



Mwariama & 18 others (Suing on their own behalf of about 3,000 Residents of Timau Area in Buuri West Sub-County) v Commisison & 5 others; Meru County & another (Interested Parties) (Environment and Land Petition E010 of 2020 & Petition 1 of 2022 (Consolidated)) [2025] KEELC 5193 (KLR) (23 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND PETITION E010 OF 2020
& PETITION 1 OF 2022 (CONSOLIDATED)**

JO MBOYA, J

JUNE 23, 2025

BETWEEN

**JOEL MWARIAMA & 18 OTHERS & 18 OTHERS & 18 OTHERS PETITIONER
SUING ON THEIR OWN BEHALF OF ABOUT 3,000 RESIDENTS OF TIMAU
AREA IN BUURI WEST SUB-COUNTY**

AND

**NATIONAL LAND COMMISISON 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
CABINENT SECRETARY FOR LANDS AND PHYSICAL
PLANNING 3RD RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT
NYAKIO HOLDINGS COMPANY LTD 5TH RESPONDENT
KARARI WAMBUGU GITUMBI 6TH RESPONDENT**

AND

**MERU COUNTY INTERESTED PARTY
COUNTY COMMISSIONER, MERU COUNTY INTERESTED PARTY**

RULING

1. The 5th & 6th Respondents to the petition [who are the Applicants herein] filed the Application dated 4th March 2025; and wherein same have sought the following reliefs:



- i. That this Application be certified as urgent and service of the same upon the respondents be dispensed with the first instance.
 - ii. That the Meru County Executive Committee member in charge of lands, physical planning, urban development, housing and public works, namely; Monica Kaithiori Kathono and the Meru County Surveyor, be ordered not to interfere with any part of the suit property herein, namely plot No. L.R 2890 Timau Township Buuri Sub county, Meru county in particular the portion of fifty (50) acres of land thereof that adjoins plot No. L.R 7452 Laikipia County pending the hearing the determination of this matter.
 - iii. That the Meru County Executive Committee member in charge of lands, physical planning, urban development, housing and public works, namely Monica Kaithiori Kathono and the Meru county surveyor be ordered not to interfere with any part of the suit property herein namely plot No. L.R 2890- Timau Township Buuri Sub county, Meru county (in particular the portion of fifty 50) acres of land thereof that adjoins Plot No. L.R 7452 Laikipia County pending the hearing and determination of this application inter partes.
 - iv. That pending the determination of prayer No. 4 hereunder, that an order be made that until the National Land Commission will have determined the issue relating to the fifty (50) acres of land forming part of Plot No. L.R 2890 Timau Township Buuri Sub-county, Meru County which adjoins plot No. L.R 7452 Laikipia county, that the Meru county government its servants or agents, particularly Meru County Executive Committee member in charge of Lands, physical planning, urban Development, housing and public works, namely Monica Kaithiori Kathomo and the Meru county Surveyor be directed not to make any decisions touching on or affecting any portion of the said fifty (50) acres of land.
 - v. That any orders issued by the court herein be implemented by the OCS, Umande Police Station, Meru County.
 - vi. That the costs of this Application be provided for.
2. The application is anchored on the various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of Wachira Wambugu Gitumbi [the Deponent] sworn on the 4th of March 2025 and a further affidavit sworn by the same deponent on 26th March 2025 and to which the deponent has annexed two [2] critical letters relative to the subject dispute.
 3. The Petitioners filed grounds of opposition to the subject application and wherein the Petitioners have raised and highlighted various issues, inter-alia that the court is divested of the requisite jurisdiction to entertain and adjudicate upon the subject matter; the court is functus officio; and that the subject application is tantamount to inviting this court to sit on an appeal on the decision of a court of coordinate jurisdiction.
 4. The 2nd & 3rd respondents [represented by the Hon. Attorney General] filed grounds of opposition dated 10th April 2025 and wherein the named respondents have also contested the jurisdiction of the court to entertain the subject application and to grant the reliefs sought. Moreover, the named respondents have reiterated the position taken by the petitioner, namely; that the court is functus officio.
 5. The application came up for hearing on the 27th of March 2025 whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions. To this end, the



court proceeded to and issued directions including prescribing the timelines for the filing of written submissions.

6. The applicants herein filed written submissions dated 4th June 2025; and wherein same has highlighted two [2] salient issues, namely; that the County Government of Meru has acted in contempt of the judgment and decree of the court; and that the current application is not an invitation to the court to re-write the judgment, either as contended or at all. Furthermore, it has also been posited that the court is not functus officio.
7. Regarding the first issue, learned counsel for the applicants has submitted that the judgment of the court, which was delivered on 5th October 2022, contained clear directions pertaining to the subject dispute. Nevertheless, it has been submitted that despite the clear and explicit terms of judgment, the County Government of Meru has since proceeded to and issued a letter dated 10th March 2025; and wherein same sought to proceed with the allocation of the suit property albeit without having determined the applicant's request for regularization of the use and or occupation of the suit property.
8. Moreover, it was submitted that in so far as the actions complained of constitute contempt, the court should take appropriate action to punish and penalize the County Government of Meru. To this end, learned counsel for the applicants has cited and referenced the decision in the case of Shimmers Plaza Ltd vs National Bank of Kenya Ltd (2015) eKLR.
9. Secondly, learned counsel for the Applicant[s] has submitted that the judgment of the court ought to be implemented and the implementation thereof ought to be intended to ensure that the parties to the proceedings are not prejudiced. Nevertheless, it has been submitted that the County Government of Meru and National Land Commission do not appear to be keen to have the judgment implemented and thus the endeavors by the County Government of Meru to frustrate the judgment of the court as pertains to the suit property.
10. Thirdly, it has been submitted that the current application is not intended to invite the court to rewrite the judgment. Furthermore, it has been submitted that the court is not functus officio. On the contrary, it has been posited that the court retains some residual jurisdiction to ensure that orders of the court are fully complied with and or adhered to. In this regard, learned counsel for the Applicants has referenced the overriding objectives [Oxygen Principles] of the court.
11. Flowing from the foregoing, learned counsel for the Applicant[s] has therefore submitted that the application before the court is meritorious and therefore same ought to be allowed.
12. The Petitioner/respondent filed written submissions dated 28th May 2025 and wherein the petitioner has highlighted two [2] salient issues namely, that the court is divested of the requisite jurisdiction to entertain the subject application; and the court is functus officio as pertains to the subject application.
13. Regarding the first issue, learned counsel for the Petitioner has submitted that the court entertained and adjudicated upon the petition that was filed before it. Furthermore, it has been posited that upon the hearing of the petition, the court rendered a judgment determining the issues in dispute.
14. Premised on the foregoing, it has been submitted that the applicants herein cannot now revert back to the court and seek further orders of injunction, which orders had been canvassed and granted by the court at the foot of the Judgment.
15. To buttress the submissions on the issue of jurisdiction, learned counsel for the Petitioner has cited and referenced various decisions, including Owners of Motor Vessel Lillian "S" vs Caltex Oil Kenya Ltd (1989) eKLR; Samuel K. Macharia & another vs Kenya Commercial Bank & 2 others (2012) eKLR.



16. As pertains to the second issue, learned counsel for the petitioner has submitted that the issues being raised by the applicants herein were canvassed and dealt with by the court. In this regard, it has been submitted that the court is functus officio.
17. The Honourable Attorney General filed written submissions and wherein same has reiterated the position taken by the petitioner. Pertinently, the Honourable Attorney General has posited that the court is functus officio and cannot now be invited to issue orders that would be at variance with the Judgment of the court.
18. Having reviewed the application and the responses thereto and upon consideration of the written submissions filed on behalf of the parties, as well as taking into account the applicable law, I come to the conclusion that the determination of the subject application turns on three [3] key issues namely; whether the affidavit underpinning the application are competent and legally tenable or otherwise; whether the application herein is tantamount to inviting the court to sit on appeal on the decision of a court of concurrent jurisdiction; and whether the court is functus officio.
19. Regarding the first issue, it is instructive to note that the supporting affidavit sworn on the 4th of March 2025; has been commissioned by a Commissioner for Oaths, namely;
Sikuku Irene Nafuna
Advocate & Commissioner for oaths
Box 87669 – 80100
Mombasa
20. It is also worthy to note that the current application has been crafted and filed by the Law firm of;
Ms. Gikandi & Co. Advocates
Box 87669 – 80100
Mombasa
21. Additionally, the Further affidavit sworn on 26th March 2025; has also been commissioned by:
Sikuku Irene Nafuna
Advocate & Commissioner for oaths
Box 87669 – 80100
Mombasa
22. What becomes apparent is that the commissioner for oaths who administered the oath at the foot of the supporting affidavit and the further affidavit, respectively, shares the same postal address as the law firm that crafted the application. To this end, it is evident that the commissioner of oath is either a partner, associate or in some way connected with the law firm that crafted the application.
23. In my humble albeit considered view, the provisions of Section 4 of the *Oaths and Statutory Declarations Act* prohibit the commissioning of an affidavit by an in-house counsel, advocate, partner and or associate. The provisions of Section 4 of the *Oaths and Statutory Declarations Act* [supra] are couched in mandatory [peremptory] terms.
24. For ease of appreciation, it suffices to reproduce Section 4 of the *Oaths and Statutory Declarations Act*.
25. Same are reproduced as hereunder;



Powers of commissioner for oaths

- (1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

26. Bearing in mind the provisions of section 4 of *Oaths and Statutory Declarations Act* [supra] and taking into account the similarities of the postal address used by the commissioner for oaths and the law firm for the applicants, I am persuaded that the situation beforehand constitutes in-house commissioning, which is prohibited by the law.
27. Additionally, in so far as the commissioning of an affidavit by a partner, associate or such other person connected with the matter is prohibited under the law, the supporting affidavit and the further affidavit are therefore rendered illegal and invalid. To this end, the said affidavits cannot be deployed to support and or anchor the application beforehand.
28. Flowing from the foregoing analysis, I come to the conclusion that the two [2] sets of affidavits beforehand are therefore null and void. In this regard, same are thus amenable to be struck out. For coherence, same are hereby struck out and expunged from the record of the court.
29. Having struck out and expunged the two [2] sets of affidavits, it then means that the application beforehand is not anchored on any affidavit. To this end, the application is rendered deficient and thus defective. It thus exposes itself to be struck out.
30. Regarding the second issue, it is worthy to recall that the subject petition was heard and determined by Hon. Justice C. Nzili, Judge *vide* Judgment rendered on 5th October 2022. In particular, the Judge issued directions pertaining to maintenance of the status quo for a duration of one year with effect from 5th October, 2022.
31. For ease of reference, limb four [4] of the judgment stated as hereunder;

Pending the hearing and determination of the request in one above, the status quo obtaining as at the date of this judgment to subsist for a period of one year.
32. It is instructive to note that the duration of one year [referenced at the foot of limb 4 of the orders that were granted by the judge] lapsed and or stood extinct on 4th of October 2023. In any event, it is not lost on me that the applicants herein have never sought to review the terms of limb 4 of the judgment or otherwise seek to extend the said timelines. Simply put, the position remains as it was posited in the judgment under reference.
33. Despite the fact that the judgment rendered on 5th October 2022 has neither been reviewed or otherwise, the applicants herein are now before the court seeking for an order of injunction which is intended to subsist until National Land Commission [NLC] will have determined the issue relating to the 50 acres of land forming part of plot number 2890 Timau Township Buuri sub-county, Meru County.



34. To my mind, the issuance of such an order on the face of an existing Judgment shall bring forth two parallel orders on record. Firstly, there is the judgment which circumscribed the orders of status quo to last for one year only and not otherwise. The said orders have not been extended.
35. Nevertheless, the situation beforehand will culminate into another set of orders, which are evidently at variance with the judgment. Such a scenario brings into disrepute the doctrine/principle of a court of record. Suffice it to underscore that a court cannot issue subsequent orders which are at variance with previous orders that have not been varied, reviewed and or set aside.
36. On the other hand, the 2nd situation that does arise is that two Judges of concurrent jurisdiction shall have made two sets of orders that are in conflict. To my mind, this situation is unfathomable and likely to culminate into absurdity. Instructively, if the applicants were minded to seek refuge in court, then there are several avenues prescribed under the law for purposes of implementing the judgment of the court.
37. Before departing from this issue, it is imperative to reiterate that a court of concurrent jurisdiction cannot issue orders that contradict the previous orders of a similar court. Such a scenario would be tantamount to sitting on appeal on the Judgment/decision of the previous court.
38. In the case of Kenya Hotel Properties Limited *v Attorney General & 5 others (Petition 16 of 2020)* [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment) the Supreme Court of Kenya [the apex Court] expounded on the principle on the following terms;

We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction, much less those courts higher than themselves.

39. Regarding the third issue, it is important to highlight that the petition beforehand was heard and determined by the court and thereafter the court, in its wisdom, declined to grant an order of permanent injunction which was one of the orders that had been sought by the current applicants. [See prayer [d] at the foot of the petition dated 23rd July 2020].
40. To the extent that the learned judge did not grant an order of permanent injunction or, better still, an injunction of whatsoever nature, the applicants herein cannot now revert to court and seek by sidewind an order which had hitherto been declined. To my mind, the applicants herein are inviting the court to re-engage with the same issues that had been previously canvassed and determined by a court of competent jurisdiction.
41. I agree that the judgment of the court issued several declaratory orders and commanded National Land Commission to take certain actions. However, if National Land Commission [NLC] has not undertaken the commanded actions, then the applicants should address their grievances in the manner known to law.
42. However, the applicants cannot choose to come back to court and seek precipitate orders through the back door. Such kind of endeavors are frowned upon by the doctrine of *functus officio*.



43. The legal import and tenor of the doctrine of *functus officio* was aptly elaborated upon in the case of *Telkom Kenya Ltd vs John Ochanda* [suing on his behalf and on behalf of 996 former employees of Telkom Kenya Ltd] [2014] eKLR where the Court of Appeal expounded the doctrine in the following manner;

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd vs Ai Thani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

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 or adjudication must be taken to a higher court if that right is available.”

44. Taking into account the foregoing exposition of the law, I come to the conclusion that the prayers sought at the foot of the current application and in particular prayer 4 thereof is prohibited by the doctrine of *functus officio*. Further and in any event, any endeavor to re-engage with this matter shall be tantamount to reopening the matter afresh.

Final Disposition

45. For the reasons which have been highlighted in the body of the ruling, it must have become evident that the application beforehand is not only premature and misconceived, but same is also legally untenable.
46. Consequently, and in the premises, the final orders of the court are as hereunder;
- I. The Application dated 4th March 2025 be and is hereby dismissed.
 - II. Costs of the Application be and are hereby awarded to the Petitioner; 2nd and 3rd Respondents only.
 - III. The Costs in terms of clause [II] shall be agreed upon and in default be taxed by the Deputy Registrar of the court.
47. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF JUNE 2025

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Mr. Mutuma- Court Assistant.

Mr. Eliud Otieno holding brief for Mr. Gikandi for the 5th & 6th Respondents/Applicants

Mr. Kurauka for the Petitioner/Respondent



Miss Miranda for the 2nd & 3rd Respondents

No appearance for the rest of the Parties.

