



Limo & another v Kipkemboi (Suing as the Administrator of the Estate of Kibet Arap Ngisirei - Deceased) (Environment & Land Case E004 of 2023) [2025] KEELC 3661 (KLR) (7 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E004 OF 2023**

GMA ONGONDO, J

MAY 7, 2025

BETWEEN

BETHWEL K. LIMO 1ST PLAINTIFF

JANE JEPKEMBOI 2ND PLAINTIFF

AND

JULIUS KIPKEMBOI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KIBET ARAP NGISIREI - DECEASED) RESPONDENT

RULING

1. The instant ruling is in regard to an application by way of Notice of Motion dated 30th January 2025 and lodged herein on 31st January 2025 by the defendant/applicant through M/s Rotich, Langat & Company Advocates seeking the orders infra:
 - a. Spent
 - b. Spent
 - c. This Honourable Court be pleased to issue an order of injunction restraining the respondents either by themselves, their agents and/or servants howsoever from entering the suit land being Nandi/Lelmokwo/123 subdivided to Nandi/Lelmokwo/789 and 790 by purporting to carry on with survey without adequate notice, pending the hearing and disposal of Eldoret Court of Appeal Civil Application E006 of 2025.
 - d. Costs of this application to the applicant.
2. The application is based on eleven grounds which include:



- a. On 3rd October 2024, this Honourable Court issued a decree which the applicant appealed against in the Court of Appeal at Eldoret.
 - b. On 21st January 2025, the applicant instituted an appeal by seeking leave to appeal and the Court of Appeal through Eldoret Court of Appeal Civil Application No. E006 of 2025 Julius Kipkemboi v Jane Jepkemboi & Another.
 - c. On 30th January 2025, the applicant received a call from his wife informing him that the Chief of Bibiret Location had delivered a letter from the County Surveyor Nandi informing him that he plans on visiting the suit land with a view of implementing the decree of this court dated 18th November 2024.
 - d. The applicant's appeal being arguable as shown in the Memorandum of Appeal will be rendered nugatory in the event that the decree dated 18th November 2024 is implemented before the hearing and disposal of the intended appeal.
 - e. The applicant stands to suffer irreparable loss which shall not be compensated by way of monetary damages given that the suit land is his ancestral home where his family has lived since his youth.
 - f. This application has been brought timely and expeditiously in the interest of justice and fairness.
 - g. The respondents will not be prejudiced if the said orders are granted since they will have a chance to be heard fairly on merit.
3. Further, the application is anchored on the applicant's supporting affidavit of twelve paragraphs sworn on even date, alongside the annexed documents marked as JK-1 to 5[b] which are: a copy of the decree issued by this court on 18th November 2024, a copy of the Memorandum of Appeal in Eldoret Court of Appeal Civil Application No. E006 of 2025, a copy of the Court of Appeal's compliance directions, a copy of the return of service, a copy of a letter from the County Surveyor Nandi dated 14th January 2025 and official search certificate in respect to the suit land dated 6th December 2024.
4. The applicant laments that on 3rd October 2024, this Honourable Court issued a judgment in this suit. Aggrieved thereby, he instituted an appeal by seeking leave to appeal at the Court of Appeal in Eldoret vide Civil Application No. E006 of 2025 Julius Kipkemboi v Jane Jepkemboi & Another and was issued with compliance directions. That thereafter, he served the Memorandum of Appeal upon the respondents in compliance with the directions. That however, on 30th January 2025, he was notified that the County Surveyor Nandi plans on visiting the suit land with a view of implementing the decree of this court dated 18th November 2024. That he has an arguable appeal which will be rendered nugatory in the event that the said decree is implemented before the hearing and disposal of the intended appeal. That he stands to suffer irreparable loss which shall not be compensated by way of monetary damages given that the suit land is his ancestral home where his family has lived since his youth. That this application has been brought timely and expeditiously in the interest of justice and fairness.
5. The respondents through M/s Cheruiyot Kirui and Company Advocates, opposed the application by way of a Replying Affidavit sworn by the 1st respondent on 7th February 2025. She deposed that this court became functus officio upon delivery of judgment in this case on 3rd October 2024. That the applicant could only lodge an application envisaged under Order 42 Rule 6 of the Civil Procedure Rules, and not the present one. That no appeal has been lodged at the Court of Appeal against the



judgment of this court delivered on 3rd October 2024 but the applicant has only filed an application seeking extension of time to file an appeal.

6. That further, the County Surveyor Nandi issued adequate notice to the parties vide a letter dated 14th January 2025. That thereafter, he visited the suit land on 31st January 2025 and carried out his work as per the court order. That the respondents have since fenced off, taken possession of, occupied and are in use of the portion of the suit land awarded to them by the court and the applicant has also done the same. That the respondents have been duly notified by the Office of the County Surveyor that the title deeds in respect to the resultant parcels are ready for collection. That therefore, the instant application has been overtaken by events thus, the same ought to be dismissed with costs.
7. The application was heard by way of written submissions pursuant to this court's directions of 10th February 2025.
8. Accordingly, Learned Counsel for the applicant filed submissions dated 3rd March 2025 and submitted that the application has not been overtaken by events since the suit land is still registered in the name of Kibet Arap Ngisirei- Deceased. That the notice issued to the respondent by the County Surveyor was insufficient as the letter was served on him a day before the survey exercise, thereby violating the principles of natural justice. That if the instant application is disallowed, the applicant stands to suffer irreparable injury which would not adequately be compensated by damages as he will lose his livelihood and that of his family. That the applicant will suffer a greater inconvenience if a survey of the suit land is conducted without adequate notice, as compared to that of the respondents. Counsel relied on the cases of *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] eKLR and *Nguruman Ltd v Jan Bonde Nielsen* [2014] eKLR, among others, to reinforce the submissions.
9. By the submissions dated 26th March 2025, the respondents' counsel identified three issues for determination thus:
 - a. Whether this court has jurisdiction to handle this matter.
 - b. If the answer to 1 above is to the affirmative, whether the application has met the legal threshold/is merited for granting the orders sought.
 - c. Who pays for the cost of the application?
10. Learned Counsel submitted that this court delivered judgment in this matter on 3rd October 2024 thereby becoming *functus officio*. That as a result, this court lacks jurisdiction to hear and determine the instant application. That furthermore, the application has been overtaken by events as the subject decree has substantially been executed. That the application has not meet the threshold for grant of injunction orders as laid out in the case of *Giella v Cassman Brown & Co.* [1973] EA 358. Thus, Counsel urged the court to dismiss the application with costs. To buttress the submissions, reliance was placed on the case of *Owners of Motor Vessel "Lillian S" v Caltex Oil [K] Ltd* [1989] KLR 1, among other authoritative pronouncements.
11. I have considered the instant application, the response thereto and the parties' rival submissions. Therefore, the issues that arise for determination are:
 - a. Whether the applicant established his claim to warrant the grant of an injunction order?
 - b. Just orders to issue herein.
12. On the first issue, I bear in mind that an injunction is an equitable and discretionary remedy; see Order 40 of the Civil Procedure Rules 2010 and *National Bank of Kenya Limited v Shimmers Plaza Limited* [2009] eKLR.



13. The principles of injunctions were enunciated in the Giella case (supra) and as was reiterated in the case of Nguruman Limited v Jan Bonde Nielsen and 2 others [2014] eKLR where the Court of Appeal held that;

“in an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

14. Further in the case of Hutchings Biemer Ltd v Barclays Bank of Kenya Ltd & 2 others [2006] eKLR, the Court of Appeal observed in part that:

“...In our view, injunctive orders are meant to preserve property and maintain the status quo...”

15. So, is the instant application meritorious?

16. On one hand, the applicant averred that he has an arguable appeal at the Court of Appeal in Eldoret which will be rendered nugatory if this court’s decree issued on 18th November 2024 is executed before the hearing and disposal of the intended appeal. That he stands to suffer irreparable loss which shall not be compensated by way of monetary damages since the suit land is his ancestral home where his family has lived since his youth.

17. On the other hand, the respondents deposed that this court became functus officio upon delivery of judgment in this case on 3rd October 2024. That no appeal has been lodged at the Court of Appeal against the judgment of this court delivered on 3rd October 2024. That the instant application has been overtaken by events since the decree has been substantially executed and they have taken possession of, occupied and are in use of the portion of the suit land awarded to them by the court and the applicant has also done the same.

18. In the case of Raila Odinga v IEBC & 3 Others [2013] eKLR, the Supreme Court of the Republic of Kenya referred to the case of Jersey Evening Post Limited v A. Thani [2002] JLR 542 at pg. 550 where it was stated that:

“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.”



19. 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, the Court of Appeal stated the following with respect to the doctrine of *functus officio*:

“*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.”

20. I am therefore, persuaded by the submissions of counsel for the respondents that this court is *functus officio*, having rendered its judgment in this matter on 3rd October 2024.

21. In the circumstances, this court lacks jurisdiction to grant any further orders herein. Therefore, it is my considered view that the proper forum to seek injunction orders is the Court of Appeal in Eldoret, where a prospective appeal has been preferred.

22. In the case of *Republic v Karisa Chengo and 2 others* [2017] eKLR, the Supreme Court of the Republic of Kenya was emphatic that:

“...Lack of jurisdiction thus renders a court’s decision void as opposed to it being merely voidable...”

23. To that end, it is my considered view that the instant application originated by way of a Notice of Motion dated 30th January 2025 and lodged herein on 31st January 2025 is devoid of merit. The same is hereby struck out with no orders as to costs.

24. Orders accordingly.

DELIVERED AND DATED AT KAPSABET THIS 7TH DAY OF MAY 2025.

G. M. A ONGONDO

JUDGE

Present;

Mr Kirui learned counsel for the plaintiffs/respondents

Mr Bungei instructed by Mr Rotich learned counsel for the defendant/applicant

Walter, court assistant

