Cheragu & another v Mari & 5 others (Environment and Land Appeal 7 of 2006) [2024] KEELC 1828 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1828 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 7 OF 2006

FO NYAGAKA, J

APRIL 4, 2024

BETWEEN

ERASTUS NDUNGU CHERAGU ..... 1ST APPELLANT

JOSEPH NGUGI CHARAGU ..... 2ND APPELLANT

AND

MONICA NJERI MARI ..... 1ST RESPONDENT

ISAAC MWANGI ..... 2ND RESPONDENT

WILLIAM BOIT ..... 3RD RESPONDENT

DANIEL WAINAINA KIARIE ..... 4TH RESPONDENT

WAMBAIRE W/O MWAURA GIKARI ..... 5TH RESPONDENT

GABRIEL NJENGA MUSEMBI ..... 6TH RESPONDENT

RULING

Background

1. This Court is greatly perturbed, disturbed, troubled, distressed, appalled, shocked, mesmerized, hypnotized, disheartened, surprised, petrified and simply made mouth-agape that a party(ies) who filed a notice of appeal herein on 28/12/2004 and neither filed an appeal pursuant thereto nor withdrew the notice could have the courage twenty years or thereabout later to argue and/ or think that their appeal(s) is/are still pending.

2. At the same time, this Court is wondering what becomes of parties when in their right minds and or with proper legal advice they decide not follow the decisions of courts and rather than appealing from or applying to set aside or review them they engage the courts in circles, as in the instant case, until when they realize in their sunset years that they are about to leave to this world their applications

and prayers suddenly become urgent. This Court states so because the applicant herein wanted this Court to deliver the instant ruling very extremely urgently because, in his view, he was now old, sickly, and wished the it be delivered urgently. This he urged in the Certificate of Urgency and deponed to paragraph 4 of the Supporting Affidavit to which he annexed the evidence of treatment chits marked as ENC-2. The mesmerism is this: on 20/11/1992, this Court delivered the judgment on the instant appeal. By the said judgment it set aside the decision of the lower Court, and among the reliefs granted were, specifically that:-

1. "The learned magistrates order of 11/10/1998 refusing review of the lower court's order of 19/8/1986 be and is hereby revered and set aside.

2. The lower court's order made on 19/8/1986 be and is hereby reviewed and set aside.

3. All transactions in relation to the appellant's share in LR. No. 7145/2 belonging to Kiambu Farmers Co. situated in Kitale Trans Nzoia District be and is hereby declared a nullity.

4. The lower court be and is hereby directed to serve afresh on the appellant and the rest of the partners of Kiambu Farmers Co. the lower courts order made on 29/11.73 and thereafter proceed to comply with the provisions of Order 21 r.44 of the Civil Procedure Rules as read with s. 27 of the Partnership Act Cap. 29 Laws of Kenya and thereafter proceed to determine the issue according to the laid down procedures

5. The appellant will have the costs of the appeal.

   Appeal allowed

   Orders accordingly

   .... Read and delivered by S/Deputy Register Eldoret on 20th day of Nov. 1992 in the presence of..."

3. After that, the parties never moved the lower Court as directed by the learned judge. Or if they did, they never informed this Court that they did so. But from the applications that heave been filed herein from time to time, it is clear that none of the parties complied with the judgment. Instead some parties filed notices of appeal lodged herein against the judgment about twelve (12) years later, and also against the execution of orders made on 11/11/2004. Subsequent to that there have been applications for various orders, some seeking interpretation of the judgment and indeed the Court rendered itself in them, for instance, the orders given on 22/05/2007. But even then, in the process of this 'mark-timing' time has been running against the execution of the judgment, in terms of the *Limitation of Actions Act*. As I will point out below, there is only one judgment herein, the one delivered on 20/11/1992: not two, not more!

4. Vide an application dated 04/09/2012 the appellant moved the Court vide a Notice to Show Cause why the decree dated 22/06/1994 had not been implements as at the time. In its ruling dated 12/11/2012 the Court rendered itself as follows:

> " Paragraph d of the decree dated 22/06/1994 is actually directed to the subordinate court for compliance, not the High Court, in regard to the order dated 29.11.1973. In the circumstances the Appellant should move the subordinate court to comply with the decree dated 22.06.1994 in the event of no appeal pending hearing and determination in regard to any of the orders arising from Eldoret H. C. Civil Appeal No. 41 of 1988 which is now Kitale High Court Civil Appeal No. 7 of 2006."

5. The Court referred the appellant correctly to the action he should have taken over this appeal since it is the same appeal that this Court whose orders and judgment the appellant seeks the grant of the orders here.

6. It is sad then that rather than focusing on the main thing as ordered by the learned judge in the judgment and even subsequently, the Applicant and indeed every other party has over the years engaged in side shows, for instance, interpreting the orders of the Court given subsequent to the judgment when the reliefs granted were clear, and in these simple terms (paraphrased), "go back to the trial Court and move it to, ask the subordinate Court to

> " serve afresh on the appellant and the rest of the partners of Kiambu Farmers Co. the lower courts order made on 29/11.73 and thereafter proceed to comply with the provisions of Order 21 r.44 of the Civil Procedure Rules as read with s. 27 of the Partnership Act Cap. 29 Laws of Kenya and thereafter proceed to determine the issue according to the laid down procedures".

8. As to whether the parties can now legally go back to the trial court to ask it for implementation of the judgment herein, it is a different ball game. It is too late in the day, as the Court will point out in its finding below. Be that as it may, it now dawns on the applicant that he is aging, perhaps not gracefully, as he states in his Affidavit sworn on 03/01/2023, and he requests for orders over the instant application urgently. Anyway, delivering justice expeditiously is the duty (and happiness) of this Court and should be for all courts. This Court now then proceeds accordingly.

9. Before me is a Notice of Motion dated 03/01/2023 brought by the 1st Appellant. It was filed on 16/01/2023. It was brought under Article 159(2)(B) (sic) of *the Constitution* of Kenya 2010, Section 3(1) and 13(7)(a) of the Environment and *Land Act*, No. 19 of 2011, Section 1A, 1B and 3A and Section 63(c) of the *Civil Procedure Act* and Order 17 Rule 2(1) and 2(3) and Order 51 Rule 1 of the Civil Procedure Rules. It sought the following orders:-

    1. ...Spent.

    2. ...Spent.

    3. ...Spent

    4. That the Respondent's Appeal lodged on 28/12/2004 be dismissed for want of prosecution.

    5. That the status quo be maintained in Land Parcel No. Sinyerere/Kipsaina Block 3/7145/2 before the hearing and determination of this matter.

    6. That the Land Registrar to issue the Applicant a title deed of land parcel No. No. Sinyerere/Kipsaina Block 3/7145/2 as per the order issued on 7/7/2005.

    7. That the 1st Appellant be allowed to distribute Land parcel No. Sinyerere/Kipsaina Block 3/7145/2 in accordance with the orders given on 22/05/2007 and leave respective portions to the Respondents for occupation and use.

    8. That the County Surveyor Trans Nzoia be directed to survey land parcel No. No. Sinyerere/Kipsaina Block 3/7145/2 before the title deed is issued to the Applicant.

    9. That the OCS Kipsaina and OCPD Kachibora to provide security during the exercise.

    10. That the ACC Kaplamai Division and Chief Sinyerere Location to supervise the exercise.

11. Costs of the Application be provided for.

10. The Application was based on the grounds that the Respondents had not prosecuted the Appeal diligently; that land parcel No. No. Sinyerere/Kipsaina Block 3/7145/2 was transferred to the 1st Appellant; the 1st Appellant/ Applicant was the lawful owner of the said parcel of land; the 1st Appellant was entitled to be issued with a title deed and occupation of part of the land parcel in issue; the 1st Appellant was authorized to distribute the property; orders evicting the 1st appellant from the parcel of land were held to be a nullity; the 1st appellant was restored to the suit property; the 1st appellant was at the time of the instant application properly occupying the parcel of land No. No. Sinyerere/Kipsaina Block 3/7145/2 and the status quo ought to be maintained; there was urgent need to survey the property before title deeds are issued; security was required during the exercise and the local administration ought to supervise it; and the application was made in good faith.

11. The Application was supported by the Affidavit sworn by Erastus Ndung'u Charagu on 03/01/2023. Besides deposing to the contents of the grounds of the Application he stated that at the time of the Application he was a partner in Kiambu Farmers Company which was registered in the companies' registry under Certificate No. 36589 since 1968 under LR. No. 7145/2, Kipsaina Area of Trans Nzoia District. He annexed the copy of a Certificate of registration of the Business name of Kiambu Farmers Company issued on 02/08/1983 and marked it as ENC-1.

12. He deponed that he was old and sickly and annexed and marked as ENC-2 a copy of a treatment sheets dated 25/11/2022. Further, that on 20/11/1992 the court delivered a judgment by which it declared all the transactions conducted by the Respondents in relation to his share in Kiambu Farmers Company null and void and that the taking away of his share in the company too was null. He annexed and marked as ENC-3 a copy of the judgment. He repeated that the transaction that was declared null and void included the eviction order against him on land in issue, which were given on 08/01/1996 based on orders made on 19/08/1986. To evidence it, he annexed and marked as ENC-4 a copy of the eviction order.

13. His further deposition was that following the judgment, the Respondents filed an appeal through notices of appeal on 28/12/2004. He annexed and marked ENC-5(a), 5(b), 5(c) and 5(d) copies of Notices of Appeal lodged on that date by M/S E. M. Mwaura & I. M. Mwaura, Mr. Stephen Musembi Nguy, Mrs. Milka Wairimu w/o Kiarie Lissy Njeri Njoroge respectively, all of P. O. Box 73649-00200 Nairobi, against both the judgment of 20/11/1992 and orders of 11/11/2004.

14. He deponed, in addition, that the Respondents never prosecuted the intended appeal hence they were guilty of laches. He prayed that the appeal be dismissed. That the Court investigated the issue of his eviction in 1996 and found that indeed there was no such order of eviction since the one issued on 19/08/1986 was eroded by the judgment issued by this Court on 20/11/1992. Further, that the removal of the orders issued on 19/08/1986 by the judgment delivered on 20/11/1992 restored him to the position he was on 09/10/1973 when an application was made attaching his shares in Kiambu Farmers Company under Order 21 Rule 44 of the Civil Procedure Rules. That the judgment (sic) which he annexed to the Affidavit and marked as ENC-6 faulted the entire process and declared the transactions false and unlawful and with no force of law.

15. In actual sense, in reference to the paragraph above and those below referring to the said annexture, the Applicant attached and marked as ENC-6 a copy of a Ruling delivered on 20/11/2002 by Hon. R. Nambuye J (as she then was) in the High Court of Kenya in Eldoret in Civil Appeal No. 41 of 1988. It extensively referred to the judgment of 20/11/1992 and declared the subdivisions and titles issued

over the suit land following the drawing of an unsigned area list, and the eviction orders thereto null and void and contrary to the judgment of 20/11/1992.

16. He deponed further that the judgment (sic) of 22/11/2002 had the effect of nullifying the whole process of the issuance of titles and all through to the act of issuance causing his eviction which were designed to circumvent the judgment of 20/11/1992. Further that the judgment (sic) of 22/11/2002 also determined that his eviction from parcel No. Sinyerere/Kipsaina Block 3/7145/2 was not based on a valid court order hence fraudulent.

17. He deponed that the judgment (sic) delivered on 22/11/2002 had never been appealed against or set aside. His further deposition was that when the Respondents moved this Court vide an application dated 14/02/2005 it determined that he was entitled to a title and occupation of his land which he had owned at the time he paid for a share in Kiambu Farmers Company. He annexed and marked as ENC-7 a copy of the order given on 22/05/2007.

18. He deponed further that the Respondents' titles were cancelled and the Respondents evicted from the parcel of land in question. He annexed and marked as ENC-8 a copy of the Order made on 03/11/2004. Further that the land parcel in question was registered in the Applicant's name and the approval of the consent by the Land Control Board was given. He annexed and marked as ENC-9 a copy of the order given on 14/06/2005.

19. His deposition was that the Respondents' then Advocate, Mr. Gaturu wrote a letter dated 18/02/2008 in which he admitted that the Applicant was entitled to 1/7 share of the partnership. He annexed and marked as ENC-10 a copy of the letter. Further, that the Kenya Revenue Authority assessed the stamp duty he was to pay on the suit land and he paid. He annexed and marked as ENC-11 a copy of the stamp duty declaration payment made on 02/07/2009.

20. He swore that subsequent to that he was registered as owner of the suit land, parcel No. Sinyerere/ Kipsaina Block 3/7145/2. He prayed the Court to direct the Land Registrar to issue a title deed to the in his favour so that he could distribute it in accordance with the orders given on 22/05/2007.

21. He deponed further that through the letter dated 18/02/2008 the Respondents warned him of stepping on land parcel No. 3/7145/2 and had since been interfering with his possession. He stated that Mr. Gaturu and Isaac Mwaura were aware that he had a share on the parcel of land and he had no debt. He prayed for his title and occupation of the land to be protected. He repeated that the continued interference of the Respondents on the parcel had caused him irreparable harm not capable of compensation by way of damages.

22. He swore that the balance of convenience regarding maintenance of status quo on the suit property tilted in that favour. He urged the court to direct the county land surveyor to survey the property and the local administration to supervise the exercise. He stated on oath that the Respondents had been employing delaying tactics to ensure he does not enjoy the fruits of his judgment.

23. The Respondents opposed the application through a Replying Affidavit sworn on 03/06/2023. He deponed that he had authority to swear the Affidavit on behalf of 1st, 2nd, 3rd and 6th. He deponed that the Applicant sought to execute a judgment delivered on 29/11/1992, 22/11/2002, orders of 03/11/2004, 14/06/2002 and 22/07/2007 to enable him get ownership of the land. He stated that the application was res judicata because a similar application dated 24/03/2021 was heard and determined and orders which enabled the appellants to enter the land and take possession of part thereof were granted. He annexed and marked DWK-1 a copy of an order issued on 19/04/2021. He deponed that the instant application had been brought more than twelve (12) years after the last order was given on 22/05/2007.

24. Further, that since the application was not a continuation of the suit but a separate proceeding independent of the suit the right to apply for execution of the decree accrued to the appellants from the respective dates of the orders and decree. That since 22/05/2007 there had been no obstructions, obstacles or other procedural technicalities to prevent the appellants from applying to realize their fruits of the decree. That for reason of delay since the 22/05/2007 the failure to apply for execution of the decree cannot be construed any differently than that it was because the orders and decree were rendered futile and incapable of enforcement due to limitation of time. That the last orders given for the appellants was on 22/05/2007 hence 12 years having lapsed it placed the appellants' application out of time.

25. He further deposition was that he was aware that Francis Kiarie Ngomane died on 20/03/1990 and was not substituted. That instead the appellants were prosecuted for his murder. That the decree and orders (of 22/05/2007) were given against the deceased, Francis Ngomane after his death without his substitution hence they were null and void and incapable of execution against his Estate now.

26. He also deponed that he was aware that Lizzy Njeri Njoroge died on 23/04/2005 and was never substituted hence when the orders of 14/06/2005 and 22/05/2007 were given the 3rd Respondent was not legally represented in the proceedings at all. Further, that he was aware that Stephen Musembi Ngui died on 15/02/2006 hence the orders of 22/05/2007 were given before the substitution of the 3rd Respondent.

27. The deponent then swore that the prayers (e), (f), (g), (h) and (i) were incapable of being granted due to non-participation of the deceased respondents and that the appellants had the opportunity to raise the issues in prayers (f), (g), (h) and (i) of their application of 24/03/2021. He deposed further that prayer (e) of the instant notice of Motion was vitiated because the application dated 24/03/2021 by which the appellants entered the suit land proceeded surreptitiously without substitution of the deceased respondents and without service at all.

28. The Applicant filed a Supplementary Affidavit sworn by Erastus Ndung'u Charagu on 01/08/2023. By it he stated that the Replying Affidavit did not describe the 4th Respondent as either male or female, adult or of sound mind or unsound. He deponed that the 4th Respondent had not annexed a written authority to shown that he indeed was authorized to swear the affidavit on 03/06/2023 on behalf of the 1st, 2nd, 3rd and 6th Respondents.

29. Regarding paragraph 3 of the Replying Affidavit, he deponed that it raised legal arguments hence ought to be struck out. That his application sought the execution of the orders of 22/05/2007 which were issued on 07/07/2005. Further, that paragraph 4 and 5 raised conclusions of res judicata and that the application was brought more than 12 years from the orders of 22/05/2007 respectively which were a preserve of the Court. He deponed further that in regard to the application dated 24/03/2021 as deponed in paragraph 4 of the Replying Affidavit on the plea of res judicata, on the contrary in the application he sought to remove strangers who were within his portion of land in the application dated 24/03/2021.

30. The Applicant swore that the instant application was to initiate execution of the proceedings based on the orders given on 22/05/2007 but issued on 14/01/2020. Further that immediately the orders of 22/05/2007 were issued, he (the Applicant) filed an application on 12/06/2007 in which he sought a Notice to Show cause why the Respondents should not be evicted from the suit land. He annexed and marked as ENC-1(a) and (b) the copy of the application and Notice to Show Cause.

31. That on 02/07/2007 the Notice to Show Cause came up before the Deputy Registrar for mention. That on 11/05/2011 it was stood over generally after learned counsel who appeared for the

Respondent indicated to the Court that the orders could not issue against the Respondent because the Appellant had not identified the portion he claimed. He deponed further that it was after the Notice to Show Cause was stood over generally that he was unable to execute the decree.

32. The deponent then swore that from the time the Notice to Show Cause was stood over generally to the time of the application filed on 16/01/2023 the period of 12 years had not elapsed. He deponed that on 17/07/2008 he wrote to the Chief Land Registrar on why he should not be issued with a title to his land. He annexed and marked as ENC-2 a copy of the letter. That again on 02/03/2020 he filed an application seeking enforcement of the decree of 22/05/2007. He annexed and marked as ENC-3 a copy of the application. The application was not prosecuted because the directed that substitution be done.

33. The Applicant stated that the issue of limitation of action as against the decree was raised by learned counsel for the Respondents and the court delivered its ruling thereon on 12/11/2012. By the said ruling the Court directed that the instant file was active since 1992. He deponed further that the Respondents did not appeal the Ruling of Hon. J. A. Owiti delivered on 12/11/2012. He deponed that he believed that the time for execution of the orders accrued from 14/01/2020.

34. The Appellant stated further that even if the time was to be computed from 22/05/2007 he made several attempts to execute the decree but there were a number of difficulties beyond his powers which prevented him from realizing the fruits of his judgment. He gave the examples of the loss of this file in 2017, also the delaying tactics by the 1st, 2nd, 3rd, 4th and 5th Respondents in refusing to substitute the deceased despite citation proceedings and the orders of 02/02/2019 by which this Court directed substitution of all save the 2nd Respondent. He annexed and marked ENC-4 (a), (b) and (c) the letter to the Deputy Registrar, the order of Citation and the directions of 04/02/2019. He attributed delay in completing execution to confusion about it due the orders of 04/02/2019 by which the Court directed that substitution be effected before he could proceed with execution.

35. He deponed further that therebefore he had made several attempts to execute the orders given on 22/05/2007 and issued on 07/07/2005 by making several applications to evict the 1st, 2nd, 3rd, 4th and 6th Respondents who occupied his portion and further obtain the title for the entire land so that he leaves the respective portions to the other respondents but the proceedings have always been frustrated by learned counsel warning the District land registrar in Kitale on 10/12/2015 not to implement the orders. He deponed that the said Respondents should not benefit from the process they frustrated. He annexed and marked as ENC – 5(a), 5(b), 5(c) and 5(d) copies of the letter dated 10/12/2015 sent to the land registrar, applications dated 17/09/2018, 02/02/2012 and 03/03/2014.

36. That he diligently followed the execution proceedings until the file got lost and the judge directed that he makes substitution. Then he swore that no Certificate of Death had been given in respect of Francis Kiarie Ngomane who died on 20/03/1990. Further, that nothing prevented the Respondents from informing the Court in 1990 that the said Ngomane had died. That in any event the estate of the said Ngomane were not affected by the execution of the decree herein. Again, that the Respondents had not availed an order that the Applicant was prosecuted for the death of the deceased. That execution proceedings were done against the estate of the deceased respondents after this appeal was heard.

37. Strangely, he deponed that the Respondents had not produced evidence to show that the judgment of this appeal was not made during the lifetime of Francis K. Ngomane. He then deponed that since the appeal had reached execution stage there was no need for substitution of the late Francis K. Ngomane.

38. Then he deponed that the judgment and execution proceedings against Francis K. Ngomane was after the determination of this appeal in 1992 and it was done under the repealed Civil Procedure Rules and its sublegislation which was repealed by the current Civil Procedure Rules, 2010.

39. His further deposition was the appellants and respondents were all tenants in common and each had a distinct share of the property. He annexed and marked as ENC-6 a copy of the title deed (sic). In actual sense the copy annexed was a Grant for Land – Agricultural. He deponed further that his share of the land was not affected by the death of Francis K. Ngomane whose share devolved to his estate. The cause of action by Francis K. Ngomane (deceased) survived for the benefit of his estate. It was true that the appeal proceeded against the surviving respondents. The suit against the deceased Francis K. Ngomane had been revived.

40. Turning to the facts about Lizzy Njeri Njoroge and Stephen Musembi Ngui the applicant deponed that the Respondents did not annex a copies of death certificates to prove that they died on 23/04/2005 and 15/02/2006 respectively but judgment was delivered in 1992 in their lifetime. His further deposition was that the appeal reached execution stage during their lifetime hence no need for substitution and that the execution was done under the repealed Civil Procedure Rules, and their suits had been revived.

41. Then he deponed that in the instant application there were no prayers (e), (f), (g), (h) and (i). That it was speculative for the Defendants to contend that for the prayers cannot be granted for reason of non-participation of the Respondents in the application dated 24/03/2021. The Respondents, despite service of citations refused to take out letters of administration and substitute in time so that they could frustrate the applicant during the execution process to their advantage. He annexed as ENC- 7(a), (b), (c) and (d) copies of affidavits of service sworn on19/03/2019 for service upon one Joseph Mwaura Kiarie; Mureiithi Kamau but effected on a sister in-law by name Joyce Njoroge; Henry Ngui Musembi; and Isaa Mwangi Mari but effected on a sister by name Esther Wambaire, respectively.

42. His further deposition was that the respondents had not been diligent in prosecution of their cases. That to argue that the application dated 24/03/2021 proceeded surreptitiously without substitution of the deceased and service is incorrect and does not provide a specific source and details hence ought to be struck out. On the contrary, by the said application he applied to remove strangers from his land and the orders granted pursuant to the application had never been appealed by the respondents despite their dissatisfaction. That the Respondent was in contempt of court by attacking orders of the Court issued on 19/04/2021 based on the application dated 24/03/2021 instead of appealing against the orders.

43. That he knew (sic) that Francis Kiarie Ngomane, Lizzy Njeri Njoroge and Stephen Musembi Ngui woke up from their death and gave their authority to swear the affidavit sworn by Elijah Mari Mwaura on 14/02/2005 which led to the grant of orders granted on 27/05/2007. He annexed and marked as ENC-8 a copy of the Application dated 14/02/2005. That it was a lie on oath when the respondents in the instant application deponed that the three deceased persons, namely, Francis Kiarie Njoroge, Lizzy Njeri Njoroge and Stephen Musembi Ngui were not substituted yet in their application dated 14/02/2007 they were active participants who gave authority to Elijah Mari Mwaura to swear the supporting affidavits in their behalf. That the applicants did not disclose the death of the three parties and seek substitution of them. That he was surprised that the issue of the death of the three was only raised the first time in Court on 20/03/2018 hence the deaths of the said persons must have occurred around 20/03/2018 and that all along up to the said date, the Respondents had instructions from the three deceased persons. That to raise such an issue despite proceeding with the application dated 14/02/2007 is an afterthought.

44. He deponed further that he knew that on 10/04/2018 the Court directed that some of the respondents be substituted but they had since been unwilling. They are to blame for the participation of the proceedings for many years and obtaining orders without disclosing material the death of some of them when they occurred. That the disclosure of the death of some of the respondents was an afterthought given after more than 12 years from when the appeal was determined fully. That the afterthought is time-barred and brought after unreasonable delay. That the said three deceased persons complained against Hon. Gacheche J on 26/09/2005 and 29/09/2005. He annexed a copy of the latter and marked it as ENC-9(a) and (b) respectively.

45. That the respondents had had their cake and they were only awoken from slumber after he made the application for distribution of the suit property. That Milkah Wairimu w/o Francis Kiarie Ngomane represented him in the Notice of Appeal filed on 28/12/2004. The applicant swore further that he believed that the correct years of the death of some of the respondents was suspect since they had been participating in the proceedings. That to participate in the proceedings up to 2018 despite deaths without disclosing that they occurred many years ago was an abuse of the process of the court.

46. He deponed that the prayers sought would not prejudice the respondents because he would ensure each of them gets their respective shares in terms of the orders granted on 22/05/2007 based on their application. That instead it was him who would be prejudiced if the application was not allowed since he was old and sickly and had spent a lot of his valuable years in prosecuting this matter and he was diligent all through. That he knew the respondents had not come to Court with clean hands.

47. The application was disposed of by way of written submissions. The applicant filed his dated 10/08/2023 on 15/08/2023. The 1st, 2nd, 3rd, 4th and 6th Respondents filed theirs dated 26/09/2023 on 27/09/2023. This Court will consider the rival submissions as it determines step by step each of the issues it identifies below for determination.

Analysis And Disposition

48. I have anxiously considered the Application, the law (both statute and case law) and the rival submissions. I am of the view that many of the issues that arise from the instant application have much to do with the manner in which the post-appeal judgment processes herein have been conducted over the years. Therefore, most of them shall be resolved by a mere examination of the Court record vis-à-vis the judgment delivered on 20/11/1992, and not necessarily through the long and winding arguments by either the applicant or the respondents herein. Nevertheless, I list first the issues that commend to me for determination in the instant application. They are:-

    a. Whether there were two judgments subsisting in relation to the Appeal herein

    b. Whether after a judgment or final decision one can lawfully subsequent thereto be granted orders which are not in tandem with it

    c. Whether the Notices of Appeal filed on 28/12/2004 were still valid

    d. whether the execution of the decree herein is time barred by virtue of passage of 12 years

49. Depending on the finding of the Court on some of the issues, they will determine the application fully without going to its merits while others must await the merits of the application. Others are mere clarifications on the proceedings and restatement of the law hence it would be in order to deal with them at the beginning. Therefore, this Court proceeds to determine each of them sequentially in terms of the order it deems their outcome may impact the application.

a. Whether there were two judgments subsisting in relation to the Appeal herein

50. The Applicant referred consistently to the judgment delivered on 20/11/1992 in this matter. He also referred to annexture ENC-6 as the other the judgment which, he argued, faulted the entire process of the transactions about subdivision, issuance of titles and his eviction. But when the Court scrutinized annexture ENC-6, it found that the document was a copy of a Ruling delivered on 20/11/2002 by it the learned judge Hon. R. Nambuye J (as she then was) in Eldoret High Court Civil Appeal No. 41 of 1988. It was in this same file but before it was transferred from the High Court in Eldoret to the High Court in Kitale and finally to this Court. It referred extensively to the judgment of 20/11/1992. This means that there was no other judgment delivered in this matter than the one of 20/11/1992. This clarifies and settles the fact that only judgment exists in this matter.

b. Whether after a judgment or final decision one can lawfully subsequent thereto be granted orders which are not in tandem with it

51. The Applicant sought for the grant of a number of prayers which this Court finds necessary to compare with the judgment of this Court, and the subsequent orders that have been made and which the applicant contended this Court should make. Thus, the issue is whether in making orders subsequent to a decision of a Court it is open for the same Court to grant some which are inconsistent with the earlier one(s), except upon an application for review or setting aside.

52. One of the enduring principles of the rule of law in a functioning legal system and democracy is that a judgment of a court of law binds the parties thereto in so far as it determines them. Therefore, unless appealed from successfully or set aside by other lawful means the parties ought to obey it irrespective of the consequences, and however painful or difficult it may sound to be. And when the Court has rendered itself on the issue, except on doing away with it on a technicality in which case the parties may resort to the same Court subject to the provisions of law regarding limitation, jurisdiction and others, the Court becomes and remains functus officio.

53. The consideration of the issue about consistency of subsequent orders to a final decision of a Court gravitates around the import thereof in regard to the jurisdiction the Court and the doctrine of functus officio. Decisions of a court, once made on merits render the Court functus officio on the issue that was before it. Elsewhere, in Raila Odinga & 2 Others v. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, the Supreme Court of Kenya in defining the doctrine of functus officio, quoted an excerpt from Daniel Mala Pretorius's work titled, "The Origins of the functus officio Doctrine, with Special Reference to its Application in Administrative Law", South African Law Journal, Vol. 122 (2005), at p. 832, in the following terms:

> "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 taken, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision-maker."

54. In simple terms, once the Court is functus officio, must down its tools if the same issues are raised before it again. It can deal with only those subsidiary issues that arise as of necessity solely for the giving effect of that decision and not the merits thereof. It follows also, that in the same manner, for instance, that a constitution must be read and interpreted as an integrated whole by not destroying it in any one particular by the other so it should be for the reliefs granted by any decision of the Court. Subsequent

ones that purport to give effect previous ones can only be read into that earlier final one sought to be perfected. Thus, a Court should not give subsequent orders that depart from the one sought to be implemented. I have highlighted the instances when the Court may have a point of departure.

c. Whether the execution of the decree is time barred by virtue of passage of 12 years

55. The Applicant moved this Court to grant orders in relation to a judgment delivered on 20/11/1992. The Respondents opposed the application arguing that the prayers were made more than 12 years, which to them, began to run on 22/05/2007. It was their contention that the failure to execute the decree could only mean that it was rendered futile and incapable of enforcement due to limitation of time. The Applicant responded by deposing that there had been issued a Notice to Show Cause which was stood over generally and from then 12 years did not elapse before he filed application on 16/01/2023. Further, that on 02/03/2020 he filed an application, a copy which he annexed as ENC-3, in which he sought enforcement of the decree. However, he did not prosecute it the Court directed that he does substitution. He deponed also that on 17/07/2008 he wrote to the Chief Land Registrar a letter a copy which he annexed as ENC-2. It inquired why he should not be issued with a title to his land.

56. The law on limitation period on decrees or orders of a Court is Section 4(4) of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. It stipulates that

> " An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

57. My understanding of the provisions above is that when the judgment of a Court has been in place for more that twelve years and is not executed the party in whose favour it was cannot act on it: no party can reap the benefits of the same in his favour. The Court cannot by any stretch of imagination extend the time to revive the time for execution. The twelve-year period, just as the one for adverse possession once the conditions thereof are fulfilled, is firmly fixed. Actually, the party against whom the execution was supposed to have been levied but it was not acquires rights arising from the judgment as though it never existed against him.

58. I would think that if such law of limitation exists against execution of the judgment after the 12 years, it is also not open for a party to apply for review of such a judgment after that period or even apply to revive a suit that abated more than 12 years before since such a period was designed by the legislature to bar endless litigation. This said, there is no dearth of authorities regarding the closure of the period of execution of a judgment after twelve years.

59. In Koinange Investments and Development Company Limited Vs Ian Kahiu Ngethe & 3 others (2015) e K.L.R, the Court cited with approval ELC No. 57 of 1992 (O.S) Hudson Moffat Mbue Vs Settlement Fund Trustees & 3 others (unreported) where Mutungi J. held as follows:

> " What I understand the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within the 12 year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute

the same. Section 4 (4) of the *Limitation of Actions Act* will bar you from carrying on with such execution".

60. I need not enumerate more decisions over this issue. Thus, when my view as supported by the above decision, is compared with the facts herein, the judgment herein was delivered on 20/11//1992, and the applicant moves this Court this late. He argues that from the time of delivery of the judgment he has made a number of applications, in respect of which the latest order was made 15/04/2021. In my humble view that does not extend the period of limitation under Section 4(4) of the *Limitation of Actions Act*. This Court considers both rival submissions on the issue and does not find much therein about it.

61. Regarding the issues of the death of some of the Appellants over time, this Court found it extremely disingenuous for the applicant to argue that issues of death of the parties, which were within his knowledge, and which the Court has even been emphatic to him regarding substitution would be a matter of argument as deponed in many of the paragraphs of his Supplementary Affidavit. Needless to say that the Court did not consider the effect thereof on the decree of the Court since under Section 37(1) of the *Civil Procedure Act*, a decree may, upon the death of a party, be executed against the legal representative of the estate of the deceased.

62. It follows that in so far as prayers listed as (5) on the maintenance of the status quo, (6) for the issuance of a title deed of land parcel No. No. Sinyerere/Kipsaina Block 3/7145/2 as per the order issued on 7/7/2005, (7) on distribution of the land as per an order of on 22/05/2007, (8) a survey to be carried on the suit land parcel before issuance of a title deed to the Applicant (9) provision of security and (10) the ACC Kaplamai Division and Chief Sinyerere Location to supervise the exercise, are in relation to the execution of the judgment herein they cannot be granted and are refused for many reasons. One, they are sought after 12 years of the delivery of the judgment herein. Secondly, they are not in tandem with the judgment of the Court as delivered on 20/11/1992. By the said judgment the Court ordered that the parties go back to the lower court for it to serve them with the order made in 1971 and proceed to determine the matter in accordance with Order 21 Rule 44 of the Civil Procedure Rules and Section 27 of the Partnership Act. There is nothing in the said judgment for execution as sought herein. Further, there is nothing for which an order of status quo can be granted herein since the Court herein was functus officio in the judgment in regard to the issues before it.

d. Whether the Notices of Appeal filed on 28/12/2004 were still valid

63. It is not in dispute that the notices of appeal sought to be declared invalid related and referred to the judgment delivered on 20/11/1992. They purported to combine, in their reference, to an order made on 11/11/2004. This Court is yet to see such 'ingenuity' in any of law practice in its entire life.

64. But while this Court was not informed under which provisions of the law it was moved to make such a finding, it is clear that Order 42 Rule 6(4) of the Civil Procedure Rules, 2010 which should be read mutatis mutandis to the repealed Civil Procedure Rules provides that "For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given." This in so far as this Court is concerned the parties who lodged the notices filed appeals to the Court of appeal. Unless the parties themselves withdraw the said notices by way of indicating as much to this Court is my humble view that I have no jurisdiction to declared whether the notices are valid or not.

65. Needless to say, that Rule 85 (1) of the Court of Appeal Rules provides that "If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any

other party, make such order." And Rule 2 thereof defines the Court as "the Court of Appeal", which means that it is only that Court that such a prayer can be entertained in. It would be laughable that a party can lodge a Notice of Appeal and pursue and appeal thereto after about 20 years. Nevertheless, this is left to the parties to see what to do in the proper forum. This court can only wait to hear what the higher Court will say when such make a move of that sort. For now, I respectfully decline an invitation to grant prayer (4) of the application.

66. The upshot is that the application herein is absolutely without merit and its right place is among those dismissed with costs.

67. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 4TH DAY OF APRIL, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE