parties are relying on the application seeking stay of execution orders against the Judgement herein and subsequent appeals being appeal E149 of 2022 and appeal E058 of 2022 filed by the respondents and interested parties respectively in the Court of Appeal. Apart from the fact that the appeals and the present suit are between the same parties the cases do not meet the parameters set out in Section 6. The issues in dispute are different. The application before this court seeks to execute the court order while in the Court of Appeal the parties are seeking stay and for the Court to overturn the orders given by this court. Even more important, there is no order staying execution or proceedings before this court. Order 42 Rule 6 of the Civil Procedure Rules is crystal clear that filing of an appeal is not automatic stay of execution or proceedings.
13.
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order (emphasis mine) but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereof as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
14. In the case of *Edward Njuguna Kangethe v Joel Kiema Mutinda & 2 others* [2021] eKLR Justice Eboso found that in the absence of a stay of execution order either in the trial court or in the Court of Appeal, there is no bar to execution. The court proceeded to allow eviction as it said “In the circumstances, no court of law abiding by the law of the land and acting conscientiously would deny a successful party the right to enforce a court award. In the circumstances, this court allows enforcement of the award of the court in tandem with Order (d) of the judgment dated 22/9/2017.”
15. The Defendants had in the Preliminary Objection also raised the issue that the Defendants had passed away hence substitution should have been sought. They did not however pursue this argument in their submissions or make reference to the issue in their affidavits. In any event it did not meet the parameters which require that Preliminary Objections should be on a pure point of law and not on any issue which requires factual determination.
16. On the third issue of whether the court is functus, 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, which authority the Applicant herein has highlighted wherein 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.” It is not contested that there is a Judgement delivered by the court in favor of the Applicant. The application before this court seeks to enforce the Judgement. It is not opening the matter up litigation on the same issues. This power is donated by Section 38 of the Civil Procedure Act which gives the court power to enforce decrees on application of decrees holders, as follows;

- a. by delivery of any property specifically decreed
- b. by attachment and sale, or by sale without attachment, of any property.
- c. by attachment of debts
- d. by arrest and detention in prison of any person
- e. by appointing a receiver; or
- f. in such other manner as the nature of the relief granted may require

The order sought by the Applicant falls under (f).

17. Regarding the issue of lack of jurisdiction, the Defendants aver that the Plaintiff has not followed the laid down procedure for reconstructing the land register as provided under Section 33 of the Land Registration Act. Section 33 (1) provides that “where a certificate of title or a certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease“.
18. From a plain reading of this section it is clear that only a proprietor may make such an application to the Registrar. It is also mandatory for such proprietor to produce evidence to satisfy the Registrar of the loss of such title. These are totally different circumstances from those prevailing in this case where the Applicant is seeking to be registered following a court decision. I find that this court has jurisdiction to determine the application and proceed to consider the same.
19. The Applicant has indicated that it is unable to effect the court Judgement as the register is missing. This court has a duty to ensure that in the absence of any legal impediment, the Applicants are able to enjoy the fruits of the Judgement they obtained from this court. This court has a duty to ensure that the Judgement it gave the Applicant does not remain a piece of paper. In the circumstances, I adopt the reasoning by Hon Justice Eboso in the case of Edward Kangethe Supra. and find that given that there is no order for stay of execution the application is merited. The plaintiff, the decree holder, is entitled to enforce execution of the judgement of the court in terms of the prayers sought in the application. The application is allowed as follows;
 - a. An order is hereby issued compelling the Land Registrar, Nairobi Land Registry to reconstruct the land register in respect of Land Parcel 7340/91 within 30 days of service of this order.
 - b. It is so ordered.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 21ST DAY OF MARCH 2024.

Judy Omenge



JUDGE

In the presence of: -

Mr. Kipkirui for the Plaintiff/Applicant

Mr. Mugo for Interested Parties

Steve - Court Assistant

