



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO.690 of 1997

IN THE MATTER OF THE APPLICATION BY LEPAPA OLE KISOTU FOR ORDERS OF CERTIORARI

NTULELE GROUP RANCH.....1ST RESPONDENT

DISTRICT COMMISSIONER, NAROK.....2ND RESPONDENT

AND

IN THE MATTER OF AN APPLICATION BY LEPAPA OLE KISOTU FOR THE ENFORCEMENT OF THE ORDERS MADE ON THE 2.7.1998 AND SUBSEQUENT ORDERS

1. SANKALE OLE KISOTU
2. SALAU OLE KILUSU
3. SALASH OLE MATINDA SILAU
4. KOSIOM OLOISONGA KISOTU
5. KAPALE OLE SIMIREN
6. OLNASHAR OLE PUNYUA
7. KIPAYIAN OLE SHONKO
8. NTARI OLE SHONKO
9. KONTEA OLE KILUSU
10. PARSAPIYO OLE KILUSU..... INTERESTED PARTIES

RULING

Introduction

1. This ruling arises from the Notice of Motion dated 25th April, 2012 in which the applicant **Lepapa Ole Kisotu** seeks the following orders:

1. **THAT this matter be certified urgent and heard ex-parte in the first instance.**

2. **THAT as ordered severally by the Honourable Court, the District Land Adjudication and Settlement Officer, Narok be and is hereby ordered do proceed and adjudicate on Lepapa Ole Kisotu land with the aid of the District Surveyor, Narok North District and the chairman of the Ntulele Group Ranch and Survey out the Applicants Plot No.1 Ntulele Group Ranch Parcel No.259 Oltepesi Ntulele Adjudication section measuring 612 acres of the area known as Oltepesi section. The same be done within thirty (30) days of the orders.**
3. **THAT in default or compliance with the above order as ordered, the Deputy Registrar, High Court of Kenya, Nairobi Law Courts be and is hereby ordered to execute the conveyance and/or transfer of the 612 acres of plot No.1 Ntulele Group Ranch parcel No.259 Oltepesi Ntulele Adjudication section and the Director of Land Adjudication and Settlement, Ministry of Lands, Nairobi do act on the said conveyance/transfer, register the same and issue the applicant with a title deed for the 612 acres of Plot No.1 Ntulele Group Ranch in an area known as Oltepesi section.**
4. **THAT upon the adjudication, surveying out and registration of the applicant parcel of the land in terms of prayer 2 and 3 above, the persons residing thereon having been declared trespassers and to be evicted in the orders of the 12th day of May 1999 are hereby in reiterating the said orders declared trespassers and orders of eviction do issue accordingly to be executed by the court bailiffs and the OCPD Narok Police Division do provide the security to oversee the peace and security during the eviction**
5. **THAT all parties do observe law and order.**
6. **The costs of this application be in the cause.**

Applicant's Case

2. The application is supported by an affidavit sworn by the applicant on 24th April, 2012.
3. According to the Applicant, on or about the 9th day of September, 1997 he lodged a Judicial Proceedings application in court for the orders of certiorari to quash a decision and order of the District Commissioner, Narok made on the 13th day of March, 1997 in land Appeal No. 240/88 wherein he had been ordered to vacate the land surrounding his homestead and disentitled to the development carried out thereon in which he claimed plot No. 259 Oltepesi/Ntulele adjudication section.
4. On the 2nd July, 1998 the Court quashed a decision the said decision and ordered that the status quo maintained including non-interference with the applicant's land. Thereafter on or about the 12th day of May, 1999 the court ordered the members of the Ntulele Group Ranch who were still interfering with the applicant's land by being on it be declared trespassers thereon be evicted. On or about the 29th day of May, 2003, the Applicant took out a Notice to show cause for the District Land Adjudication and Settlement Officer, Narok District to attend court and produce the Map relating to the Plot No.1 Ntulele Group Ranch whose acreage is 612 acres known as Oltepesi section and on the 31st day of July, 2003 upon hearing the Applicant's application the court directed that the land adjudication officer do adjudicate Applicant's land with the aid of the District Surveyor and the Chairman, Ntulele Group Ranch. Further to that on or about 16th day of November, 2005 the Honourable court ordered that the land dispute be surveyed and demarcated according to the survey.
5. However, despite all these orders were duly served upon the District Land Adjudication and Settlement Officer, Narok and the Director of Land Adjudication and Settlement, the same have not been implemented. Instead, the said District Land Adjudication and Settlement Officer, Narok has been shifting goal posts and on occasions alleging lack of the map for the Ntulele Group Ranch, a map which the Applicant insists exists and is readily available. Despite answering all the queries raised by the Applicant, the said orders have not been implemented despite seeking the assistance of several government offices.
6. According to the Applicant even an attempts by Sankale Ole Kisotu & 10 others to set aside the orders in his favour have all been unsuccessful.
7. In his view, court orders are not made in vain and ought to be implemented by the Court by assisting him secure the implementation of the said orders. by directing to the District Land Adjudication and Settlement Officer, Narok to implement the court orders in place in his favour

- within a time frame of thirty(30) days and in default the Deputy Registrar of the High Court Nairobi do execute the necessary conveyances, transfers to give effect to the said orders.
8. In a rejoinder, the Applicant filed a supplementary affidavit sworn on 10th August, 2012 in which he deposed that the acreage of his parcel of land has since been ascertained to be the 612 acres and that the acreage thereof has severally been addressed and there are on record, the maps, the acreage, the sketch map. Further, in a letter dated the 19th day of February, 2008 by the District Land Adjudication and Settlement Officer Narok to the Director of land adjudication the said District Land Adjudication and Settlement Officer Narok District sought direction but more importantly confirmed that they are aware of a claim for land by Lepapa Ole Kisotu which he stated to be 600 acres. According to him, here has been several attempts to implement the said Orders by the District Land Adjudication and Settlement Officer, Narok District and it is in bad faith to now turn around and state that parcel No.259 Oltepesi Ntulele Adjudication Section does not exist or that there is no map. There were attempts to implement the court order on the 3rd September, 2003, on the 22nd October, 2003, on the 5th December, 2003, just but the same was not implemented for various reasons namely; non-attendance of committee members of Ntulele Adjudication Section forcing the implementation to be postponed, that there were very many hostile people who blocked the road some kilometres to the site making it impossible to access the place and the implementation team had no option but to return and of course the reason that the map does not exist. It was therefore deposed that the failure by the District Land Adjudication and Settlement Officer, Narok North District to implement the court order has been through a catalogue of excuses intended to defeat the realization of the fruits of the litigation to the advantage of the people who are busy sub-dividing the farm. Since the adjudication of the Oltepesi section is now on, the whole notion that there are Orders in **Nairobi HCMC No.871 of 2005** is hollow.
 9. Taking into account the final nature of the orders granted, the Applicant's position was that without any injunction or restraining orders or an appeal, he did not wish to be drawn to clan fights between **Keekonyokie, Purko** and **Ildamat** clans of the Maasai.
 10. In the submissions filed on behalf of the Applicant it was contended that since what is sought in this application is the implementation of the Court's already made decision this Court has jurisdiction to grant the orders sought and pursuant to Article 159(2)(d) of the Constitution, the Court ought not to allow procedural technicalities to defeat the course of justice.
 11. While recognizing the existence of the doctrine of separation of powers, it was submitted that the Courts have the interpretative role including the last word in determining the constitutionality of all government actions which is also an incidence of separation of powers.
 12. According to the Applicant he is not praying for a new right but an existing right, a tail-end remedy to assuage his suffering and bring to an end the long history of litigation.

Respondent's Case

13. In response to the application the Respondent filed a replying affidavit sworn by **Okenyi Odari**, the Land Adjudication and Settlement Officer, Narok North District on 18th July, 2012.
14. According to the deponent, he has not refused to enforce any of the court orders as claimed by the Applicant. However the same are incapable of being enforced for the reasons that parcel **No. 259 Oltepesi Ntulele Adjudication Section** does not and has never existed and what exists is **Oletepesi Section** which has not been adjudicated for the reason that there is a stay order against adjudication issued in **Nairobi HCMC No. 871 of 2005**; that the Applicant's claim is in respect of Ntulele Group Ranch No.1 (7) adjudication sections as of the 26th November, 1992 and it is not possible for the office to enforce the Court Order in regard to what does not exist; and that for the enforcement of this court order, it is necessary for a map to be published and in the instant case the map does not exist and therefore it is impossible to enforce the court order.
15. In his view since the Court did not specify the acreage as claimed by the Applicant, the Applicant has set out to mislead the Court hence he has come to Court with unclean hands. According to him the Applicant's claim for 612 acres is a new claim that needs to be determined hence the application herein is an attempt to mischievously determine acreage without adhering to the law.
16. It was further the deponent's view that Judicial Review application is a limited jurisdiction and the

orders sought cannot be issued as the Court is *functus officio* and acreage and ownership dispute cannot be determined by Judicial Review. According to him, the process of adjudication is determined by law and any attempt to carve out parcel of Land from Adjudication as sought by the Applicant can result to an illegality. He further contended that since his office was never a party to the main suit, it was never given an opportunity to be heard in regard to this matter and could not ventilate the above issues. Apart from that he contended that the Orders sought are bad in law as the same goes against the principle of separation of powers.

17. On behalf of the 2nd interested party it was submitted that the Court having granted the orders sought in the judicial review became *functus officio* under section 8 of the Law Reform Act. It was submitted that in the present application, the applicant is seeking a set of new orders against new parties, the District Land Adjudication and Settlement Officer, Narok and the Deputy Registrar of the High Court. To the Respondent the best the Court can do is to ensure compliance with the orders of 1998 and nothing more.
18. By seeking an order which had already been granted on 4th August, 2003, it was submitted that the matter is *res judicata*.
19. It was further submitted that since the parcel of land for which the orders are sought does not exist the Court ought not to grant the orders sought. Apart from that in light of the existence of an order in HCMA No. 871 of 2005, staying the adjudication of the section in question, to grant the orders sought herein would cause conflict and the Applicant is abusing the Court process.

Determinations

20. It has been contended the Court having granted the judicial review orders sought, it became *functus officio* and under section 8 of the Law Reform Act this Court has no jurisdiction to entertain the instant application. Section 8(2) of the **Law Reform Act**, Cap 26 Laws of Kenya provides:

No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

21. This provision has in some cases been construed to mean that once the Court makes a determination on an application in judicial review proceedings, the Court has no power to revisit those proceedings. This view was however disabused by the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** expressed itself as follows:

“Counsel for the respondent in his submissions, seems to suggest that where a law is silent on whether review is permissible, then courts must decline jurisdiction where a review is sought. While the court agrees with him that judicial review is a special jurisdiction, it does not agree that in clear cases, courts should nonetheless fold their arms and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is, otherwise, not to blame for circumstances he finds himself in. The Court in *Aga Khan Case* expressed the view, that review jurisdiction in cases as the present one, should be exercised sparingly and in very clear-cut cases... In the present case it was the Superior Court which put the appellant in the predicament it finds itself in. It was mistaken on the applicable law. The appellant acted promptly and sought an order reviewing the erroneous order. The court declined jurisdiction with the result that the limitation period expired. If that decision is not reviewed it would not have any remedy. It is hardship of that nature which the review jurisdictions should be exercised to obviate, more so if it is shown that the applicant did not contribute to that state of affairs. The case of *Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others vs. Kilach [2003] KLR 249*, does not hold that review is not available under Order 53 of the Civil Procedure Rules. It would be oppressive and an affront to common sense in a case like the one before the court where the court precipitated a situation for the same court to turn round and say it lacks jurisdiction to correct what is obviously a wrong decision, more so where, as here, the court was not addressed on the merits or otherwise of the application for leave. The court *suo moto* raised the jurisdictional issue without asking the applicant’s counsel to address it on the matter... There has been a debate as to whether or not Order 44 of the Civil

Procedure Rules applies to proceedings under Order 53. Whether or not Order 44, above, applies is a matter which should await another occasion. What is important is that the superior court in the matter before the court had the residual power to correct its own mistake. It may be that the appellant had cited the wrong provision of the law in its application for review. That *per se* would not deprive the court the power of correcting its own mistake which that court itself acknowledged it made.”

22. In my view the residual powers alluded to by the Court of Appeal is the inherent power of the Court. As held by **Ouko, J** (as he then was) in **The Matter of The Estate of George M’mboroki Meru HCSC No. 357 of 2004**:

“The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court’s jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

23. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005** held:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

24. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.

25. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.

26. Similarly, in **Mawji vs. Arusha General Store Civil Appeal No. 19 of 1969 [1970] EA 137**, the East African Court of Appeal held:

“A Court must have power to effect its orders. This is not a case of recalling an order but giving effect in one part of the order to the decision arrived at in another part. It would be non-sense to stultify the activities of any court of justice that it would be unable to give effect to a decision which it had just handed down. No provision of the rules should be so construed as to preclude a court from giving effect to its decision...Under the inherent powers of the court, a court should not be

precluded by anything incidentally set out in the Code or in the rules made under the Code from giving effect to its decision, and giving effect in a way which will result immediately in justice between the parties and in saving of unnecessary proceedings. Even if section 89(2) does give the power to give effect to this judgement by a separate suit, that would not preclude the High Court from giving effect to its judgement in a more efficacious way. Even if section 89(1) restricts the power given by it to the court of first instance, which in the circumstances of this case has no jurisdiction, to order restitution, and there is no provision elsewhere vesting this power in the High Court, that would not prevent the High Court giving effect to its decision. A court must have power, unless it is most clearly set out to the contrary by legislation, to give effect to its decision and that is all that the court sought to do here. It is not suggested that the discretion, which, of course must lie in the court as to the manner in which to give effect to its decision, was wrongly exercised in this case but the argument is that the court did not have the power to make this order. The Court is satisfied that it did, and, indeed, that any court must have the power to give effect to its decisions...There is an abundant authority for a court in certain circumstances to recall its order and the Court is satisfied that the inherent power of that court conferred upon it by the Civil Procedure Code would override the provisions of rule 3 of Order 20 of the Civil Procedure Rules.”

27. In Central Bank of Kenya & Another vs. Uhuru Highway Development Ltd. & 4 Others Civil Appeal No. 91 of 1999, the Court of Appeal held that a Court must only make orders, obedience of which it can compel and it is the Court’s duty to compel such obedience.

28. Similarly in Eastern Radio Services vs. Tiny Tots [1966] EA 392 where the then President of the East African Court of Appeal, **Sir Charles Newbold, P** held:

“There are, however, many occasions in which further matters remain for determination in the suit after final judgement has been given on one or more issues raised in the suit. If a litigant in the course of the proceedings for determination of such further matters wilfully disregards an order of the court, the court must have an inherent jurisdiction to make an appropriate order. In addition to this inherent jurisdiction Order 10 rule 20 when it speaks of liability of a plaintiff “to have the suit dismissed” must be construed in such circumstances as meaning a liability to have those issues which remain for determination in the suit dismissed. There is absolutely no difficulty in so construing that rule and every reason to do so. That being the position in law it is clear that the judge, in making the order that the suit as a whole be dismissed with costs, made an order in excess of his jurisdiction in respect of those matters which had already been finally determined. In so far , however, as his order related to matters still for determination in the High Court he had power to make the order; and such an order would have been an appropriate order in the circumstances of the case.”

29. It follows that the mere fact that a Court has given orders sought in judicial proceedings, it is not precluded from giving further orders in the matter to ensure that its decision is implemented. It would be a mockery of justice if the Court was made helpless after its decision to effectuate its decision. However, it is my view that the power to ensure its orders are implemented is a limited jurisdiction and does not justify the Court in reopening the matter and granting new orders which were not in the contemplation of the parties at the time they approached the Court. It must always be remembered that in judicial review only those orders which were sought in the Statement accompanying the application for leave and for which leave was granted can be granted in judicial review proceedings. To grant fresh substantive orders for which no leave was sought and granted is not permissible in my view. I derive support for this holding from the decision of **Musinga, J** (as he then was) in Republic vs. District Land Registrar Nandi & Another Ex Parte Tegerei & Another [2005] 1 KLR 521, where he held:

“The application dated 10th March 2004 was very unusual in that it was an application for an injunction made within an application for judicial review brought under Order 53 of the Civil Procedure Rules, and the judicial review matter had already been finalised when the orders of *certiorari* were granted as sought. Firstly, the Court became *functus officio* after it granted the orders for *certiorari* that had been prayed for and the matter could not be reopened so that injunctive orders could be granted. Secondly, it is common knowledge that under Order 53 , the

only remedies that can be granted are orders of *certiorari*, *mandamus* and prohibition. Injunctions cannot be sought in a matter commenced by judicial review. Thirdly, the applicant therein was praying for temporary prohibitory and mandatory injunctive orders against the interested party as well as a permanent injunction to restrain him from entering, remaining or using in any way LR No. Nandi Chepterit/856. The orders sought were also mandatory in nature in that it was anticipated that the OCS Kapsabet Police Station would evict the interested party from the aforesaid parcel of land. These orders were being sought when there was no matter pending between the parties herein following the finalisation of the judicial review matter. It is also not clear whether the said parcel of land exists any more as there are proceedings, which seem to indicate that the said title was cancelled.

30. This position is supported by the decision of Aroni, J in Peres Awiti Oyamo vs. Ouma Kumba Kisumu HCCC No. 131 of 2007 in which the learned Judge held that the court having delivered its judgement, no new matters can be introduced in the cause and as the issue of eviction was not raised during the hearing and determined as the matter revolved around the removal of the caution, all the issues raised were finally determined and was court is thus *functus officio*. The learned Judge further held that if the plaintiff was further aggrieved or if fresh issues emerged she was at liberty to bring a fresh suit for hearing and determination hence the application was misconceived and not properly before court and could not succeed.
31. It was further submitted that to grant the orders sought herein would amount to a violation of the doctrine of separation of powers. In Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), Ngcobo, J who delivered the leading majority judgement expressed himself as follows:

“The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle “has important consequences for the way in which and the institutions by which power can be exercised.” Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution...But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament “must act in accordance with, and within the limits of, the Constitution”, and the supremacy of the Constitution requires that “the obligations imposed by it must be fulfilled.”³⁴ Courts are required by the Constitution “to ensure that all branches of government act within the law” and fulfil their constitutional obligations.³⁵ This Court “has been given the responsibility of being the ultimate guardian of the Constitution and its values.” Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that “the obligations imposed by [the Constitution] must be fulfilled.” It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution... Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a “settled practice” or general rule of jurisdiction that governs judicial intervention in the legislative process...The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or “settled practice”. Where immediate intervention is called for in order to prevent the violation of the Constitution and the

rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object. The primary duty of the courts in this country is to uphold the Constitution and the law “which they must apply impartially and without fear, favour or prejudice.” And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.”

32. The learned Judge went ahead to hold:

“This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, “there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.” But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government.¹⁶⁶ When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O’Regan J explained in a recent minority judgment, “the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.” In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective.”

33. In my view, where a Court gives an order, to direct that the same be implemented by the executive *ipso facto* cannot be said to be a violation of the doctrine of separation of powers. It ought to be appreciated that the judiciary is usually handicapped when it comes to the actual implementation of its orders hence on occasions it may be necessary that appropriate directions be given to the executive to ensure the orders of the Court are implemented.

34. With respect to the prayer seeking that the Deputy Registrar executes the necessary documents, the Deputy Registrar ought not to be construed as a third party to the proceedings. The Deputy Registrar in executing documents carries out ministerial actions on behalf of the Court. Section 98 of the *Civil Procedure Act* provides:

***“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.*”**

35. Whereas it may be argued that section 98 of the *Civil Procedure Act* is inapplicable to judicial review proceedings, in my view there is nothing barring the Court from invoking similar powers

- in the exercise of its inherent jurisdiction.
36. It was contended that some of the orders sought herein have already been granted. If that be the position then this Court would be *functus officio* with respect to the said orders and to seek the same order would be an abuse of the process of the Court. The applicant has exhibited a copy of an order issued on 4th August, 2003 in which the Court ordered that the Land Adjudication Officer adjudicates on the applicant's land with the aid of the District Surveyor and the Chairman of the Ntulele Group Ranch so as to ascertain the acreage of the applicant.
37. In this case the main order which the applicant seeks is that, as ordered severally by the Honourable Court, the District Land Adjudication and Settlement Officer, Narok be and is hereby ordered to proceed and adjudicate on Lepapa Ole Kisotu land with the aid of the District Surveyor, Narok North District and the chairman of the Ntulele Group Ranch and Survey out the Applicants Plot No.1 Ntulele Group Ranch Parcel No.259 Oltepesi Ntulele Adjudication section measuring 612 acres of the area known as Oltepesi section and that the same be done within thirty (30) days of the orders.
38. On 12th May 1999 the Court issued an order to the effect that those members of Ntulele Ranch who are still interfering with the applicant's land by being on it, either by themselves, their agents and/or servants in disobedience of the Court order made in favour of the applicant on 3rd July, 1998 be and are hereby declared trespassers thereon and hereby ordered to be evicted, which eviction was to be carried out by qualified court bailiffs. In the instant application the applicant seeks that upon the adjudication, surveying out and registration of the applicant parcel of the land in terms of prayer 2 and 3 above, the persons residing thereon having been declared trespassers and to be evicted in the orders of the 12th day of May 1999 are hereby reiterating the said orders declared trespassers and orders of eviction do issue accordingly to be executed by the court bailiffs and the OCPD Narok Police Division do provide the security to oversee the peace and security during the eviction.
39. As clearly recognised by the applicant, the prayers sought in this application have been substantially granted in the past. The only problem has been the implementation of the orders already granted. In my view once the Court grants orders, the implementation thereof ought not to be by way of seeking the same orders. Our procedural and substantive law provides for execution of orders already granted and as already held hereinabove once the orders are granted unless for the limited jurisdiction of review, the court becomes *functus officio* in the matter.
40. This position was confirmed in **Eastern Radio Services vs. Tiny Tots [1966] EA 392** (supra) as follows:

“The fact that the High Court was again seised of the matter by reason of an order of the Court of Appeal which ordered a retrial on the determination of additional amount of damages does not make any real difference. The essential question is whether a judge in a suit in which some issues remain for determination, has jurisdiction under this rule or under the inherent power of the court to set aside, a final judgement already given by the High Court in respect of other issues in the suit. Such a position might arise, for example, where judgement has been on admissions under Order 12 rule 6, or where judgement has been given on liability in advance of any consideration of the issue of quantum. A judge has no such jurisdiction and this lack of jurisdiction stems from the fact that, subject to slip rule, as the court has already disposed of the particular issue in the suit by giving judgement on it, the court in respect of that issue is functus officio. It makes no difference whether that final decision is a decision of the High Court unaffected by any order on appeal, or whether it is a decision which has been confirmed on appeal, or whether it is a decision resultant from an order of the Court of Appeal on appeal. The sole question is whether the court has given a final decision on a matter so that it is no longer a matter in issue in the suit and thus no longer a matter in respect of which any further decision of the High Court can be given.”

41. Since the other orders sought were consequential to the grant of prayer 2 herein which the applicant recognised had substantially been granted severally in the past, the prayers sought herein are totally unnecessary.
42. However, before I conclude this ruling I wish to comment briefly on the Respondents' position that the orders made herein are incapable of being implemented. In **Menze and Others vs. Matata [2003] 1 EA 151**, it was held that although a litigant who has failed to comply with a

Court order for discovery should not be precluded from pursuing his claim or setting up his defence, where the failure to comply is due to wilful disregard of the order of the Court and is a great impediment in the course and the cause of justice in the matter, the litigant may be precluded from setting up his defence. In my view it is not the prerogative of a party or any person against whom a Court order is directed to decide that the same ought not to be complied with because it is impossible to be implemented. If circumstances are such that a Court order cannot for any reason be implemented along the lines directed by the Court, the person who is liable to implement the same ought to appropriately move the Court for review or variation thereof since the power to review or vary an order is not a preserve of the parties to the suit but is available to any person “considering himself aggrieved” by a decision.

43. It is therefore my view that this application was rendered unnecessary in light of the orders previously granted herein.

Order

44. In the premises the Notice of Motion dated 25th April, 2012 is dismissed but taking into account the conduct of the Respondents there will be no order as to costs.

Dated at Nairobi this 3rd June, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Arusei for the Applicant

Cc Kevin