Gambo (Suing as legal representative of the Estate of Harrisson Gambo Mbango - Deceased) v Kutakasa (Sued as the legal representative of the Estate of Mwambire Mbitha - Deceased) & 4 others (Enviromental and Land Originating Summons 16 of 2022) [2024] KEELC 6238 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6238 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 16 OF 2022

EK MAKORI, J

SEPTEMBER 25, 2024

BETWEEN

JANE NYADZUA GAMBO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF HARRISSON GAMBO MBANGO - DECEASED) ..... PLAINTIFF

AND

KABIBI KUTAKASA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MWAMBIRE MBITHA - DECEASED) ..... DEFENDANT

AND

BENSON KARISA CHARO ..... 1ST INTENDED DEFENDANT

ONESMUS CHARO MWAMBIRE ..... 2ND INTENDED DEFENDANT

JOHN CHARO MWAMBIRE ..... 3RD INTENDED DEFENDANT

JOSEPH FRANCIS DUNDI ..... 4TH INTENDED DEFENDANT

RULING

1. The Applicants filed a Notice of Motion Application dated 2nd February 2024 seeking the following prayers from this Court:

    a. Spent

    b. The Court be pleased to grant orders of injunction restraining the plaintiff/respondent, her servants, agents, hirelings, or whosoever from subdividing and from interfering with the applicant's peaceful enjoyment and use of suit property Kilifi/Ngerenya/586 pending hearing and determination of this application;

c. The Court be pleased to grant orders of injunction restraining the plaintiff/respondent, her servants, agents, hirelings, or whosoever from subdividing and from interfering with the applicant's peaceful enjoyment and use of suit property Kilifi/Ngerenya/586 pending hearing and determination of this suit;

d. The Court be pleased to grant orders of injunction restraining the plaintiff/respondent, her servants, agents, hirelings, or whosoever from subdividing and carrying out a survey scheduled for 2nd February 2024 concerning land parcel No. Kilifi/Ngerenya/586 pending hearing and determination of this suit;

2. This Court be pleased to grant orders joining the intended defendant's - applicants to the suit herein;

3. The costs of this application be in the cause.

4. The application is supported by the annexed affidavit sworn on 2nd February 2024 by Benson Karisa Charo on behalf of the other applicants- intended defendants. In response, the defendant-respondent Kabibi Kutakasa, through her advocates, filed grounds of opposition and a Preliminary Objection, both dated 9th February 2024. The plaintiff/respondent, Jane Nyadzua Gambo, filed a replying affidavit dated 9th February 2024.

5. Parties were directed to file written submissions. I received submissions from the plaintiffs' advocate, Muli Ole Kina, Advocates. I did not see submissions from the advocates for the intended defendants or the defendant.

6. I frame the issues for this Court's determination as follows: Should the Preliminary Objection dated 9th February 2024 be allowed? Should the Court grant the orders of injunction sought by the intended defendant/applicants? Should the applicants be joined as defendants in this matter? Who bears the costs of the application and the PO?

7. The issue regarding the Preliminary Objection, in my view, goes hand in hand with the main prayers as sought in the application, as it will have a bearing in disposing of the entire application if it succeeds.

8. in the affidavit, the applicants contend that they are unaware of the Succession of their grandfather's Estate and the consent entered between the plaintiff and defendant. They were never involved in the entire proceedings leading to the consent here and in the Succession Cause by either the plaintiff or the defendant. They claim to be legal beneficiaries of the Estate of their grandfather, Mwambira Mbitha, which is the subject of the proceedings here and in the Succession Cause taken out by the defendant. They then seek the stoppage of the subdivision and survey of the suit property in terms of the consent entered and an injunction to restrain both the plaintiff and the defendants from enforcing the said consent. They are entitled to be heard and, therefore, will seek to be joined in these proceedings to protect their rights as beneficiaries of the Estate of the late Mwambira Mbitha.

9. The Preliminary Objection raised by the defendant and supported by the plaintiff is to the effect that the moment this Court adopted the parties' consent, it downed tools. What remains is an appeal or an application for review. The intended defendants have not applied for review of the consent orders or sought to appeal. They have not been joined as parties to pursue any orders from this Court. They have no suit pending to seek injunctive orders. They have also not revoked the grants issued to the plaintiff and the defendants to warrant locus standi to be joined in this suit.

10. This Court has been referred to the leading judicial authority on what amounts to a Preliminary objection – see *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. the defendant/respondent contends that in the present matter, the court is functus officio, having adopted

the consent by the plaintiff and the defendant as a judgment of the Court. Thus, the orders sought cannot be granted, and the application offends the principle of Reipublicae Ut Sit Finis Litium (in the interest of society, litigation must come to an end) - that the matter was concluded upon the adoption of consent between the parties on the 28th July 2022. Thus, the crucial issue in this matter is the functus officio concept: The Court's role became wholly redundant and may no longer entertain the relevant question posed in the application unless the suit is reopened by setting aside the orders in place. The intended defendants have not applied to set aside the orders or the reopening of the matter for further scrutiny.

11. On functus officio, the Court was referred by the plaintiff to the decisions in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR and *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 – that this Court cannot revisit a matter it has already decided. It cannot have a second bite on it.

12. On the effect of a consent judgment and on how to set it aside, the Court has been referred to the decisions in *Geoffrey M. Asenyo & 3 others v The Attorney General* in Petition Number 7 of 2019 and *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* Civil Appl. No. 1 of 2015: [2015] eKLR.

13. The Court has also been implored to take cognizance of the fact that the plaintiff and the defendant, in the spirit of Alternative justice Resolution, decided to amicably settle the matter pursuant to Article 159 (2)(c) of the *Constitution* - on this argument see also the decision in *Hausram Limited v Nairobi City Council* Civil Case No. 421 of 2013; [2013] eKLR, highlighting on the duty of this Court to promote AJS.

14. From the materials and the submissions placed before me, it should be noted that there is no suit pending before me, the Court having adopted the consent entered by the parties on 18th July 2022. The Preliminary Objection then attacks the legality and standing of the application because there is no pending suit, and an ordinary application for an injunction is brought at the commencement of proceedings and not post-judgment.

15. The principles that the Court is commanded to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the leading case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. On page 700, Law JA stated:

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

On page 701, Sir Charles Newbold, P. added:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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 is the exercise of Judicial discretion..."

16. For a Preliminary Objection to succeed, then, the following parameters ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. If successful, a valid preliminary objection should dispose of the suit (read the application in this case).

17. The doctrine of Functus officio has been raised as a bar to this Court entertaining the current application. In *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 Others* [2013], eKLR, the Supreme Court, in considering the doctrine of functus officio, cited with approval a passage in an article by Daniel Mala Pretorious entitled "The Origins of functus officio doctrine, with Special Reference to its application in Administrative Law," in South African Law Journal, Vol. 122 [2005], at p. 832, stated as follows:

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to the 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 taken, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

18. On 12th July 2022, consent was filed by the parties to this suit (the plaintiff and the defendant), and the same was adopted on 18th July 2022 as an order and final judgment of the Court. The parties involved were both legally Appointed Representatives of the Estates involved in the suit. The defendant, the legal representative of the estate of Mwambire Mbitha (deceased), confirmed the occupation status on the ground by consenting with the plaintiff/applicant regarding the legality of the defendant's occupation on land title No. Kilifi/Ngerenya/586 leading to a consent as follows:

> " A declaration that eight (8) acres to be excised from the title of the said Mwambire Mbitha (deceased) to the freehold interest on title No. Kilifi/Ngerenya/586 has been extinguished by the applicant's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.
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> A declaration that the applicant has acquired the freehold interest on eight (8) acres equivalent to 3.24 Ha. In title No. Kilifi/Ngerenya/586 by his adverse possession thereof for a period of more than 12 years, i.e., from at least 1972 to date.
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> An order do issue requiring and directing Chief Land Registration Officer Kilifi to register the applicant, the estate of Harrisson Gambo Mbango(deceased) as the proprietor of the eight (8) acres of all that land title No. Kilifi/Ngerenya/586 in place of Mwambire Mbitha and in place of any other person succeeding the respondent.
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> That each party to bear own costs."

19. The Supreme Court in *Geoffrey M. Asenyo & 3 others v The Attorney General* in Petition Number 7 of 2019 discussed the finality of a consent adopted by the Court in this manner:

> " Adoption of a consent by a Court is a process, in the course of which a Court discharged the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes functus officio."

20. Further in *Edward Acholla v Sogea Satom Kenya Branch & 2 others* cause No. 1518 of 2013; [2014] eKLR, the Court held:

> [A] "Consent becomes a judgment or order of the Court once adopted as such. Once consent is adopted by the Court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out."

21. Still, in *Samuel Mbugua Ikumbu v. Barclays Bank of Kenya Limited* Civil Appl. No. 1 of 2015: [2015] eKLR, the Court held that a consent order is binding on the parties and cannot be set aside or varied unless it is proved that it was obtained by fraud, contrary to the court's policy, or without sufficient material facts. Only a party to the consent can claim fraud.

22. In this matter, the intended defendants have not applied to set aside the consent order in place or sought its review. They have instead applied for injunctive and restraining orders, oblivious that there is no pending suit. Even if this Court were to give the injunctive orders quite late in the day in these proceedings, what would it be preserve pending a hearing on a concluded matter?

23. The prayers sought by the applicants apply only when judgment is yet to be issued since a Court becomes functus officio after delivery of a judgment. The said prayers can only be granted if the Consent order adopted on 18th July 2022 is set aside; the Court will thus be venturing into an unprecedented exercise of sitting on appeal of its judgment if the application is allowed and the orders of the court are yet to be set aside since they have not been challenged in any way.

24. 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."

25. 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 and a decree issued, as is the case herein. It is my findings, therefore, that this Court will be misdirecting itself if it goes ahead to hear the application on whether or not it should join the intended defendants in a matter that it has already rendered its judgment on. This Court shall be sitting on appeal of its own decision, a practice that is frowned upon by the law and is meant to be barred by the doctrine of functus officio.

26. I hold that the provisions of Section 99 of the *Civil Procedure Act* cannot apply to the application filed by the intended defendants seeking to be joined in a matter that has been concluded, and no appeal has been preferred (it is not pending). Due to the existence of the judgment delivered on 18th July 2022, the Court is functus officio and thus cannot revisit the issue. Hence, by entertaining the Notice of Motion Application dated 2nd February 2024, the Court will do so against the Reipublicae Ut Sit Finis Litium principle.

27. The intended defendants/Applicants have not brought before this Court anything to prove that the consent order was given contrary to the Court's policy; they have not challenged the Court's decision, nor have they requested leave to have the Court orders set aside and the case re-opened. Instead, they only want to be joined in a matter that has already been finalized, which is an abuse of the Court process.

28. Joinder of parties to proceedings is governed by Order 1 rule 10(2) of the *Civil Procedure Rules*, which provides that:

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

29. In *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR, Odunga J. held as follows on the issue of joinder:

> " The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori v Chege & 3 Others* [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:
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> 1. He must be a necessary party.
> 2. He must be a proper party.
> 3. In the case of the defendant, there must be a relief flowing from that defendant to the plaintiff.
> 4. The ultimate order or decree cannot be enforced without his presence in the matter.
> 5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.
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> 56. In *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55, it was held as follows:
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> "A clear distinction is called for between joining a party who ought to have been joined as a defendant, and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit, one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person and that it is desirable, for the avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."

57. In *Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR, the court observed as follows:

> "Again, the power given under the Rules is discretionary, which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter so that the dispute may be determined in their presence at the time without any protraction or inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial."

30. Joinder, therefore, can occur at any trial stage, even post-judgment. But in this case, as already stated, the intended defendants' joinder at this stage will bring nothing to the table of justice on an already concluded matter. They invoked the Court's jurisdiction wrongly. They are latecomers in these proceedings. They should trace their feet backward to the Succession Cause.

31. Due to the preceding, the Preliminary Objection succeeds. The application dated 2nd February 2024 is hereby struck out with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 25TH DAY OF SEPTEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Kagori for the Intended Defendants

Mr Gambo for the Plaintiff**

Happy: Court Assistant

In the absence of:

Mr Muranje, for the Defendant