



**Hopf v Director of Survey & 2 others; Sakaja & 2 others (Interested Parties) (Environment & Land Case 4 of 2021) [2024] KEELC 6350 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6350 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 4 OF 2021  
FO NYAGAKA, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**GEORGE HOPF ..... PLAINTIFF**

**AND**

**DIRECTOR OF SURVEY ..... 1<sup>ST</sup> DEFENDANT**

**THE CABINET SECRETARY MINISTRY OF LANDS & URBAN  
DEVELOPMENT ..... 2<sup>ND</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JOHN SAKAJA ..... INTERESTED PARTY**

**PASTOR GEORGE ODERA ..... INTERESTED PARTY**

**GODFREY OJILO ..... INTERESTED PARTY**

**RULING**

1. The Plaintiff sued the Defendants for several reliefs, including a declaration that he and other registered owners were the legally registered owners of parcel No. LR. 2073/23, and the intended excision or expansion of the road in issue was unconstitutional and in breach of his right to own and use his property. Further, the action was without just cause and compensation hence illegal, unlawful and unconstitutional, a permanent injunction against the defendants prohibiting them from excising any part of his 31.7 acres comprised in the suit land, and in the alternative, an order for adequate compensation before compulsorily acquiring their parcels of land.
2. In the course of time, the Interested Parties moved this Court through an application dated 03/02/2022, to be enjoined as such. On 04/05/2022, this Court granted the prayer and directed that they be enjoined within a certain period. They did. At the same time, the court issued a temporary



injunction against the Plaintiff prohibiting him from continuing with the construction on the road reserve, which was the suit's subject. The suit proceeded to conclusion. The Court delivered a judgement delivered on 05/12/2023, dismissing the suit and ordering each party to bear its own costs.

3. Thereafter the plaintiff filed a notice of appeal dated 07/12/2023, on the same date. Subsequence to that he applied for certified copies of the decree and proceedings for the purpose of filing the record of appeal.
4. In the course of time the Interested Parties filed an application dated 23/02/2024. They sought an order that the County Surveyor, Trans Nzoia County be directed to visit the parcel of land known as LR No. 2073/1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 34, and 36 within Trans Nzoia County and open the access and lay beacons thereon.
5. The application was the basis of the Plaintiff filing a preliminary objection dated 28/02/2024. The Objection was based on only one ground being that the Court lacked jurisdiction to entertain the application because it became functus officio having fully discharged its duty in this matter.
6. Following the primary objection the parties filed their written submissions. The Interested Parties filed theirs dated 07/05/2024. But the Defendants filed grounds in support of the Notice of Motion. The Interested Parties written submissions were that the Court had the power to enforce its order after judgment. They relied on the authority of Elisha Caribou Synagogue bases. Elizabeth J Seroma 2013, KLR
7. I have considered the Preliminary Objection. I have also considered the law and the submissions by the parties. Only two issues lie for determination herein: whether the Preliminary Objection is merited and who to bear the costs of the Objection.
8. A Preliminary Objection was defined by the seminal case of Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, wherein Sir Charles Newbold stated as follows:

“ 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... a Preliminary Objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

9. A further definition of the nature of a Preliminary Objection is given in the case of Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR, where the same Court held that,

“ We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”



10. Additionally, in *Susan Wairimu Ndiangui V Pauline W. Thuo & another* [2005] eKLR, Musinga J as he then was held as follows:-

“ a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

11. It goes without saying then that a Preliminary Objection arises on a point of law only. The Court needs only to examine the parties’ pleadings compare them with the law and make a finding on the merits or otherwise of the Objection based on the intersection of the two aspects. Anything short of pleadings only and therefore calling for an inquiry into facts or the need to clarify the point through an assessment of facts would not amount to a Preliminary Objection. If the court were to be called to trudge along this path it would be determining the weight of evidence before it and not the law. In such circumstances it would require a full hearing of the facts relating to the issue before it.

12. In the instant matter, the court delivered judgment in dismissing the suit. Thereafter, the Plaintiff filed a Notice of Appeal against the judgment. Thus, as it stands, the matter is in the Court of Appeal, unless the Notice of Appeal has been withdrawn. Further, as it is now, there is no suit before me over the same issue, being the opening of the road of access in regard to the parcels of land known as LR. No. 2073/2, 3, 4, 5, 6, 11, 15, 34 and 36. The subject of the suit over these parcels of land has since moved to the Court of Appeal. What that means is that if there is anything to be determined by this Court over the same parcels of land, particularly, regarding the road of access, it can only be after there is a setting aside of the Judgment of this Court through an order of the Court of Appeal or by way of a review of the same as provided by law. After the delivery of the judgment on 05/12/2024, this Court is seized with the jurisdiction to deal with the subject matter of the instant suit only in so far as the issues to be presented before it as post-judgment steps, such as costs or execution of the judgment, if such arises. If there is an issue regarding the opening of the road of access over the parcels of land, it can only flow from the Judgment of the Court. And if it does, then the proper means of doing so are not by way of an application as is in the instant case.

13. Of importance to note is that, one thing that flows from the Judgment of the Court is that once it dismissed the Plaintiff’s case, unless the judgment of the Court has been stayed, the dismissal put the parties back to the position where they were before the suit was filed: meaning that the Defendants were at liberty to proceed with the process they had either began or intended to begin on excision of the 12.9 meter road, while following the law. That is where the Applicant’s effort should focus rather than making an application of this nature.

14. In essence, and this court agrees with the Plaintiff that it became *functus officio* when it delivered the judgment on 05/12/2024. The doctrine of *functus officio* was well explained by the Court of Appeal in case of *Telcom Kenya Ltd -vs- John Ochanda* (suing on his behalf and on behalf of 996 former Employees of Telcom Kenya Ltd (2014) eKLR where it 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--

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 Judicature 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.---”



15. In *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550 the learned judges explained that:

“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”

16. The learned author Daniel Malan Pretorius, in his work, “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, expounds on this doctrine 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 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.”

17. In *Odinga v Independent Electoral & Boundaries Commission & 3 others* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) the Supreme Court of Kenya held that,

“It is a legal and constitutional obligation of any court, from the basic-level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the court’s jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the court is satisfied and it declares as much.”

18. I have before me an Application which this Court considers to be a pleading. In so far as it presents the prayers sought as compared with the doctrine of functus officio as explained above, this Court is satisfied that judicial process regarding the declaration of any rights by it as an adjudicatory forum as between the parties herein was exhausted. Thus, the Court is functus officio. I uphold the Preliminary Objection. I dismiss the Application dated 23/02/2024, with no order as to costs.

19. Orders accordingly.

**RULING SIGNED, DATED AND DELIVERED AT KITALE VIRTUALLY VIA THE TEAMS PLATFORM ON THE 19<sup>TH</sup> SEPTEMBER, 2024**

**HON. DR. IUR F. NYAGAKA**

**JUDGE, ELC KITALE**

In the presence of;

Oduor holding brief for Wekhomba for----the Plaintiff

Nafula holding brief for-----the Interested Parties

No Appearance for----Defendants (A.G. counsel absent).

