



**Iraru (As legal representatives of the Estate of Habel Iraru Okimaru) v Wanjala
(As the legal representative of the Estate of David Wanjala Welime) (Environment
& Land Case 128 of 1994) [2024] KEELC 4823 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 128 OF 1994
EC CHERONO, J
JUNE 20, 2024**

BETWEEN

**GEORGE OKIMARU IRARU PLAINTIFF
AS LEGAL REPRESENTATIVES OF THE ESTATE OF HABEL IRARU
OKIMARU**

AND

**MARGARET WELIME WANJALA DEFENDANT
AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID WANJALA
WELIME**

RULING

1. By a Notice of Motion dated the 26th January, 2024 brought under Section 1A, 1B & 3,3A& 63C of the [Civil Procedure Act](#), Order 40 Rule 1(a) and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#), the Applicant seeks for the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to issue an order of permanent injunction restraining the plaintiff/respondent his relatives, agents, assignees and other persons acting on his behalf from any trespassing, building structures, destroying the applicant’s sugarcane and digging holes on property herein referred to as LR No. Kamukuywa Settlement Scheme/Naitiri/138 now Bungoma/Kamukuywa/138.
 - d. That this honourable court be pleased to issue an order directing the plaintiff/respondent, his relatives, agents, assignees and any other person acting on his behalf to remove all the structures



they have built on the defendant/applicant's and LR No. Kamukuywa Settlement Scheme/Naitiri/138 now Bungoma/Kamukuywa/138.

- e. That this honourable court be pleased to issue an order evicting the plaintiff/respondent, his relatives, agents, assignees and other person acting on his behalf from LR No. Kamukuywa Settlement Scheme/Naitiri/138 now Bungoma/Kamukuywa/138.
 - f. That the OCS Mukuyuni Police Station do provide and accord the defendant/applicant with sufficient security during execution of any of the above orders sought.
 - g. That cost of this application be provided for.
2. The application is based on grounds on the face of the application supported by the affidavit of Margaret Welime Wanjala-the applicant herein sworn on 26th January, 2024.
 3. The applicant in her supporting affidavit deposed that she is the administratrix of the estate of David Wanjala Welime-deceased. She stated that this suit was dismissed on 28th March, 2017 by Justice Mukunya J under Order 17(2) of the Civil procedure Rules and that the applicant's position is that the respondent lost all rights to claim LR No. Kamukuywa Settlement Scheme/Naitiri/138 now Bungoma/Kamukuywa/138. The applicant further deposed that despite the respondent's attempts to revive the suit, both this court and the Court of Appeal dismissed his applications to that effect on 23rd January, 2020, 11th March, 2022 and 22nd September, 2023 respectively. The applicant further stated that the respondent, without any colour of right forcefully entered the applicants land LR No. Kamukuywa Settlement Scheme/Naitiri/138 now Bungoma/Kamukuywa/138 with a multitude of people, dug holes, destroyed crops, threatened her and her family and has been continuously invading the land claiming ownership. The applicant therefore prays for a permanent injunction and an eviction order against the respondent.
 4. In opposition to the said application, the respondent filed a replying affidavit dated 11th April, 2024 in which he deposed that this case has since been concluded after being dismissed for want of prosecution and this court is therefore *functus officio* and the applicant cannot perpetuate it by making this application. By way of background, the respondent stated that David Wanjala Welime-deceased purchased 19 acres of land parcel No. Kamukuywa Scheme/Naitiri/139 from their neighbour but his (the respondents) father declined to sell his share; Kamukuywa Scheme/Naitiri/138 measuring 37 acres which saw the said David Wanjala Welime-dcd grab the land using tricks and his influence as a government official leaving their family destitute. He stated that his father was at some point arrested and charged in Webuye Criminal case No. 158 of 1980 over the land in issue and acquitted by the High Court in Kisumu in Cr. Appeal No. 71 of 1981.
 5. The respondent deposed that his father pursued the issue by filing a suit in the High Court at Eldoret In Civil Suit No. 158 of 1982, appealing to the then president of the Republic and the current suit seeking to recover his land. It was stated that before the suit was heard, both David Wanjala Welime and Habel Iraru Okimaru died and the matter was delayed before substitution could be done thus various notices for dismissal and eventually the matter was dismissed. It was deposed that various applications and appeals were filed to revive the suit but were all dismissed.
 6. The respondent simultaneously filed s Notice of Preliminary Objection dated 31st March, 2024 on grounds that there is no judgment or ruling on record in favour of the applicant to justify the prayers sought, that the application is not anchored in law and that the dismissal of the Respondent's suit for want of prosecution does not justify the orders sought. The Respondent sought to have the application struck out with costs.



7. The applicant, filed a supplementary affidavit dated 6th May, 2024 in which he deposed that the proceedings in RM Court Bungoma Civil Case No. 127 of 1982 and the resultant eviction order concluded this case. It was argued that the prayers sought in the preliminary objection were purely pleadings and not points of law. It was stated that the late David Wanjala Welime is still the registered proprietor of land parcel no. Bungoma/kamakoiwa/138. They sought to have the application allowed arguing that they stand to suffer irreparable loss.
8. Directions were taken and parties agreed to dispense with the application and the preliminary objection by way of written submissions.
9. The applicant filed submissions dated 6th May, 2024 in support of her application and in opposition to the preliminary objection. On the preliminary objection, the applicant submitted that the same does not raise any pure point of law as contemplated in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd* (1969) EA 696. In support of the application, the applicant argued that they filed the application in this suit instead of filing a separate suit to avoid the issue of res judicata. It was their submission that David Wanjala Welime is the registered owner of the land in issue and that the respondents keep on invading the same and that they ought to be stopped. Reliance was placed in the case of Bungoma ELC No. 8 of 2022 (OS) *Ronald Kilwake Wasike vs. Johnstone Wekesa Nyongesa & Another*.

Analysis and Decision

10. I have carefully read and critically considered the pleadings, court proceedings, the written submissions, cited authorities relied upon and the relevant provisions of the appropriate and enabling laws with regard to both the notice of motion application and the preliminary objection. In my considered view, the issues for determination are;
 - a. Whether the preliminary objection is merited.
 - b. Whether this court is *functus officio*.
 - c. Whether the applicant is entitled to the orders sought
 - d. Who bears the costs.
11. It is important that I first deal with the issue raised as a Preliminary Objection. According to the [*Black's Law Dictionary*](#), a Preliminary Objection is defined as follows:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
12. The above legal proposition is made clear in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd*. [1969] EA 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that:–“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”



13. Additionally, I have relied in the decision of *Attorney General & Another – versus - Andrew Mwaura Gitbinji & another* [2016] eKLR:- In that case, the court explicitly dealt in a more concise precision what is tantamount to, the scope, nature and meaning of a Preliminary Objection inter alia:-
- (i) A Preliminary Objection raises a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
14. Looking at the preliminary objection as framed, it is clear that the issues raised therein are factual details liable to be contested or proved through evidence as opposed to being pure points of law. See *Oraro vs Mbaja* (2005) 1 KLR 141. Therefore, it is my finding that the preliminary objection dated 31st March, 2024 lacks merit.
15. Turning to the application where the applicant seeks for injunction orders, eviction orders and an order for the respondent to remove structures built on the suit land. It is not in dispute that this matter was dismissed for want of prosecution on 28th March, 2017. At this juncture it is imperative to determine the purport and import of dismissal of a case for want of prosecution. The respondent in his replying affidavit argues that the court is functus officio since the matter was dismissed.
16. The Court of Appeal in *Telkom Kenya Limited vs. John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR held: -

“*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.”

Further that :-

“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Limited vs A1 Thani* [2002] JLR 542 at 550: also cited and applied by the Supreme Court;

“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 or adjudication must be taken to a higher court if that right is available.”

17. The Supreme Court of Kenya discussed the doctrine of *functus officio* in Election Petitions Nos. 3, 4 & *5 Raila Odinga & Others vs. IEBC & Others* [2013] eKLR where it cited with approval an excerpt



from an article by Daniel Malan Pretorius, in “*The Origins of the Functus Officio Doctrine, with Specific Reference to its Application in Administrative Law*,” (2005) 122 SALJ 832:

“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.”

18. In the case of *Francis Muendo John v Republic* [2020] eKLR I stated that:-

“Once a court becomes *functus officio*, the only orders it can grant are review orders which are an exception to the *functus officio* doctrine”

19. This matter was dismissed for want of prosecution where the court found that there was no sufficient cause shown why the matter should not be dismissed. A dismissal in itself is a judgment that determines a suit. Therefore, as it is, there is no suit pending and the applicant’s application is untenable. Having arrived at the above finding, a determination of the other issues becomes moot.

20. In the upshot, it is my finding that the applicant’s application dated 24th January, 2024 lacks merit and the same is hereby dismissed with costs to the Respondent.

21. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF JUNE, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr Kundu for Defendant/Applicant

Mr. Oira h/b Angima for Plaintiff/Respondent

Bett C/A

