



REPUBLIC OF KENYA



KENYA LAW
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**Kiai & 6 others (Personal Representatives of the Estate of Njuguna
Kiai Deceased) v Kiai & 2 others (Environment & Land Case
1406 of 2007) [2023] KEELC 60 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 60 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1406 OF 2007**

**MD MWANGI, J
JANUARY 20, 2023**

BETWEEN

**PETER KAIRU KIAI 1ST PLAINTIFF
NJOROGE KIAI 2ND PLAINTIFF
KANYUIRA KIAI 3RD PLAINTIFF
NGANGA KIAI 4TH PLAINTIFF
MUNGAI KIAI 5TH PLAINTIFF
MBURU KIAI 6TH PLAINTIFF
JOHN NJUGUNA KIAI 7TH PLAINTIFF
PERSONAL REPRESENTATIVES OF THE ESTATE OF NJUGUNA KIAI
DECEASED**

AND

**MUCHERU KIAI 1ST DEFENDANT
ATTORNEY GENERAL (SUED ON BEHALF OF LAND REGISTRAR
KIAMBU) 2ND DEFENDANT
JOSHUA KINIARU MWAURA 3RD DEFENDANT**

((In respect of the Notice of Motion Application dated 1st December 2022 brought under the Provisions of Order 50 rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3 A of the Civil Procedure Act, Section 73, (1) of the Land Registration Act, Section 13, 19 of the Environment and Land Court Act and all other enabling provisions of the Law.))



RULING

Background

1. In this case, Judgment was delivered way back on October 2, 2014, whereby the court dismissed the Plaintiffs' case which had been filed in the year 2004. The Applicant herein was the 3rd Defendant in the suit, and is the registered proprietor of all that parcel of land known as Title No Ndeiya/Ndeiya/1983 which was one of the subject properties in the dispute.
2. The Applicant states that there is presently a restriction/caution registered by the 2nd Defendant against the title to his land, Title No Ndeiya/Ndeiya/1983, acting on instructions from the law firm of Kibunja & Associates on behalf of the Plaintiffs. He further avers that the Plaintiffs have no lawful claim over his land as already determined by the court in its judgment rendered in this matter.
3. It is the Applicant's case that the maintenance of the restriction/caution over the title to his land, 8 years after the delivery of the judgment is unfair, illegal and unjustifiable. It has greatly prejudiced his rights of enjoyment of his property by restricting any dealings whatsoever over the property.
4. The application had not been served upon the other parties as the Applicant had 'baptized' it, 'ex parte application'.

Submissions by the Applicant.

5. The application was argued orally in court by the Advocate for the 3rd Defendant/Applicant relying on the grounds on the face of the application and the affidavit of Joshua Kiniaru Mwaura sworn on December 12, 2022.

Issues for Determination.

6. The fact that judgment has already been delivered in this matter raises a fundamental issue on the jurisdiction of this court to entertain and determine this application. The court must at this juncture determine whether it is functus officio before dwelling into the merits of the 3rd Defendant's application before it.

Determination.

7. In the case of *Telkom Kenya Ltd v John Ochanda (2014) eKLR*, the court of Appeal while discussing the principle of functus Officio stated 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. The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar, is a merit based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

8. The court pointed out the various exceptions to the principle of functus officio, notably: - Application for stay (of execution) Application to correct the decree (under the slip rule) Application for accounts; Application for execution including garnishee proceedings; Application for review, and Applications under section 34 of the *Civil Procedure Act*.



9. In the case of *Raila Odinga v IEBC & 3 others Petition No 5 of 2013*, the Supreme Court of Kenya cited with approval a paragraph from, ‘The origins of the functus officio doctrine with specific reference to its application in administrative law’ by ‘Daniel Malan Pretorius’ 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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

10. The Supreme Court also referred to the case of *Jersey Evening Post Limited v A Thani (2002) JLR 542 at page 550* where the court stated: -

“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.”

11. Having regard to the above cited authorities, I have no doubt in my mind that this court is functus officio and lacks the jurisdiction to entertain and determine the application presented by the 3rd Defendant. The 3rd Defendant in his application invites this court to a merit based decisional re-engagement with the case after final judgment has been entered and a decree thereon issued.

12. Probably, the 3rd Defendant/Applicant imagined that this court would ‘close its eyes’ to these provisions of the law since their application was “ex parte” as he termed it.

13. This court is a court of record entrusted by the people of Kenya with the divine responsibility of impartially doing justice in accordance with the *Constitution* and the Law. Amongst the national values that this court must at all times uphold is rule of law.

14. I need not over-emphasize that the issue of jurisdiction is weighty and fundamental in any case. Moreover, it is a point of law. The court has a duty to uphold the law in this case, in all other cases and at all times whether the issue is raised or not by any party in the particular case.

15. In the famous case of *Owners of Motor Vessel Lilian ‘S’ v Caltex Kenya Ltd (1989) eKLR*, the court stated that: -

“Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. The Court of Appeal affirmed the position in the case of *Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR* where it stated that: -

“It is settled that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek



refuge under the oxygen principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.”

17. I need not say any more. The 3rd Defendant/Applicant’s application dated December 1, 2022 is struck out for want of jurisdiction but with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2023

M D MWANGI

JUDGE

In the virtual presence of:

Ms Kagucia for the 3rd Defendant/Applicant.

N/A by the Respondents.

Court Assistant: Joan

M D MWANGI

JUDGE

