



**Kirui v Rop & 2 others (Environment & Land Case E020 of 2021)  
[2025] KEELC 1427 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1427 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E020 OF 2021  
LN GACHERU, J  
MARCH 20, 2025**

**BETWEEN**

**JONATHAN KIMETET KIRUI ..... PLAINTIFF**

**AND**

**SAMWUEL KIPKOECH ROP ..... 1<sup>ST</sup> DEFENDANT**

**NAROK LANDS REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**NAROK DISTRICT SURVEYOR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The matter for determination is the Notice of Motion Application dated 21<sup>st</sup> May 2024, which Application is anchored under various provisions of law, and wherein the Plaintiff/Applicant has sought for these orders: -
  - a. Spent
  - b. That pending the honourable court's ruling on the defendant's application dated the 3<sup>rd</sup> November 2023, and the interparties hearing and determination of this application, this honourable court be pleased to grant an order of temporary injunction restraining the 1<sup>st</sup> Defendant/Respondent, his agents, servants and/or assigns from quarrying and selling of building blocks along Amalo River and felling of indigenous Riverine trees causing serious environmental degradation and other dealing with the suit land in a manner that will prejudice the Plaintiff's/Applicant's proprietary interest in LR No.Cismara/Olposimoru/354.
2. The application is premised on the various grounds as stated on the face of the said Application, and on the Supporting Affidavit of Jonathan Kimetet Kiru, who reiterated mostly what was averred on the grounds in support of the Application.



3. Among the grounds enumerated in support are; that the court heard this case and determined that the Plaintiff/Applicant is the legal proprietor of Land known as LR No. Cis-mara/Olposimoru/354, vide its judgment of 6<sup>th</sup> September 2023. It was also averred that the 1<sup>st</sup> Defendant/Respondent is in occupation of the suit land as a result of stay of execution of the said Judgment which stay order was issued by the court on 7<sup>th</sup> November 2023.
4. Due to the said occupation and stay, the 1<sup>st</sup> Defendant/Respondent is exploiting the natural resources on the suit land, particularly building blocks and cutting down indigenous trees to the detriment of the Plaintiff/Applicant.
5. It was averred that in the months of March and April 2024, the 1<sup>st</sup> Defendant/Respondent dug up stones from the quarry and sold them to Olmariko Secondary School and he was issued with a cheque of approximately 180,000/= despite the existence of the Judgment against him.
6. Further, that the 1<sup>st</sup> Defendant/Respondent together with his family has unlawfully prevented the plaintiff/ applicant from accessing the suit land and enjoying the fruits of his Judgment. Further, that the Plaintiff/Applicant will suffer irreparable loss and damage if the orders sought are not granted. Therefore, it is in the interest of Justice and fairness that the instant application be allowed.
7. In his Supporting Affidavit, the Plaintiff/Applicant Jonathan Kimetet Kiru reiterated the averments that the court did hear the suit herein and determined that he was the legal proprietor of the suit land LR No. Cis-Mara/Olposimoru/354, vide its Judgment of 23<sup>rd</sup> September, 2023. However, the 1<sup>st</sup> Defendant/Respondent and his family has unlawfully prevented him from accessing the suit land and enjoying the fruits of his Judgment. He urged the court to allow the instant application.
8. The application is opposed by the 1<sup>st</sup> Defendant/Respondent Samuel Kipkoech Rop vide his Replying Affidavit dated 26<sup>th</sup> July 2024, wherein he averred that his advocate has informed him that the annexed photographs to the Applicant's Supporting Affidavit are inadmissible in evidence as the photos offend the admissibility of electronic evidence on photos from electronic device whose certificate has not been filed and/or device disclosed.
9. He also averred that he has been informed by his advocate on record that the said exhibits do not meet the requisite legal threshold under the Evidence Act as the Plaintiff/ Applicant has not filed a certificate as required under Section 65(8) as read with Section 106 and 108B of the Evidence Act, and hence the exhibits are non-compliant with the provisions of the law.
10. The deponent also deposed that the Judgment that the Plaintiff/Applicant is alluding to was stayed in the court's Ruling of 7<sup>th</sup> November 2023, and that he is in occupation and all the activities that he is undertaking are squarely within the perimeters of the said parcel of land Cis-mara/Olposimoru/ 354, which belongs to the estate of Kipro Arap Rono.
11. Further that the Plaintiff/ Applicant has not annexed a copy of the cheque that he alluded to, nor did he produce any documentary evidence of the alleged supply of the stones to a Olmariko Secondary School.
12. It was his further averment that his advocate has informed him that the instant application does not meet the threshold for grant of temporary injunction, and thus the application is fatally defective, frivolous, vexatious and an abuse of the court process. It was his contention that it is fair and in the interest of justice and equity that the instant application be dismissed.



13. The said application was canvassed by way of written submissions. the Plaintiff/Applicant filed his submissions dated 2<sup>nd</sup> December 2024, through Koeh J.K & Co. Advocates and urged the court to allow the instant application.
14. The Plaintiff/Applicant relied on various decided cases among them the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Panari Enterprises Ltd v Lyuoch & 2 others* [2014]eKLR, which submissions and cited authorities the court has thoroughly read and considered.
15. The 1<sup>st</sup> Defendant/Respondent also filed his written submissions dated 25<sup>th</sup> February 2025, through Kamwaro & Co Advocates, and urged the court to dismiss the instant application with costs.
16. The 1<sup>st</sup> Defendant/Respondent cited various decided cases being *Hezron Kamau Gachuru v Kianjoya Enterprises Ltd & another* [2022]eKLR; *Pius Kipchirchir Kogo v Frank Kemeli Tenai* [2018]eKLR; *Paul Gitonga Wanjau v Gathuthia Tea Factory Co. Ltd & 2 others* [2016]eKLR, *Virginia Edith Wambui v Joash Ochieng Ougo* Civil Appeal No. 3 of 1987 [1987]eKLR, among others.
17. The court has carefully read and considered the rival written submissions and finds that the single issue for determination is whether the instant application is merited.
18. From the court's record, what is evident is that the court delivered a Judgment on 26<sup>th</sup> September 2023, wherein it found in favour of the Plaintiff/Applicant herein. However, on 7<sup>th</sup> November 2023, the court did issue stay of execution of the said Judgment on temporary basis pending the hearing and determination of the application for stay dated 3<sup>rd</sup> November 2023.
19. The said stay order was granted on a temporary basis, but the said court order did not indicate the stay order was to last for how long. The said temporary stay of execution has not been lifted by the court, and thus this court can presume that the said stay order is still in place.
20. In the instant application, the Plaintiff/Applicant has sought for temporary injunction pending the ruling of the Notice of Motion Application dated 3<sup>rd</sup> November 2023, which application the 1<sup>st</sup> Defendant had sought for various orders among them stay of execution of the judgment; joinder of proposed Interested Party; recalling of the process server; setting aside of the impugned Judgment and re-hearing of the case among other prayers.
21. What is clear is that there is a Judgment that was issued by the court on 26<sup>th</sup> September 2023, and to an extend the court became functus officio, on merit based issues. However, the court can entertain post judgment applications for execution of the said Judgment, stay of execution, review, setting aside and/or vacation of the said Judgment on reasonable grounds.
22. The Plaintiff/ Applicant herein has sought for temporary injunction to restrain the 1<sup>st</sup> Defendant who has stay orders from carrying out various activities on the suit land. It is also trite law that an order of temporary injunction can only be issued where there is a substantive suit in place otherwise the injunction will be in vain and it cannot stand in law.
23. In the instant Application, since the Judgment has not been set aside, but only stayed, then on the face of it, this is a concluded case, and there is no substantive suit in place or pending determination for a temporary injunction to issue.



24. In the case of *Cresta Investments Limited v Gulf African Bank Limited & Another* [2020] eKLR, the court held: -
- “Moreover, an application for injunction under Order 40 of the *Civil Procedure Rules* is predicated on a suit filed by the party seeking the injunction. An injunction without a substantive claim is a plea in vain and cannot lie in law or at all.”
25. The application herein for temporary injunction opens new frontiers in a concluded matter, wherein the court is *functus officio*. Therefore, the court being *functus officio* cannot entertain such an application which might require calling of further evidence, may it be Affidavit evidence or otherwise in an already concluded matter, which might lead to re-opening of the case. Before the Judgement in issue has been set aside, the court remains *functus officio* on merit based issues.
26. It is evident that in our Kenyan Law, a court becomes *functus officio* after it has rendered a final Judgment or order and therefore, it no longer has the power to revisit or alter the decision. This court delivered a judgement on 26<sup>th</sup> September 2023, and later stayed it. Those orders have not been vacated, and the court cannot again issue temporary injunctive orders to a rival party.
27. The Court of Appeal in the case of *Telkom Kenya Ltd v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd)* [2014] eKLR, held;
- “*functus officio* is an enduring principle of Law that prevents re-opening of a matter before a court that rendered the final decision therein.”
28. The court herein issued and/ or rendered a Judgment on 23<sup>rd</sup> September 2023, and later stayed the said Judgment temporary. The Plaintiff/Applicant has alleged that the 1<sup>st</sup> Defendant/Respondent is carrying out activities which activities ought to be stopped through a temporary injunction.
29. In the event the 1<sup>st</sup> Defendant/Respondent denies carrying out the said activities, then the court will be called upon to scrutinize the available evidence through Affidavits, thus re-opening the matter so that the application can be determined on merit.
30. The Supreme Court of Kenya rendered itself as follows in the case of *Raila Odinga & 2 others v IEBC & 3 others*[2010]eKLR;
- “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 or adjudication must be taken to a higher court if that right is available.”
31. Being guided as above by the decisions of the Superior courts, this court finds that when it comes to merit based issues in this case, then the court is *functus officio* and hence devoid of jurisdiction to entertain an application for temporary injunction pending the delivery of a ruling of the Notice of Motion dated 3<sup>rd</sup> November 2023.
32. What the parties should strive to achieve herein is to prosecute the Notice of Motion Application dated 3<sup>rd</sup> November 2023 expeditiously, so that the court can determine and/ or decide whether to set aside



the said judgment or decline to do so. The parties should stop filing of other interlocutory applications before determination of the Application dated 3<sup>rd</sup> November 2023.

33. It is trite that temporary injunctions are issued to preserve the status quo or to prevent potential harm until a final court decision is made. It is evident herein that a final judgment was issued herein on 26<sup>th</sup> September 2023, which Judgment though stayed has not been set aside, and thus the suit is a concluded one. With the Stay order the status quo that prevailed before the judgement was preserved.
34. There was no tangible evidence that the 1<sup>st</sup> Defendant/Respondent has cut down trees as alleged or excavated building blocks and sold them to Olmariko Secondary School. As averred by the 1<sup>st</sup> Defendant/ Respondent the photograph marked JKK1 does not prove that the said stones were excavated on the suit land and/or sold to the said school.
35. This court finds and holds that the instant application dated 21<sup>st</sup> May 2024 is not merited. Consequently, the said application is dismissed entirely with costs being in the cause.
36. Let the parties herein prosecute the earlier application dated 3<sup>rd</sup> November 2023 to its logical conclusion within the next 45 days from the date hereof. In default or any further delay will lead to the lifting of the temporary stay of execution Order that were issued on 7<sup>th</sup> November 2023.

It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 20<sup>TH</sup> MARCH, 2025.**

**HON. L. GACHERU**

**JUDGE**

**20/3/2025**

Delivered online in the presence of

Elijah Meyoki – Court Assistant

Mr. Koech for Plaintiff/Applicant

Mr. Kamwaro for 1<sup>st</sup> Defendant/Respondent

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents

**HON. L. GACHERU**

**JUDGE**

**20/3/2025**

