



Buchunju (Suing for and on behalf of the Estate of the Late Buchunju Kapchanga - Deceased) v Muyundo & 7 others (Environment & Land Case 143 of 2017) [2024] KEELC 5183 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 5183 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 143 OF 2017
EC CHERONO, J
JUNE 13, 2024

BETWEEN

MAIKUMA WEKESA BUCHUNJU (SUING FOR AND ON BEHALF OF THE ESTATE OF THE LATE BUCHUNJU KAPCHANGA - DECEASED) .. PLAINTIFF

AND

DONALD WEKESA MUYUNDO 1ST DEFENDANT
CO-OPERATIVE BANK OF KENYA LIMITED 2ND DEFENDANT
FREDRICK MUTAYI KHAEMBA 3RD DEFENDANT
ONESMUS W MACHARIA T/A WATTS AUCTIONEERS 4TH DEFENDANT
KENYA COMMERCIAL BANK LIMITED 5TH DEFENDANT
AGRICULTURAL FINANCE CORPORATION 6TH DEFENDANT
COUNTY LAND REGISTRAR, BUNGOMA COUNTY 7TH DEFENDANT
HON ATTORNEY GENERAL 8TH DEFENDANT

RULING

1. The plaintiff/Applicant, vide a Notice of Motion application dated 4th January 2024 seeks the following orders;
 1. (SPENT)
 2. That there be stay of execution of Judgment/Decree issued on the 5th day of October 2023 pending the hearing and determination of this application inter-parte



3. That there be stay of execution of Judgment/Decree issued on 5th day of October 2023 pending hearing and determination of Court of Appeal NO. E283 of 2023 at Kisumu
4. Costs
2. The application is premised on grounds apparent on the face of the said application and the supporting affidavit of the Maikuma Wekesa Buchunju sworn on even date.
3. By way of opposition, the 2nd Respondent filed a replying affidavit sworn on 8th May,2024

Applicants's Summary Of Facts

4. In his supporting affidavit, the Applicant deposed that he is the administrator of the Estate of the late Buchunju Kapchanga-deceased and that this Court delivered Judgment in this case on 5th October, 2023 where it dismissed the suit and entered Judgment in terms of the respondent's counterclaim. He deposed that in the impugned judgment, the court declared the 1st defendant/Respondent the bona fide purchaser for value of land parcel NO. NDIVISI/NDIVISI/177 and ordered him evicted within 90 days from the date of Judgment. He stated that he was aggrieved by the impugned judgment and preferred an Appeal to the Court of Appeal at Kisumu vide CA NO. 283 of 2023.
5. The Appellant/Applicant deposed that he occupies the suit land with his entire family since he was born and has done huge developments which include constructing permanent residential houses, farming, commercial trees and will suffer irreparable harm and loss and that he will suffer substantial loss which may not be compensated in monetary terms if the order of stay of execution is not granted. He stated that his intended appeal has high chances of success and that unless the stay orders are granted, his appeal will be rendered an academic exercise and his family will be rendered homeless and destitute.
6. The applicant further stated that he will abide by any condition this Honourable Court will give as security for the due performance of the decree.
7. In his replying affidavit, the 2nd respondent deposed that the application by the Appellant/Applicant is vexatious, frivolous and a waste of judicial time since the Honourable Court is functus officio and therefore, has no jurisdiction to delve into the issue whether the applicant has satisfied the conditions for grant of an order for stay of execution pending appeal since orders are not given in vain. He stated that the Honourable court pronounced itself on the final judgment in the matter hence it became functus officio and it must therefore trown its tools for want of jurisdiction to hear and determine the applicant's application.
8. The 2nd Respondent further stated that in the absence of a statutory authority, the principle of functus officio prevents this Honourable from re-opening a case where it has already pronounced itself on the final decision and judgment has been delivered. The 2nd Respondent deposed that there is need for finality of proceedings and that this honourable court should not therefore entertain the application since it calls upon this Honourable court to revisit and reconsider final orders simply because the applicant has filed a Notice of Appeal. He stated that if the Honourable Court allows the stay orders after having delivered the judgment, this would be detrimental to the concept of finality in litigation within the hierarchy and structure of the Kenyan Court. The 2nd Respondent further deposed that having delivered a final judgment in this matter, this Court has no authority or legal competence because the duties and functions of the original commission have been fully accomplished.
9. The 2nd Respondent also stated that the application herein is defective and ought to be struck out on the grounds that it was drawn by a Firm that is not properly on record having not sought and



obtained leave of the court to come on record after judgment has been entered. In conclusion, the 2nd Respondent stated that the applicant has neither established a prima facie case nor proved that he will suffer substantial loss and that the balance of convenience tilts in declining the grant of injunction orders and/or temporary stay of execution orders sought

Applicant's Written Submissions

10. The Applicant through the firm of M/S Wattangah & Co. Advocates submitted on one issue, to wit; Whether the plaintiff has satisfactorily discharged the conditions warranting the grant of stay of execution of the Judgment and/or Decree pending hearing and determination of the intended Appeal and determination of the application dated 4th January, 2024.
11. On this issue, the learned counsel cited the provisions of order 42 Rule 6 of the Civil Procedure Rules and submitted that the 1st Respondent has issued Notice and threats to evict the plaintiff/applicant and the entire family which is a clear demonstration that unless the stay orders are granted, the applicant will suffer substantial loss. He submitted that the suit property is the only home known to the plaintiff/applicant where he stays with his family that include very young children who are all school going.
12. On the issue of security, the learned counsel submitted that the Applicant is ready and willing to provide such security as this Honourable court may order for the due performance of the decree
13. Lastly, the applicant's counsel submitted that the applicant has an arguable appeal with high chances of success. Reliance was made in the following cases; Arun Sharma V Ashana Raikundala T/a Araikundalla & Co. Advocates & 2 Others (2014) Eklr, Stanley Kangethe Kinyanjui V Tony Ketter & 5 Others (2013) eKLR.

2Nd Respondent's Written Submissions

14. The 2nd Respondent through the Firm of M/S Kiruki & Kayika Advocates submitted on the following three issues;
 - a. Whether the Honourable court is functus officio?
 - b. Whether the plaintiff's/applicant's application has met the criteria for grant of the orders sought?
 - c. Who should meet?
15. On the 1st issue, the learned Counsel submitted that the application herein is a non-starter and what the Applicant is calling the Honourable court to do is affirm that this application was a false start. He placed reliance in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others V Iebc & Others (2013) eKLR.
16. The learned Counsel submitted that in this case, judgment was delivered on 5th October 2023 dismissing the Plaintiff/Applicant's suit with costs to the defendants which decision was final and has not been set aside and which is the subject of an appeal and that this Honourable court has no jurisdiction to grant any additional stay of execution herein, the previous having lapsed thirty (30) days after the delivery of the judgment. Reliance was made to the case of Owners Of The Motor Vessel "lillians" V Caltex Oil(kenya) LTD (1989) KLR. He further submitted that the plaintiff/applicant is asking this Honourable Court to sit as an appellate court against its own judgment and determine that the appeal has high chances of stay and grant stay orders which is against the rules of justice. In support of this, the learned Counsel cited the case of Asige Keverenge & Anyanzwa Advocates V Kenya Revenue Authority & Another (2021) eKLR.



17. As regards the 2nd issue, the Counsel submitted that the grant of interim orders is discretionary and the applicant must demonstrate to the court that he will suffer irreparable harm. He submitted that the applicant has not established the principles for the grant of the injunction orders. Reliance was placed in the following cases; *Giella V Cassman Brown* (1973) E.a 358, *Robert Ochanda Abuya V Kenya Power & Lighting Company Ltd* (2021) Klr, *Elijah Kipng'eno Arap Bii V Kenya Commercial Bank Ltd* (2001) KLR.
18. In conclusion, the learned counsel urged this Honourable court to disallow the plaintiff/applicant's application with costs to the 2nd Respondent.

Legal Analysis And Determination.

19. I have considered the Notice of Motion application under review dated 4th January, 2024, the supporting affidavit by the applicant sworn on even date, the Replying affidavit by the 2nd Respondent and the rival submissions by counsel appearing for the applicant and the 2nd Respondent as well as the relevant law.
20. It is not in contention that this Honourable court heard and determined this suit vide its judgment delivered on 5th October, 2023. It is not also in contention that the Court's decision rendered on 5th October, 2023 dismissed this suit with costs to the defendants/respondents which was a final decision.
21. Having considered the materials placed before the court hereinabove, I find that the following issues commend for determination;
 - a. Whether this Court is functus officio?
 - b. Whether this Honourable Court has Jurisdiction to deal with the application under review and grant the orders sought?
 - c. Who shall bear the costs of the application?
22. On whether this court is functus officio having rendered itself in its judgment delivered on 5th October 2023, the Court of Appeal in *Telkom Kenya Ltd V John Ochanda* (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd held as follows on the doctrine of functus officio

“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 Nazaire Co*, (1879), 12 Ch. D 88.

The basis for it was that the power to rehear was transferred by the 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.”
23. The Supreme Court of Kenya also discussed the principle of Functus officio in the case of *RAILA ODINGA & 2 OTHERS V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS* (2013) eKLR where they 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.”

24. The under Section 99 of the *Civil Procedure Act* Cap 21 Laws of Kenya, the law 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.”

25. From the above provisions of the law, it is clear that the doctrine of *Functus officio* does not bar a court from entertaining a case where it has rendered judgment but prevents it from re-visiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein. I agree with the 2nd Respondent and his Counsel that after it rendered its judgment on 5th October 2023, this court became *functus officio* except as provided for under Section 99 of the *Civil Procedure Act*.

b) Whether this Honourable Court has jurisdiction to deal with the application under review and grant the orders sought?

26. Jurisdiction has been discussed by scholars and the courts in numerous decisions by the superior Courts. John Beecroft sounders in book “Words and Phrases legally defined”, Volume 3 at page 113 defines court jurisdiction as follows;

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgment is given.”

27. The locus classicus on jurisdiction is traced to the case of OWNERS OF THE MOTOR VESSEL “LILLIANS” V CALTEX OIL(K)LTD (1989) KLR1 where Nyarangi JA held as follows;

“jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.”

28. In the present application, the applicant is asking this Court to stay its judgment which determined the dispute herein between the parties in finality. It is my view that having granted the applicant thirty days (30) stay of execution on the delivery of judgment, the applicant was to utilise the time, if he was dissatisfied with the decision of this court to lodge appeal before the Court of Appeal. Once the thirty days (30) period lapsed, the Court ceased to have jurisdiction to handle this matter. That position



was discussed in the case of *Asige Keverenge & Anyanzwa Advocates v Kenya Revenue Authority & Another* (2021) eKLR where the court held;

- “24. It is this Court’s finding that having granted stay of execution pending appeal and thereafter, heard and determined the appeal before the High Court on its merits and rendered a Judgment dismissing the said appeal, all pertinent issues of fact and points of law have been fully canvassed and considered. As such, this Court conclusively dealt with the issues of whether the applicant’s appeal is an arguable and concluded that it has no merit.
25. Having discharged its duty on the appeal which was before it, this court is *functus officio*. 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.
26. In view of the above finding, this Court has no jurisdiction to delve into the issue whether the applicant has satisfied the conditions for grant of an order for stay of execution pending appeal since Court orders are not given in vain. The upshot is that the application dated 11th December 2020 and 15th January 2021 are devoid of merit and the same are dismissed with costs to the 2nd Respondent.”
29. I agree with the findings of the court in the above decision. Applying the same principles which are in all fours with the current application, I find the Notice of Motion application dated 4th January 2024 devoid of merit and the same is hereby dismissed with costs to the 2nd Respondent.

Orders accordingly.

READ, DATED AND SIGNED AT BUNGOMA THIS 13TH DAY OF JUNE, 2024

E.C. CHERONO

ELC JUDGE

In the presence of;

Mr. Khisa for the 2nd defendant and H/B for Ngetich for the 1st Defendant.

Mr J.B Macharia for the 4th & 5th defendants.

Mr. Juma Waswa H/B for Mr. Wattangah for the Plaintiff/Applicant.

Bett – CA.

