



REPUBLIC OF KENYA



**Raymark Limited v Ochieng & 8 others (Environment & Land Case
E045 of 2021) [2024] KEELC 6028 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6028 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E045 OF 2021
A OMBWAYO, J
SEPTEMBER 20, 2024**

BETWEEN

RAYMARK LIMITED PLAINTIFF

AND

RAYMOND OCHIENG 1ST DEFENDANT

EVANRAY COMMERCIAL AGENCIES 2ND DEFENDANT

NAKURU DISTRICT LAND REGISTRAR 3RD DEFENDANT

JAMES MWANGI GATITU 4TH DEFENDANT

GEORGE KINUTHIA NJUGUNA 5TH DEFENDANT

ALEX WAINAINA HINGA 6TH DEFENDANT

DAVID NJENGA IYAI 7TH DEFENDANT

FREDRICK MWANGI MBUTHIA 8TH DEFENDANT

SIMON NJUGUNA MWANGI 9TH DEFENDANT

RULING

Brief Facts

1. The applicants filed the instant application dated 27th March 2024 seeking the following orders;
 1. Spent.
 2. That the court be pleased to set aside status quo orders issued on 29th June, 2021.
 3. That the court be pleased to set aside the consent orders issued on 22nd September, 2021.



4. Spent.
 5. That pending the hearing and determination of the suit herein, this Honourable court be pleased to grant temporary injunction against the Plaintiff by itself their agent, servants, employees from entering, remaining, cultivating, trespassing, subdividing, placing beacons, selling, buying, dealing and/or in any way interfering with the parcel number Solai/Ndunguri block 10/80.
 6. That cost of this application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of James Mwangi Gatutu the 1st Applicant herein sworn on 27th March, 2024. He stated that he is the bonafide purchaser for value of part of the parcel of land known as Solai/Ndunguri block 10/80 (Ol Banata Farm) having purchased the same from the 1st and 2nd Defendant who had purchased from the Plaintiff.
 3. He averred that the orders issued on 29th June, 2021 and 21st September, 2021 being status quo and consent orders respectively with regard to the suit land. The 1st Applicant avers that the said orders were issued when together with others were not parties to the suit. He further averred that the Plaintiff continues to interfere with the suit land under the disguise of the said orders. He also averred that the Plaintiff is enjoying irregular orders that were issued without the Applicants participation thus undermining their rights as bonafide purchasers with rights to the suit land. The 1st Applicant averred that unless the Plaintiff and his agents are restrained by an order of this court, they will continue developing and converting the land for their own personal use to the Applicant's detriment. He urged the court to allow the instant application.

Response

4. The Plaintiff filed its replying affidavit sworn by the Plaintiff's manager, one Justin John Wachira on 17th April, 2024. He deposed that the application was incompetent since the court had already determined the issue of injunction with the status quo in place. He further deposed that the Applicants had made a similar application dated 19th April, 2023 which sought similar orders and orders issued vide a ruling dated 23rd May, 2023. He deposed that the said ruling barred filing of further interlocutory application. He deposed that the instant application offended the doctrine of functus officio since the court had already adjudicated on matters injunction. He urged the court to have the application struck out with costs.
5. The Applicant filed a Supplementary Affidavit dated 8th May, 2024 where he reiterated the contents of his supporting affidavit. He emphasized that the orders issued were irregular given that they were issued in the absence of the Applicants and other parties. In conclusion, the Applicant urged the court to allow the instant application as prayed.
6. It is noteworthy that the Plaintiff also filed a Notice of Preliminary which challenged the competence of the instant application. He argued that the application offended the provisions of Section 7 of the Civil Procedure Code thus res judicata.

Submissions

7. Counsel for the Applicant filed his submissions dated 27th May, 2024 where he identified three issues for determination. First issue was whether the court ought to set aside the status quo orders issued on 29th June, 2021. Counsel submitted that the orders were issued without the Applicants participation thus only relevant to the Plaintiff and 1st Defendant. He submitted that with the introduction of other



- Defendants, it became punitive and it would only be fair if the same is set aside. He relied on the Court of Appeal case in *CMC Holdings Ltd v Nzioki* [2004] eKLR.
8. The second issue was whether the court ought to set aside the consent orders issued on 22nd September, 2021. He submitted that the consent was entered into when the Applicants were not parties to the suit. He argued that if the same continues to exist in the present form, the same would be injurious to the Applicants and other Defendants. Counsel relied on the Court of Appeal case in *Board of Trustees National Social Security Fund v Michael Mwalo* [2015] eKLR and submitted that the said order was irregular and ought to be set aside.
 9. The third issue was whether an injunction should be issued against the Plaintiff. Counsel relied on the case in *Peter Kairu Gitu v KCB Kenya Limited & another* [2021] eKLR. He submitted that the suit was in danger of being further alienated as the Plaintiff has been in active use and possession of the suit land with the intention to sell it at the expense of the Applicants and other Defendants. He further submitted that if an injunctive relief is not granted, the Applicants right will perish into oblivion together with their beneficial interest as purchasers of the suit property. He added that the Applicants would also suffer irreparable damage due to the Plaintiff's trespass and interference with the suit property. Counsel cited the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR.
 10. Counsel relied on the Supreme Court case of *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR and submitted that the instant application fell under the realm of exceptions to the rule of re judicata. It was counsel's argument that the initial application dated 19th April, 2023 stemmed from different facts as at that time the Plaintiff was only cultivating the land. He added that the current position was that the Plaintiff went further and altered the measurements on the ground, placed beacons and is looking to dispose of the suit property.
 11. Counsel for the Plaintiff also filed his submissions dated 25th June, 2024 where he reiterated the contents of their Replying Affidavit and Preliminary Objection. He submitted that matters of injunction were settled by the orders issued on 28th June, 2021 and 22nd September, 2021. He added that the instant application raised the same issues which were determined through the ruling of this court on 23rd May, 2023. Counsel submitted that the court had no jurisdiction to delve into the determination of the application since the court was functus officio. He cited the Supreme Court case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR.
 12. In conclusion, counsel submitted that the Applicants do not deserve the orders since the court has already preserved the subject matter pending the hearing and determination of the suit. He urged the court to dismiss the application with costs.

Analysis and Determination

13. This court has considered the application, supporting affidavit, replying affidavit, preliminary objection and submissions by the parties and is of the view that the main issue for determination is whether this court is functus officio to the instant application.
14. It is not in dispute that the Applicants filed an application dated 19th April, 2023 which sought similar orders as the present application. It is also not in dispute that this court on 23rd May, 2023 in its ruling found that the *status quo* order was by consent of parties and the same was extended until the hearing and determination of the suit. This court also directed that no further application or fresh documents was to be filed without leave of the court.



15. The Court of Appeal in *Telkom Kenya Ltd v John Ochanda (Suing in his behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR held 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”

16. In view of the above, this court had already rendered its ruling on the instant application. Determining the application, the same would surmount to sitting on an appeal from this court’s own ruling of 23rd May, 2023. In the upshot, I find that this court is functus officio . Consequently, I find and hold that the instant application is without merit and is therefore dismissed with costs to the Plaintiff. It is so ordered.

RULING DATED, SIGNED AND DELIVERED ELECTRONICALLY ON THE 20TH DAY OF SEPTEMBER 2024.

A.O.OMBWAYO

JUDGE

