



REPUBLIC OF KENYA



**Abwiba & 3 others v Walumbe s/o Joseph Mapesa & another (Environment & Land Case 326 of 2016) [2025] KEELC 4353 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4353 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 326 OF 2016**

**A NYUKURI, J  
MAY 21, 2025**

**BETWEEN**

**ROSALIA MASABAKHWA ABWIBA ..... 1<sup>ST</sup> PLAINTIFF  
JOHN MASABAKHWA ABWIBA ..... 2<sup>ND</sup> PLAINTIFF  
ERNEST MASABAKHWA ABWIBA ..... 3<sup>RD</sup> PLAINTIFF  
NICHOLAS CHIBOLE ABWIBA ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**FRANCIS WALUMBE S/O JOSEPH MAPESA ..... 1<sup>ST</sup> DEFENDANT  
ACTION FOR CHILD DEVELOPMENT TRUST ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before court is the Notice of Motion dated 11<sup>th</sup> October, 2024 filed by the 2<sup>nd</sup> respondent seeking the following orders;
  - a. Spent
  - b. That the 2<sup>nd</sup> respondent/applicant be allowed to execute the judgment, decree and all consequential orders dated 28<sup>th</sup> June, 2018.
  - c. That the caution lodged by the respondent be discharged.
  - d. That Kakamega County Land Registrar and surveyor be limited to visit land parcel number Butso/ Shikoti/1449 to ascertain, affix and plant the boundaries.
  - e. That there be an order evicting the respondents from the portion trespassed and encroached by the respondent;



- f. That there be an order demolishing all structures erected by the respondents from the trespassed portion.
  - g. That costs of this application be borne by the respondents
  - h. That such other orders as the court deems fit, just and expedient to grant.
2. The application is premised on the grounds on its face as well as the supporting affidavit of the applicant's director one Robert Wawire dated 7<sup>th</sup> October, 2024. The applicant's case is that the 2<sup>nd</sup> respondent is the absolute and bona fide owner of the parcel of land known as Butsotso/Shikoti/1449 measuring 0.5 hectares. That the respondents filed this suit but the same was dismissed on 28<sup>th</sup> June, 2018 and that the respondents have neglected to comply with the judgment and trespassed on the suit property. That unless the court intervenes there is a likelihood of breach of peace on the ground. That the respondents have their separate parcel of land. He attached a copy of the title deed and decree.
  3. The applicants/respondents opposed the application by filing of grounds of opposition dated 10<sup>th</sup> December, 2024. They stated that the application was misconceived and prematurely filed without capacity, and that the allegations made in the supporting affidavit are not backed by any evidence. Further, they argued that the application was an afterthought, failed to meet requirements of Order 9 Rule 9 and order 3 Rule 1 of the *Civil Procedure Rules* and that the same is contrary to the maxims of equity and justice.
  4. The application was disposed by way of written submissions. On record are submissions filed by the respondent dated 10<sup>th</sup> December, 2024, which the court has duly considered.

#### **Analysis and Determination**

5. Having carefully considered the application, response and submissions filed, the only issue that arise is whether this court having delivered judgment herein in 2018, should issue the orders sought.
6. The record shows that the four plaintiffs/respondents herein filed the suit herein by way of Originating Summons dated 28<sup>th</sup> October, 2013 seeking to have the parcel of land known as Butsotso/Shikoti/1449 transferred to them claiming that they had acquired it under the doctrine of adverse possession. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed replying affidavit both dated 21<sup>st</sup> November, 2014 whereof they counterclaimed for an order of permanent injunction to restrain the respondents from interfering, entering, constructing or in any way dealing with the suit property.
7. Upon hearing the parties, the court dismissed with costs the applicants claim of adverse possession. There was no reference or findings in respect to the counter claim for permanent injunction by the court. The 2<sup>nd</sup> respondent/applicant did not seek a review of the judgment and it is clear that they were satisfied with the same. That judgement remains in force and has not been set aside. A decree was issued in terms of the judgment. That being the case, it is clear that apart from an award of costs, no positive order was made in favour of the 2<sup>nd</sup> respondent/applicant.
8. In the instant application, the 2<sup>nd</sup> respondent seeks for eviction against the applicants; removal of caution, demolishing of their structures and for the Land Registrar and surveyor to fix boundaries on the suit property. Those prayers were never granted in the judgment, and therefore constitute new causes of action which require filing of a fresh suit as they cannot be granted in a concluded suit as this court is now functus officio.



9. In the case of *Telcom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telcom Kenya Limited)* (2014) eKLR, the Court of Appeal held as follows;

“*Functus Officio* is an enduring principle of law that prevents the reopening of a matter before a court that rendered the final decision thereon.

The general rule that final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *Re-st Nazarire Co.* (1879)12ch D.88. The basis for it was that the power to rehear was transferred by Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to the exceptions.”

10. Similarly, in the case of *Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others* (2013)e KLR, the Supreme Court of Kenya cited with approval an excerpt from an Article by Daniel Malan Pretorius entitled “*The origins of the Functus Officio Doctrine*, with special reference to its application in Administrative Law” (2005)122 SALJ832 which states;

“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 ad judicature or decision making powers may as a general rule, exercise ...powers only once in relation to the same mater.....The (principle) is that once such a decision has been given, it is subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or valued by the decision maker”.

11. It is clear from the instant application that the 2<sup>nd</sup> respondent is seeking for grant of new orders which were not granted in the judgment. This court having discharged its mandate in determining the issues as presented by the parties is now *functus officio*. In the premises, this court has no jurisdiction to grant the orders sought in the application dated 11<sup>th</sup> October, 2024 and the same is hereby struck out with costs.

12. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 21<sup>ST</sup> DAY OF MAY, 2025**

**A. NYUKURI**

**JUDGE**

In the presence of;

Ms Wilunda for the 1<sup>st</sup> to 4<sup>th</sup> respondents

No appearance for the applicant

Court Assistant: M. Nguyai

