



REPUBLIC OF KENYA



KENYA LAW
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**Muia v Ndetei & another (Environment & Land Case 98 of 2017)
[2024] KEELC 5926 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 98 OF 2017
TW MURIGI, J
SEPTEMBER 18, 2024**

BETWEEN

ALOIS MUIA PLAINTIFF

AND

EDWARD MUTINDA NDETEI 1ST DEFENDANT

COUNTY GOVERNMENT OF MAKUENI 2ND DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated February 18, 2024 brought under the provisions of Order 51 Rule 1 of the Civil Procedure Rules and Sections 3, 3A and 94 of the [Civil Procedure Act](#) in which the Applicant seeks the following orders:-
 - i. Spent.
 - ii. That the Honourable court do grant leave to the Plaintiff/Applicant to execute the decree of the court dated 28th December 2018 forthwith by eviction of anyone found to have trespassed into the Plaintiff's property and demolition of any structures erected on land title No. Emali Township Block 1/198 before the amount of costs incurred in the suit is ascertained by Taxation except as to so much thereof as relates to the costs and damages to be executed once costs are ascertained by taxation.
 - iii. That costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Alphonse Muema Mbindyo Advocate sworn on even date.



The Applicant's Case

3. The deponent averred that this court delivered its judgment on 28th December 2018 in favour of the Applicant. That being aggrieved, the Respondent appealed against the judgment in Civil Appeal No. 123 of 2019 which was thereafter dismissed vide the judgment delivered on 7th July 2023.
4. He further averred that vide the ruling delivered on 24/1/2024, the OCS Emali Police Station was ordered to enforce the judgment by providing security and supervision to the Applicant to evict anyone found to have trespassed into his property and demolish structures erected thereon. He urged the court to grant the Applicant leave to execute the decree before taxation of costs.

The Respondent's Case

5. The Respondent filed a replying affidavit dated 30/4/2024 in opposition to the application. He argued that the application is an abuse of the court process for the reason that the court became functus officio after it delivered its judgment.
6. He further averred that he was not issued with any notice to vacate the suit property in accordance with the provisions of Sections 152B and 152E of the Land Act. He argued that the Applicant should consider selling the suit property to him so as to preserve the hotel business since it provides employment to the local community.
7. The parties were directed to canvass the application by way of written submissions.

The Applicant's Submissions

8. The Applicant's submissions were filed on 13/05/2024.
9. In his submissions, Counsel reiterated the contents of his affidavit in support of the application.

The Respondent's Submissions

10. The Respondent filed his submissions dated 15th May 2024.
11. On his behalf, Counsel identified the following issues for the court's determination:-
 - i. Whether the Respondent was served with a notice to vacate the suit property in accordance with Sections 152B and 152E of the Land Act?
 - ii. Whether the court is functus officio?
12. Counsel submitted that eviction of an unlawful occupier of private land must be undertaken in accordance with the provisions of Sections 152B and 152E of the Land Act. Counsel contended that the Respondent is entitled to due process and as such, his eviction from the suit property must be undertaken in accordance with Sections 152B, 152E and 152G of the Land Act.
13. With regards to the second issue, Counsel relied on the definition of functus officio set out in the Black's law Dictionary. Counsel submitted that the court became functus officio after it delivered its judgment.
14. Concluding his submissions, Counsel urged the court to temper justice with mercy by taking into account that the Respondent took 16 years to build the hotel and that it provides employment to the local community. To buttress his submissions, Counsel relied on the case of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR.



The Response

15. Counsel for the Plaintiff filed response submissions dated 13th May 2024. Counsel submitted that Section 152E of *Land Act* is applicable where a suit has not been filed or where the owner of land is of the opinion that a person is in occupation of his land without his consent. In addition, Counsel submitted that Section 152E is inapplicable in the present case as the court had issued vide its judgment an eviction order against the Respondent herein. To buttress his submissions, Counsel relied on the case of *Salome Naliaka Wabwile v Alfred Okumu Musinaka* [2022] eKLR

Analysis And Determination

16. Having considered the application in light of the pleadings and the rival submissions, the following issues fall for determination:-
- i. Whether the court is functus officio?
 - ii. Whether the Plaintiff should be granted leave to execute the decree dated 28th December 2018 before taxation of costs.

Whether The Court Is Functus Officio

17. The 1st Respondent contended that the court became functus officio upon delivering its judgment on 28th December 2018.
18. The Black's Law Dictionary 10th Edition defines functus officio as follows:-
- “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.”
19. 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.”
20. 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 v 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...”
21. 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.



22. In the matter at hand, the record shows that judgment was delivered on 17/05/2023. Being aggrieved, the Respondent appealed against the decision to the Court of Appeal in Civil Appeal No. 128 of 2019. The Appeal was dismissed vide the judgment delivered on 7th July 2023. The Applicant thereafter filed the present application seeking to execute the decree dated 28th December 2018 before taxation of costs.
23. The Court has not pronounced itself on the present application. I therefore find that the Court is not functus officio on the hearing and determination of this application.
24. The Plaintiff is seeking leave to execute the decree dated 28th December 2018 before taxation of costs.
25. Section 94 of the *Civil Procedure Act* provides as follows:-

“Where the High Court considers it necessary that a decree passed in exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order the decree shall be executed forthwith, except as to so much thereof as relates to the costs; as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.
26. Section 94 clearly stipulates that the decision to allow or disallow execution to proceed before taxation of costs is discretionary.
27. In the case of *Bamburi Portland Cement Co. Ltd v Imranali Chandbhai Abdulhussein* [1996] eKLR the Court of Appeal stated as follows:-

“Section 94 of the *Civil Procedure Act* requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to the High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court”.
28. The 1st Respondent argued that he was not issued with any notice to vacate the suit property in accordance with Sections 152B and 152E of the *Land Act*.
29. The reading of the provisions of Sections 152A to 152G of the *Land Act* are applicable in respect to evictions of persons occupying public, community or private land that may be carried without a court order. In those instances, it is a requirement that notices be issued by the National Land Commission or the County Executive Committee member responsible for land or the owner of private land as the case may be. Section 152B of the *Land Act* provides that an unlawful occupant of private, community or public land shall be evicted in accordance with the Act.
30. Section 152G of the *Land Act* provides for the mandatory procedures to be followed during eviction as follows:-
 1. Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures—
 - a. be preceded by the proper identification of those taking part in the eviction or demolitions;



- b. be preceded by the presentation of the formal authorizations for the action;
- c. where groups of people are involved, government officials or their representatives to be present during an eviction;
- d. be carried out in a manner that respects the dignity, right to life and security of those affected;
- e. include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
- f. include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;
- g. include mechanisms to protect property and possessions left behind involuntarily from destruction;
- h. respect the principles of necessity and proportionality during the use of force; and
- i. give the affected persons the first priority to demolish and salvage their property

31. Section 152E of the [Land Act](#) provides for the issuance of an eviction notice to unlawful occupiers of private land and provides as follows:-

“(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent the owner or the person in charge may serve on that person a notice of not less than three months before the date of the intended eviction.”

32. From the above provision, it is clear that Section 152E is not applicable where the court has specifically issued an eviction order. In the case of *Muthithi Investment Limited v Andrew S Kyendo & 22 others* [2020] eKLR the court when faced with similar question held that:-

“..the Applicant’s reliance on Section 153E of the [Land Act](#) are misplaced because that framework does not relate to evictions carried out in execution of court decrees. Thirdly, there is no evidential material presented to the court to demonstrate that the decree holder has or is about to violate the eviction procedure spelt out in Section 153E of the [Land Act](#) or any other section of the [Land Act](#)”.

33. Where the court specifically provides in its final orders that the provisions of Section 152E of the [Land Act](#) should be complied with during eviction, then the said procedure has to be complied with.

34. In the present case, the court granted an order of eviction against anyone found to have trespassed into the Plaintiff’s property and demolition of any structures erected on the said title number Emali Township Block 1/198 without mentioning the applicability of Section 152E of the [Land Act](#).

35. The 1st Defendant having failed to vacate the suit property, it follows that the Plaintiff is at liberty to evict any person found to have trespassed into his property and demolish any structures erected thereon.

36. In the end, I find that the application dated February 18, 2024 is merited and the same is hereby allowed with costs to Applicant.

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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:

Mbindyo for the Applicant.

Nyanchera holding brief for Mwangambo for the Respondent.

Court assistant Stephen

