



**Kombo & 2 others v Uhutta Properties Limited & another; Rahasi & 4 others  
(Interested Parties); Maisha Mabati Mills Limited (Objector) (Environment and  
Land Case 89 of 2021) [2025] KEELC 6547 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6547 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE 89 OF 2021  
LL NAIKUNI, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**SOMBO K KOMBO ..... 1<sup>ST</sup> PLAINTIFF**

**DZOMBO M KOMBO ..... 2<sup>ND</sup> PLAINTIFF**

**KOMBO W MWAMUMBO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**UHUTTA PROPERTIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR KWALE ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MDOE TUNGWA RAHASI ..... INTERESTED PARTY**

**JUSTUS MANGALE MUDZOMBA ..... INTERESTED PARTY**

**LUBANDO BAHASI NGWAYA ..... INTERESTED PARTY**

**JIRA KARUNGA NJONGOLI ..... INTERESTED PARTY**

**EINSTEIN CHARON GAZA ..... INTERESTED PARTY**

**AND**

**MAISHA MABATI MILLS LIMITED ..... OBJECTOR**



## RULING

### I. Introduction

1. The Honourable Court was called upon to make a determination to the Notice of Motion Application dated 5<sup>th</sup> May, 2025 by the 3<sup>rd</sup> Defendant/Applicant, Mabati Rolling Mills Limited. It was filed pursuant to the provisions of Articles 40, 48 & 50 of the Constitution of Kenya 2010, Sections 1A,1B & 3A of the Civil Procedure Act, Cap. 21, Sections 3 & 13 of the Environment and Land Court Act, No. 19 of 2011, Order 1 Rule 10 [2], Order 51 Rule 1 of the Civil Procedure Rules 2010 and other enabling provisions of the law.
2. Upon service, the application was opposed by the Plaintiffs/Respondents through filing both of a Replying Affidavit dated 4<sup>th</sup> June 2025. Additionally, the Plaintiffs/Respondents raised an objection by filing a Notice of Preliminary objection dated 4<sup>th</sup> June 2025. The Honourable Court shall be dealing with these issues at a later stage of this Ruling accordingly.

### II. The 3<sup>rd</sup> Defendant/Applicant's case

3. The 3<sup>rd</sup> Defendant/Applicant sought for the following orders.
  - a. Spent.
  - b. Spent.
  - c. That this Honourable Court be pleased to issue an order setting aside, varying and or quashing the Judgement dated and delivered on 24<sup>th</sup> June 2024 together with the resultant Decree issued on 1<sup>st</sup> July 2024
  - d. That upon setting aside the Judgement dated and delivered on 24<sup>th</sup> June 2024 together with the resultant Decree issued on 1<sup>st</sup> July 2024, this Honourable Court be pleased to issue an order for the joinder of the applicant as a substantive 3<sup>rd</sup> Defendant for full, extensive and unfettered participation in this suit.
  - e. That upon joining the Applicant herein as a Co-Defendant, this Honourable Court be pleased to issue an order directing for the re - opening of this suit for hearing and determination de novo with the full participation of the Applicant herein as a Defendant or in any other capacity the court may deem necessary and appropriate for the conclusive hearing and determination of the present dispute.
  - f. That pending hearing and determination of this matter de novo, this Honourable Court be pleased to issue an order of injunction prohibiting the Plaintiffs and 2<sup>nd</sup> Defendant whether by themselves, their agents, employees, agents or any person or entity acting under their instructions and/or authority from entering upon, taking possession, destroying, changing ownership or in any way interfering with the ownership status of the suit properties namely Kwale/South Samburu/90 and Kwale/South Samburu/112.
  - g. That this Honourable Court be pleased to issue an order directing the Plaintiff to effect service of all pleadings and relevant documents filed in this suit upon the applicant
  - h. That this Honourable Court be pleased to issue the necessary directions to secure the expeditious hearing and determination of this matter



- i. That costs for this application be provided for.
4. The application was premised on the grounds, testimonial facts and the averments made out under the 11 Paragraphed Supporting Affidavit of Mercy Kendi Mberia, the Company Secretary of the 3<sup>rd</sup> Defendant/Applicant herein on record sworn and dated 25<sup>th</sup> May 2025 with two (2) annexures marked as 'A-B'. The deponent averred that:
- a). Sometimes in July 2020 without any notice of defect and for valuable consideration the 3<sup>rd</sup> Defendant/Applicant - Mabati Rolling Mills Limited purchased all that property known as Kwale/South Samburu/90 from the 1<sup>st</sup> Defendant and Kwale/South Samburu/112 from a legal entity trading in the names and style of New Connections Suppliers Limited who were not a party to this suit.
  - b). The applicant was later shocked to learn of the instant proceedings and the Judgement that had been rendered by this Court on 24<sup>th</sup> June 2024 and the resultant Decree issued on 1<sup>st</sup> July 2024 directing the cancellation of title against the 1<sup>st</sup> Defendant an entry which was entered in the proprietorship section of the suit property on 25<sup>th</sup> July 2024.
  - c). The Applicants ownership of the suit property since September 2020 had been opened and that the said information was concealed deliberately from the court by the Plaintiff.
  - d). Further in order to defeat the Applicant's rights over the property, the Plaintiffs/Respondents proceeded to execute the Judgment despite of it being an irregular one. The applicant stated that it had instituted objector proceedings vide the application dated 1<sup>st</sup> October 2024 where it was instructed to file an application to set aside the impugned Judgement.
  - e). The Applicant maintained that the titles were cancelled by an impugned Judgement which was obtained through failure to disclose material facts.
  - d). The court was urged to vary and/or set aside and quash the decision of the court rendered on 24<sup>th</sup> June 2024.

### **III. The responses by the Plaintiffs/Respondents.**

5. While opposing the application, the Plaintiffs/Respondents filed their Replying Affidavit sworn and dated 4<sup>th</sup> June 2025. He averred as follows that:-
- a). The application had not laid a basis for seeking the orders for stay of execution of the Judgment delivered on 24<sup>th</sup> June 2024. Further and/or consequential orders emanating therefrom and to vacate and altogether set aside its Judgement delivered on 24<sup>th</sup> June 2024
  - b). The proposed 3<sup>rd</sup> Defendant/Applicant should pursue its claim against the 1<sup>st</sup> Defendant in a different forum not in this matter which had been concluded and the court had rendered its Judgement upon hearing all the parties and therefore any claim on the subject land had not legal basis.
  - c). The 3<sup>rd</sup> Defendant/Applicant could not seek to set aside a Judgement and/or review it where it was not a party to the proceedings.
  - d). The claim proposed by the 3<sup>rd</sup> Defendant/Applicant was fully presented to court by the 1<sup>st</sup> Defendant who sold it the suit property.



- e). The Plaintiffs/Respondent had already executed the Judgement and as such the application was otiose. The Judgement of the court and decree were executed on 25<sup>th</sup> July 2024 when they were registered with the County Land Registrar.
- d). The Court had in its Judgement already pronounced itself that the transfer of the subject properties to the 1<sup>st</sup> Defendant was illegal. Therefore the proposed Interested Party could not still claim to be the rightful owner of the suit properties.
- e). The sale agreement referred by the proposed 3<sup>rd</sup> Defendant/Applicant that it bought the subject properties from the 1<sup>st</sup> Defendant could not stand as the court directed the 2<sup>nd</sup> Defendant to cancel the title deeds registered in the name of the 1<sup>st</sup> Defendant. Therefore, the 1<sup>st</sup> Defendant had no title or property to sale to the proposed 3<sup>rd</sup> Defendant/Applicant.
- f). The Judgement had already been executed. Thus, the application for stay of execution and the order for stay of execution was issued on 19<sup>th</sup> August 2024 had been overtaken by events.
- g). The proposed 3<sup>rd</sup> Defendant/Applicant could not claim ownership and being in possession of the subject properties when the court itself directed the 1<sup>st</sup> Defendant to give vacant possession of the suit properties to the Plaintiffs/Respondent.
- h). The deponent maintained that the 3<sup>rd</sup> Defendant/Applicants application dated 5<sup>th</sup> May 2025 was fatally defective and hence it ought to be dismissed with costs.

#### **IV. The Notice of Preliminary Objection**

- 6. As indicated above, at the same time, the Plaintiffs further raised an objection by filing a Notice of Preliminary objection dated 4<sup>th</sup> June 2025 in opposition and response to the 3<sup>rd</sup> proposed Defendant's application dated 5<sup>th</sup> May 2025 and which was the instant application herein. The objection were on the following grounds: -
  - a. The proposed 3<sup>rd</sup> Defendant's application dated 5<sup>th</sup> May 2025 had been overtaken by events as the Judgement delivered on 24<sup>th</sup> June 2024 had already been executed fully and there was nothing to stay and/or set aside
  - b. The Honourable Court lacked jurisdiction to hear and determine the application dated 5<sup>th</sup> May 2025 and the court was now "functus officio".

#### **V. Submissions**

- 7. While all the parties were present in Court, they were directed to have the Notice of Motion application dated 5<sup>th</sup> May 2025 and the Preliminary Objection dated 4<sup>th</sup> June 2025 be disposed of simultaneously by way of written submissions. Unfortunately, by the time the Court was proceeding to pen down this Ruling, none of the parties had obliged. Thus, the Honourable Court proceeded to deliver a ruling on its own merit on Notice by Court accordingly.

#### **VI. Analysis and Determination**

- 8. I have carefully read and considered the pleadings herein and the relevant provisions made by the Learned Counsels in the matter, the relevant provision of the Constitution of Kenya, 2010 and the statutes herein. In order to arrive at an informed, reasonable and Equitable decision, the Honorable Court has framed the following four (4) issues for its determination. These were:-



- a. Whether the Notice of Preliminary Objection dated 4<sup>th</sup> June 2025 is merited based on law and precedents?
- b. Whether or not the Applicant has met the threshold for issue of an order setting aside, varying and or quashing the Judgement dated and delivered on 24<sup>th</sup> June 2024 together with the resultant decree issued on 1<sup>st</sup> July 2024.
- c. Whether the Notice of Motion application dated 5<sup>th</sup> May 2025 meets threshold required for the enjoinder of an intended 3<sup>rd</sup> Defendant
- d. Who will bear the Costs of Notice of Motion application 5<sup>th</sup> May 2025 and the Notice of Preliminary Objection dated 4<sup>th</sup> June 2025.

**ISSUE No. a). Whether the Notice of Preliminary Objection dated 4<sup>th</sup> June 2025 is merited based on law and Precedents**

9. Despite of the filed application dated 5<sup>th</sup> May 2025 by the 3<sup>rd</sup> Defendant/Applicant, its trite law that where an objection has been raised, the Honourable Court does deal with it as a matter of precedence. Hence, it follows that it will proceed to tackle the objection raised by the Plaintiffs herein.
10. The threshold of a preliminary objection was set in the case of:
 

*“Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Limited [1969] EA 696”* where the Court held that: -

“...a Preliminary Objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may have disposed of the suit. Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”
11. The Court further held that:
 

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
12. From the foregoing decision, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion. Being a point of law a preliminary objection can be raised at any point of the proceedings. Legally speaking, therefore the preliminary objection raised herein by the Plaintiffs being one on the jurisdiction of this Court to hear and entertain this matter after it had delivered its Judgement on the matter passes the test as one that is based on pure law.



**ISSUE No. b). Whether or not the Applicant has met the threshold for issue of an order setting aside, varying and or quashing the Judgement dated and delivered on 24<sup>th</sup> June 2024 together with the resultant decree issued on 1<sup>st</sup> July 2024.**

13. Under this sub – heading, the Honourable Court will endeavor to examine the issue of whether it has Jurisdiction to handle the matter after it had delivered its Judgement. The issue of jurisdiction touches on the core mandate/power of the court to administer justice by adjudicating over disputes and is thus an issue of law.
14. In opposition to the application for stay of execution, the Plaintiffs in their Preliminary Objection, challenged this court’s jurisdiction to hear and determine the applicant’s Notice of Motion application. It has been held in several decisions that jurisdiction is a preliminary issue and ought to be dealt with at the onset, given that without jurisdiction, a court is obligated to down its tools. In the case of:- “Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others SC Application No. 2 of 2011 [2012] eKLR” we noted as follows:-
- “(68) A Court’s jurisdiction flows from either the Constitution or Legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”
15. The challenge on the jurisdiction of this Court raised by the Plaintiffs is two-pronged. First that the Judgement earlier on issued by the court revoking the 1<sup>st</sup> Defendant’s title and reverting it back to the Plaintiff has already been executed and thus the prayer to stay execution of the same has been overtaken by events. Secondly, that the court is “functus officio” having delivered its mandate through the Judgment on record which has been executed.
16. Critically assessing the filed pleadings that have been placed before me, it is clear that the Plaintiffs executed the Judgement issued in their favour. The court in its discussions also expressed the irregularity with which the 1<sup>st</sup> Defendant had obtained title and thereafter had it cancelled forthwith. The intended 3<sup>rd</sup> Defendant has stated that it purchased the suit property from the 1<sup>st</sup> Defendant and has the intention of defending its interest over the suit property through this court.
17. In my humble view, to entertain the application will be akin to opening up pleadings once more to allow a new party to join in and ventilate its case. This is clearly impossible for the fact that a determination has already been made as to the proprietorship of the property and the decision duly implemented. I am thus in agreement with the Plaintiffs that the applicant has made its application a little too late and thus as stated that prayer has already been overtaken by events. It is a case of closing the stable when the horse has already bolted.
18. I wish to further discuss the issue of the court being “*functus officio*” in order for me to cement my reasoning above. The doctrine of functus officio was considered by the Court of Appeal in the case of “Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR”, where the court held that -
- “Functus officio is an enduring principle of law that prevents the re - opening of a matter before a court that rendered the final decision thereon.”
19. The Supreme Court of Kenya while addressing the doctrine of *functus officio* in the case of “Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR”,



cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 which reads: -

“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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

20. In view of the foregoing therefore, I discern that the Preliminary objection raised by the Plaintiffs herein has merit and must succeed.

**ISSUE No. c). Whether the Notice of Motion application dated 5<sup>th</sup> May 2025 meets threshold required for the enjoinder of an intended 3<sup>rd</sup> Defendant**

21. Ideally, from the above findings, the Honourable Court need not belabour the point on dealing with the other issues framed herein. However, it shall do so for the benefit of doubt.

22. Based on the above case law which are binding to this court and facts, the court admits that it was indeed functus officio after rendering its Judgement on 24<sup>th</sup> June 2024. The court cannot therefore reopen the matter as efforts to do so by the parties were never pursued by the intended party before the court made its final verdict. The court cannot take it upon itself to resuscitate the suit as it bears no interest whatsoever in the same. The Applicant states the Plaintiff failed to inform the court that the suit property had been purchased by the Applicant thus concealing material facts. That the same are an error apparent on the face of the court record, the question therefore is was it?

23. Under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. See the case of:- “*Paul Mwaniki v NHIF Board of Management* [2020] eKLR”.

24. The Applicant has in its pleadings clearly stated that it purchased the suit property from the 1<sup>st</sup> Defendant herein. The Plaintiff was in no way a party to this transaction. It would be absurd in my opinion for the Applicant to state that it was the duty of the Plaintiffs to inform court of a transaction over the suit property while the party who in fact was a vendor to the said transaction failed to disclose these facts to the court. I do not think it was thus the duty of the Plaintiffs to disclose these facts to the court. a mistake thus in my opinion did not occur as alleged.

25. As indicated above, I reiterate that, the preliminary objection has already succeeded as proven above. Thus, to save on judicial resources, I wish to rest the matter at this juncture. As has been discussed in a myriad of authorities a preliminary objection properly argued can dispose of a suit or application.

**ISSUE No. d). Who will bear the Costs of Notice of Motion application 5<sup>th</sup> May 2025 and the Notice of Preliminary Objection dated 4<sup>th</sup> June 2025.**

26. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceedings in any litigation process.



27. The provision of Section 27 ( 1 ) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By the events it means the outcome or result of the legal action. The guiding principles for the grant of costs were established in the case of “*Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Petition No. 4 of 2012 [2014] eKLR”, holding that costs follow the event. However, this should not be used to punish the losing party, but to compensate a successful party. Additionally, this is not an invariable rule. The ultimate factor on the award of costs is left to judicial discretion.
28. Noting the circumstances of the instant application, the Honourable Court finds it fair and reasonable for each party bearing their own costs of the proceedings before this Honourable Court.

#### **V. Conclusion & Findings.**

29. Having conducted an intensive analysis to the framed issues herein, the Honourable Court as guided by the principles of Preponderance of Probabilities and the balance of convenience, proceeds to make the following specific orders. These are:-
- a). That the Notice of Preliminary Objection dated 4<sup>th</sup> June, 2025 by the Plaintiffs herein be and is hereby found to have merit and thus allowed.
  - b). That the Notice of Motion application dated 5<sup>th</sup> May, 2025 by the proposed 3<sup>rd</sup> Defendant/ Applicant be and is hereby found to be unmeritorious as this Court has already become “Functus Officio” in the given circumstances and thus dismissed.
  - c). That each party to bear their own costs.

It is ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT Kwale THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2025**

.....  
**HON. MR. JUSTICE L.L NAIKUNI,**  
**ENVIRONMENT & LAND COURT**  
**AT**  
**KWALE.**

Ruling delivered in the presence of: -

Mr. Daniel Disii, the Court Assistant.

Mr. Ondabu Advocate for the Plaintiffs/Respondents.

Mr. Lianza Advocate holding brief for Mr. Shimaka Advocate for the 1<sup>st</sup> Defendant.

M/s. Nzau Faith Advocate holding brief for M/s. Mwanaszumba Advocate for the 2<sup>nd</sup> Defendant.

No appearance for the for the Proposed 3<sup>rd</sup> Defendant/Applicant.

