Wambua v Munyao (Being sued as administrator of the Estate of John Musau Mupya - Deceased) & 2 others (Environment and Land Appeal E008 of 2023) [2025] KEELC 833 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEELC 833 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E008 OF 2023

NA MATHEKA, J

FEBRUARY 26, 2025

BETWEEN

JOHNSON MWANZIA WAMBUA ..... APPELLANT

AND

BONNIFACE MUNYAO (BEING SUED AS ADMINISTRATOR OF THE ESTATE OF JOHN MUSAU MUPYA - DECEASED) ..... 1ST RESPONDENT

SUSAN NDINDA MUTETI (BEING SUED AS ADMINISTRATOR OF THE ESTATE OF MICHAEL MUTETI - DECEASED) ..... 2ND RESPONDENT

NATIONAL HOUSING CORPORATION ..... 3RD RESPONDENT

JUDGMENT

1. The appellant being aggrieved by the Judgment and Decree delivered by Hon. Ondieki (PM) on 3rd August, 2023 hereby wholly appeals against the said Judgment on the following grounds:

    1. That the learned Magistrate erred in law by considering and basing its entire Judgment on issues that had already been considered and a substantive Ruling made on them and thereby falling into error.

    2. That the learned Magistrate erred in law in that having made the Ruling on the above issues the court had become functus officio on those issues and therefore lacked jurisdiction to entertain them at Judgment and in so doing entirely misdirected itself.

    3. That the learned Magistrate erred in law by purporting to depart from its own earlier decision over the same issues in the same matter and proceeds to determine the suit using them without any basis in law.

4. That the learned Magistrate erred in law and fact by failing to determine the suit on its merit and instead striking it out entirely on a technicality whose Ruling he had already been made thereby falling in error.

2. The Appellant prays for orders that;

   a. This Appeal be allowed and Judgment and Decree of 3rd August, 2023 be set aside.

   b. The Plaintiff's case in CM ELC 83 of 2020 be allowed as prayed against the Defendants.

   c. Costs of this Appeal and of the lower court be awarded to the Appellant.

   d. Any other relief this Honourable Court may deem fit to grant.

3. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

> I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

4. The appellant submitted that the 1st respondent filed an application dated 14th April 2021 seeking for orders that the court be pleased to strike him out of the suit and the entire suit be struck out for being time barred. By a ruling delivered on 5th August 2021 the trial court stated that the suit was not filed out of time and the 1st respondent had failed to make a case on a balance of probabilities to have his name struck out from this suit on the basis that he lacked capacity to be sued. That however, in its judgement the court reopened the same issues and found that the suit against the 1st respondent was incompetent and struck out the suit for being time barred. That the learned Magistrate erred in law in that having made the Ruling on the above issues the court had become functus officio on those issues and therefore lacked jurisdiction to entertain them at Judgment and in so doing entirely misdirected itself.

5. The 1st and 2nd respondents submitted that the issues deliberated and the ruling delivered were prima facie issues. That the ultimate judgement on the matter was a judicial change of mind. The 3rd respondent submitted that the doctrine of functus officio only applies after issuance of a final and perfected judgement.

6. In the case of Telkom Kenya Ltd vs John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd (supra), the Court of Appeal held as follows on the functus officio doctrine;

> 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 general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the

formal judgment had been drawn up, issued and entered, and was subject to two exceptions. ---"

7. The Supreme Court of Kenya in the case of 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 which reads;

> 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."

8. 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."

9. 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 as is the case herein. Having discharged its duty on this suit this court is therefore functus officio, 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."

10. I find that the ruling delivered by the trial court was not the final judgement and hence he was not functus officio and was not barred from revisiting the matter in his final judgement after considering the evidence.

11. The other issue for determination is the learned Magistrate erred in law and fact by failing to determine the suit on its merit and instead striking it out entirely on a technicality. The trial court struck out the 1st defendant for not being the administrator and the suit for having been filed out of time.

12. In the case of Edward Moonge Lengusuranga vs James Lanaiyara & Another (2019) eKLR, it was held as follows;

> Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement."

13. Section 7 of the *Limitation of Actions Act* provides as follows;

> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

13. The purpose of the Law of Limitation was stated in the case of Mehta vs Shah (1965) E.A 321, as follows;

> The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

14. In the case of Gathoni vs Kenya Co-operative Creameries Ltd (1982) KLR 104, the Court of Appeal held as follows;

> ...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

15. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of Iga vs Makerere University (1972) EA, the Court stated that;

> A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought."

16. Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff.

17. PW1 testified that on the 31st October 2001 he entered into a sale agreement for the purchase of house 22 from John Musau Mupya (Deceased) who was the registered owner at National Housing Corporation. The said agreement was produced in evidence. That on 26th November 2001 he issued a cheque of Kshs. 163,000/= in favour of the 3rd Defendant. That the Vendor subsequently died and he has been unable to acquire vacant possession of the same. I have perused the court record and note that this suit was filed on the 29th June 2017. I find that time started to run in 2001 when he entered into the sale agreement. This is about 16 years later! I find that the suit in the trial court is statute barred. I also find no evidence on record to show that the 1st defendant is the administrator of the estate of the deceased John Musau Mupya. Having found so there would not be any need to go into the merits and the demerits of the case. I find no probable reason to disturb the judgement of the trial court and this appeal is dismissed with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE