



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 12 OF 2017

WALTER OTISO OSORO.....PLAINTIFF

VERSUS

MWAURA KARUGA.....1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED.....2ND DEFENDANT

LAND REGISTRAR.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

By Notice of Motion application dated the 3rd May, 2019, which the Plaintiff has brought pursuant to Section 18 of the Civil Procedure Act, he prays for:

- Spent
- That pending the hearing inter partes and the determination of this application there be stay of proceedings in the instant suit.
- Spent
- That Machakos Civil Suit No. 260 of 2010 be consolidated with the instant suit.
- Costs of the Application be borne by the Respondents.

The application is premised on the summarized grounds that the Applicant has recently become aware of Civil Suit No. 260 of 2010 instituted by the 1st Respondent against the 2nd Respondent. The subject matter (Kajiado/ Kaputiei North/ 11275) in the Civil Suit 260 of 2010 is the same as in this suit. Although Civil Suit No. 260 of 2010 was heard and determined with judgment delivered in favour of the 1st Respondent herein, the Applicant herein did not receive any notification of the said suit; was not served with any documents in respect to the said suit; neither was he enjoined as a party therein, despite having an interest in the said suit property. The Applicant only became aware of Civil Suit No. 260 of 2010 vide a notice of preliminary objection filed by the 1st Respondent on 30th January, 2017. Further, that the Applicant seeks to be enjoined in the said suit. The proceedings in the instant suit ought to be stayed pending the hearing and determination of this application as well as enjoinder of the Applicant as a party to Civil Suit No. 260 of 2010.

The application is supported by the affidavit of Plaintiff WALTER OTISO OSORO where he reiterates his claim above.

The 1st Defendant opposed the application and filed Grounds of Opposition dated the 9th May, 2019 where he averred that the High Court became functus officio in Machakos HCCC No. 260 of 2010 upon issuance of a Decree. The High Court under the doctrine of functus officio cannot review or alter its decision and any challenge of the decision or ruling can only be ventilated to a higher court and not a court of equal jurisdiction. Section 18 of the Civil Procedure Act deals with transfer of suits by the High Court from itself to any court subordinate to the High Court, and in any event a transfer of suit envisages only a situation where such suit, appeal or proceedings is pending and not otherwise. Further, consolidation of suit envisages where two suits to be consolidated are live and/or pending but not otherwise. He contends that it is not true that the Plaintiff has recently become aware of Civil Suit No. 260 of 2010 as at the time of filing this suit (2015) some four years ago, the Plaintiff was praying for the setting aside of the orders in Civil Suit No. 260 of 2010 and is therefore intent on misleading this court with the aim of obtaining unfair advantage. He contends that he has no contractual or otherwise dealings with the Plaintiff and there was no basis for suing or enjoining him in Civil Suit No. 260 of 2010. He insists if the Plaintiff had any right or claim to the suit property, then the same was extinguished by his indolent behavior, inactivity and/or court order in Civil Suit No. 260 of 2010.

The Plaintiff and the 1st Defendant filed their respective submissions which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion application dated the 3rd May, 2019 including the supporting affidavit, grounds of opposition and respective submissions, the only issue for determination is whether this suit should be consolidated with Machakos Civil Suit No. 260 of 2010 (Now Kajiado ELC No. 74 of 2017).

The Applicant has sought for consolidation of this suit with Machakos Civil Suit No. 260 of 2010 (Now Kajiado ELC No. 74 of 2017) but abandoned the prayer for transfer of the said suit as it was overtaken by events. He submitted that the 1st Defendant was dishonest and concealed material facts by failing to enjoin him in the Machakos Civil Suit No. 260 of 2010 which case was determined, yet he was already residing in the suit land. He claims that the Court should order consolidation of these suits to prevent a miscarriage of justice. He relied on the case of **Nyati Security Guards & Services Ltd V Municipal Council of Mombasa (2000) eKLR**; and **LAW SOCIETY OF KENYA VS THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY, SUPREME COURT OF KENYA, PETITION NO. 14 of 2013** to support the argument for consolidation. He contended that there were exceptions to the *functus officio* principle and relied on the **Telkom Kenya Limited Case**. The 1st Defendant in his submissions opposed the consolidation of the suit and reliance on the exception to the doctrine of *functus officio*. He relied on the case of **re Estate Of Kinuthia Mahuti – Deceased (2008) eKLR** to support this argument. Order 11 Rule 3 (1) (h) of the Civil Procedure Rules provides that:

(1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in

which it shall—

(h) Consider consolidation of suits;'

In the case of **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** the learned Judge explicitly stated the criteria for consolidation of suits as follows: 'The Civil Procedure Rules mandate Courts to consider consolidation of suits and in so doing, to be guided by the following :-

1. *Do the same question of law or fact arise in both cases?*
2. *Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction*
3. *Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party.*

Further in the said case while quoting the case of **LAW SOCIETY OF KENYA VS THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY, SUPREME COURT OF KENYA, PETITION NO. 14 of 2013**, the Supreme Court of Kenya had this to say about consolidation of suits:-

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it”

While in the case of **Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** the Supreme Court held that: 'We, therefore, have to consider the concept of "*functus officio*," as understood in law. Daniel Malan Pretorius, in "*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*," (2005) 122 SALJ 832, has thus explicated this concept:

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

[19] This principle has been aptly summarized further in *Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550*:

“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” [emphasis supplied].

In the current case, the Plaintiff has sought to consolidate this matter with the Machakos Civil Suit No. 260 of 2010 (Now Kajiado ELC No. 74 of 2017) which had been heard and determined in 2014. I note in the said case the Decree had already been executed with the 1st Defendant being registered as owner of the suit land. The Plaintiff claims to have been residing on the suit land, which he purchased from the 2nd Defendant. Further, that the 1st Defendant failed to enjoin him in the said suit and only learnt of it when the matter had been determined.

Based on my analysis above and relying on the above cited judicial authorities, I opine that since the Machakos suit was determined, insofar the Plaintiff seeks to rely on the exceptions to the doctrine of functus officio, I hold that in the Machakos Case, the Court in indeed functus officio. Further, *I hold that the suit sought to be consolidated has already been determined and I concur with the 1st Defendant that consolidation at this juncture is immaterial.*

It is against the foregoing that I find the application unmerited and will disallow it.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 25th day of November, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Matundura for the plaintiff/applicant

Kerongo for 1st defendant/respondent

No appearance for 2nd, 3rd, 4th defendants

Court assistant- Mpoye