

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT ELDORET**

**ELC No. 209 OF 2014**

**CHURCH COMMISSIONERS OF KENYA** .....  
**PLAINTIFF**

**VERSUS**

**PAMELA JETO LEMURIAN** ..... **1<sup>ST</sup>**  
**DEFENDANT**

**MOLU MAMO** ..... **2<sup>ND</sup>**  
**DEFENDANT**

**JARSO ROBO** ..... **3<sup>RD</sup>**  
**DEFENDANT**

**OSMAN KURACHO** ..... **4<sup>TH</sup>**  
**DEFENDANT**

**MICHAEL KARANJA** ..... **5<sup>TH</sup>**  
**DEFENDANT**

**SILBANO K. KOGO** ..... **6<sup>TH</sup>**  
**DEFENDANT**

**MATEBE MASAI JAFTSA MASAI** ..... **7<sup>TH</sup>**  
**DEFENDANT**

**MARGARET NALIKA** ..... **8<sup>TH</sup>**  
**DEFENDANT**

**EMILY JEROTICH** ..... **9<sup>TH</sup>**  
**DEFENDANT**

**DAVID MWANGI** ..... **10<sup>TH</sup>**  
**DEFENDANT**

**NATHAN K. KOLUM** ..... **11<sup>TH</sup>**  
**DEFENDANT**

**DAVID WANYOIKE GITHUMBI** ..... **12<sup>TH</sup>**  
**DEFENDANT**

**DINO WANDERA** ..... **13<sup>TH</sup>**  
**DEFENDANT**

**SUKE AMINA** ..... **14<sup>TH</sup>**  
**DEFENDANT**

**KHANALI F. LIKHUNDA** ..... **15<sup>TH</sup>**  
**DEFENDANT**

<b>SILVA WAMBOI</b>	.....	<b>16<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>NJERI WAIRAKU</b>	.....	<b>17<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>PETER NDINGURI</b>	.....	<b>18<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>FATUMA MALIKUA</b>	.....	<b>19<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>MESHACK KINUTHIA NDUGI</b>	.....	<b>20<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>EMILY JEPKETER JUDA</b>	.....	<b>21<sup>ST</sup></b>
<b>DEFENDANT</b>		
<b>AKIBA MALICHA</b>	.....	<b>22<sup>ND</sup></b>
<b>DEFENDANT</b>		
<b>MARY MAINA</b>	.....	<b>23<sup>RD</sup></b>
<b>DEFENDANT</b>		
<b>ISAACK KIRONGOI ONYINGWO</b>	.....	<b>24<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>GIDEON KIPLIMO BIWOTT</b>	.....	<b>25<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>FRANCIS LELEPO</b>	.....	<b>26<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>ANJALINE MACHARIA</b>	.....	<b>27<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>RICHARD OKOLLA</b>	.....	<b>28<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>RUTH MWANIKI</b>	.....	<b>29<sup>TH</sup></b>
<b>DEFENDANT</b>		

**RULING:**

1. In the Notice of Motion Application dated 23<sup>rd</sup> December, 2024 the Defendants/Applicants seek for the following orders;
  - (a) Spent
  - (b) That pending hearing and determination of this application, a temporary order do issue preventing the Plaintiff either by itself or through its agents from evicting or otherwise

interfering with the Defendants' property described as KIPKAREN PLOT No. BLOCK 15/620-645 until the issue of boundary delimitation between the aforesaid parcel of land and the suit land is determined.

(c) That the Honourable court be pleased to direct the County Land Surveyor to conduct a land survey and boundary delimitation on land parcel No. ELDORET MUNICIPALITY BLOCK 15/2026 and the adjacent parcels of land including KIPKAREN PLOT No. BLOCK 15/645.

(d) That costs of this application be provided for.

2. The Application is premised on the grounds set out on the face of it, and is supported by an Affidavit of even date sworn by Joseph Lolepio. He deponed that in its judgment dated 15<sup>th</sup> October, 2024 the Court found that the Defendants had invaded and/or trespassed onto the Plaintiff's land known as ELDORET MUNICIPALITY BLOCK 15/2026 (the suit property). He deponed that the Court ordered them to vacate the land within 90 days or be evicted therefrom. He averred that the Defendants are ready to vacate the land.
3. He alleged that the Defendants are lawful owners of several plots of land namely KIPKAREN PLOT NO BLOCK 15/620-645, which they have occupied for more than 30 years. According to the Defendants, the the Plaintiff has now trespassed onto KIPKAREN PLOT NO BLOCK 15/645 and other adjacent parcels claiming that they fall under the suit property. That the Plaintiff is in the process of constructing a four storey-building on KIPKAREN PLOT NO BLOCK 15/645. The deponent expressed the Defendants' apprehension that the Plaintiff will evict them from

their aforesaid parcels under the guise of executing the judgment of 15<sup>th</sup> October, 2024.

4. He explained that there is a need to conduct a survey to ascertain the boundaries separating the suit property and the Defendants' parcels of land adjacent to it to avoid any possible unlawful evictions. He also alleged that the survey was one of the subjects of a court annexed mediation during the subsistence of the case but the same never materialised. He deponed that the Defendants are willing to obey the court orders and vacate the suit property after proper boundary delimitation.
5. The Plaintiff/Respondent filed a lengthy Replying affidavit sworn by Archdeacon Ben Birech, its Administrative Secretary, opposing the application and contesting the Defendants' claims. He confirmed that the Plaintiff lawfully acquired the suit property. He termed the application fatally and incurably defective, an abuse of court process and asserted that the Defendants are undeserving of the orders sought. He confirmed that the court in its Judgment dated 15<sup>th</sup> October, 2024 declared the Defendants trespassers on the suit property.
6. He averred that the matter was heard and determined and the Defendants ought to have raised the boundary issue during the hearing of the main suit, and not seek to re-litigate after the judgment. He claimed that the instant application is thus res judicata. He further deponed that the court is now functus

officio and lacks jurisdiction to entertain the instant Motion, which seeks to delay the realisation of the judgment.

7. Archdeacon Birech further deponed that the instant application is a veiled attempt to review the judgment of the court. He claimed that the application is defective since some of the Defendants are deceased and have not been substituted. Further, that Joseph Lolepio had no written authority to plead on behalf of the other defendants, and had not obtained a Grant of Representation to enable him act for his father, the 26<sup>th</sup> Defendant, thus he lacks locus standi. He asserted that the Supporting Affidavit was defective and invalid, and without it the Application cannot stand.
8. Archdeacon Birech deponed that the parcels known as KIPKAREN PLOT No. 15/620-645 were excised from the suit property, which is owned by the Plaintiff. He claimed that the copy of the cadastral map annexed to the Defendants' Application herein holds no legal protection. He deponed that the Defendants were served with the decree but have adamantly refused to comply, and continue to unlawfully occupy the Plaintiff's property. That this application is a tactical manoeuvre to prolong their occupation and delay justice. He asked the court to dismiss the application with costs and order the Defendants to vacate the land.
9. In response to the Replying Affidavit, the Defendants filed a Further Affidavit again sworn by Joseph Lolepio on 23<sup>rd</sup> April, 2025 reiterating their earlier averments. He claimed that he

obtained the authority to plead for the other Defendants at the instance of filing the suit, and the same has never been an issue thus the Plaintiff's allegations are unfounded. He deponed that the application is not res judicata as the issue of delimitation and survey of the adjacent property has never been a subject of any proceedings before a competent court of law.

10. He further deponed that no decision has been rendered on the same, not even through the judgement of 15<sup>th</sup> October, 2024. He also claimed that the court is not functus officio and has power to hear this application since it arose from the suit herein. He asserted that it is in the interest of justice that the court orders the survey exercise as it will inform the Defendant's exit from the suit property.

**Submissions:**

11. On 11<sup>th</sup> March, 2025 the court directed that the application be heard by way of written submissions. The Defendants/Applicants complied and filed their submissions dated 23<sup>rd</sup> April, 2025. The Plaintiff/Respondent failed to comply despite seeking for more time on 19<sup>th</sup> May, 2025 and being granted 3 more days to do so.

**Defendants/Applicants' Submissions:**

12. In the Defendants submissions, it was argued that this court has power under Section 13 read with Article 162(2)(b) of the Constitution to determine boundary disputes and grant any relief it deems fit. Counsel submitted that the Defendants

deserve a chance to prove through the Survey that their property is adjacent to the suit property but does not form part of it. Counsel cited **Ndegwa & Another vs Gichuki (Environment and Land Appeal E011 of 2023) (2024) KEELC 1308 (KLR).**

13. Counsel submitted that the Application does not undermine the doctrine of res judicata as the issues raised have never been dealt with by any court of competent jurisdiction, nor any decision rendered on the same. He relied on the case of **Tiony & Another vs Raiply Wood (K) Limited & 3 Others (2024) KEELC 14174 (KLR).** Counsel argued that the Plaintiff will suffer no prejudice if this court allows the application and directs that the boundaries be ascertained. On costs, Counsel submitted that they follow the event, which in this case is by allowing the application as prayed.

**Analysis and Determination:**

14. I have carefully considered the Defendants' Application and Affidavits filed in support thereto, the response to the same by the Plaintiff as well as the submissions filed. The issues which emerge for determination are:-
- i) Whether the Application is fatally defective for being supported by an Affidavit sworn by a stranger to the suit*
  - ii) Whether the Defendants have made a case for grant of the orders sought; and*
  - iii) What order should be made on costs?*

i. **Whether the Application is fatally defective for being supported by an Affidavit sworn by a stranger to the suit**

15. On the issue of locus standi, I note that indeed the deponent of the Defendants' Supporting Affidavit and Further Affidavit is one Joseph Lolepio. He is not a party to this suit, but has deponed as the son to the 26<sup>th</sup> Defendant, Francis Lolepio. Prior to this, it appears that Francis Lolepio was active in this matter. I note that he swore a Replying Affidavit on 8<sup>th</sup> December, 2017 in response to an application in this matter. Francis Lolepio has always been represented by Counsel in this matter, previously through the firm of Mwinamo Lugonzo & Company Advocates, and currently through the firm of Munyaga Githaiga Advocates LLP.
16. The Plaintiff has alleged that Joseph Lolepio lacks locus standi since he never obtained a Grant of Representation over his father's estate. If indeed the 26<sup>th</sup> Defendant is deceased, his son, Joseph Lolepio can only act on his behalf if he can show that he was appointed as the legal representative to the estate. However, I have seen no Death Certificate to the effect that the 26<sup>th</sup> Defendant passed away.
17. Joseph Lolepio's claims that he obtained authority to plead at the inception of the suit are also unfounded as no such authority has been presented before this court or anywhere else in these proceedings. Be that as it may, Order 51 Rule 4 provides that:

**4. Contents of notice [Order 51, rule 4]**

***Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.***

18. From the above provision, an application must state the grounds upon which it is grounded. It appears however, that it is not mandatory that an application must be supported by an affidavit. A Supporting Affidavit is in fact only served when the Applicant intends to adduce evidence to support the grounds thereof.

19. Therefore, even if this court were to determine that the said Joseph Lolepio has no locus standi and invalidate his Affidavits, the Application would not be fatally defective. It is for this reason that I will proceed to determine the instant Motion on its merits.

**ii. Whether the Defendants have made a case for grant of the orders sought**

20. On 15<sup>th</sup> October, 2024, this court delivered judgment in this suit. In the said judgment, the court found that the Defendants unlawfully invaded into the Plaintiff's land, which invasion amounted to trespass. In its final orders, the court ordered the Defendants to vacate the land within 90 days, failure to which they would be evicted from the land.

21. Instead of complying with the orders of the court, the Defendants have now come with this application seeking an

order that the County Land Surveyor be directed to conduct a survey delimiting the boundaries between the suit property and their parcels of land known as KIPKAREN PLOT No. BLOCK 15/620-645, which they allege are adjacent to it. The Defendants alleged that the said properties were allotted to them and that they had annexed their allotment letters thereto and bundles of rates invoices and receipts as JL2(a)-(d).

22. However, a look at the Application and annexures reveals that no such allotment letters were annexed to the application. The Defendants only annexed a copy of the Cadastral Map as JL1, which for the record, does not show the positions of their alleged properties as against the suit property. They also annexed copies of Land Management Receipts as JL2(a) & (b) and a copy of Land Bill as JL2(c).
23. Notably, the Defendants also claim that the Plaintiff has trespassed onto their said properties and is now putting up a four-storey building. No proof of the alleged invasion by the Plaintiff has been tabled before this court.
24. The allegation that the Plaintiff is constructing on the land are not new in this suit. During the pendency of this suit, the 2<sup>nd</sup>, 4<sup>th</sup>, 10<sup>th</sup>-12<sup>th</sup>, 14-22<sup>nd</sup> Defendants' filed a Notice of Motion Application dated 27<sup>th</sup> July, 2023. In that previous application, the said Defendants sought an injunction to stop the Plaintiff from constructing on the land and annexed photographs of what appears to be two Four-Storey buildings. This application was dismissed on 28<sup>th</sup> September, 2023. I note that it was not

alleged in the previous application that the Plaintiff was at the time constructing on land belonging to any of the Defendants, only that it was constructing on the contested land.

25. In the instant Motion, no proof has been tabled to show any ongoing construction on the suit property. In particular, it is not exactly clear whether the new alleged four-storey building is a new construction or at all different from the one that the court was already aware of when it rendered itself in its judgment.
26. I also take note that in both their Affidavits sworn in support of the Motion herein as well as their submissions, the Defendants have expressed their willingness to vacate the suit property. However, this willingness is pegged on the court granting the order for survey of the suit property sought in this application. This is to me proof enough that the Defendants know the boundaries to the Plaintiff's property, and is also an admission that they are still in occupation thereof contrary to the orders of this court.
27. The judgement of 15<sup>th</sup> October, 2024 did not place any condition on the Defendants' exit from the suit property, save that they had 90 days from the date of delivery thereof to vacate the suit land voluntarily. The Claim by the Defendants that they are willing to vacate the suit land only on the condition that a survey must be conducted to ascertain the boundaries is most certainly a veiled attempt to review the judgment. In any event, the Defendants cannot hold the court

hostage by claiming that they will only obey its orders only if the orders they seek are granted.

28. As stated by Romer, L.J. in **Hadkinson vs Hadkinson (1952)**

**ALL ER 567:-**

***“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”***

29. Court orders should be obeyed and/or honoured unless and until they are set aside. There is no proof that the judgement of this court was ever challenged successfully through an appeal, or that it has been varied or set aside. Therefore, for as long as the judgment of this court still stands, the Defendants are under an obligation to obey and abide by the said judgement and resultant decree, whether or not this application is allowed.

30. As to whether the application herein is res judicata, Section 7 of the Civil Procedure Act provides that:-

***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the***

***suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

31. At Explanations 3-5 of Section 7 above, the Civil Procedure Act explains that:-

***Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***

***Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***

***Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***

32. The Defendants themselves have admitted that the issue of the survey came up during a court ordered mediation while the suit was pending but nothing came of it. From the record, the Mediation Agreement of 1<sup>st</sup> October, 2019 was formerly adopted as an order of the court on 13<sup>th</sup> February, 2020 before Hon. Justice M. Odeny. It was within the Defendants' power to pursue the execution of the order during the subsistence of the main suit before judgment was entered, but they did not do so.

33. Moreover, since the court did not make any determination on the issue of the alleged boundary dispute, going by Explanation 5, the same is to be deemed as refused. This issue cannot

therefore be raised at this late stage for the court to make a separate determination thereon. And to do so through this application would offend the doctrine of res judicata as contained in Section 7 of the Civil Procedure Act.

34. All in all, I am inclined to believe the Plaintiff that this application is just but an attempt to delay the execution of the decree herein and for the Defendants' continued trespass on the Plaintiff's land. Having failed to prove the assertions in their instant application, the only conclusion that can be made is that the Defendants have failed to make a case for grant of the orders sought herein.

**iii. What order should be made on costs?**

35. In matters of costs, the general rule as enunciated at Section 27 of the Civil Procedure Act is that costs follow the event. Section 27(1) in particular provides that:-

**27. Costs**

***(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***

***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***

36. From the above provisions, this Court has the discretion as concerns the awarding of costs of a suit and or application, However, that discretion must be exercised judicially. Where the Court decides not to abide by the general principle, it is required to give reasons for not doing so. (See the decision of **Odunga J.** (as he then was) in **Joseph Oduor Anode vs Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009 (2012) eKLR**).
37. The Defendants herein dragged the Plaintiff to court in this Application, owing to which the Plaintiff has had to incur additional expense and/or trouble to respond to the application. The Defendants then failed to prove the assertions in the Application and show that they are entitled to the orders sought.
38. Since the Plaintiff has successfully defended the application, and no justifiable reason exists for denying them the costs, it is my finding that the Plaintiff is entitled to the costs of the application.

**Orders:**

39. In the circumstances, the Defendant's Notice of Motion Application dated 23<sup>rd</sup> December, 2024 lacks merit. The same is dismissed with costs payable by the Defendants to the Plaintiff.
40. Orders accordingly.

**DATED, SIGNED and DELIVERED** virtually at **ELDORET** on this **2<sup>ND</sup>** day of **OCTOBER, 2025** vide Microsoft Teams.

**HON. C. K. YANO  
ELC, JUDGE**

In the presence of;

Ms. Chesoo for Plaintiff/Respondent.

Mr. Kiprop for Defendants/ Applicants.

Court Assistant - Laban.

ORIGINAL