



REPUBLIC OF KENYA



**Said & 3 others v Mzungu & 20 others (Environment & Land Case  
180 of 2021) [2024] KEELC 4883 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4883 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 180 OF 2021**

**AE DENA, J  
JUNE 24, 2024**

**BETWEEN**

**TAHIR MOHAMED OSMAN SAID ..... 1<sup>ST</sup> PLAINTIFF  
SAID MOHAMMED OSMAN SAID ..... 2<sup>ND</sup> PLAINTIFF  
SALIMA MOHAMED OSMAN ..... 3<sup>RD</sup> PLAINTIFF  
NADIA D H MUSTAFA [AS TRUSTEE FOR] AHMED MOHAMED  
SAID ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**CHIMERA MZUNGU ..... 1<sup>ST</sup> DEFENDANT  
UHURU MERI ..... 2<sup>ND</sup> DEFENDANT  
DIYO KOMBO MWAGOGO ..... 3<sup>RD</sup> DEFENDANT  
JAJI BABU MWAMUERO ..... 4<sup>TH</sup> DEFENDANT  
KANGA SAID DOFU ..... 5<sup>TH</sup> DEFENDANT  
PRISCILA MWAHANJE ..... 6<sup>TH</sup> DEFENDANT  
CHIZI KAMBI NDAIKULA ..... 7<sup>TH</sup> DEFENDANT  
MAALIM KARISA ..... 8<sup>TH</sup> DEFENDANT  
ZUMA NDARO KOMBO ..... 9<sup>TH</sup> DEFENDANT  
MASHUDI MRAPHE ..... 10<sup>TH</sup> DEFENDANT  
MZUNGU MULENI ..... 11<sup>TH</sup> DEFENDANT  
CHIDZIDZINGO MULENI ..... 12<sup>TH</sup> DEFENDANT  
MOSE MZUNGU ..... 13<sup>TH</sup> DEFENDANT**



KOMBO KOMBO .....	14 <sup>TH</sup> DEFENDANT
KUMBO ZUMA .....	15 <sup>TH</sup> DEFENDANT
NDARO ZUMA .....	16 <sup>TH</sup> DEFENDANT
BIMBA ZUMA .....	17 <sup>TH</sup> DEFENDANT
CHIMIVATSI ZUMA .....	18 <sup>TH</sup> DEFENDANT
MWANZARA MKAHA .....	19 <sup>TH</sup> DEFENDANT
ALI MTLU .....	20 <sup>TH</sup> DEFENDANT
MUCHE MWUERUPHE KUMBO .....	21 <sup>ST</sup> DEFENDANT

## RULING

1. The application subject of this ruling is by the Plaintiffs/Applicants and seeks the following orders; -
  1. Spent
  2. That there be stay of further proceedings in respect of the instant suit pending the interparties hearing and determination of this application.
  3. That an order of *status quo* as at 17<sup>th</sup> November 2023 as per the site visit report issued.
  4. The Honourable court be pleased to order that it is *functus officio* in light of the consent dated 28<sup>th</sup> September 2020 and filed on 1<sup>st</sup> October 2020 and the orders of 6<sup>th</sup> October 2020 and 24<sup>th</sup> November 2022.
  5. That the honourable court be pleased to review and /or set aside any further directions, proceedings and/or orders issued post the dismissal of the suit on 24/11/2022.
  6. That the costs of this application be borne by the Defendants jointly and severally.
2. The application is premised upon grounds listed on its face and the supporting affidavit sworn by Tahir Mohammed Osman Said. It is averred that the Plaintiffs are the registered proprietors of the suit property Kwale/Mwavumbo/4. That the instant suit was settled vide the consent order dated 28/9/2020 and filed on 1/10/2020. The said consent was adopted as an order of the court. That on 24/11/2022 the court out of its own motion set this matter down for dismissal for want of prosecution. That consequently the applications dated 19/1/2021 and 12/3/2021 were dismissed for non-attendance. That the file was then marked as closed with no orders as to costs.
3. That in light of the above, the court is now *functus officio* as the application to reinstate the suit has to date not been prosecuted. That the proceedings after the said consent are therefore an error apparent on the face of the record. It is averred that from the site visit undertaken herein the Defendants are not in occupation of the suit property. That the Plaintiffs took vacant possession of the same and the issue of ownership has thus been overtaken by events. The court is informed that a similar suit is further pending before this court being ELC No 97 of 2021.
4. The Applicant states that in light of the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*, the court can review a decision earlier made on account of



a mistake or error apparent on the face of the record. The court is urged to allow the application as prayed.

5. In opposing the application, the Defendants/Respondents filed a replying affidavit sworn by Zuma Ndoro Kombo the 9<sup>th</sup> Defendants/Respondents. The Plaintiffs application is termed defective, incompetent, malicious and devoid of merit and should be dismissed. The Respondents state that they never instructed the firm of J O Magolo & Co Advocates to enter into any consent on their behalf. That the issue was reported at Kwale Police Station vide OB 48/12/1/2021. That J O Magolo & Co Advocates filed an application to set aside the consent and which is dated 19/1/2021.
6. That on 4/3/2021 the Plaintiff was given 14 days to file a response and the Defendants a further 14 days to file a supplementary affidavit and submissions. That the Plaintiffs did not comply with the said orders and instead begun demolishing the Defendants houses which action resulted in the application for stay of execution dated 12/3/2021. The Defendants aver that the applications dated 19/1/2021 and 12/3/2021 were never dismissed by the court on 24/11/2022. The Defendants maintain that going by the ruling of this court rendered on 26/1/2023, the court is not *functus officio*. That the site visit conducted by the court has clear evidence of the demolished houses, the grave sites and the activities that had been alluded to initially. The Defendants/Respondents state that the consent dated 28/9/2019 was entered into fraudulently and the same should be disregarded by the court. The court is urged to dismiss the application.

### Submissions

7. The application was dispensed by way of written submissions. The Plaintiffs' submissions are dated 15/3/2024. Reiterating the background to the application culminating to the site visit which is stated to have revealed that the Defendants were not in occupation of the suit premises, it was contended that this supported the position that the consent marking the matter as closed was performed to its conclusion and the Defendants handed over vacant possession of the property to the Plaintiffs. That this was fortified by the Defendants Counsels leave to have the Defendants allowed to access the premises for purposes of cultivating during the rainy season. That the court should reiterate it has no jurisdiction to proceed with the hearing in this matter.
8. It is stated that the court having adopted the consent and marked the as closed, there was some extent of finality unless there is an order to reopen the proceedings. The court automatically became *functus officio* in respect of any further proceedings as to hearing on merits as it is assumed the merits of the have already been dispensed with. The case of [\*Raila Odinga and 2 others v Independent Electoral Boundaries Commission\*](#) as relied in [\*George Boke Kisiawo v Republic\*](#) [2022] eKLR. That the court has discharged its duty and any further proceedings on merit is an abuse of the court process as held in [\*ICEA Lion General Insurance Co. Ltd v Julius Nyaga Chomba\*](#) [2020] eKLR.
9. The Defendants submissions were filed on 7<sup>th</sup> June 24 way out of time without the leave of the court. The court did not consider the submissions.

### Determination

10. The main issue for determination is whether the application is merited. The application is anchored under the provisions of Section 13 of the [\*Environment and Land Court Act\*](#), Order 51 Rule 1 and Order 45 Rule 1 of the [\*Civil Procedure Rules 2010\*](#) and Sections 1A,1B,3A and 80 of the [\*Civil Procedure Act\*](#) and all other enabling provisions of law. Section 13 of the [\*ELC Act\*](#) is on the jurisdiction of the court and the nature of reliefs it may grant in the exercise of its jurisdiction. Order 45 read together with section 80 is on the power of the court to review its judgement or order.



11. The court has been invited to stay the proceedings herein pending the determination of this application. The prayer has been overtaken by events. This also applies to the prayer that an order of *status quo* as at 17th November 2023 as per the site visit report be issued. I say so for the reason that as rightly stated in the Plaintiffs submissions this court declined access to the suit property for purposes of cultivation.
12. The substantive prayer in this application is that the court should declare itself *functus officio* and review and or set aside any further directions, proceedings and or orders issued post the dismissal of the suit on 24<sup>th</sup> November 2022.
13. When is the court *functus officio*. 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, expounded on the principle as follows.

“*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. The Supreme Court of Kenya while addressing the principle 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: -

18 “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.”

19. This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550: “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” [emphasis supplied].
15. Guided by the above dictum I will seek to analyse if the consent judgement was perfected to warrant this court pronouncing itself as having discharged its duties and therefore *functus officio*.
16. It is not in dispute that a consent judgement was recorded between Mathenge Wambugu & Company Advocates for the Plaintiff and J. O. Magolo & Company Advocates for Defendants. The same was adopted as an order of the court on 6/10/2020 by Justice Sila Munyao. The consent was in the following terms; -
  1. That this matter be marked as settled.
  2. That the Defendants undertake to vacate the suit premises within 7 days of adoption of this consent.
  3. That each party to bear their own costs.



17. The file was then marked as closed. On 19/1/2021, the file was yet again placed before Justice Yano for the application dated 19/1/2021 for orders to set aside the above consent. The court noted that the file had been closed and ordered for service of the application upon the other party. On 4/3/2021, directions were issued on the disposal of the application by written submissions. On 12/3/2021 another application was filed seeking orders of injunction against an alleged demolition of structures on the suit property ostensibly in execution of the consent order. The court noted that no evidence of the demolition had been tendered and declined to issue such orders.
18. Additionally, the file was first placed before me on 24/11/2022 when the court was undertaking an exercise to dismiss cases for want of prosecution. Only Mr. Gathu attended court holding the brief of Mr. Wambugu for the Plaintiff. He informed the court that the matter was marked as settled. The court noted that according to the record of 6<sup>th</sup> October 2020 the matter was marked as settled. The court made an order that it shall remain as such and ordered the file be closed.
19. Firstly, let me state that looking at the orders recorded the same were in finality. It is only that an application was filed by the Defendants contesting the consent on various grounds and seeking to have it set aside. The application has not been prosecuted to date and therefore the orders have so far never been set aside. Coupled with this are the orders of 24/11/2022. It is important to note that the present application is not on the validity of the said consent and the basis upon which it was being sought to be set aside. It is also not the forum for arguing the status quo. As I understand it, it is on the jurisdiction of the court to have proceeded subsequently entertaining this matter when firstly it had since been settled, the consent order having not been set aside and the proceedings having not been reopened following the closure of the file.
20. Let me also clarify that this court as the record shows did not dismiss the case for want of prosecution. It simply reiterated what was on record and then closed the file. Procedurally I see the flaw in that the Defendants ought to have moved the court for reopening of the proceedings for purposes of the prosecution of the applications that had been filed. It is the Defendants case that the court is not *functus officio* by dint of the ruling of this court rendered on 26/1/2023. For me the file having been closed by this court and the pendency of the consent order which had not been set aside means the Defendants efforts to reopen the matter were never pursued to completion. As it is in view of the orders adopted as the judgement of the court this court as well as the orders closing the file this court admits it was indeed *functus officio* to this extent.
21. The Plaintiffs have referred to the proceedings post consent and marking the file as closed an error apparent on the face of the court record. The question therefore is are they? The court is invited to review and set aside its subsequent proceedings and or orders post the dismissal of the suit. Indeed, it is clear from the court record that various proceedings were held within this matter including the application for injunction dated 21/3/2023, the status quo orders among others. See the record of proceedings on 23/3/2023 and 18/5/2023. This is where the Plaintiff wants to invoke the provisions of section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#).
22. Section 80 of the [Civil Procedure Act](#) provides thus  
Any person who considers himself aggrieved-
  - a) By a decree or order in which an appeal allowed by this Act, but from which no appeal has
  - b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.



23. The provisions of Order 45 Rule 1 provide for the review of a decree or order as follows: -
1. (1) Any person considering himself aggrieved: -
    - a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred or
    - b) By a decree or order from which no appeal is hereby allowed, and from whom the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.
24. Arising from the law above what stands out is that for the court to exercise its power in favor of an applicant seeking review it must be demonstrated that there is Discovery of new and important matter or evidence, Mistake or error apparent on the face of the record and any other sufficient reason. An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. See *Paul Mwaniki v NHIF Board of Management* [2020] eKLR. From the record and as stated above herein, the consent was never set aside and meaning the order closing the file is still in place. This, in my opinion is self-evident and explanatory.
25. It is also important that the record is regularised and for me this is also sufficient reason for review. I must confront the wrong as long as the court is not sitting on appeal of its own orders. In *Shanzu Investments Limited v Commissioner for Lands* (Civil Appeal No 100 of 1993) the Court of Appeal held that: -
- “Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *Civil Procedure Act*: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”
26. Consequently, the proceedings post the consent cannot stand. I will not touch on the site visit report and the status quo as indicated in the report because the issue is not for this forum. In any event the Plaintiff has faulted all the proceedings post the consent and my order closing the file and I do not see the justification for them to benefit from the very proceedings they are impugning.
27. The upshot of the foregoing is that is that the application dated 23<sup>rd</sup> February 2024 shall be disposed of in the following terms;
- i. That this court is *functus officio* in light of the orders of October 6, 2020 and November 24, 2022.
  - ii. That in view of the orders above any further proceedings and/or orders issued post the dismissal of the suit on 24/11/22 are hereby set aside.
  - iii. For the avoidance of doubt the record shall revert as recorded on November 24, 2022.
  - iv. That there shall be no orders as to costs.
- Orders accordingly.



**RULING DATED SIGNED AND DELIVERED THIS 24TH DAY OF JUNE 2024.**

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**A.E DENA**

**JUDGE**

Ms. Gathu for the Plaintiffs in ELC No 180 of 2021

Ms. Kyalo for the Defendants

Ms. Mohamed Amina in ELC No E005 of 2022

Mr. Daniel Disii – Court Assistant

