



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**ELC CASE NO. 06 OF 2018**

**MORRIS KIRUJA MPUNGU.....1<sup>ST</sup> PLAINTIFF**

**GENESIO KIRAITHE MPUNGU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MARGRET NGIRI MUCHIRI.....1<sup>ST</sup> DEFENDANT**

**ROBERT NYAGA RUTERE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The ruling is in respect of the notice of motion dated 11<sup>th</sup> March, 2021 stated to be brought pursuant to section 13 (7) (g) of ELC Act seeking orders:

i. That the plaintiffs do vacate L.R No. Muthambi/Erega /204 within a period of sixty (60) days in default the defendants be at liberty to enlist a court bailiff to conduct an eviction at the plaintiff's cost.

ii. That costs of this application be borne by the plaintiffs.

2. The application is premised on the grounds set out therein and supported by an affidavit sworn by Robert Nyaga Rutere. He avers that the plaintiff's claim premised on the doctrine of adverse possession was dismissed on 17/11/2020.

3. He contends that the plaintiffs continue to occupy the suit land despite a finding that their claim thereto had no merit. He further states that the trial court did not pronounce itself on the issue of the plaintiff's illegal occupation.

4. That it would be fair and just for the court to allow the instant application in order to minimize the cost and time that may be expended in instituting a separate suit.

5. He further contends that it is not out of the ordinary for a trial court to require parties claiming under adverse possession to vacate the suit land once the claim has been found to be without merit.

6. He further avers that there exists no circumstance in place that hinder this honourable court from considering the defendants application and issuing the orders sought.

7. On the 7<sup>th</sup> of July 2021 a replying affidavit was filed by Morris Kiruja Mpungu in which he claims that the honourable court is functus officio as far as Chuka ELC.No.06 of 2018 is concerned.

8. He explains that the Honourable court determined the case Chuka ELC.No.06 of 2018 involving the parties herein as the court record will show and that, judgement in this matter was delivered on 17.11.2020.

9. He contends that the plaintiff filed a Notice of Appeal on 30.11.2020 and requested for court proceedings as attached herein, information within the knowledge of the defendants and their counsel on record.

10. He avers that the notice of motion application is defective in Law and procedure. He further states that the present notice of motion application seeking to enforce Eviction as against the plaintiffs herein is unmerited and frivolous given the circumstances of the case at hand.

11. He further alleges that the law, process and procedure on eviction is well articulated and stipulated in section 152 (e) of the Land Act, procedure for which the defendants have not adhered to.
12. He explains that the purported demand letter dated 17.11.2020 issued to the plaintiffs with a fourteen days' notice period to vacate from their portion of land in L.R No. MUTHAMBI/EREKA/204 is defective ab initio and contravenes the law on eviction.
13. He contends that the plaintiffs aver that in their attempt to maintain the Status Quo pending the hearing and determination of the Appeal, filed a stay Application, which was heard and court granted temporary stay of execution on condition that they deposit a sum of Kenya shillings Eight hundred Thousand (Kshs.800,000) within 14 days of the date of ruling failing which the conditional stay of execution granted therein will automatically lapse. That indeed the stay lapsed as the plaintiffs could not secure the security.
14. The 1<sup>st</sup> plaintiff avers that the court should preserve the entire LR.No.Muthambi/Erega/204 until the hearing and determination of the Appeal and Cmcc Succ.cause No.271 of 2016 in entirety and that status quo to remain.
15. Lastly the 1<sup>st</sup> plaintiff contends that no prayers or counterclaim was presented in the Chuka ELC.No.06 of 2018 by the defendants for eviction orders as against the plaintiffs.

#### **ISSUES FOR DETERMINATION**

- i. Whether the court is *functus officio*.
- ii. Whether the process and procedure of eviction has been followed pursuant to filing the notice of motion application herein.
- iii. Whether the application is merited.

#### **ANALYSIS AND DETERMINATION**

##### **16. Whether the court is *functus officio*.**

The **Black's Law Dictionary**, Ninth Edition defines the describes *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.”

17. The rule of *functus officio* has exceptions. **Section 99** of the **Civil Procedure Act** establishes the slip rule and it provides that: -

“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.”

18. The Civil Procedure Rules provides under **Order 21 Rule 3 (3)** that: -

“A judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review.”

19. The law allows for the correction of the judgement but not its merits. The Court of appeal in **Telkom Kenya Limited (2014)eKLR** also held that: -

“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. There do therefore exist certain exceptions...”

The application for review by the applicant pointed to the fact that his name had been struck out by the amendment to the plaint and the court ought not to have attached liability to a 1st defendant who did not exist and dismissed the case of a 2<sup>nd</sup> and 3<sup>rd</sup> Defendant whilst the suit only had two defendants, which did not include the appellant, at the time of the hearing and decision making. The court due to these circumstances was not *functus officio* and was not barred from reviewing the judgment.

20. Similarly in **Raila Odinga –Vs- IEBC & 3 Others Petition No. 5 of 2013** the Supreme Court of Kenya cited with approval the following passage from **“The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law”** by **Daniel Malan Pretorius**:-

...“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.”

21. In addition, the Supreme court also referred to the case of **Jersey Evening Post Limited –Vs- A. Thani [2002] JLR 542** at pg. 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.” [own emphasis]

22. Having regard to the above authorities I humbly opine that the court is not functus officio. This is because the application as framed seem to seek orders to enforce the judgement and decree of the court.

**23. Whether the process and procedure of eviction has been followed pursuant to filing the notice of motion application herein.**

24. The motion is premised on the provision of section 13(7) (g) of the Environment and Land Court Act, which provides that in exercise of its jurisdiction under the Act, the court shall have power to make any order and grant relief as the court deems fit and just, including-restitution.

25. Section 152 E of the Land Act,2012 provides for eviction in Kenya. Section 152E of the Amended Land Act provides that:

‘Eviction Notice to un lawful occupiers of private land

(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 a notice, of not less than three months before the date of the intended eviction.

(2) The notice under subsection (1) shall-

a) Be in writing and in a national and official language:

b) In the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land,

c) Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require: and

d) Be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

26. The 1<sup>st</sup> plaintiff’s replying affidavit at paragraph 10 alleges that there was a purported demand letter dated 17.11.2020 issued to the plaintiffs with fourteen days’ notice period to vacate from their portion of land in L.R Muthambi/EREGA/204.The plaintiffs aver that the said notice is defective ab initio and contravenes the law on Eviction under the Land Act,No.3 of 2012.I respectfully concur with the above assertion. That is not the correct procedure when issuing a notice to vacate as provided in Section 152 E of the amended Land Act.

27. The 1<sup>st</sup> plaintiff has also alleged in paragraph 15 of his replying affidavit that no prayers or counter-claim was presented in the Chuka ELC.No.06 of 2018 by the defendants for eviction orders as against the plaintiffs. I have perused the court record and find that there was no counterclaim filed by the defendants. Indeed, the judgement and decree of this court did not contain an order of eviction as against the plaintiffs.

28. In the notice of motion application, the applicants at paragraph 4 state that in order to minimize the cost and time that may be expended in instituting a separate suit, they filed the instant application. In my considered view, the defendants have approached the court unprocedurally. They slept on their right by not including a counterclaim in ELC SUIT No. 06 OF 2018.The correct procedure in filing for eviction should be followed as per section 152 E of the Land Act.

29. In the **case of Margret Karwirwa Mwongera versus Francis Kofi (2019) eKLR** a similar application was filed pursuant to section 152 E of the Land Act and Justice Sila Munyao held that an eviction notice had been served upon the respondent. It will also be seen from section 152 E (d) that the eviction notice is supposed to be served upon the Deputy County Commissioner in charge of the area where the land is situated and also upon the OCPD of the area. I have not seen any notice that was properly served in line with section 152E. Instead a demand letter was served, and even then, the same was served only upon the plaintiffs.

30. Consequently, this court finds that the notice of motion application dated 11<sup>th</sup> March,2021 is devoid of merit. The application is dismissed with costs to the plaintiffs.

Dated, signed and delivered at Chuka this **16<sup>th</sup> day of November, 2021** in the presence of:

CA: Ndegwa

Mutuma Githinji h/b for Muriithi for Applicants

Ms. Kijaru h/b for Ms. Muiruri for Respondents

**C.K. YANO,**

**JUDGE.**