



**Tormoi (Suing as Personal Representative of the Estate of David Kiptormoi) v Saina (Suing as Personal Representative of the Estate of Joel Kipsaina Korir) (Environment and Land Case 90 of 2015) [2025] KEELC 6052 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6052 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT AND LAND CASE 90 OF 2015  
LA OMOLLO, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**SIMON KIBET TORMOI (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID KIPTORMOI) ..... PLAINTIFF**

**AND**

**MOSES KIBORE SAINA (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOEL KIPSAINA KORIR) ..... DEFENDANT**

**RULING**

**Introduction.**

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 24<sup>th</sup> March, 2025. The application is expressed to be brought under Order 45 Rule 1, 2 & 3, Order 40 Rule 1(a) & (b) of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*.
2. The application seeks the following orders;
  - a. Spent
  - b. Spent
  - c. There be an order of injunction, barring, restraining, prohibiting and preventing the Respondent either by himself, his relations, agents, employees and/or his servants from transferring to himself or registering the property in his name, disposing, leasing, ploughing and wasting the suit properties LR No. Kericho/Koita-Burot/289; Kamara/Mau Summit (sic) Block 4/153 (Boror B) and Kamara/Mau Summit Block 4/157 (Boror B) pending the lodging of an appeal against the judgement of Hon. Lady Justice M.C Oundo delivered on 9<sup>th</sup> May, 2024.



- d. This Honourable Court do review and vary the terms in its ruling dated 20<sup>th</sup> March, 2025 and issue an order of stay of execution of the decree issued by this Court pending the lodging of Memorandum and Record of Appeal in the Court of Appeal.
  - e. Costs of this application be provide for. (sic)
3. The application is based on the grounds on its face and the supporting affidavit of Moses Kibore Saina sworn on 24<sup>th</sup> March, 2025.

### **Factual Background.**

4. The Plaintiff/Respondent commenced the present proceedings vide the Plaint dated 7<sup>th</sup> June, 2011 which plaint was amended on 25<sup>th</sup> September, 2015 and further amended on 11<sup>th</sup> November, 2019. He sought the following orders;
- a. (AA). A declaration that the Defendant is holding the title numbers Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”), Kericho/Koita-Burut/289 and Kericho/Manaret/14 in trust for himself and the Plaintiff.
  - b. (BB). An order that the said trust be dissolved and the Defendant’s registration as the proprietor of title numbers Kamara/Mau Summit Block 4/153(Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) Kericho/Koita-Burut/289 and Kericho/Manaret/14 be cancelled and Kamara/Mau Summit Block 4/153(Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) be registered in the name of the Plaintiff and L.R No. Kericho/Koita-Burut/289 be subdivided into equal portions and each portion be registered in the names of the Plaintiff and the Defendant respectively
  - c. (CC). A mandatory injunction be issued compelling the Defendant by himself, his workers, servants, employees and/or agents to vacate his crops from all that portion of land in Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) measuring 5.348 hectares until the hearing and determination of this suit.
  - d. (DD). A perpetual injunction restraining the Defendant himself, his workers, servants, employees and/or agents from entering, working on, transferring, leasing and/or in any way or manner whatsoever interfering with the Plaintiff’s possession and/or use of land parcel numbers Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) and the Plaintiff’s portion in LR No. Kericho/Koita-Burot/289.
  - e. Costs of the suit.
  - f. Any other relief that the Court deems fit to grant.
5. The Defendant filed a Statement of Defence dated 7<sup>th</sup> October, 2011 which was amended on 26<sup>th</sup> October 2016, further amended on 5<sup>th</sup> February, 2018 and further amended on 17<sup>th</sup> December, 2019. In his Counterclaim he sought the following orders;
- a. A declaration that the Defendant (now Plaintiff) is the absolute sole and legal proprietor of the parcel of land known as Kamara/Mau Summit Block 4/153 (Boror “B”), Kericho/Koita-Burot/289 and Kericho/Manaret/14.
  - b. An eviction order against the Plaintiff (now Defendant) from the parcel of land known as Kamara/Mau Summit Block /153 (Boror “B”), Kericho/Koita-Burot/289 and Kericho/Manaret/14.



- c. A permanent order of injunction restraining the Plaintiff (now Defendant), his servants, agents, representatives, assigns and heirs from putting up any structures, both temporary and permanent, transferring, planting, grazing or doing any activities on land parcel numbers Kamara/Mau Summit Block 4/153 (Boror "B"), Kericho/Koita-Burot/289 and Kericho/Manaret/14 to the detriment of the Defendant (now Plaintiff).
  - d. Mesne profit.
  - e. Costs of the suit.
6. The Court in its judgement delivered on 9<sup>th</sup> May, 2024 made the following orders;
- a. The deceased Defendant's registration to land parcel LR No. Kericho/Koita-Burot/289 shall be cancelled within 30 days wherein the suit property shall be shared equally among the deceased Defendant and the deceased Plaintiff.
  - b. Secondly, the deceased Defendant's registration to land parcels Kamara/Mau Summit Block 4/153 (Boror "B") and Kamara/Mau Summit Block 4/157 (Boror "B") which are the resultant subdivisions of No. Kamara/Mau Summit Block 4/115 (Boror "B") shall be cancelled within 30 days and registered in the name of the deceased Plaintiff.
  - c. Therein after, there is herein issued an injunction restraining the original deceased Defendant's estate, his workers, servants, employees and/or agents from entering, working on, transferring, leasing and/or in any way or manner whatsoever interfering with the original deceased Plaintiff's estate's possession and/or use of land parcel numbers Kamara/Mau Summit Block 4/153 (Boror "B"), Kamara/Mau Summit Block 4/157 (Boror "B") as well as his portion in LR No. Kericho/Koita-Burot/289.
  - d. Since this suit is between family members there shall be no order as to costs.
7. The application under consideration first came up for directions on 23<sup>rd</sup> June, 2025 when the Court directed that it be heard by way of written submissions.
8. On 31<sup>st</sup> July, 2025 the matter was mentioned to confirm filing of submissions and then reserved for ruling.

#### **The Defendant/Applicant's Contention.**

9. The Defendant/Applicant contends that he is the representative of the estate of Joel Kipsaina Korir (Deceased) and has the authority and consent of the other beneficiaries to prosecute (sic) this suit.
10. He also contends that on 20<sup>th</sup> March, 2025 this Court delivered a ruling on the application dated 20<sup>th</sup> May, 2024.
11. He further contends that the said ruling was delivered at a time when the Plaintiff/Respondent, his relatives, employees, agents and/or servants were wasting the suit parcels by cutting down trees, harvesting maize on the 4.5-acre farm and harvesting peas.
12. It is his contention that the Plaintiff/Respondent was acting in total disobedience of the order of status quo that had been issued by the Court.
13. It is also his contention that the Plaintiff/Respondent has caused a lot of damage on one of the suit parcels and a valuation has been done by the Kenya Forest Service.



14. It is further his contention that officers from the Ministry of Agriculture also assessed and valued the damage caused by the Plaintiff/Respondent and his agents who harvested his crops.
15. He contends that the Plaintiff/Respondent and his agents are inclined to waste the suit parcel and that he is apprehensive that he (Plaintiff/Respondent) is likely to dispose of the land to third parties and render the appeal nugatory.
16. He also contends that this Court should grant the prayers sought so that the intended appeal is not rendered nugatory.
17. He further contends that he is advised by his Advocates on record that this Court can exercise its discretion to ensure that the ends of justice are met.
18. It is his contention that this Court has the jurisdiction to review its ruling by taking into account the new evidence he has placed before it and issue an order of injunction and an order of stay of execution of the decree.
19. It is also his contention that it is a fact known to all that his late father used his earnings in purchasing the suit properties. He goes on to state that the beneficiaries of his estate have been subjected to great mental anguish and agony.
20. It is further his contention that it is in the interest of justice that the application be allowed.

**The Plaintiff/Respondent's Response.**

21. The Plaintiff/Respondent filed a Replying Affidavit sworn on 25<sup>th</sup> July, 2025.
22. He deposes that he is advised by his advocates on record that this Court is functus officio having already pronounced itself in the ruling delivered on 20<sup>th</sup> March, 2025 on the Defendant/Applicant's application dated 20<sup>th</sup> May, 2024.
23. He denies wasting the suit properties as alleged by the Defendant/Applicant.
24. He further deposes that the Defendant/Applicant contends that the said wastage occurred on 6<sup>th</sup> and 7<sup>th</sup> November, 2024 (sic). He adds that if at all the said wastage occurred in 2024, which wastage he denies, then it has been overtaken by events as there is no destruction happening at the moment.
25. It is his deposition that therefore, there is no discovery of new evidence to warrant review, varying or setting aside of the orders issued on 20<sup>th</sup> March, 2025.
26. It is also his deposition that if there was contempt of Court orders, then the Defendant/Applicant ought to have moved the Court in November, 2024 when the said orders of status quo were subsisting. He goes on to state that the Defendant/Applicant's allegations of wastage of trees and crops in the year 2024 are not true.
27. It is further his deposition that the suit parcels i.e. Kericho/Koita-Burot/289, Kamara/Mau Summit Block 4/153 (Boror "B") and Kamara/Mau Summit Block 4/157 (Boror "B") are registered in the names of the deceased father of the Defendant/Applicant one Joel Kipsaina Korir (deceased).
28. He deposes that the Court in its judgement found that Joel Kipsaina Korir (deceased) registered himself as the owner of the suit parcels in trust for his family and in trust for the Plaintiff/Respondent.
29. He also deposes that prior to the institution of the present proceedings, he (Plaintiff/Respondent) and his family members have been in occupation of land parcel No's Kamara/Mau Summit Block 4/153 (Boror "B") and Kamara/Mau Summit Block 4/157 (Boror "B"). He goes on to state that they are also



in occupation of half of land parcel No. Kericho/Koita-Burot/289 while the Defendant/Applicant's family is in occupation of the other half of the property.

30. He further deposes that if the Court issues orders of interim injunction restraining him from utilizing the suit parcels, then he will incur irreparable loss and damage.
31. He ends his deposition by urging the Court to dismiss the Defendant/Applicant's application as it lacks merit.

### **Issues for Determination.**

32. The Defendant/Applicant and the Plaintiff/Respondent filed their submissions; both are dated 29<sup>th</sup> July, 2024.
33. The Defendant/Applicant submits on the following issues;
  - a. Whether the Applicant has met the legal threshold for grant of an injunction.
  - b. Whether the Court should stay execution of the decree (sic) issued on 20<sup>th</sup> March, 2025.
  - c. Whether the Respondent's continued actions threaten to defeat the intended appeal and render it nugatory.
  - d. Whether the Honourable Court should review and vary the terms in its ruling dated 20<sup>th</sup> March, 2025 and issue an order of stay of execution of the decree issued pending appeal. (sic)
34. On the first issue, the Defendant/Applicant relies on the judicial decisions of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, *Nguruman Limited versus Jan Bonde Nielson & 2 Others* CA No. 77 of 2012 (2014) eKLR and submits that he has a prima facie case.
35. The Defendant/Applicant also submits that he has substantial interest in the suit parcels and has raised valid grounds of appeal against the judgement of this Court.
36. The Defendant/Applicant further submits that he has exhibited materials (sic) that demonstrate his long-term occupation, development and physical investment on the suit parcels which include planting of trees, agricultural use and presence of structures and/or boundaries that show possessory control.
37. It is the Defendant/Applicant's submissions that the Plaintiff/Respondent has not gained full endorsement (sic) through final registration or Court supervised eviction but he has proceeded to fell trees and commercialize the land. He adds that the Plaintiff/Respondent's actions are prejudicial to him (Defendant/Applicant).
38. It is also the Defendant/Applicant's submissions that a prima facie case must reveal triable issues that warrant legal protection.
39. The Defendant/Applicant relies on the judicial decision of *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396 as was cited in *Josim Instantaneous Consortium v Equity Bank Kenya Limited* [2025] KEHC 6871 (KLR) and submits that despite the Court issuing orders of status quo, the Plaintiff/Respondent has undertaken irreversible actions (sic) thereby undermining the integrity of this Court and posing a threat to the intended appeal.
40. The Defendant/Applicant submits that the damage he is likely to suffer cannot be adequately compensated by an award of damages as the value and extent of loss is not readily ascertainable.
41. The Defendant/Applicant also submits that the destruction of trees some of which were planted decades ago carries ecological, environmental and sentimental significance which cannot be quantified.



42. The Defendant/Applicant further submits that interference with the current use of the land would permanently alter the nature of the said land resulting in irreversible and lasting changes.
43. The Defendant/Applicant relies on the judicial decisions of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR, Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] Vol. 1 EA 86, Waithaka v Industrial and Commercial Development Corporation [2001] eKLR in support of his submissions.
44. It is the Defendant/Applicant's submissions that the balance of convenience favours restraint.(sic)
45. The Defendant/Applicant submits that the Plaintiff/Respondent will suffer no harm if he is temporarily restrained from interfering with the suit parcels pending the determination of the intended appeal.
46. The Defendant/Applicant relies on Article 159 of *the Constitution* of Kenya 2010, the judicial decisions of Joseph K. Wakiaga & 2 Others v Daniel Otieno Ojwelu & 2 Others [2022] KEELC 2129 (KLR), Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR and submits that he has met the legal threshold for grant of a temporary injunction.
47. The Defendant/Applicant also submits that there is a pending appeal against the judgement of this Court which affects the ownership and control of the suit properties.
48. The Defendant/Applicant further submits that the risk posed by the Plaintiff/Respondent's actions is immediate and substantial and unless the injunctive relief is granted, there is a genuine danger that the intended appeal will be overtaken by events.
49. On the second issue, the Defendant/Applicant submits that the Plaintiff/Respondent's actions after the Court delivered its ruling on 20<sup>th</sup> March, 2025 are calculated to render any appeal nugatory.
50. The Defendant/Applicant also submits that he has signaled his intention to appeal but the Plaintiff/Respondent has embarked on acts that alter the nature, use and value of the suit properties. The said acts include cutting down trees, taking steps towards registration and transfer of the suit parcels and excluding him (Defendant/Applicant) from the land he has always cultivated.
51. The Defendant/Applicant relies on Order 42 Rule 6 of the Civil Procedure Rules, the judicial decision of Butt vs Rent Restriction Tribunal (citation not given) and submits that the Court in issuing orders of stay of execution of the ruling delivered on 20<sup>th</sup> March, 2025 will not be making a determination on the merits of the intended appeal.
52. The Defendant/Applicant also submits that he stands to suffer substantial loss if the orders sought are not granted and that he is willing to comply with any terms the Court may impose to preserve equity and fairness.
53. On the third issue, the Defendant/Applicant submits that he intends to lodge an appeal against the ruling (sic) delivered on 9<sup>th</sup> May, 2024 once certified copies of proceedings are availed by the Court.
54. The Defendant/Applicant also submits that if no injunctive relief is granted, the Plaintiff/Respondent will alter the suit properties in a way that the appeal if successful will be incapable of being restored to its original position.
55. The Defendant/Applicant relies on the judicial decision of Butt v Rent Restriction Tribunal [1982] KLR 417 in support of his submissions.



56. On the fourth issue, the Defendant/Applicant submits that he is seeking that the Court reviews its ruling delivered on 20<sup>th</sup> March, 2025 on the ground that he has discovered new material evidence.
57. The Defendant/Applicant relies on Order 45 Rule 1 of the Civil Procedure Rules and submits that he has learnt post-judgement that the Plaintiff/Respondent has engaged in extensive acts of wastage on the suit parcels by cutting down trees that were planted a long time ago by his deceased father.
58. The Defendant/Applicant relies on the judicial decision of Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Others [2021]eKLR and submits that the Court can review its orders in instances where there is discovery of new and important evidence which despite exercise of due diligence was not within the knowledge of an Applicant or could not be produced by an Applicant at the time when the order was made.
59. The Defendant/Applicant concludes his submissions by urging the Court to allow his application as prayed.
60. The Plaintiff/Respondent submits on the following issues;
  - a. Whether the orders sought herein by the Defendant/Applicant's (sic) in his application dated 24<sup>th</sup> March, 2025 is functus officio. (sic)
  - b. Whether the Defendant/Applicant have (sic) established the threshold of temporary injunction.
  - c. Whether the Applicant have (sic) demonstrated any grounds of review, vary and/or set aside Court's ruling dated 20<sup>th</sup> March, 2025. (sic)
  - d. Who will bear the costs of this application?
61. On the first issue, the Plaintiff/Respondent sets out the prayers sought in the application dated 20<sup>th</sup> May, 2024 and submits that the Defendant/Applicant is seeking similar prayers in the application under consideration.
62. The Plaintiff/Respondent submits that the Defendant/Applicant's application dated 20<sup>th</sup> May, 2024 was dismissed by this Court in its ruling delivered on 20<sup>th</sup> March, 2025.
63. It is the Plaintiff/Respondent's submissions that this Court is therefore functus officio. The Plaintiff/Respondent relies on the Supreme Court judicial decision of Raila Odinga & 2 Others vs Independent Electoral Boundaries Commission & 3 Others [2013] eKLR and submits that this Court in its ruling delivered on 20<sup>th</sup> March, 2025 from paragraphs 55 to 65 extensively adjudicated on the issue of grant of temporary injunction and/or stay of execution pending the institution of the intended appeal.
64. The Plaintiff/Respondent reiterates that this Court is functus officio and it cannot adjudicate on an application seeking similar reliefs.
65. On the second issue, the Plaintiff/Respondent submits that the principles of injunctions were enunciated in the judicial decision of Giella vs Cassman Brown (1973) EA 358 and reiterated in Nguruman Limited vs Jan Bonde Nielson & 2 Others [2014] eKLR.
66. The Plaintiff/Respondent relies on the Court of Appeal judicial decision of Mrao Ltd vs First American Bank of Kenya Ltd [2003] eKLR and submits that the Defendant/Applicant has failed to demonstrate that he has met the principles of grant of injunctive orders.



67. The Plaintiff/Respondent reiterates that the alleged acts of wastage occurred on 6<sup>th</sup> and 7<sup>th</sup> November, 2024 (sic) as shown by the reports of the Forest Officer and Agricultural Officer attached to the Defendant/Applicant's affidavit in support of the application.
68. The Plaintiff/Respondent submits that the said actions took place in the year 2024 which means that they have been overtaken by events.
69. The Plaintiff/Respondent also submits that the Defendant/Applicant did not take any steps to restrain him (Plaintiff/Respondent) if at all the said actions took place.
70. The Plaintiff/Respondent reiterates that if the said acts of wastage were done during the subsistence of the orders of status quo, the Defendant/Applicant ought to have commenced Contempt of Court proceedings against him (Plaintiff/Respondent).
71. The Plaintiff/Respondent reiterates his averments in his Replying Affidavit and submits that if the orders sought are granted, he will be rendered destitute and have no place of abode.
72. The Plaintiff/Respondent also submits that the suit parcels are registered in the name of the Defendant/Applicant's deceased father and they cannot legally be sold or disposed of.
73. The Plaintiff/Respondent relies on the judicial decisions of Kenya Lime Products Limited v Kalunde & 9 others (Environment & Land Case 17 of 2021) [2024] KEELC 990 (KLR) (21 February 2024) (Ruling), Chem vs Mwaniki (Environment and Land Appeal E006 of 2021) [2024] KEELC 3497 (KLR) (2 May 2024) (Judgement) in support of his submissions.
74. On the third and fourth issues, the Plaintiff/Respondent submits that the Assessment Reports by the Forest Officer and Agricultural Officer that the Defendant/Applicant is relying on cannot be construed to be discovery of new evidence since they were in the Defendant/Applicant's possession.
75. The Plaintiff/Respondent also submits that the Defendant/Applicant is estopped by the doctrine of estoppel from denying that the said reports were in his possession.
76. The Plaintiff/Respondent further submits that the Defendant/Applicant has not demonstrated that he has met the requirements of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.
77. The Plaintiff/Respondent relies on the judicial decision of Francis Origo & another v Jacob Kumali Mungala (C.A Civil Appeal No. 149 of 2001) (unreported) and urges the Court to dismiss the Defendant/Applicant's application with costs.

### **Analysis and Determination.**

78. I have considered the Defendant/Applicant's application, the response thereto and the rival submissions. In my view, the following issues arise for determination:
  - a. Whether this Court is functus officio and whether it can issue an injunction pending the filing of the intended appeal.
  - b. Whether this Court should review its ruling delivered on 20<sup>th</sup> March, 2025.
  - c. Who should bear costs of the application.



**Whether this Court is functus officio and whether it can issue an injunction pending the filing of the intended appeal.**

79. The Plaintiff/Respondent contends that the Defendant/Applicant filed the application dated 20<sup>th</sup> May, 2024 where he sought similar orders as the present application.
80. The Plaintiff/Respondent also contends that the Court delivered a ruling on the said application on 20<sup>th</sup> March, 2025 and dismissed it.
81. It is the Plaintiff/Respondent's contention that this Court is functus officio and it cannot determine the application under consideration.
82. The Defendant/Applicant did not address this issue in his submissions.
83. In the application dated 20<sup>th</sup> May, 2024 the Defendant/Applicant sought the following orders;
- a. This application be certified urgent and be heard ex parte in the first instance.
  - b. The firm of J.K Bosek and Company Advocates be granted leave to come on record for the Defendant/Applicant.
  - c. There be an interim order staying the Plaintiff/Respondent either by himself, agent, servants, auctioneers and any other person whomsoever asking on his behalf from (sic) interfering with the Defendant possession and enjoyment of the suit parcels of land pending the hearing of this application interpartes.(sic)
  - d. There be an interim order staying the Plaintiff/Respondent either by himself, agent, servants, auctioneers and any other person whomsoever asking on his behalf from interfering with the Defendant possession and enjoyment of the suit parcels of land pending filing of Appeal. (sic)
  - e. Costs of this application be provided.
84. The prayers sought in the application under consideration have been set out in the preceding paragraphs but I will nonetheless replicate them as hereunder;
- a. This application be certified as urgent and be heard ex parte in the first instance.
  - b. There be an order of interim injunction, barring, restraining, prohibiting and preventing the Plaintiff/Respondent either by himself, his relations, agents, employees and/or his servants from transferring to himself (sic) or registering the property in his name, disposing, selling, leasing, ploughing and wasting the suit properties L.R. No. Kericho/Koita-Burot/289; Kamara/Mau Sumit (sic) Block 4/153 (Boror B) and Kamura/Mau Summit Block 4/157 (Boror B") pending the hearing of this application inter parties.
  - c. There be an order of injunction, barring, restraining, prohibiting and preventing the Respondent either by himself, his relations, agents, employees and/or servants from transferring to himself or registering the property in his name, disposing, leasing, ploughing and wasting the suit properties LR. No. Kericho/Koita-Burot/289; Kamara/Mau Sumit Block 4/153 (Boror B) and Kamura/Mau Summit Block 4/157 (Boror B") pending the lodging of an appeal against the judgement of Hon. Lady Justice M.C. Oundo delivered on 9<sup>th</sup> May, 2024.
  - d. This Honourable Court do review and vary the terms in its ruling dated 20<sup>th</sup> March, 2025 and issue an order of stay of execution of the decree issued by this Court pending the lodging of Memorandum and Record of Appeal in the Court of Appeal.



- e. Costs of this application be provided for.
85. Contrary to the assertions by the Plaintiff/Respondent, the prayers sought in the present application are not similar to the prayers that were sought by the Defendant/Applicant in the application dated 20<sup>th</sup> May, 2024.
86. The Supreme Court in *Odinga v Independent Electoral & Boundaries Commission & 3 others* [2013] KESC 8 (KLR) stated as follows on the doctrine of *functus officio*;
- “ 18. We, therefore, have to consider the concept of “*functus officio*,” as understood in law. Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:
- “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.”
19. This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550:
- “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” [emphasis supplied].”
87. 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] KECA 600 (KLR) held as follows;
- “*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.”
88. As was held in the above cited judicial decisions, the doctrine of *functus officio* prevents the re-opening of a matter before a Court that rendered the final decision.
89. In the application under consideration, the Defendant/Applicant is seeking an order of injunction pending the intended appeal and an order of review of the ruling of this Court delivered on 20<sup>th</sup> March, 2025.
90. The Defendant/Applicant is seeking an order of injunction to restrain the Plaintiff/Respondent from ploughing, leasing, disposing, wasting the suit parcels and/or registering the suit parcels in his name pending the filing of the intended appeal.
91. The Defendant/Applicant submits that he has a *prima facie* case as he has made numerous developments on the suit parcel.



92. The Defendant/Applicant also submits that he is likely to suffer irreparable harm if the said injunction is not granted as the Plaintiff/Respondent is cutting down trees on the suit parcel that were planted decades ago whose environmental and sentimental value cannot be quantified.
93. The Defendant/Applicant also submits that the balance of convenience tilts in his favour.
94. In response, the Plaintiff/Respondent submits that the Defendant/Applicant has failed to demonstrate that he has met the conditions for issuance of injunctive orders.
95. The Plaintiff/Respondent also submits that the alleged acts of wastage took place in the year 2024 and the Defendant/Applicant did not move the Court as soon as the said activities took place.
96. The Plaintiff/Respondent further submits that the suit parcel is registered in the name of the Defendant/Applicant's deceased father and therefore it cannot be sold off legally.
97. In the judicial decision of *Chembe Katana Changi v Ministry For Lands & Settlement (sic) & 4 others* [2014] KEELC 181 (KLR) the Court held as follows;

- “ 12. It is true that once the trial Court decides the suit on merit, it becomes *functus officio*. The trial (sic) cannot revisit the issues that were before it in a subsequent application. Revisiting the issues that were ventilated in a trial would amount to a trial Court sitting on its own appeal which is improper.
13. The only occasion that the trial Court can deal with a matter it has already heard and determined is during the execution process or when an Application for review of the Judgment has been filed pursuant to the provisions of Order 45 or when an Application for stay of execution pending appeal has been filed pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
14. There is no provision in the Civil Procedure Rules allowing a party against whom Judgment has been entered to file an Application for injunction pending appeal.
15. The absence of such a provision, in my view, is for good reason. It will be an absurdity for the trial Court to grant to a party an injunction after delivery of Judgment considering that one of the principles that must be established by an Applicant in such an Application is to show that he has a prima facie case with chances of success.
16. Once a Judgment has been delivered, there will be no pending suit. It therefore follows that a party challenging a Judgment cannot at the same time show by way of an application that he has a prima facie case with chances of success. A trial Court which attempts to deal with such an application, as I have already stated above, will be sitting on its own appeal...
18. It is the Court of Appeal that should grant to a party an injunction pending appeal pursuant to the provisions of Rule 5(2) (b) of the Court of Appeal Rules. Under that Rule, the Court of Appeal can grant to the Applicant the prayer if the Court is satisfied that the Appeal may be rendered nugatory and if the Appeal has chances of success. On the other hand, the law does not grant the trial Court the lee way to make such pronouncements because the Court, as it were, becomes *functus officio* after determining the suit. Indeed, the question that arises when the trial Court attempts to deal with



an application for injunction pending appeal is what parameters the trial Court should employ to determine whether to grant or not to grant such an application.” (Emphasis mine)

98. In the above cited judicial decision, the Court held that there is no provision in the Civil Procedure Rules that allows a party against whom judgement has been entered to seek orders of injunction pending appeal. This is because, a party challenging a judgement cannot at the same time show by way of an application that he has a prima facie case with chances of success. The logic here is that the court has already determined that he has no case and has entered judgment against him. Further, a Court becomes functus officio upon delivery of judgement.
99. It is the Court of Appeal that can consider whether or not it can grant an injunction pending appeal.
100. For the foregoing reasons, I find that this court is functus officio and cannot grant an injunction pending appeal.

**B. Whether this Court should review its ruling delivered on 20th March, 2025.**

101. The Defendant/Applicant is seeking that this Court reviews the terms of its ruling delivered on 20<sup>th</sup> March, 2025 on the ground that he has discovered new evidence.
102. The Defendant/Applicant contends that he came to learn post judgement that the Plaintiff/Respondent is wasting the suit parcel by cutting down trees.
103. The Defendant/Applicant submits that he was not aware of the said wastage at the time of the delivery of the said ruling and he therefore seeks that the Court reviews its orders.
104. In response, the Plaintiff/Respondent contends that if at all the said actions of wastage took place when orders of status quo were subsisting, then the Defendant/Applicant ought to have moved the Court appropriately.
105. The Plaintiff/Respondent also contends that the reports by Forest and Agricultural Officers attached to the Defendant/Applicant’s affidavit in support of the application were prepared in the year 2024 and therefore the Defendant/Applicant cannot now claim that they are new evidence.
106. Section 80 of the Civil Procedure Act provides as follows;  
“ Any person who considers himself aggrieved—
  - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”
107. Order 45 Rule 1 and 2 of the Civil Procedure Rules provides as follows;  
“(1) Any person considering himself aggrieved—
  - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or



evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.”

108. In the judicial decision of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR the Court held as follows:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

109. As was held in the above cited judicial decision, the Court can only review its orders on the following grounds;

- a. Discovery of new evidence which was not within the knowledge of the Applicant or could not have been produced at the time an order was made or a decree issued.
- b. On account of mistake or error apparent on the face of the record.
- c. For any sufficient reason.

110. In the application under consideration, the Defendant/Applicant is seeking that this Court reviews its ruling delivered on 20<sup>th</sup> March, 2025 on account of discovery of new evidence.

111. As afore stated, the Defendant/Applicant contends that he discovered after delivery of judgement that the Plaintiff/Respondent is wasting the suit parcels.

112. The Defendant/Applicant submits that given the new evidence, the Court should review its ruling and issue an order of stay of execution of the decree of this Court.

113. The Defendant/Applicant has attached to his affidavit in support of the application a copy of a report dated 7<sup>th</sup> November, 2024 that is prepared by Antony W. Wamai the Kuresoi North Sub-County Forest Officer. The report is addressed to the Officer Commanding Station, Mau Summit Police Station.



114. He states that subject to the letter written by the Officer Commanding Station, Mau Summit Police Station under OB No. 09/26/10/2024, he visited land parcel No. 153 that belongs to Moses Kibole Saina on 31<sup>st</sup> October, 2024. He observed that five trees had been cut down which he valued at Kshs. 153,332.86.
115. The Defendant/Applicant has also attached a copy of a Damage Assessment Report for Mr. Moses Kibore Saina OB 09/26/10/2024 prepared by Lilian Sompot from the Kuresoi North Agricultural Office and addressed to Mau Summit Police Station. The report is dated 6<sup>th</sup> November, 2024. The report assesses the crop damage on the suit parcel at kshs. 371, 500.
116. It is evident that the reports the Defendant/Applicant is relying on to allege discovery of new evidence were prepared in November, 2024 and they were based on complaints filed at the police station in October 2024.
117. The present matter was last in Court on 8<sup>th</sup> October, 2024 when the application dated 20<sup>th</sup> May, 2024 was reserved for ruling. The next time the matter was in Court was on 20<sup>th</sup> March, 2025 when the Court delivered its ruling.
118. The Court in its ruling delivered on 20<sup>th</sup> March, 2025 declined to grant an order of stay of execution on the ground that the Defendant/Applicant failed to demonstrate that he will suffer substantial loss.
119. It is evident that the Defendant/Applicant became aware of the alleged wastage of the suit property in October, 2024 way before this Court delivered its ruling on 20<sup>th</sup> March, 2025.
120. In the judicial decision of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR) the Court held as follows;

“For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the Applicant exercised due diligence. It must be such evidence or material that was not available to the Applicant or the Court.”[Emphasis Mine]
121. In the present case, it is evident that the Defendant/Applicant was aware of the alleged wastage of the suit parcels way before the Court delivered its ruling.
122. It is also evident that the reports relied on by the Defendant/Applicant were prepared pursuant to an OB that had been recorded on 26<sup>th</sup> October, 2024 at Mau Summit Police Station.
123. That being the case, the alleged destruction of the suit parcel cannot be termed as new evidence as it was within the knowledge of the Defendant/Applicant in October, 2024.
124. The Defendant/Applicant has therefore failed to make a case for this Court to review its ruling delivered on 20<sup>th</sup> March, 2025.

#### **Who should bear costs of the application.**

125. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.



**Disposition.**

126. Taking the foregoing into consideration, it is my view that the Defendant/Applicant's Notice of Motion application dated 24<sup>th</sup> March, 2025 lacks merit and it is hereby dismissed with costs.

127. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Bosek for the Defendant/Applicant.

Evanson for Mr. Koske for the Plaintiff/Respondents.

Court Assistant; Mr. Joseph Makori.

