



**Chesebe (Being the personal representative of the Estate of Ndiwa Chesebe Meini) v Sikuku  
(Environment and Land Appeal 01 of 2019) [2024] KEELC 3922 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3922 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 01 OF 2019**

**EC CHERONO, J**

**APRIL 24, 2024**

**BETWEEN**

**KIPYEGON NDIWA CHESEBE (BEING THE PERSONAL REPRESENTATIVE  
OF THE ESTATE OF NDIWA CHESEBE MEINI) ..... APPELLANT**

**AND**

**JOHN CHESEBE SIKUKU ..... RESPONDENT**

**RULING**

1. By Notice of Motion dated 17<sup>th</sup> August, 2023 the Applicant sought for the following orders: -
  - a. Spent
  - b. Spent
  - c. That there be a finding on whether the decree in the judgment of the Environment and Land Court ELC Appeal No. 01 of 2019 and the decree in the judgment of the Kimilili PMCC Case no 2 of 2011 having ordered the subdivision and transfer of 10 Acres of land from land parcel no. Elgon/Kaptama/459 are in proper provisions of the law with the now Kimilili PMCC Case no 2 of 2011 court order dated 14<sup>th</sup> July, 2022 issued on 21<sup>st</sup> July, 2022 having directed the subdivision of land parcel no. Elgon/Kaptama/610.
  - d. That there be a review of the decree in the judgment of the Bungoma Environment and Land Court ELC Appeal Case no 1 of 2019 and the decree in the judgment of the Kimilili PMC Civil case no.2 of 2011 and the Kimilili PMC Court Civil case no.2 of 2011 court order dated 14<sup>th</sup> July, 2022 issued on 21<sup>st</sup> July, 2022 against the applicant.
  - e. That costs of this application be in the cause.
2. The application is based on grounds apparent on the face thereof and the Supporting Affidavit of Kipyego Ndiwa Chesebe, the applicant herein sworn on 17<sup>th</sup> August, 2023. In his affidavit, the



Applicant deposed that he is the personal representative of Ndiwa Chesebe vide a power of attorney dated 26<sup>th</sup> August, 2015. He further states that when this honourable court upheld the trial court's judgment awarding the respondent 10 acres of land to be carved out of land parcel no Elgon/Kaptama/459("hereinafter referred to as "the suit land"), the Respondent extracted a decree from the trial court and through a notice dated 24<sup>th</sup> April, 2023 sought to alienate 10 acres from Elgon/Kaptama/610 which is a different parcel of land from the suit land.

3. The Applicant averred that the survey was conducted on the night of 5<sup>th</sup> May, 2023 and the resultant sub-division has caused unrest within the family with one of the beneficiaries of Elgon/Kaptama/610 registering a caution over the piece of land. The Applicant therefore sought to have the decree issued in Kimilili PMC Court Civil case no.2 of 2011 reviewed to reflect the correct land parcel number.
4. In opposition to the application, the Respondent filed a Replying affidavit sworn on 6<sup>th</sup> October, 2023.
5. The Applicant, with leave of the court filed a further affidavit sworn on 1<sup>st</sup> November, 2023 where he stated that the Appellant filed a notice to act in person dated 5<sup>th</sup> January, 2016 and that the Applicant herein has a duly registered power of attorney issued by Chesebe Meini. It was stated that the status of the suit land changed prior to the dispute being filed in court and therefore the allegations made in the Replying affidavit were vexatious and scandalous.
6. Parties took directions and by consent agreed to canvass the application by way of written submissions.
7. Vide written submissions dated 20<sup>th</sup> November, 2023 and supplementary submissions dated 20<sup>th</sup> December, 2023 the Applicant submitted on various issues. First, he submitted that the Applicant having filed a notice to act in person removed the firm of M/S Simiyu Wafua & Co Advocates on record and as such the Applicant contends that he was properly on record. It was further submitted that the power of attorney as presented by the Applicant was valid and applicable. The Applicant also submitted that the trial court erred in issuing a court decree with newly introduced evidence when a superior court had already pronounced itself in a judgment.
8. It was further submitted that the application for review of the subject parcel number from Elgon/kaptama/459 to Elgon/kaptama/610 by the Respondent in the lower court after this honourable court had rendered its judgment was in bad faith since Elgon/kaptama/610 was not the suit land as per the pleadings in the lower court. The applicant placed reliance in the case of Migori HCCA No. 52 of 2017 *Daniel Otieno Migore vs. South Nyanza Sugar Co. Ltd, Kisumu* HCCA No. 18 of 2017 *Philmark Systems Co. Ltd vs. Andermote Enterprises*, Garisa ELC Court No. 20 of 2018 *Khalif Sheikh Adan vs. The Hon. Attorney General* and Bomet HCCA No. e39 of 2021 *James Bosire Mochogu vs. John Kipkirui Chepkwoy.*
9. The Respondent filed his submissions dated 21<sup>st</sup> November, 2023 and submitted on four issues. First, he submitted that the applicant was a stranger to this case since the power of attorney was issued in 2015 while the appeal herein was filed in 2019. The Respondent contends that the power of attorney is not properly registered and further that the donee in the power of attorney did not seek leave to substitute the Appellant and as such, he had no audience before this Honourable court.
10. The respondent further submitted that this court did not issue the order the Applicant seeks to review and as such, the application was filed in the wrong forum. Further, the Respondent argued that the current application was filed with inordinate delay and as such cannot be entertained by this court. Lastly, it was submitted that the Applicant did not attach the order he seeks to be reviewed as required under the law. Reliance was placed in the case of *Hosea Nyandika Mosagwe & 2 others vs. County Gov't of Nyamira* (2022)eKLR.



11. Upon consideration of the Notice of motion application dated the 17<sup>th</sup> August, 2023 including the respective affidavits in support and opposition and the party's respective submissions, this court is of the view that the issues that commend for determination are whether the orders sought can be issued and which party bears the costs of the application.
12. By way of background, this is a matter that had been heard and determined by Hon. G.R.Sagero SRM in Kimilili Civil suit No. 2 of 2011 and a judgment rendered in favour of the Respondent herein who was the plaintiff in the former suit. The import of the impugned judgment is that the Appellant who was the Defendant in the former suit was to sub-divide the suit land and transfer 10 acres to the Respondent. Being dissatisfied with the trial court's decision, the Appellant appealed on the said decision seeking to quash the same. Upon determining the appeal, this Honourable upheld the trial court's decision thereby dismissing the appeal and ordered each party to bear their own costs.
13. From the context of the current application, it is apparent that the Respondent thereafter approached the trial court seeking to execute its judgment. It emerges that upon hearing an application dated 19<sup>th</sup> May, 2023 the subordinate court issued a decree for 10 acres to be excised out from land parcel no. Elgon/Kaptama/610 and registered in the name of the Respondent. In the present application, the Applicant contends that the suit land has always been land parcel no. Elgon/Kaptama/459 and not land parcel Elgon/Kaptama/610 and therefore the Decree of the subordinate court issued on 21<sup>st</sup> July, 2022 ought to be reviewed to reflect the correct land Reference Number.
14. This court suo moto acknowledges its authority to consider the present application, recognizing its status as an appellate court. As an appellate court, this court's mandate is narrowly defined both in common understanding and in numerous judicial decisions. The primary role of a first appellate court is namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Magistrate are to stand or not and give reasons either way. See *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR,
15. From the above exposition of the mandate of this court in so far as the appeal is concerned, this court determined the appeal and rendered itself vide its judgment delivered on 23<sup>rd</sup> March, 2022. Having determined fully what was before it for consideration, it is my humble view that this court became functus officio. The Black's Law Dictionary, Tenth Edition defines the term "functus officio" 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.
16. In *Mombasa Bricks & Tiles Ltd & 5 Others vs. Arvind Shah & 7 Others* [2018] eKLR, where the court observed on the doctrine of functus officio that :-

“I understand the doctrine, like its sister, the res judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.”



17. Also see the decision of the *Supreme Court in Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 and the case of *Telkom Kenya Limited vs. John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR
18. Moreover, if the Applicant is dissatisfied with the trial court’s ruling leading to the Decree issued on 21<sup>st</sup> July, 2023, the law offers avenues through which grievances can be addressed, which certainly do not align with the procedure adopted by the applicant. In simple terms, this court lacks the authority to review an order issued by a trial court; its jurisdiction lies solely in considering such matters on appeal.
19. Regarding the Applicant’s eligibility to file the current application, several irregularities are apparent from the documentation supporting their authority to sue in that capacity. First, he contends that he filed a notice to act in person dated 5<sup>th</sup> January, 2016 and therefore, he is properly before this court. However, I note that the trial court entered its judgment on 5<sup>th</sup> May, 2015 when the Ndiwa Chesebe Mein was being represented by the firm of M/S Simiyu Wafula & Company Advocates. The Civil procedure under Order 9 Rule 9 of the *Civil Procedure Rules* provides:
 

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

  - (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
20. From the above provision, Ndiwa Chesebe Mein was therefore required to seek leave of the court or file a consent with his counsel on his intention to act in person. Further, the process by which Kipyegon Ndiwa Chesebe assumed the role of the Applicant remains unclear, as the necessary permission to substitute for Ndiwa Chesebe Mein was not sought and obtained as mandated by the law.
21. From the foregoing, this court does not deem the Applicant’s argument for the order to review the decree issued on 21<sup>st</sup> July, 2022, suitable for consideration before this court. Having discharged its duty on the appeal which was before it, this Court is functus officio. Additionally, the Applicant is a stranger to these proceedings, thus not appropriately before this court.
22. In the final analysis, the application dated 17<sup>th</sup> August, 2023 is devoid of merit and the same is hereby dismissed with costs to the Respondent.
23. Orders accordingly.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 24<sup>TH</sup> DAY OF APRIL, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Wamalwa R for Respondent
2. Appellant-present



3. Bett C/A

