



**Kithuku v Mutuku (Environment & Land Case 28 of 2019)
[2024] KEELC 6239 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6239 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 28 OF 2019
TW MURIGI, J
SEPTEMBER 18, 2024**

BETWEEN

JOSEPH KITHUKU PLAINTIFF

AND

KAVII MUTUKU DEFENDANT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 7th November 2023 raised by the Defendant on the following grounds:-
 1. The court is functus officio thus it cannot entertain the application.
 2. That it is a cardinal rule that parties are bound by their pleadings.
 3. The application is vexatious, bad in law, an afterthought and an abuse of the court process.
 4. The Applicants have not demonstrated any sufficient interests either proprietary or otherwise to warrant any orders.
2. The parties were directed to canvass the preliminary objection by way of written submissions.

The Defendant's Submissions

3. The Defendant's submissions were filed on 16th February 2024.
4. On his behalf, Counsel outlined the following issues for the court's determination:-
 1. Whether the preliminary objection meets the threshold in Mukisa Biscuits case?
 2. Whether this court can review the judgment it delivered on 17/5/2023 and the subsequent orders issued on 20th June 2023?



3. Does Order 51 Rule 15 the law cited by the Applicant support the motion?
5. As regards the first issue, Counsel submitted that the preliminary objection has met the threshold set out in the case of *Mukisa Biscuits Manufacturing Limited v West End Distributors Limited* as it raises a pure point of law. Counsel submitted that the court rendered its judgment based on the pleadings presented by the parties herein.
6. With regards to the second issue, Counsel submitted that parties are bound by their pleadings and therefore any evidence that is at variance with the pleadings must be disregarded.
7. Counsel submitted that the Plaintiff's application dated 18th September 2023, is seeking to amend the suit property from Nzuuni/Kyuasini/724 to Okia/Nzuuni/724. Counsel contended that amending the judgment will amount to an illegality as it reflects the pleadings of the parties herein.
8. On the third issue, Counsel argued that Order 51 Rule 15 of the Civil Procedure Rules is inapplicable in the present application as the judgment was delivered after the close of pleadings by both parties.
9. Concluding his submissions, Counsel submitted that the application is not supported by any law and urged the court to dismiss the same with costs.
10. None of the authorities cited by Counsel were availed for the court's perusal.

The Plaintiff's Submissions

11. The Respondents submissions were filed on 7th March 2024.
12. On his behalf, Counsel submitted that Section 80 of the *Civil Procedure Act* as read together with Order 45 Rule 1 of the Civil Procedure Rules permits a party to seek review of the judgment.
13. Counsel submitted that the court is not functus officio as the Applicant was not seeking to have the matter heard afresh.
14. Counsel relied on the provisions of Sections 1A and 3A of the Civil Procedure Code to submit that the court has inherent jurisdiction to hear and determine the application.
15. On the issue of the application being filed under the wrong provisions of the law, Counsel relied on the provisions of Article 159(1)(d) of *the Constitution* to submit that the court should overlook procedural technicalities in administering justice to the parties.
16. Concluding his submissions, Counsel urged the court to dismiss the preliminary objection with costs.
17. To buttress his submissions, Counsel relied on the following authorities:-
 1. John Gilbert Ouma vs Kenya Forest Services Limited (2021)eKLR
 2. Godfrey Kirimi vs Catherine Makena (2021) eKLR

Analysis And Determination

18. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated as follows:-

“So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

19. Further on Sir Charles Newbold JA stated:-

“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 demurrer. It raises a 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. 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.”

20. In *Oraro Vs Mbaja* 2005 eKLR Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

21. For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence or deal with disputed facts.

22. Having considered the Preliminary objection in light of the pleadings and the rival submissions, the only issue that arises for determination is whether the Court is functus officio.

23. The Defendants’ preliminary objection is based on the grounds that the court became functus officio after delivering its judgment on 17th May 2023.

24. The Black’s Law Dictionary 9th Edition defines 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.”

25. The doctrine of functus officio was stated by the Court of Appeal in the case of *Telkom Kenya Limited v John Ochanda* (2014) e KLR 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.”

26. In the case of *Jersey Evening Post Limited v Al Thani* (2002) JLR, which case was cited by the Supreme Court in the case of *Raila Odinga & 2 Others Vs Independent Electoral and Boundaries Commission & 3 Others* (2013) eKLR the Court held as follows: -

“...A court is functus officio 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...”

27. Based on the above authorities which are binding on this court, it is clear that when a Court has already pronounced itself on a matter, it is deemed to have performed all its duties in the case and it becomes functus officio.
28. The record shows that judgment herein was delivered on 17/05/2023.
29. The Plaintiff/Applicant filed the application dated 18th September 2023 seeking the following orders:-
 1. Spent.
 2. That the judgment delivered on 17.05.2023 and the subsequent orders issued on 20th June 2023 be reviewed and accordingly amended to capture the suit property correctly as Okia/Nzuuni/724.
30. The law that governs applications for review is set out in Section 80 of the *Civil Procedure Act* and in Order 45 Rule 1 of the Civil Procedure Rules.
31. Section 80 of the *Civil Procedure Act* provides as follows;
Any person who considers himself aggrieved -
 - a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
32. Order 45 Rule 1 of the Civil Procedure Rules provides that: -
Any person considering himself aggrieved -
 - a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or
 - b. By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.
33. From the above provisions, it is clear that a court has jurisdiction to review a judgment. In the matter at hand, the Court has not pronounced itself on the application for review of the judgment delivered on 17th May 2023.
34. This Court is therefore not functus officio on the hearing and determination of the application dated 18th September 2023.
35. In the end, I find that the preliminary objection raised by the Defendant is devoid of merit and is hereby dismissed with costs.



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HON. T. MURIGI

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF
SEPTEMBER, 2024.**

In The Presence Of:

Kioko for the Defendant.

Court assistant Stephen

