



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 118 OF 2015

(AS CONSOLIDATED WITH ELC NO. 87 OF 2015)

SHEILA KABOLE MABWA.....PLAINTIFF

VERSUS

JOSHUA ANGELEI.....1ST DEFENDANT

ROBERT LOBUR ANGELEI.....2ND DEFENDANT

GEDION LOITAMA ANGELEI.....3RD DEFENDANT

ALLAN EGILAE ANGELEI.....4TH DEFENDANT

AND

RICHARD SIMWA.....APPLICANT

RULING

The Application

1. The instant Application before me presents a unique situation. The Applicant is an individual who avers that he was not a party to the proceedings that gave rise to the judgment he seeks to review and set aside. This calls for the balancing of the interests of justice and the requirements of the law. The Application is a Notice of Motion dated 25/8/2021. The judgment it seeks to review was delivered on 3/12/2018. The Applicant wants to be permitted to be enjoined in the suit as a defendant in the suit. He also seeks the prayers abovementioned in the said Application. The other two prayers which were for having the matter being certified urgent and for stay of execution of the impugned judgment pending the hearing and determination of this Application were spent at the interim stage.

2. The Application is based on the grounds on the face of it and supported the affidavit of one, **Richard Simwa**, the Applicant herein. The grounds upon which the Applicant relies are that he was not a party to the suit and that the judgment of this court dated and delivered on 3/12/2018 affects his parcel of land being **No. Trans-Nzoia/Kaisagat/248**. Further, that the Applicant is entitled to bring the Application even though he was not a party to the suit.

3. In his affidavit sworn on 25/8/2018, **Richard Simwa**, depones that he owns 5 acres of land which he purchased from **Nancy Mabwa**. These comprise of all that parcel of land known as **No. Trans-Nzoia/Kaisagat/248**. His contention is that the land was initially part of all that parcel of land known as **Trans-Nzoia/Kaisagat/111** which was later subdivided into several portions. One of the portions was land parcel **No. Trans-Nzoia/Kaisagat/201** which was later sub-divided by **Nancy Mabwa** to other portions including **L.R. No. Trans-Nzoia/Kaisagat/248**. He acquired the said title by way of transmission after the death of the owner, one **Nancy Mabwa**. Judgment was delivered by this Court on the abovementioned date, declaring that the subdivision of the **Parcel No. 201** into parcels numbers **247, 248, 249** and **250** was illegal, null and void. He states further that he is aggrieved by the judgment of the court for reason that the Respondents are in the process of evicting him from the land. He avers that he has been in possession of the land parcel uninterrupted since **1992** and has developed it extensively.

4. In opposing the Application, the Respondents filed Grounds of Opposition dated 27/9/2021 and a Replying Affidavit sworn by one, **Joshua Angelei**, the 1st Defendant herein. The Replying Affidavit was sworn on the same date as the grounds of opposition. The grounds which are largely echoed in the replying affidavit. They are that this honourable court does not have the jurisdiction to review or set aside its judgment delivered on 3/12/2018 since there is a pending appeal filed in the Court of Appeal. The said Appeal was preferred by the Plaintiff. They state further that there is no ground for reviewing or setting aside the judgment, that the applicant cannot have a better title than the one held by the Plaintiff and, finally, that the Application has been brought after unreasonable delay.

5. This Court granted leave to the Applicant to file a Supplementary Affidavit. He filed one sworn by himself on the **30/9/2021**. By it, he deposes that the grounds of opposition lack merit. He reiterated that the court has the jurisdiction. He emphasized that he was not a party to the suit and that the judgment decrees the cancellation of his title without him being heard.

Submissions

6. The Applicant filed submissions on the **5/10/2021**. There are none on record filed on behalf of the defendants. Nevertheless, this Court will proceed to determine the Application based on the documents filed in relation to it. Absence of a party's submissions from the record will not prejudice the party's case because this Court is enjoined to analyse the facts in comparison with the law. After all, it has been stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**, as follows:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

Analysis and Determination

7. This Court takes cognizance of the fact that before the instant Application was filed, the Plaintiff who was an unsuccessful party in this suit, preferred an Appeal against the impugned judgment by filing it in the Court of Appeal Registry in Eldoret. The Appellant/Plaintiff filed in this Court a Notice of Appeal dated the **10/12/2018** on **11/12/2018**. He also sought for the typing of proceedings by way of a letter filed the same day. Later, on **20/2/2019**, a certificate of delay was issued by this Court. It would appear that the Plaintiff filed a Record of Appeal in the Appeal Registry soon thereafter. This is because, from **Annexure JA 3** of the Affidavit of one, Joshua Angelei, sworn on **27/09/2021**, the Record of Appeal dated **27/02/2019** was served on Kidiavai & Company Advocates on **11/03/2019**, together with a Memorandum of Appeal dated **27/2/2019**.

8. Upon careful consideration of the Application, the affidavits in support and in opposition, the grounds of opposition, the submissions on record as well as the law, this court frames the following issues for determination:

- (a) ***Whether the application and the prayers sought are properly before the court***
- (b) ***Whether judgment can be reviewed when an appeal has been preferred there from***
- (c) ***Whether the court has jurisdiction to entertain the application?***

9. The issues are discussed below, starting with the first one:

(a) Whether the application and the prayers sought are properly before this court

10. The Applicant in the instant Application was not a party in the suit, all through until it was concluded. He moved this Court on **26/08/2021** to be enjoined as a Defendant. At the same time, he sought to review the Judgment of the Court. The judgment was delivered in the matter earlier, on **3/12/2019**. That was about one year and eight months before the present Application. An individual who was a party to the suit, the Plaintiff, has appealed against the judgment.

11. The Applicant seeks to be enjoined as a defendant and prays that he be allowed to file pleadings in his defence to this suit. The Applicant has combined the prayer for being enjoined or added to the suit with those of setting aside and being granted leave to file his defence and pleadings. He has not sought leave to be enjoined as a party before being granted leave to be added as a party. This Court is of the view that a person cannot lawfully and successfully so move the Court for substantive prayers, such as setting aside a judgment or ruling, before he is enjoined in the suit. In so far as the individual makes such a move, the prayers are being sought by an ‘outsider’ who is unknown to the proceedings. Strangers are not to be fed with the children’s food. Put differently, once a suit has been filed, other persons other than the parties cannot effectively take part in the proceedings thereto unless they have been given leave of the Court to take part in them.

12. **Order 1 Rule 3** of the **Civil Procedure Rules** provides for joinder of persons as Defendants to suits. That is envisioned when **“...any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, ...”** This occurs, under **Order 1 Rule 1(2)** of the **Civil Procedure Rules**, at the point where a party files suit. Where a party does not do so, the Court can, at any stage of proceedings, either upon or without the application of either party, order the name of a person to be added as either a Defendant or Plaintiff as long as his presence is necessary in determining the issues at hand in the matter. This is provided for under **Order 1 Rule 10(2)** of the **Civil Procedure Rules**. The **Black’s Law Dictionary 9th Edition** at Page **1232** defines a “Necessary Party” as **“a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.”** In **Baluram vs P. Chellathangam & Ors** on **10/12/2014** the Supreme Court of India defined both a “necessary party” and “proper party.” It stated as follows:

“A “necessary party” is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a “necessary party” is not impleaded, the suit itself is liable to be dismissed. A “proper party” is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made.”

13. *Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887)*, making reference to **Order 1 Rule 10(2)** of the **Indian Civil Procedure** which is similar in all fours with Kenya's, state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.” This means that anyone can move the Court to be enjoined as a party as long as he is able to demonstrate that he is a necessary party in the proceedings. In the instant application, the Court would have considered the merits of the Application in relation to the requirements for a necessary party.

14. One aspect of the provision that remains to be considered is, whether joinder can be allowed irrespective of the stage of the proceedings. Bearing in mind that judgment has already been delivered in this matter, and even so, about one year and eight months ago, the issue becomes pertinent to grapple with. Are the proceedings at this stage those that an individual can be added into even though he may be a necessary one? In *Edgar-Gear Investments Limited v Guido Pallada & another [2021] eKLR* my brother Justice Yano considered a matter of similar nature. He was of the view that since execution of the judgment had taken place by the time the Applicant moved the Court, that was late in the day for him to do so. Thus, he declined the Application.

15. In *JMK -v- MWN & Another (2015)eKLR*, the Court of Appeal stated as follows:

“We would however agree with the respondent that Order 1 Rule 10 (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sarkar's Code (supra) quoting as authority, decisions of Indian courts on the provisions, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in Tang Gas Distributors Ltd -v- Said & Others (2014) EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage....”

16. The Sub-rules alluded above, that is to say, **Order 1 Rule 10(2)** are to the effect that a party may move the court to be enjoined as a party if their presence is necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. A careful reading of the provisions imports the idea that they apply to instances where the matter is still pending hearing and determination in contrast with the present case where judgment has been delivered. In essence, there is no pending suit to be adjudicated. What is pending for hearing and determination is the appeal which has been lodged at the Court of Appeal.

17. In so far as the matter has reached the judgment stage and its judgment is challenged before the Court of Appeal, the issue is not necessary to discuss now for the reasons given when discussing the issues that follow. But to the extent that the Applicant sought to be added as a party, that limb of the Application, namely, **Prayer 4** of the instant application was brought properly before the Court. Its merits or otherwise is what the Court has not gone into.

18. Now, turning to the two substantive prayers sought by the applicant, that is to say, the one for joinder as a defendant and the other for an order to file his defence, this Court starts by referring to the provisions cited in the Application. **Sections 3, 3A and 80** of the **Civil Procedure Act** provide for special jurisdiction of the Court where no provisions of law exist over an issue sought by a party, the Court using its inherent powers for the ends of justice, and review of an order or ruling respectively. **Order 45 Rule (1)** of the **Civil Procedure Rules** provides for somewhat similar reliefs as **Section 80** of the **Act**.

19. The first prayer to consider is whether or not the applicant can be enjoined in the suit at this stage. None of the provisions cited by the Applicant provide for the grant of the prayer. However, this Court applies its mind to **Article 159(2) (d)** of the **2010 Constitution** and moving away from the technicality of failure to cite the relevant law and go to the substantive merits of the prayer by looking at the relevant law.

20. **Section 80** of the **Act** and **Order 45 Rule 1** of the **Civil Procedure Rules** refer to any person who is aggrieved. These provisions, as discussed below, do not seem to limit the persons who may apply for a review. The determining ground for them is that they are “aggrieved” by the decision they seek to apply to review. Thus, the Applicant was right in bringing the Application, whether merited or not.

(b) Whether judgment can be reviewed when an appeal has been preferred there from

21. The issue that is pertinent to this Application is whether or not this Court can review its judgment while an appeal has been preferred therefrom. The starting point is consideration of the provisions of law that form the basis for review. As stated above, the relevant provisions are **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Rules**. **Order 45 Rule 1(a)** of the **Civil Procedure Rules** provides in the relevant part that *“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;...may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”* **Section 80** of the **Act** has similar wording. Thus, review is one avenue available to any person, in regard to a decision of the Court that he feels aggrieved by. Appeal is another, if the law permits it. But the question is, are the two available to a party at the same time?

22. The provision is clear that a review is not available where an appeal has been preferred from the decree or order. The relevant part of the phrase is, “from which no appeal has been preferred.” In my view, it is immaterial who has preferred the Appeal. Once that is done, and another party or person still feels aggrieved by the same issue, he or she is barred by law from applying for review, until the higher Court to which the Appeal was preferred pronounces itself on the issue.

23. Secondly, it does not matter who is seeking to move the court for review. Put in question form, does the position change if an aggrieved

person is or was not a party to the proceedings? To answer that question requires a logically analyzed one: if the right to a review for a party who is in the matter as of right is curtailed once he appeals from the decision of a Court, how much more one who is not a party? His is an even more difficult situation. He has to cede ground until the parties to the suit have their fair game in the appellate Court and then, if perchance the Appellate Court refers the issue back to the trial Court he then applies to be enjoined. It is irrespective whether or not he was a party to the proceedings he seeks to review. The guiding noun is, "person". It is different from its counterpart, "party", that is used **Order 45 Rule 1 (2)** of the **Civil Procedure Rules**. The former is "all encompassing". It may include a party in the proceedings, while the latter refers to individuals who are in the matter (as parties).

24. An Applicant has a recourse for review only where "no appeal has been preferred" or "no appeal is allowed..." (Refer again to **Sec. 80** of the **Act** and **Order 45 Rule 1 (1) (a)** and **(b)** of the **Rules** respectively). It was submitted by Counsel for the Applicant that the filing of a Notice of Appeal cannot deprive a party of his right for and order of review under **Order 45(2)**. He relied on the Court of Appeal case of **Noradhco Kenya Limited v Loria Michele [1998] eKLR**. I wish to distinguish that authority with the instant case: in that authority the Applicant had filed only a Notice of Appeal.

25. In the instant case not only has he filed a Notice of Appeal but has even filed a Record of Appeal. Again, in my respectful view, I would depart from that decision cited, given that there are subsequent authorities from the same Court that have held that the filing of a Notice of Appeal is itself equated to filing an Appeal. I know I am bound by the doctrine of judicial precedent and stare decisis for that matter. But where it commends to me that the higher Court arrived a wrong interpretation of the law, I am duty bound to point out the error by distinguishing the authority from my conclusion.

26. Regarding the above view, I believe, respectfully, that the learned Judge was in error. On this, I rely on the more recent Court of Appeal case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR**, where their Lordships held, "The appellant submitted that though no substantive appeal had been filed, a notice of appeal had been lodged... Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling."

27. In any event, a grammatical reading of **Rule 2(2)** of the **Court of Appeal Rules** yields the idea that an appeal to include an intended appeal. It reads, "“appeal”, in relation to appeals to the Court, includes an intended appeal;..." Intent does not exist in a vacuum, it is shown by a filing of a Notice. This was the holding by their Lordships in the above-cited case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR** where they held: "It is immaterial whether the substantive Appeal has been filed or not. Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal...There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal." Thus, an intended Appeal to the Court of Appeal occurs when a party lodges a Notice of Appeal in the right Registry.

28. The reason why the provisions barring a person from seeking review when there is pending an appeal from the decision were put in place was to avoid occurrence of two things: one, running of parallel proceedings and hence having the possibility of having two separate different outcomes or decisions and, two, leaving the subject matter to subsist in the Court that has jurisdiction over it at that moment. An explanation of these two reasons is apt. The latter one is discussed.

29. Looking at the first one in comparison with the present Application, the Applicant wants this Court to review its judgment delivered on **3/12/2018**. The Appellant wants to set aside the said judgment. Supposing this Court agrees with the Applicant and reviews the judgment while the Court of Appeal confirms it, or vice versa? How shall the situation be resolved? What an absurd situation that would be! Common Law came into existence for good order and certainty. Supposing this Court agrees with the Applicant and reviews the Judgment before the Court of Appeal determines it, will that not be a way of destroying the substratum of the Appeal? The above loud thoughts must have been the wisdom behind the requirement of **Order 4 Rules 1(2)** and **1(5)** of the **Civil Procedure Rules** about disclosure by parties of the fact that there is no suit pending or previous proceedings between the same parties over the same subject.

30. The second aspect deals with the jurisdiction which a Court seizes over a subject matter before it. This court has noted that there is a pending appeal before the Court of Appeal. It is not yet given a number by the Registry in the Eldoret Court Appeal. From the Notice of Appeal filed in this court on **10/12/2018** and served on **14/12/2018** and now referred to as **Annexure JA2** in the Affidavit of Joshua Angelei, and the Memorandum of Appeal filed in the said Appellate Court Registry in Eldoret in early **2019** and served on the Respondent on **11/03/2019**, the Appellant is seeking a determination by the Court of Appeal on the whole of the judgment of this Court. From the first and second ground of appeal in the said Memorandum of Appeal, the Appellant seeks the finding of that Court to the effect that this Honourable Court erred in finding the subdivision of **Trans Nzoia/Kaisagat/201** into parcels Nos. **247,248, 249** and **250** illegal, null and void. The second ground seeks to declare that the decree of this Court cancelling the title deeds above mentioned was in error. These, among many grounds, are issues that emanate from this judgment dated **3/12/2018** that is sought to be reviewed herein.

31. The Applicant alleges that he was not aware that the matter had been instituted before the Court of Appeal. Even after his Counsel being served with a Replying Affidavit which shows that an appeal has been preferred against the judgment of this Court, both he and the Applicant submit that the Applicant does not know that such an appeal exists. I find that puzzling. Or is it for the sake of arguing that this argument is put forth? Again, elsewhere in the submissions the Applicant submits that the fact that an appeal has been preferred does not disentitle the Applicant his right to apply for review. These arguments are self-defeating. One cannot say he is not aware of anything and again recognize its existence. Even assuming that the Applicant was not aware of the appeal and did not participate in the proceedings, does that change the position of the law? In my view it does not. The application has been brought when the subject matter has been moved to the Court of Appeal. It is the one now seized of jurisdiction it. As such, any application after the delivery of the judgment and where an appeal has been preferred could at best have been filed before the Court of Appeal where the subject matter is pending hearing and determination. This court is of the considered view that the application before it is improperly filed.

32. The claim naturally follows the subject, and jurisdiction does likewise. In essence, once a court is seized of jurisdiction over a certain subject, that divests all others of jurisdiction over the same. This is what this court may refer to as momentary suspension of all other jurisdictions until that subject moves legally to any such other judicial body as provided by law. And once the subject moves to that other judicial body properly authorized to handle it, the next body legally assumes jurisdiction over that subject thereby causing the previous forum

to experience momentary suspension of its jurisdiction. It is momentary in the sense that there is a possibility that once done with the subject, the second forum, for instance, the Court of Appeal, may refer the subject back to the former. In that case the former forum once more assumes jurisdiction over the subject. This means that as long as the matter is legally before one forum for adjudication, other forums can only watch and wait for the decision of the forum with currency in the subject. In this case, the subject is in the hands of the Court of Appeal at the moment.

33. Therefore, this court is of the considered view that any issue that a party wishes to raise in relation to the subject of this suit ought to raise the same in the Court of Appeal where the matter rests at the moment. In so far as this Court is concerned at this stage, there are no proceedings pending before it to ground the Applicant's right to move the Court to be enjoined. This view, coupled with the discussion above about momentary suspension of jurisdiction, lead this Court to find that the correct forum that the instant application ought to have been filed in.

34. Illustratively, in the competitive world where it is survival for the fittest, nature has given vultures 'jurisdiction' (the self-conscious right) over eating meat from carcasses. Thus, for those who believe in the Holy Scriptures of the Bible, at one time the Great Teacher said, in **Luke 17: 37**, "For wherever the carcass is, there vultures will be gathered together". In this example, the subject matter over which a court has jurisdiction may be equated to a "carcass" and the "vultures", litigants who desire to hew the "carcass". Hence by comparison with this wise saying, once an appeal was preferred against the judgment of this Court, there is no "carcass" in it at this stage: it has moved to and is in the Court of Appeal. There the vultures should gather the relief of hewing the carcass. The call by the Applicant for a gathering in this Court at this stage is misplaced.

35. Therefore, the applicant ought to have addressed the issues herein before the Court of Appeal. In the case of **Karani 47 Others V Kijana & 2 Others (1987) KLR 557** the court held thus:

"....once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."

36. I have shown above that the Defendant raised grounds of opposition challenging the jurisdiction of this court to hear and determine the instant Application. Their contention is that there is an appeal which has been filed challenging the courts judgment dated **3/12/2018** before the Court of Appeal. I agree. The applicant on the other hand has urged the court to find that he is not barred from filing the instant application before this court hence the court has jurisdiction to entertain the Application. He relies on **Order 45 Rule 1(2)** of the **Civil Procedure Rules** and the case of **Noradhco Kenya Ltd vs. Loria Michele Civil Application No. 258 of 1997** in support of their contention.

37. It is common ground that this court already rendered its judgment and the plaintiff has lodged an appeal against the judgment. The appeal is pending hearing and determination. A court is only empowered to determine issues before it when it is vested with the jurisdiction. Whereas the court may entertain an application for **review and setting aside of judgment together with an application for stay of execution pending appeal** brought under the relevant provisions of the law, it does so only when it is seized with the jurisdiction. I have explained previously above how jurisdiction may keep moving from one court to another but cannot vest in two forums at the same time over the same issues by same parties. What essentially happened in this matter is that once this Court delivered its judgment on **03/12/2018**, it became *functus officio* except for post-judgment procedures. When that happened the Court ceded its jurisdiction to another Court.

38. In the case of **Menginya Salim Murgani vs. Kenya Revenue Authority (2014)eKLR** the Supreme held that:

"it is general principle of law that a court after passing judgment, becomes *functus officio* and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."

39. Similarly, in the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR** the Supreme held that:

"[18] ... 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]."

40. Reliance is made to the above cited decisions. I will not re-invent the wheel. In the instant case, the Application has been brought when the court has already rendered its judgment and decree extracted ready for execution. It is not in doubt that the matter is at the execution stage and there are no orders for stay of execution issued. No party has demonstrated that there is such an order in force.

41. Again, as earlier stated in this ruling, the matter is pending appeal. That being the position, the jurisdiction of this court is held in abeyance until the Court of Appeal holds otherwise. I say so because, two courts of different jurisdictions cannot have the jurisdiction to deal with the same subject matter at the same time. There is no provision of allowing courts to have parallel jurisdictions.

42. Even assuming I was to find that this Court is not *functus officio*, entertain this application and the application succeeds, of what benefit would the order for enjoinder be while the matter is pending hearing and determination in the Court of Appeal for I would do nothing more? It would be an exercise in futility.

43. Jurisdiction is everything and without it, the court will not carry any tools and if it already had them in the hands it downs them. In the celebrated case of the Owners of Motor Vessel "Lilian S" vs Caltex Oil Kenya Ltd (1989) KLR1 the Court held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

44. This court is of the considered view that momentarily it does not have the jurisdiction to hear and determine the Application dated 25/8/2021 as the subject is pending hearing and determination of the appeal before the court of appeal. The applicant may champion his case where the subject it.

45. I need not say more since I have said enough. I therefore down my tools at this point. Resultantly, as I do so, I strike out the Application dated 25/8/2021 with costs to the Defendants.

Orders accordingly.

Dated, signed and delivered at Kitale via electronic mail on this 19th day of November, 2021.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE