



Muia v Ndetei & another; Kitilimu alias Agnes Nduku Kitilimu (Applicant) (Environment & Land Case 98 of 2017) [2024] KEELC 7200 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 98 OF 2017
TW MURIGI, J
OCTOBER 23, 2024**

BETWEEN

ALOIS MUIA PLAINTIFF

AND

EDWARD MUTINDA NDETEI 1ST DEFENDANT

COUNTY GOVERNMENT OF MAKUENI 2ND DEFENDANT

AND

AGNES N KITILIMU ALIAS AGNES NDUKU KITILIMU APPLICANT

RULING

1. By a Notice of Motion dated 25th September, 2024 brought Sections 1A, 1B and 3A of the Civil Procedure Act in addition to Order 45 Rule 1 and Order 51 of the Civil Procedure Rules the Applicant seeks the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to stay execution of the judgment and all consequential orders pending hearing and determination of this application.
 3. That this Honourable Court be pleased to set aside the proceedings pending hearing and determination of this application.
 4. That this Honourable Court be pleased to set aside the Ruling delivered on 24th January, 2024 herein and all consequential orders thereof.
 5. That this Honourable Court be pleased to review its own judgment/decree for there is sufficient reason.



6. That this Honourable Court be pleased to grant leave to the Applicant to be joined in the proceedings.
 7. THAT the costs of the application be provided for.
2. When the application came up for hearing on 8th October, 2024, Mr. Mbindyo learned Counsel for the Plaintiff raised a preliminary objection to the application on the following grounds:-
- i. That the court is functus officio and therefore lacks jurisdiction to hear and determine this application.
 - ii. That the Applicant has no locus standi to bring the present application.
- The preliminary objection was canvassed by way of oral submissions.

The Plaintiff's Submissions

3. On behalf of the Plaintiff, Mr Mbindyo submitted that the court became functus officio after it delivered its judgment on 28th December 2018 and after the decision was upheld by the court of Appeal in its judgment delivered on 7th July 2023.
4. Counsel contended that the suit herein was heard on merit and as such, the court cannot revisit what it has determined and upheld by the Court of Appeal. To buttress this point, Counsel relied on the following authorities: -
 - i. Civil Appeal No. 112 of 2021
 - ii. Civil Appeal No. 189 of 2019
 - iii. Civil Appeal No. 30 of 2019
5. On the second ground, Counsel submitted that the Applicant has no locus standi to seek for a stay of the judgment as she was not a party to the proceedings herein. To buttress this point, Counsel relied on Civil Case No. E011 of 2023 where the Court of Appeal held that a person who is not a party in the proceedings cannot seek review of the judgment of the court.
6. Counsel submitted that the Applicant does not deserve any equitable relief as she has come to court with unclean hands. It was argued that the Applicant averred in her application that she was not aware of the proceedings herein yet she was witness number 2 for the Defendant.
7. Counsel further submitted that the application is a non-starter for the reason that the Applicant is seeking for orders before being made a party to the proceedings herein. Counsel cited the case of Florence Nafula Ayodi & 5 others v John Tabalya Mukite & another; Benson Girenge Kidiavai & 67 others (Interested Parties) [2021] KEELC 1476 (KLR) to submit that a party ought to first seek leave to be joined as party before he/she can seek any other orders.
8. Counsel further submitted that the application has not complied with the provisions of Order 45 Rule 1 of the Civil Procedure Rules as it brought with unreasonable delay. Counsel submitted that the application was filed 5 years and 9 months after delivery of judgment. Counsel urged the court to allow the preliminary objection and strike out the application with costs.

Applicant's Submissions

9. In opposing the preliminary objection, Mr. Kimeu learned Counsel for the Applicant argued that the court is not functus officio as the issues between the Applicant and the Plaintiff have not been



determined. Counsel submitted that the Applicant moved the court because the Plaintiff intends to destroy her property namely Plot No. 556 Emali Township.

10. Counsel further submitted that the Applicant filed the application as soon as she learnt that the Plaintiff intends to execute the judgment. Counsel contended that the argument that the Applicant has come to court with unclean hands is not a point of law. Counsel urged the court to dismiss the Preliminary objection.

The 1st Defendant's Case

11. In opposing the preliminary objection, Mr. Mwangambo learned Counsel for the 1st Defendant associated himself with the submissions of Mr. Kimeu. He argued that the application ought to be heard on its merits and should not be dismissed at the preliminary stage.

The Response

12. In a brief rejoinder, Mr. Mbindyo submitted that the Plaintiff was seeking to execute the judgment of the court which relates to eviction of persons found on Plot No. 198. Counsel further submitted that there is no judgment in respect of Plot No. 556 and urged the court to uphold the preliminary objection.

Analysis And Determination

13. 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 a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

14. 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”.

15. The issue of locus standi and functus officio are pure points of law which can determine the matter without having to consider the merits of the application. This Court is satisfied that the Plaintiff's Preliminary Objection is based on a pure point of law.
16. The Plaintiff contended that the court became functus officio after it delivered its judgment on 28th December 2018 and after the decision was upheld by the Court of Appeal in its judgment delivered on 7th July 2023.



17. 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.”
18. The doctrine of functus officio was stated by the Court of Appeal in the case of Telkom Kenya Limited Vs 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.”
19. In the case of Jersey Evening Post Limited v Al Thani (2002) JLR, which 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 that: -

“...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...”
20. 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.
21. In the matter at hand, the record shows that judgment was delivered on 28th December 2018. Being aggrieved, the Defendant appealed against the decision in Civil Appeal No. 128 of 2019. The judgment of this court was upheld by the Court of Appeal vide the judgment delivered on 7th July 2023. In my view, once the appeal was heard and determined by the Court of Appeal and a final decision rendered, this court became functus officio. From the foregoing, it is clear that the Court has performed its duties as pertains the dispute between the Plaintiff and the Defendant and is therefore functus officio.
22. With regards to the second ground, this court is called upon to determine whether the Applicant has locus standi to bring the instant application.
23. Locus standi is defined in Black's Law Dictionary 9th Edition as “the right to bring an action or to be heard in a given forum.”
24. In the case of Alfred Njau and Others vs City Council of Nairobi (1982) KAR 229, the Court defined the word Locus Standi as follows:-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”



25. Further in the case of Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000, the Court held that;

“Locus Standi signifies a right to be heard, A person must have sufficiency.”

26. The Applicant is seeking for a stay of execution of the judgment amongst other orders. The basis of her argument is that the issues between herself and the Plaintiff have not been heard and determined. According to the Applicant, the Plaintiff intends to destroy her property in execution of the decree. The Plaintiff contended that the Applicant has no locus standi to bring the present application as she is not a party to the proceedings herein. In prayer No. 6 of the application, the Applicant is seeking for leave to be joined in the proceedings herein.

27. Joinder of parties is governed by Order 1 of the Civil Procedure Rules. Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows: -

‘(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.’

28. From the foregoing, it is clear that Order 1 Rule 10 (2) envisages a situation where the suit has not been heard and determined and that is why it provides for joinder of a party either as Plaintiff or Defendant or a party whose presence before the court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. The Applicant is seeking leave to be joined in the proceedings as an Interested Party after the suit was determined vide the judgment delivered on 28th December, 2018.

29. The circumstances under which a party may be joined in a suit after delivery of judgment were set out by the Court of Appeal in the case of J.M.K vs M.W.M & Another (2015) eKLR as follows:-

“In the same vein, the court of Appeal of Tanzania while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules IN TANG GAS DISTRIBUTORS LTD V SAID & OTHERS (2014)EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage...”

In the matter at hand, the Applicant applied for joinder as an Interested Party after the court of Appeal had upheld the judgment of this court and the Plaintiff was in the process of executing the decree. The joinder at this stage will not enable the Applicant to participate in the proceedings herein. In view of the foregoing, there is no suit pending for determination for which the Applicant may be joined as an Interested Party. From the foregoing, it is crystal clear that the Applicant has no locus standi in these proceedings and the application for joinder cannot issue since the suit has already been heard and determined.



30. In the present application, the Applicant avers at paragraphs 2 and 3 of the application as follows: -

“2. That I am the registered owner of Plot Number 556 situated at Emali Town.

3. That the Respondent has since encroached into Plot number 556 and intends to demolish my property which vest on Emali Town pursuant to a court Order that issued to him upon conclusion of the instant suit.

31. In the judgment delivered on 28th December, 2018, the Plaintiff was granted inter alia an order of eviction of anyone found to have trespassed onto the Plaintiff's land and demolition of any structures erected on the said land Title No. Emali Township Block 1/198.

32. These are two distinct properties whose ownership, the Applicant and the Plaintiff respectively claim. However, the judgment in respect of Title No. Emali Township Block 1/198 has been delivered in favour the Plaintiff.

33. In the end, I find that the preliminary objection dated 8th October, 2024 is merited and the same is hereby upheld. The application dated 25th September, 2024 is hereby struck out with costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF OCTOBER, 2024.

In The Presence Of:

Court assistant Steve

Mbindyo for the Plaintiff

Kilonzi holding brief for Musyoka Kimeu for the Interested Party.

