



REPUBLIC OF KENYA



KENYA LAW
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**Ali & 2 others v Boit & another (Environment & Land Case
200 of 2012) [2022] KEELC 4778 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4778 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 200 OF 2012
SM KIBUNJA, J
SEPTEMBER 21, 2022**

BETWEEN

**JABER MOHSEN ALI 1ST PLAINTIFF
CHELUGOI MOHSEN ALI 2ND PLAINTIFF
HEGEONS AUCTIONEERS 3RD PLAINTIFF**

AND

**PRISCILLA BOIT 1ST DEFENDANT
JAMES C BOIT 2ND DEFENDANT**

RULING

1. The application dated June 7, 2021 was filed by the defendants and seeks for the following prayers;
 - a. Spent.
 - b. Pending the hearing and determination of this application inter-parties the applicants be granted a temporary stay of execution of the certificate of costs arising from taxation of the respondent's bill of cost pending the hearing and determination of the defendants appeal to the Court of Appeal.
 - c. Pending the hearing and determination of this application inter-parties the applicants be granted a temporary stay of execution of the taxation proceedings ensued pursuant to this court's judgment of July 31, 2014 together with decree issued pursuant thereto pending the hearing and determination of the defendants appeal to the Court of Appeal.
 - d. The bill of costs dated August 8, 2014 be re-opened for taxation.
 - e. Costs of this application be in the cause.



2. The application is based on the twenty two (22) grounds on its face and supported by the affidavit sworn by James C Boit, the 2nd defendant, on the June 7, 2021. Their case is that the Plaintiffs filed this case vide the plaint dated the February 9, 2005 alleging that they had encroached onto land parcel Uasin Gishu/Sosiani/28. The suit was heard and determined through the judgement delivered on the July 31, 2014. That being aggrieved the defendants filed an appeal to the Court of Appeal, being Eldoret CACA No 50 of 2015 that was dismissed on the February 24, 2021 for lack of prosecution. That the plaintiffs then embarked on the execution of the court's judgement by pursuing their costs. That the defendants were not invited for taxation of the bill of costs and were condemned without being heard. That as the defendants application for their appeal to be reinstated was heard on the March 25, 2021 and is pending for ruling on the June 4, 2021, the execution of the certificate of costs, and all other execution proceedings should be stayed pending the outcome of the appeal.
3. The application is opposed by the plaintiffs through the replying affidavit sworn by Chelugoi Mohsen Alion the June 17, 2021. It is their case that the court is *functus officio* for the reasons that the parties in this claim are before the Court of Appeal; the application is *res judicata* since the court already declined to grant the defendants an order of stay of execution in its ruling delivered on October 23, 2014, and that the Court of Appeal had granted the defendants a conditional order of stay of execution in its ruling delivered on November 13, 2014.
4. Pursuant to the directions issued on the March 3, 2022 the defendants filed their submissions dated April 7, 2022 and the plaintiffs filed theirs dated the March 30, 2022. The following are highlights of the said submissions.
 - a. The defendants started their submissions by indicating that prayers (a), (b) and (c) of the application are now spent, and their submissions would only be on prayers (d) and (e), which are about the bill of costs being reopened for taxation, and costs of the application. They further submitted that their counsel's failure to attend court for the taxation of the bill of costs should not be visited upon them as litigants, and relied on the decision in the case of *Patriotic Guards Limited v James Kipchirchir Sambu*(2018) eKLR. They further submitted that the taxing court's failure to give the defendants a hearing, as relates to the taxed amount, violates the defendants' right to a fair trial as is envisioned in article 50(1) of the *Constitution*. The defendants urged the court to exercise its discretion in their favour to allow the order to reopen the taxation of the bill of costs, and relied on the 4th Chief Justice of the United States of America decision in the case of *Osborn v Bank of the United States*, 22 U S 738 [1824] where the court held that as follow:

“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”

And the Supreme Court of India in Civil Appeal No 9047 Of 2014 *K Praksh v B r Sampath Kumar*, which quoted with approval the decision of the King's Bench as follows:

“The King's Bench in *Rookey's Case* [77 ER 209; (1597) 5 Co.Rep.99] it is said:



“Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to 16 Page 17 (sic) be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity is by the constitution entrusted with.”

The defendants urged the court to use its discretion to grant prayer (d) seeking the reopening of the bill of costs for taxation, and to allow the application dated June 7, 2021 with costs.

- b. The plaintiffs submitted that when the bill of costs came up for taxation on the January 27, 2015 the defendants' counsel, Mr Aseso, was present and it was agreed by consent of the advocates on record that the plaintiffs' bill of costs would be taxed on February 17, 2015. In the circumstances, the defendants' claim that they were not given a fair chance at a hearing is not justified, as the defendants' advocate was in court when the date for taxation was agreed upon. That the bill of costs was taxed on the aforementioned date at Kshs 901,600.00. The plaintiffs urged the court to decline the invitation to set aside *ex parte* proceedings to aid a party who has demonstrably attempted to delay or obstruct the course of justice. The plaintiff cited the decision in the case of Richard Nchapai Leiyangan v IEBC & 2 others, where the court expressed itself thus:

“We agree with the noble principles which go further to establish that the courts discretion to set aside *ex parte* ... order-for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

The plaintiffs submitted that the defendants application has no merit as the defendants sought to challenge a bill of costs that had already been taxed in complete disregard of the provisions of rule 11 of the Advocates Remuneration Rules.

That the delay of seven (7) years in filing of the application to challenge a bill of costs was inordinate. The plaintiffs submitted that no proper grounds have been advanced to disturb the taxation of February 17, 2015 which was undertaken seven (7) years ago, and cited the case of Philip Chemwolo & Another v Augustine Kubende (1982-1988) KAR 103 at 1040, where the court stated that the broad equity approach of putting right error or default by payment of costs would not be applicable if there is intention to overreach.

5. The following are the issues for the court's determinations;
- a. Whether the defendants have made out a reasonable case for the fresh taxation of the bill of costs; and
 - b. Who pays the costs of the application.
6. The court has carefully considered the grounds on the notice of motion dated the June 7, 2021, the affidavit evidence by the parties, the submissions filed by the parties learned counsel, superior courts decisions cited thereon and come to the following conclusions;



- a. That the primary issue for determination by the court is whether there is merit in the prayer seeking to re-open the taxation of the bill of costs proceedings. The provisions of rule 11 of the [Advocates Remuneration Order 2009](#) is instructive and provide as follows:

““Objection to decision on taxation and appeal to Court of Appeal

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision, give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

7. The above leaves no doubt that a party who is aggrieved by the decision of a taxing master, is obliged to lodge a notice of objection to taxation against the decision of the taxing master within 14 days from the date of such taxation. That from the notice of motion dated the June 7, 2021, it is apparent that the defendants appear to have been aggrieved by the decision of the taxing master issued on February 17, 2015 but for reasons that are unclear to the court, the defendants opted to file the instant application seeking to re-open the taxation proceedings, instead of filing a notice of objection and thereafter a reference to the judge within the timelines stipulated in law. The defendants’ application appears to be a half-hearted attempt to file a reference in complete disregard of what the law provides, relating to the manner of dealing with an objection to the decision of the taxing master of a bill of costs. Though the court is clothed with the power to extend time for filing a reference on a taxation decision, the defendants herein have not sought for extension of time before filing the instant application, or in the notice of motion.
8. The court in [Dennis K Magare & Ben Musundi T/a Magare Musundi & Co Advocates v Parminder Singh Manku & another](#) [2021] eKLR observed as follows as relates to a situation where a party failed to lodge a notice of objection:

“My reading of the provision of rule 11 (1) of the [Advocates Remuneration Order](#), drives me to the conclusion that the lodgement of the notice of objection to taxation, is preemptory, mandatory and/or imperative...”



In the circumstances, I find that the defendants' application dated the June 7, 2021 lacks merit as it seeks to contest the decision of a taxing master without the requisite notice of objection. The application dated the June 7, 2021 has no merit is dismissed with costs.

Notice of Motion Dated the January 21, 2022.

9. The Plaintiffs notice of motion dated the January 21, 2022 seeks the following orders inter alia:
 - a. “That the defendant/respondent herein James C Boitbe and is hereby evicted from land parcel No Uasin Gishu/Sosiani/28.
 - b. That the OCS Juakali Police Station do provide security to the court bailiffs on the execution of the order of eviction granted herein.
 - c. That the decree holder be allowed to attach and sell by public Auction that property identified as Uasin Gishu/Sosiani/25, the property of the estate herein, to meet taxed costs of Kshs 1, 659, 522.80/= and further appeal costs which the Respondent has refused and/or failed to pay.
 - d. That costs of this application be provided for.”
10. The application is based on the seven (7) grounds on its face and supported by the affidavit sworn by Jaber Mohsen Ali on the January 21, 2022. It is the plaintiffs' case that in the judgement of the court of the July 31, 2014, the defendant was ordered to vacate from the suit land in 30 days, and a permanent injunction restraining the defendant from further occupying the said land was also issued. The appeal No 50 of 2015 filed by the defendant was dismissed on the December 3, 2021, but the defendant has declined to comply with the court's judgement, and hence the instant application.
11. The application is opposed by the defendants through the replying affidavit sworn by James C Boit, on the March 30, 2022. The defendant's case is that he has been in occupation of the suit land where he has been doing agro forestry, and harvesting trees on roll every six months, since 1972. That after the judgement of July 31, 2014, he filed Eldoret CACA No 50 of 2015 which was heard and dismissed on December 3, 2021. That the suit land is about fifty (50) acres and he has not refused to vacate but need about six months to remove the developments made in the thirty (30) years of his occupation. That he has paid the taxed costs of Kshs 901,000/-, but the costs in the Court of Appeal is yet to be taxed.
12. The learned counsel for the plaintiffs and the defendant filed their submissions dated the March 30, 2022 and April 7, 2022, for and against the application, respectively, summarized as follows:
 - a. That plaintiffs submitted that after the Court of Appeal affirmed this court's judgment of July 31, 2014, and the defendant had no basis of refusing to vacate from the suit land and paying the legal costs as ordered. That accordingly, the order sought for OCS Juakali Police Station to provide security during eviction should issue. That they should be granted their prayer to have land parcel Uasin Gishu/Sosiani/25 attached and auctioned to satisfy the decree.
 - b. On his part, the defendant submitted that they are not opposed to an order of eviction being issued as prayed in the application, but prayed to be granted six months to vacate the suit premises. That it would be unnecessary to seek the protection of the OCS Juakali to provide security during the eviction exercise as he intends to vacate the suit property; The defendants contested the sum of Kshs 1,659,522.30 sought by the plaintiffs as costs together with interest for reasons that the court did not award any interest on costs. The defendant relied on the



decision in the case of *Dakianga Distributors Kenya Ltd v Kenya Seed Company Limited*[2015] eKLR where the court held as follows:

“The power of a taxing master in taxing bills of costs before him/her is totally dependent on whether the costs were awarded by the trial court. On the same breath, the taxing master’s authority is limited to the extend the trial court directed such taxation proceedings to be conducted.”

The defendant further submitted that the jurisdiction of the taxing master cannot be extended beyond what the court ordered, and cited the decision in the Court of Appeal in *Adero & Another v Ulinzi Sacco Society Limited*[2002] 1 KLR 577 where the court stated as follows:

- “1) ...
- 2) The jurisdiction either exists or does not *ab initio*,..
- 3) Jurisdiction cannot be conferred by the consent of the parties or assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. (Emphasis ours)
- 4) ...”

The defendant urged the court to find that the plaintiffs attempt to get orders to execute for its costs for defending the appeal before the Court of Appeal is premature, and submitted that the Plaintiffs’ application be dismissed with costs.

13. The issues for the determinations of the court are as follows;
 - a. Whether the plaintiffs have established a reasonable basis for issuing of eviction order against James C Boit, the 2nd defendant.
 - b. Whether an order for provision of security should issue.
 - c. Whether the plaintiffs have established that the defendant has refused or failed to pay the taxed costs and if so, whether an order of attachment and auctioning of land parcel Uasin Gishu/Sosiani/25 to satisfy the taxed costs of Kshs 1,659,522.80 and further costs incurred on appeal should issue.
 - d. Who pays the costs of the application.
14. The court has carefully considered the grounds on the application dated the January 21, 2022, the parties’ affidavit evidence, the submissions by the learned counsel, the superior courts decisions cited and come to the following findings;
 - a. The Supreme Court in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR observed as follows:

“A replying affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed... Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders. It behoves the court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The court is under a duty to look



at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this court.”

This court takes judicial notice of the fact that vide an application dated September 5, 2014, the plaintiffs sought for eviction orders against the defendants. The aforementioned application was heard and determined on its merits resulting in a ruling of the court delivered by the honourable Justice Munyao on October 23, 2015, and at paragraph 18 of the said ruling stated as follows in verbatim:

“ 18. Having disallowed the application for stay in so far as possession of the suit land is concerned, I have no reason not to allow the application for eviction. I allow it only that I will grant the defendants a further seven days to vacate the premises. If they do not so vacate, the plaintiff to proceed and appoint a court bailiff to execute the eviction order and the OCS Turbo to provide security to the court bailiff while executing this order. costs of both applications to the plaintiffs. It is so ordered.”

- b. The court further takes judicial notice of the fact that the defendants’ filed an application before the Court of Appeal dated October 28, 2015 seeking for stay of execution of the judgment of the court delivered on July 31, 2014 together with the ruling of the court delivered on September 23, 2015. The Court of Appeal rendered itself vide a ruling delivered on November 13, 2014, *inter alia* issuing the following orders:

- i. That application dated October 28, 2014 is allowed as prayed on condition that the applicant will deposit a suitable security for Kshs. One million by way of either bank guarantee, insurance bond, or real estate mutually acceptable to both parties, within the next 30 days.
- ii. The appellant to file and serve the record of appeal within the next 90 days.
- iii. The appeal to be set down for hearing before the end of 2015.
- iv. Costs shall be in the appeal.
- v. There shall be liberty to apply.

The court further takes judicial notice of the fact that the defendants appeal was dismissed for non-attendance vide a ruling of the Court of Appeal delivered on February 24, 2021 for lack of prosecution. The appeal was later reinstated, heard on merit and dismissed through the judgement of December 3, 2021.

- c. In view of the foregoing, the dismissal of the defendants’ appeal by the Court of Appeal means the eviction orders issued by this court in its ruling delivered on upon October 23, 2015 are no longer stayed. There may not have been any need therefore, for the Plaintiffs to seek for eviction order, as one had already been granted in 2015. Though no explanations have been tendered why the application was found necessary, the court notes that by the time the notice of motion



was filed, about six years had lapsed from 2015 when the eviction order was issued. Further the court has noted the change on the police station that is expected to offer security.

- d. That it follows that the aforementioned Court of Appeal decisions in this dispute effectively confirmed or upheld the position taken by this court on the issues on appeal. Though this court is effectively *functus officio* in this matter, it still has the responsibility to deal with the execution proceedings as moved by the parties and this is the essence of the application dated the January 21, 2022. The doctrine of *functus officio* is one of the expressions in law on the principle of finality. *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.”

The Supreme Court decision in *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 to the effect that:

“ 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.”

The Court of Appeal in *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR stated the following on the 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.”

- e. The application dated the January 21, 2022 being aimed at executing the judgment of the court therefore has merit and is allowed as prayed with costs.
1. The final orders on the two applications subject matter of this ruling are as follows;
 - a. That as shown at paragraph 8 above, the defendants’ notice of motion dated the June 7, 2021 is without merit and is dismissed with costs.
 - b. As indicated at paragraph 14(e) above, the plaintiffs’ notice of motion dated the January 21, 2022 has merit and is allowed as prayed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 21ST DAY OF SEPTEMBER, 2022

S. M. KIBUNJA, J.

ENVIRONMENT & LAND COURT - ELDORET

IN THE VIRTUAL PRESENCE OF;



PLAINTIFFS:No appearance

DEFENDANTS:No appearance

COUNSEL: Mr. Ogongo for Defendants

COURT ASSISTANT: ONIALA

S. M. KIBUNJA,J.

ENVIRONMENT & LAND COURT - ELDORET

