C.F.F Kimbo Church & 4 others v Ndegwa & another (Environment and Land Appeal E081 of 2023) [2025] KEELC 6153 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6153 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E081 OF 2023

JM ONYANGO, J

SEPTEMBER 18, 2025

BETWEEN

C.F.F KIMBO CHURCH .... 1ST APPELLANT

BONIFACE MWAURA KAMAU .... 2ND APPELLANT

JANEROSE NGUTA MATI .... 3RD APPELLANT

JOFFREY CHERUIYOT .... 4TH APPELLANT

BEATRICE WANGARI MURIITHI .... 5TH APPELLANT

AND

PETER GATHUMA NDEGWA .... 1ST RESPONDENT

GRACE KIMANI .... 2ND RESPONDENT

(Being an appeal from the ruling of Honourable J. A Agonda Principal Magistrate, delivered on 5{{^th}} December 2023 in Ruiru CMELC Case No. 134 of 2020)

JUDGMENT

1. This appeal arises from the ruling of Honourable J.A Agonda Principal Magistrate delivered on 5th December 2023 in Ruiru CMELC Case No. 134 of 2020. The said ruling was in respect of an application dated 26th September 2023 filed by the Appellants seeking inter alia to set aside or review the judgment delivered on 27th January 2022 and for leave to join the Appellants to the suit as interested parties.

2. The application was brought pursuant to Articles 48 and 50 of *the Constitution* of Kenya, 2010, Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 1 Rule 10 of the Civil Procedure Rules.

3. A brief background of the case is necessary in order to put the matter into perspective. The 1st Respondent instituted a suit in the lower court against the 2nd Respondent claiming that she had trespassed on his land parcel number Ruiru/Ruiru East Block2/13544. [Hereinafter referred to as the suit property]. He sought a permanent injunction to restrain the 2nd Respondent from trespassing or erecting any buildings or doing any other act of wastage on the suit property as well as an eviction order.

4. The 2nd Respondent filed a Defence and Counterclaim in which she denied the 1st Respondent's claim. In the Counterclaim she sought a declaration that her late husband the late Noah Kimuyu Kariuki was the owner of the suit property and that the same forms part of his estate. She also sought an order that the title deed for land parcel number Ruiru/Ruiru East Block2/13544 issued to Peter Gathuma Ndegwa on 18th April 2014 be cancelled by the Land Registrar, Thika.

5. Her third prayer was that the administrators of the estate of the late Noah Kimuyu Kariuki be issued with a title deed in respect of land parcel number Ruiru/Ruiru East Block2/13544 to hold it in trust for the beneficiaries of the said estate.

6. The suit was set down for hearing on 3rd November 2021 when the 1st Respondent failed to attend court. His suit was therefore dismissed for non- attendance and the court proceeded to hear the 2nd Respondent's Counterclaim. The court subsequently delivered its judgment on 22nd January 2022 in favour of the 2nd Respondent and made the following orders:

   i. A declaration that the Defendant is the lawful proprietor of plot No. 1 and plot No. 3 excised from the parcel of land known as Ruiru/Ruiru East Block2/5006.

   ii. A permanent injunction restraining the plaintiff by himself, servants, agents or assigns or otherwise howsoever from trespassing, disposing, selling, constructing or in any other manner whatsoever interfering with the defendant's quiet possession of plot no. 1 and plot No. 3 excised from the parcel of land known as Ruiru/Ruiru East Block2/5006.

   iii. A mandatory injunction is issued against the plaintiff by himself, his agents, servants employees and legal representatives from trespassing, disposing, selling, constructing or in any other manner whatsoever interfering with the defendant's quiet possession of plot no. 1 and plot No. 3 excised from the parcel of land known as Ruiru/Ruiru East Block2/5006.

   iv. An order cancelling the title deed issued to James Ndirangu Mbuthia and Bernard Ndungu Mbuthia and that the title that was acquired was fraudulent, null and void.

   v. An order for the Land Registrar to construct and/or restore the original register for Ruiru/Ruiru East Block2/5006 and excise plot No. 1 and plot No. 3 to be registered in the name of the defendant as the 2nd registered owner after the Government of Kenya.

   vi. The costs to the Counterclaim shall be paid by the Plaintiff.

7. The 2nd Respondent subsequently filed an application dated 29th March 2023 seeking orders that the Land Registrar dispenses with the requirement that the Defendant submits the original title for land parcel number Ruiru/Ruiru East Block2/5006 before the Land Registrar acts on the judgment delivered on 27th January 2022.

8. By its ruling dated 15th June 2023 the court cancelled the records for land parcel number Ruiru/Ruiru East Block2/5006 and directed that new titles be issued based on the mutation form dated 17th April 2014. This resulted in the 2nd Respondent being registered as the owner of parcel number Ruiru/Ruiru

East Block2/13542 and 13544 while parcel number Ruiru/Ruiru East Block2/13543, 13545 13546 were registered in the name of the 1st Respondent.

9. This is what prompted the 2nd, 3rd and 4th Appellants to file the application dated 26th September 2023 as they were the registered owners of land parcels number Ruiru/Ruiru East Block2/13543, 13545 and 13546.

10. The Appellants also complained that the 1st Respondent failed to inform them that there was an on-going suit that affected their properties and that the said properties had been allocated to him by the orders issued on 25th August 2023.

11. In its ruling dated 5th December 2023 the court allowed the application in part and stayed the orders granted on 25th August 2023. The court directed that the said order would operate as an injunction restraining the Respondents whether by themselves, their agents, servants and employees from causing the Registrar to issue new titles as outlined in the orders dated 25th August 2023. The court further granted leave to the Appellants to be joined in the suit, and file their Defences, Lists of Documents and Witness Statements within 14 days and move the Environment and Land Court, Thika for appropriate orders. However, the court declined to set aside the judgment.

12. The Appellants being aggrieved by the said ruling, filed the instant appeal citing the following Grounds of Appeal:

    i. That the Honourable trial Magistrate erred in law and in fact by declining to set aside the ex-parte judgment in RUIRU MCELC CASE No. 134 of 2020.

    ii. That the Honourable trial Magistrate erred in law and in fact by allowing the Appellants' application partially and ordering the Appellants to file their defences, Lists of Documents and Witness Statements and yet failed to set aside the judgment.

    iii. That the Honourable trial Magistrate erred in law and in fact by appreciating the rule of natural justice that a party should not be condemned unheard, yet failed to set aside the ex-parte judgment.

    iv. That the Honourable trial Magistrate erred in law and in fact by failing to appreciate that the Appellants have placed the application and showed [sic]that they were not aware of the same.

    v. That the Honourable trial Magistrate erred in law and in fact by failing to appreciate that the ex-parte judgment and eviction orders had an adverse effect on the Appellants/ Applicants and they were never parties to the said suit.

    vi. That the Honourable trial Magistrate erred in law and in fact having found that the appellants should have been enjoined as parties in the said suit and erred when she failed to set aside the judgment.

    vii. That the Honourable trial Magistrate erred in law and in fact when she found that there had been inordinate delay despite having found that the Appellants were not aware of the on-going suit which resulted in the judgment affecting their properties.

    viii. That the Honourable trial Magistrate misapplied the doctrine of functus officio and misdirected herself by finding that a long period of two years has passed without any intervention from the Appellants while in the same breath acknowledging the reason for the lack of intervention was because the appellants were not aware of the on-going suit.

ix. That the Honourable trial Magistrate erred in law and in fact by ruling against reviewing the judgment while in the same breath acknowledging that if the matter was still pending, it would be clear that the Appellants' presence in the proceedings would have been necessary to enable the court to effectually and completely adjudicate the suit.

x. That the Honourable trial Magistrate erred in law and in fact and misdirected herself when she totally ignored the Appellants' application and material facts raised thereunder.

xi. That the Honourable trial Magistrate erred in law and in fact when she made the orders she did.

13. The Appellants prayed that the appeal be allowed and the ruling of the Principal Magistrate made on 5th December 2023 in Ruiru CMELC No. 134 of 2020 be set aside and substituted with an order allowing the application, setting aside the judgment and granting leave to the Appellants to defend the suit.

14. In a related appeal ELC Appeal No. E065 of 2024, the 2nd to 5th Appellants filed a similar appeal against the 1st and 2nd Respondents save that CFF Kimbo Church was named as a 3rd Respondent. The 2 Appeals were consolidated and the court directed that ELC Appeal No. 81 of 2023 be the lead file.

15. The appeal was canvassed by way of written submissions and both parties complied by filing their submissions which are on record.

ANALYSIS AND DETERMINATION

16. I have considered the Memorandum of Appeal, Record of Appeal and the rival submissions. The singular issue for determination is whether the ruling of the trial magistrate ought to be set aside.

17. This is an appeal against a discretionary order. The principles upon which an appellate court may interfere with the exercise of discretion by a trial court have been stated in many decisions. In the case of Mbogo & Another v Shah [1968] EA, Sir Clement de Lestang, V.P. at page 94 stated thus,

> " I think it is well settled that a court will not interfere with the exercise of its discretion of an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or it failed to take into consideration which it should have taken into consideration and in so doing arrived at the wrong conclusion."

18. Even though the court has the discretion to set aside an ex parte judgment or order, the discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See Shah v. Mbogo & Another [1967] EA 116.

19. In Patel v. East Africa Cargo Services Ltd [1974] EA 75 this principle was reiterated thus:

> " The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."

20. The application which the 2nd, 3rd 4th and 5th Appellants filed in the lower court was essentially an application for joinder and setting aside the judgment delivered on 22nd January 2022. It is important to note that the Appellants were not parties to the suit in the lower court and therefore the issue of whether the judgment was regular or irregular as against the Appellants does not arise.

21. The main reason advanced by the Appellants is that they were not aware of the suit between the 1st and 2nd Respondent which touched on their respective parcels of land. The 2nd, 3rd, 4th and 5th Respondents each swore affidavits to which they annexed copies of their title deeds for land parcels number Ruiru/ Ruiru East Block2/13543, 13545 and 13546 respectively.

22. In her ruling dated 5th December 2023, the learned trial Magistrate acknowledged that the right to be heard is a valued right which is enshrined in *the constitution*. She further observed that the Appellants had not been given an opportunity to be heard as the 1st Respondent who was the Plaintiff in the lower court failed to bring them on board yet he had sold the suit property to them. She observed that one's property rights cannot be arbitrarily taken away without the person being given an opportunity to ventilate their case. It is against this background that she granted the Appellants leave to be joined to the suit and directed that they file their defences, Lists of Documents and Witness Statements.

23. Indeed, the right to a fair hearing is one of the cardinal rules of natural justice and remains at the heart of every judicial determination. In the case of M.K v M.W & Another [2015] eKLR the court observed that:

> "The courts of his land have been consistent in observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made."

24. In Gerita Nasipondi Bukunya & 2 Others v Attorney General [2019] eKLR the court held that:

> "There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

25. And in Mbaki and others v Macharia & Another [2005] 2 EA 206 at Page 210 the Court stated that:

> "The right to be heard is a valued right, it would offend all notions of justice if the right of a party were to be prejudiced without the party being afforded an opportunity to be heard"

26. The learned trial magistrate however fell into error when she declined to set aside the judgment citing the reason that the court was functus officio.

27. In the case of James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR, the Court of Appeal held as follows:

> "The former Court of Appeal for Eastern Africa in Ali Bin Khamis v Salim Bin Khamis Kirobe and Others [1956] 1 EA195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justiciae from setting aside such order. Briggs J.A with whom Worley P and Sinclair VP concurred stated thus.
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> On the appeal before us, Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made, without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it must be set aside ex debito justiciae and that in cases of nullity

procedure is unimportant, since the court has inherent jurisdiction to set aside its own orders. I accept these principles as laid down by Lord Greene MR".

28. I am guided by the above decisions.

29. I will now proceed to determine whether the court was functus officio. The Supreme Court of Kenya in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others v. IEBC & Others [2013] eKLR cited with approval an excerpt from an article by Daniel Mala Pretorius entitled "The Origins of the functus officio Doctrine, with Special Reference to its Application in Administrative Law", in South African Law Journal, Vol. 122 [2005], at p. 832, stated 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 a superior body or functionary] final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

30. It is clear that the doctrine of functus officio does not bar the court from entertaining an application for setting aside the judgment under order 12 Rule 7 of the Civil Procedure Rules. The said rule provides as follows:

> "Where under this order judgment has been entered or the suit has been dismissed, the court on application may set aside or vary the judgment upon such terms as may be just."

31. After hearing the Appellants' application, the court had the discretion to set aside the said judgment on the grounds that the Appellants had not been afforded an opportunity to be heard but it failed to do so.

32. Learned counsel for the 2nd Respondent relied the case of Christabel Achieng Odera & 6 Others v Christopher Juma Akinyi & 5 Others David Odera & 18 Others Interested Parties [2023] KEELC112 [Judgment, 19 January 2023] where the court declined to set aside the judgment and join the Interested parties in the suit after delivery of judgment. It is important to note that the instant case is distinguishable from the case of Christabel Achieng as the 2nd, 3rd, 4th and 5th Appellants acquired their parcels of land before the suit was filed unlike the interested parties in the case of Christabel Achieng case who acquired their titles from the defendants during the pendency of the suit.

33. This brings me to the issue as to whether the 1st Appellant should have been granted leave to join the suit. It has been submitted on behalf of the 2nd Respondent that the 1st Respondent's sale of the suit property to the 1st Appellant CFF Kimbo Church after the judgment was entered constitutes an act of fraud. This is because the judgment declared that the 1st Respondent was not the lawful owner of the suit property and ordered cancellation of his title. The judgment was delivered on 22nd January 2022 and on 19.6.23 before the 1st Respondent's title could be cancelled, he sold the property to the 1st Appellant who subsequently charged it to Unitas Savings and Credit Society Limited to secure a loan.

34. The sale of the suit property soon after judgment was contrary to the doctrine of lis pendens. In Mawji v US International University & Another 1976 KLR 185 the court observed that:

> "The doctrine of lis pendens under section 52 of the TPA is substantive law of general application . Apart from being in the statute, it is a doctrine equally recognized by common law . It is based on the expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interest of public policy

and good effective administration of justice. It therefore overrides section 23 of the RTA and prohibits a party from giving to others pending the litigation, rights to the property in dispute so as to prejudice the other…."

35. The doctrine of lis pendens continues to be applied by the courts and in the recent case of Marete v Ndegwa & 2 Others [2024] KECA 545 [KLR] the court held that:

> " The ITPA was repealed by the *Land Registration Act* whose section 107[1] provides for the saving and transitional provisions of the Act in the following terms :
>
> "Unless the contrary is specifically provided for in this Act, any right, interest, title power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act. A reading of the LRA does not reveal any prohibition of the application of the doctrine of lis pendens. It is for this reason and in view of section 107 aforesaid that the court has held that the doctrine of lis pendens is still applicable to this day, albeit under common law"

36. I therefore agree with learned counsel for the 2nd Respondent that the sale of the suit property to the 1st Appellant was unlawful as it was contrary to the judgment of the court and was therefore null and void a initio. It was clearly intended to subvert the course of justice. Although the 1st Appellant is entitled to seek redress against the 1st Respondent, he is at liberty to do so in another suit. Allowing the 1st Appellant to be joined to this suit would be tantamount to sanctioning an illegality.

37. In view of the foregoing, the appeal succeeds partially and the orders of the lower court are set aside and substituted with the following orders:

    a. The judgment dated 22nd January 2022 in Ruiru CM ELC Case No. 134 of 2020 is hereby set aside together with all consequential orders thereto.

    b. Boniface Mwaura Kamau, Janerose Nguta Mati, Joffrey Cheruiyot and Beatrice Wangari Muriithi are hereby added to the suit as 1st to 4th interested parties respectively.

    c. The 1st to 4th Interested parties shall file and serve their defences, List of Documents and Witness statements within 21 days.

    d. The suit shall be set down for hearing afresh before a Magistrate other than Honourable J. A Agonda P.M.

    e. The 1st Appellant's appeal is hereby dismissed.

    f. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF SEPTEMBER 2025.

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J. M ONYANGO

JUDGE

In the presence of:

1. Ms Muthee for the 2nd – 5th Appellants

2. Ms Nyaguthie for the 1st Appellant

3. No appearance for the Respondents

Court Assistant: Hinga