



**Mwachihi v Kamunya & 9 others (Environment & Land Case  
5 of 2018) [2024] KEELC 7126 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7126 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 5 OF 2018  
NA MATHEKA, J  
OCTOBER 31, 2024**

**BETWEEN**

**JUMA MOHAMED MWACHIHI ..... PLAINTIFF**

**AND**

**SAMUEL HEZRON KAMUNYA ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL MWANGI MBURU ..... 2<sup>ND</sup> DEFENDANT**

**CYRUS GICHOI RITUGA ..... 3<sup>RD</sup> DEFENDANT**

**PATRICK MATHENGE MBUTHIA ..... 4<sup>TH</sup> DEFENDANT**

**SOLOMON WAO ODHIAMBO ..... 5<sup>TH</sup> DEFENDANT**

**RUTHY MUGURE KARIUKI ..... 6<sup>TH</sup> DEFENDANT**

**ELIZABETH MUGURE KARIUKI ..... 7<sup>TH</sup> DEFENDANT**

**ELIZABETH WANJIRU MAINA ..... 8<sup>TH</sup> DEFENDANT**

**ROSE AKINYI OLEWE ..... 9<sup>TH</sup> DEFENDANT**

**NANCY NTHAMBI KARIUKI ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. The first application is dated April 8, 2024 and is brought under Section 1A, 1B, 3C, and 63 (e) Orders 2 Rule 15, 8 Rule (3(1) 45 Rule 1 of the Civil Procedure Rules (2010) Articles 40, 50(1), of [the Constitution](#) of Kenya 2010 seeking the following orders;
  1. That the Judgement of this Honorable Court delivered on the 20<sup>th</sup> January, 2022 together with subsequent Orders thereof be vacated, reviewed and or set aside.



2. That subsequent to grant of prayer 1 above the 2<sup>nd</sup> Defendant be granted leave to amend his statement of defence dated 20<sup>th</sup> February, 2018 as per the draft amended statement of defence attached herewith.
  3. Subsequent to grant of prayer 2 above the draft amended statement of defence and counter-claim be deemed as duly filed subject to payment of the requisite court fees.
  4. That this Honorable Court at its own discretion be pleased to issue any other Order that it deems fit and just to grant for the interest of justice.
  5. That costs of this suit be provided for.
2. It is based on the annexed affidavit of Samuel Mwangi Mburu and on the following grounds that the Plaintiff obtained Judgement in this Court without the participation of the 2<sup>nd</sup> Defendant which Judgement was delivered on 20<sup>th</sup> January, 2022. That upon perusal of the said Judgement which was only brought to the attention of the 2<sup>nd</sup> Defendant on the 31<sup>st</sup> March, 2023 vide the warrant of attachment issued on 20<sup>th</sup> December, 2022 the 2<sup>nd</sup> Defendant came to realize that this Honorable Court had on 10<sup>th</sup> May, 2021 issued Orders to the effect that the suit herein be reopened subject to the 2<sup>nd</sup> Defendant paying a thrown away costs to the Plaintiff. That on the date of the said Order the Plaintiffs Advocates instead of informing the 2<sup>nd</sup> Defendant of the Order for payment of thrown away costs mentioned above called the 2<sup>nd</sup> Defendant to their offices and informed him that the Plaintiff was willing to settle this suit amicably whereby the Plaintiff offered to sell and the 2<sup>nd</sup> Defendant accepted to purchase 167M<sup>2</sup> part of Plot No. Kwale/Ukunda/1009 the suit property herein, in which an Agreement was executed by the Plaintiff and 2<sup>nd</sup> Defendant to that effect. That upon the signing of the said Agreement on 10<sup>th</sup> May, 2021 the 2<sup>nd</sup> Defendant/ Applicant herein was made to believe that the suit against him was settled and he had become the lawful owner of 167M<sup>2</sup> of the suit property being currently occupied by him. That the 2<sup>nd</sup> Defendant was not aware of the subsequent proceedings that lead to the Judgement of 20<sup>th</sup> January, 2022 until when served with the warrants of attachment issued on 20<sup>th</sup> December, 2022.
3. That 167M<sup>2</sup> of Plot No. Kwale/Ukunda/1009 having been sold to the second Defendant/Applicant by the Plaintiff himself the said suit property is not available to be claimed by the Plaintiff/Respondent herein and therefore the Plaintiffs suit herein as currently constituted amounts to an abuse of the court process. That the only option left to this Honorable Court is to allow this Application and issue Orders as prayed for in the draft amended statement of defence filed herewith. That there will be no prejudice that will be subjected to the Plaintiff herein in the event that this Application is allowed as he was paid a sum of Kshs. one million seventy-three thousand five hundred seventy-one (Kshs. 1,073,571) upon the signing of the Sale Agreement dated 10<sup>th</sup> May 2021
5. The second application is dated 13<sup>th</sup> February 2024 and is brought under Section 1A, 1B, 3C and 63 (e) Orders; 2 (15), 51 (1) of the Civil Procedure Rules (2010) and Article 50 (1) or *the Constitution* of 2010 and other enabling provisions or the law) seeking the following orders;
1. That this Honorable court be pleased to issue an Order to the effect that the firm of J. X Kanyi recuse themselves from participating in these proceedings.
  2. That subsequent to grant of Paragraph Number 1 above the suit against the 2<sup>nd</sup> Defendant herein be struck out with costs to the 2<sup>nd</sup> Defendant.
  3. That the Land Registrar Kwale County be ordered to subdivide PLOT NO. Kwale / Ukunda/1009 and the suit property herein to the 2<sup>nd</sup> Defendant as per measurements outlined



in the Sale Agreement signed between the Plaintiff and the 2<sup>nd</sup> Defendant on the 10<sup>th</sup> May, 2021.

4. That this Honorable court at its own discretion be pleased to issue orders that it deems fit and just to grant for the interest of justice.
5. That costs of this Application be provided for
6. It is based on the annexed affidavit of Samuel Mwangi Mburu and on the following grounds that the 2<sup>nd</sup> Defendant purchased Plot No. /Ukunda/1009 from the Plaintiff on the 10<sup>th</sup> May 2021 and therefore, 167 Meter Square being part of Plot No. Kwale /Ukunda/1009 is not available for the Plaintiff herein. That Mr. Kanyi whose firm is having the conduct of this matter on behalf of the Plaintiff on the on the 9<sup>th</sup> day of April, 1991 then sitting as a Magistrate, delivered a judgment touching on the same suit property herein and in the premises there will be a conflict of interest if he or his firm are allowed to continue participating in these proceedings. That there is no prejudice that will be occasioned to the Plaintiff in the event that this application is allowed.
7. The plaintiff stated that the applicant is guilty of laches the application having been brought more than 2 years since judgement was delivered herein on 20<sup>th</sup> January, 2022. That the issues raised by the applicant in the application were not pleaded and should be raised in a separate suit. That the prayer by the applicant that the suit against himself be struck out has been overtaken by events, judgement against him having been entered against him on 20<sup>th</sup> January 2022. That in any event the applicant has not shown any reasonable justification why the suit against him should be struck out. That the issue of subdivision of the suit property is a substantive issue which was not pleaded in the pleadings and should therefore be raised in a separate suit. That the applicant comes to court with unclean hands having refused to honour the terms of the judgement of this court more than 2 years since it was delivered. That further, despite notice and demand, the 2<sup>nd</sup> Defendant has refused to pay costs certified against him herein. That there is no justifiable reason advanced by the applicant for his advocates Kanyi J. & Company Advocates to recuse themselves from acting for him.
8. The third application is dated 5<sup>th</sup> April 2023 and is brought under Order 40 Rule 1, 2, 2A (1) and 3 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. Rule 3 (1) of the High Court Practice and Procedure Rules of the Judicature Act seeking the following orders;
  1. That this application be certified as urgent Service of this application be dispensed with in the first instance.
  2. This application be heard during the High Court vacation.
  3. The leave be granted for M/S Chelongo & Co Advocates to come on record for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants /Applicants.
  4. That pending inter parties hearing and determination of this Application there be a temporary stay of execution of the Warrants of attachment of moveable property dated the 20<sup>th</sup> of December 2022.
  5. That pending the hearing and determination of this Application, this Honorable court be pleased to issue an order restraining the Claimant/Respondent through their agents, servants and/or employees from harassing, intimidating and/or attaching any properties belonging to the Defendants/Applicants.
  6. That this Honorable court be pleased to stay execution of the orders issued on the 20<sup>th</sup> of December 2022.



7. The costs of this application be provided for.
9. It is supported by the grounds that the Plaintiff/Respondent obtained attachment orders on the 20<sup>th</sup> of December 2022 against the Defendants/Applicants through M/S Fantasy Auctioneers. That the intended execution process is through the attachment of the Defendants/Applicants moveable goods to fulfil bill of cost amounting to Kshs. 751,720/= as judged by this Honorable Court to be borne jointly and/or severally. That the Defendants/Applicants have approached this Honorable Court at the earliest opportune moment when they became aware of these execution proceedings and without any unreasonable delay whatsoever. That this suit was for Defendants/Applicants to give vacant possession of the Disputed land and be permanently restrained from it, but Plaintiff/Respondent erred in fact as the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants/Respondents have not been on said parcel of land since January 2018, as their areas were identified by KENHA (Kenya National Highways Authority) as forming part of the Road and Road-reserve hence demolished.
10. That the Plaintiff/Respondent through his Advocates M/S Kanyi J. & Company Advocates, in the year 2021 received sums of money from the Defendants/Applicants to wit the Defendants/Applicants for sale of the same parcel of land in question and most of which has been earmarked for Road expansion. That Despite payment of quoted sums to Plaintiff/Respondent Advocates in 2021, Two years later the Defendants/Applicants to date have yet to receive title to their land and the Plaintiff/Respondent's and his Advocate continues to hold proceeds of the Sale breaching terms of the sale agreement. That Parties to this suit contrary to the status currently, had agreed that upon payment of the Purchase price by the Defendants/Applicants, the Plaintiff/Respondent's Advocate who acts for both parties in the sale of said suit land would record consent and withdraw matter from court as all would have been settled. That the Defendants/Applicants stands to suffer substantial loss if the stay orders they are seeking are not granted. That the scales of justice tilts heavily in favor of the grant of the temporary stay to afford the Applicants an opportunity to ventilate their grievances in this Court.
11. This court has carefully considered the application and submissions therein. The Respondent submitted that the remedy of review is not available for the Applicant. In the case of *Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171* is relevant. It was held, that;

A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of *Rose Kaiza Vs Angelo Mpanju Kaiza 2009*, the Court was categorical that;

“An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made...”

12. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

- (1). 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 judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

13. The aforesaid rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states 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.”

14. Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In *Court of Appeal, Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau*, the Court of Appeal held that;

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law”.

15. From the above provisions of the law, authorities cited and facts of this case the applicant stated that the Plaintiff obtained Judgement in this Court without the participation of the 2<sup>nd</sup> Defendant which Judgement was delivered on 20<sup>th</sup> January, 2022. That upon perusal of the said Judgement which was only brought to the attention of the 2<sup>nd</sup> Defendant on the 31<sup>st</sup> March, 2023 vide the warrant of attachment issued on 20<sup>th</sup> December, 2022. That the 2<sup>nd</sup> Defendant accepted to purchase 167M<sup>2</sup> part of Plot No. Kwale/Ukunda/1009 the suit property herein, in which an Agreement was executed by the Plaintiff and 2<sup>nd</sup> Defendant to that effect. That upon the signing of the said Agreement on 10<sup>th</sup> May, 2021 the 2<sup>nd</sup> Defendant/ Applicant herein was made to believe that the suit against him was settled and he had become the lawful owner of 167M<sup>2</sup> of the suit property being currently occupied by him.



16. I have perused the court file and find that on the 2<sup>nd</sup> November 2020 when the matter came up for trial the Advocate for the 2<sup>nd</sup> Defendant M/s Mburu Nyamboye & Company Advocates had been served but failed to attend court and the matter proceeded for hearing. The hearing was concluded on the 4<sup>th</sup> November 2020 and a date given for final submissions. Meanwhile the 2<sup>nd</sup> defendant through his advocate filed an application to arrest the judgement and reopen the case so that he could defend the same. The court delivered a ruling delivered on the 10<sup>th</sup> May 2021 allowing the same on condition that that he pays throwaway cost of kshs. 20,000/= to the plaintiff within 14days. This was not done and final judgement was delivered on the 20<sup>th</sup> January 2022. During the trial the court was made aware of the sale agreements but the defendants had failed to make payments as agreed. I find that there is no omission or error on the face of the record in the instant case. I find that there is no sufficient in this case to review the judgement and/or the execution. I note that this application for review was filed was filed on 8<sup>th</sup> August 2024 and the judgement was entered on 20<sup>th</sup> January 2022, the Defendants are guilty of laches.

17. I find that this court is now functus officio. In the case of Telkom Kenya Ltd vs John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd (supra), the Court of Appeal held as follows on the functus officio doctrine;

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--

18. 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. ---”

19. The Supreme Court of Kenya in the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads;

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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

20. 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.”

21. 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 as is the case herein. Having discharged its duty on this suit this court is therefore functus officio, defined in Black’s Law Dictionary, Ninth Edition 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.” In the circumstances, the court is wary of the Applicants’ invitation to re-engage with this dispute by extending the time for execution and their option would be to file an appeal. Having found that this court is functus officio and rejecting the application for review all the other applications before me must fail. I find that all the three applications are not merited and I dismiss them with costs to the plaintiffs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**N.A. MATHEKA**

**JUDGE**

