



**Ngare v Ogamba (Environment and Land Case E001 of 2022)
[2025] KEELC 6952 (KLR) (15 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND CASE E001 OF 2022
DO OHUNGO, J
OCTOBER 15, 2025**

BETWEEN

ESTHER NYABATE NGARE PLAINTIFF

AND

ARNOLD RASUGU OGAMBA DEFENDANT

RULING

1. This ruling is in respect of the Defendant's Notice of Motion dated 6th May 2025, through which he seeks the following orders:
 1. That, the instant application be certified as urgent and the same be heard ex parte in the first Instance.
 2. That, that the Honourable Court be pleased to issue an order that the Deputy Registrar Nyamira Law Courts do execute discharge documents on behalf of the chargor and chargee, subdivision, transfer and all conveyancing documents in respect of Matutu Settlement Scheme/641 to give effect to the Judgement delivered on 15th February 2024 within seven (7) days from the date of delivery of this Court's ruling.
 3. That, the Land Registrar Nyamira County does effect and register the discharge, subdivision, transfer as well as issue a Title Deed/Certificate of title in respect of the 8 acres belonging to the Defendant/Applicant herein within fourteen (14) days after receipt of the documents in prayer 2 above.
 4. That, costs of this Application be provided for.
2. The application is supported by a supporting affidavit and further affidavit, both sworn by the Defendant. The Plaintiff opposed it through a replying affidavit which she swore. To put matters into



better perspective, I will begin by highlight the milestones in this litigation. I will return to the affidavits later.

3. The proceedings commenced on 4th April 2022, when the Plaintiff filed Plaintiff dated 1st April 2022. The Defendant filed Defence and Counterclaim dated 13th June 2022. Upon hearing the matter, the Court (Mugo Kamau, J.) delivered judgment on 15th February 2024 as follows:

1. The Plaintiff's suit and prayers engraved in the Plaintiff dated 1/4/2022 is hereby and wholly dismissed with costs to the Defendant.
2. The Defendant's Counter-claim dated 13/6/2022 is hereby allowed in terms of prayers number (b) and prayer number (a) the latter being restricted to the 8 Acres he has been occupying.
3. The Co-operative Bank of Kenya Limited is hereby ordered to discharge the entire parcel of land Matutu Settlement Scheme/641, to facilitate the same to be sub-divided into two in the ratio of 2:1 between the Deceased Stephan Ngare Ogamba and the Defendant Arnold Rasugu Ogamba respectively.
4. Immediately after the aforesaid sub-division the two portions shall be registered with the Defendant being registered the absolute owner of 8 Acres thereof which shall be where he has built a mud house and the Deceased being the proprietor of the 16 Acres on the other side which has the permanent house.
5. The Co-operative Bank of Kenya Limited shall be at liberty to charge the Plaintiff's (Deceased's) portion and if not enough then she will look for other collaterals belonging to the Deceased.
6. For the avoidance of doubt, the Defendant shall have the costs of the suit and that of the Counter-claim.

These are the orders of the court.

4. Following delivery of the judgment, the Plaintiff filed Notice of Motion dated 11th March 2024, through which she sought stay of execution pending appeal. The application was determined through a ruling delivered on 27th May 2024 as follows:

“This being the scenario, if an unconditional stay of execution is granted in this case, and the Judgment Debtor decides, as she and her late husband have done in the last 10 years, not to service the loan, then the Bank would dispose of the property by way of exercise of her statutory power of sale and both parties would lose the property and this will be the surest way of rendering the intended appeal an academic exercise and thus making the fears of the Applicant a reality. In addition to the order that the Title Deed in respect of L.R. No. Matutu Settlement Scheme/641 be deposited in court within the next 15 Days from the date of this Ruling, I will also give another condition to the stay. The Judgment Debtor will have to either:

- a. Deposit in this court the sum of Kshs. 4,007,572.01 as security for the outstanding loan, or in the alternative,
- b. Furnish this court with proof that she has cleared the said loan with the Co-operative Bank of Kenya and has had the property discharged, or further in the alternative,



- c. Deposit a sum of money to be agreed with the Co-operative Bank of Kenya with an undertaking and commitment on how to liquidate the balance of the outstanding loan by monthly instalments until payment in full.

In the last option, in case of any default in payment of any one instalment on its due date, execution to issue.

Should any of the above 3 conditions be satisfied within the next days hereof, there shall be a stay of execution only limited to the sub-division of the parcel of the land known as L.R. No. Matutu Settlement Scheme/641. However, the Decree Holder shall remain in possession and occupation of the designated 8 Acres of the suit property as was his share and as is set apart on the ground until the Hearing and determination of the intended Appeal.

5. Later, Co-Operative Bank of Kenya Ltd filed Notice of Motion dated 12th June 2024 through which it sought to join the suit as an Interested Party and leave to file a statement of defence and counterclaim. The application was determined through a ruling delivered on 9th October 2024. The Court (Mugo Kamau, J.) held thus:

“This is a discretionally prayer and equity aids the vigilant and not the indolent. And besides, the Court has already taken the interests of the Applicant into consideration. Nowhere has the Applicant suggested to the Court that the wind of opportunity given to her would not be successful.

In any case, what is the interest of the Applicant rather than recovering the monies advanced to the Judgment Debtor’s Estate which as observed above, she has had no interest pursuing. This leads to only one conclusion. The Applicant is acting at the behest of the Judgment Debtor which was very clear in the proceedings in that even though the loan was not serviced at all, the Applicant took no action. This of course explains why the Judgment Debtor is not opposed to the Motion. In fact the last correspondence from the Applicant to the chargor is dated 28/12/2006 demanding that the chargor do make payments. This was produced in Court by the Applicant’s own Business Manager. Now that the court has condemned the Judgment Debtor to have the Decree Holder’s parcel of land released from the entire charged parcel and the Decree Holder has demanded the discharge of the same, the Applicant has rushed to Court to have the process halted instead of pursuing the large portion which the Court has ordered that it be charged. The Judgment is very clear. If the same were to be sub-divided and/or transferred to 3rd Parties, it would only be because the Applicant has allowed it to happen. The Applicant has therefore not come to court with clean hands nor in good faith and I strongly believe that her Application dated 12/6/2024 belongs to the archives. The same is hereby dismissed with costs to the Defendant/Decree Holder.”

6. Thereafter, the matter remained dormant in this Court until the Defendant filed Notice of Motion dated 6th May 2025. I now return to the various affidavits filed.
7. The Defendant deposed in the supporting affidavit that the suit property remains charged in favour of Co-Operative Bank of Kenya Ltd and that the loan remains un-serviced. That despite the judgment, it had become impossible for him to get his portion since the bank was uncooperative in executing discharge forms despite several reminders. He added that there was no compliance with the conditions pursuant to which stay of execution was granted on 27th May 2024 and that nothing stops the bank from exercising statutory power of sale in respect of the whole of the suit property.



8. The Defendant further deposed that the Plaintiff filed an application for stay of execution in the Court of Appeal which application was declined. That in view of non-compliance with the conditions of stay granted by this Court, he was at liberty to execute yet the bank's application to join this suit was declined. He added that the limited grant taken out by the Plaintiff was purely for filing and defending suit and could not be used for executing discharge and transfer forms. I have also noted the contents of the Defendant's further affidavit.
9. In her replying affidavit, the Plaintiff deposed that the application is vague since the decree indicates that the title document is in the hands of Co-Operative Bank of Kenya Ltd which is not a party to this suit. That she had filed an appeal against the judgment at the Court of Appeal in Kisumu being Civil Appeal No. E281 of 2024 and that the present application may render the appeal nugatory. She added that the decree is incapable of execution since the suit property is registered in the name of a deceased person and that the Land Registrar Nyamira County who the application seeks to be ordered to register the discharge, subdivision, transfer and to issue a title deed in respect of the 8 acres is not a party to the suit.
10. The application was canvassed through written submissions. The Defendant/applicant filed submissions dated 5th July 2025. He submitted that he notified the bank of the judgment but there was no compliance by the bank thereby leaving him with no option but to file the present application since the stay of execution granted by the Court had lapsed. Relying on Section 98 of the *Civil Procedure Act* and the maxim "equity will not suffer a wrong to be without a remedy," he urged the Court to allow the application.
11. In response, the Plaintiff filed submissions dated 7th August 2025. She argued that the Court does not have jurisdiction to subdivide land registered in the name of the deceased and charged with the bank. She added that only the Succession Court has jurisdiction to order subdivision of property registered in the name of a deceased person. She posed questions as to who would charge the remainder of the property and who would sign on behalf of the deceased.
12. The Plaintiff went on to submit that the Land Registrar is not a party to this suit and that the Court is incapable of granting the remedies sought by the Defendant. Restating that the decree is incapable of execution, she contended that the application does not seek to compel her to do anything in furtherance of the decree. She therefore urged the Court to dismiss the application with costs to her.
13. I have considered the application, the affidavits and the submissions. The sole issue for determination is whether the orders sought should issue.
14. A lot of the details in this matter are not in contention. The fact of the existence of the judgment and its terms is not disputed. It is also not in contention that an appeal against the judgment is pending in the Court of Appeal and that the suit property is charged in favour of Co-Operative Bank of Kenya Ltd (the bank).
15. Although the orders sought are to be effected by the Deputy Registrar and the Land Registrar, the orders directly affect the bank which is the chargee. The bank has not participated in the hearing of the present application. Its effort to join the case failed on 9th October 2024, following dismissal of its application.
16. The Defendant has relied on the maxim "equity will not suffer a wrong to be without a remedy" which is rendered in Latin *ubi jus ibi remedium*. Even as the Defendant argues his case on the strength of the maxim, I am confronted by the Plaintiff's exclamation that the Court is incapable of granting the remedies sought since neither the bank nor the Land Registrar are parties in this matter. In advancing



that argument, the Plaintiff is in essence introducing yet another Latin maxim: *audi alteram partem*, which translates to “hear the other side.”

17. The *audi alteram partem* rule was discussed by the Supreme Court (Njoki Ndungu, SCJ.) in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR as follows:

“Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of *audi alteram partem* (hear the other side or no one is to be condemned unheard) and *nemo iudex in causa sua* (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled.”

What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & Others v Union of India & Others*, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements:

- (i) an opportunity of hearing must be given; and
- (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v Collector of Customs, Calcutta & Others*, AIR 1962 Cal. 460).

18. In the present application, the Defendant is asking the Court to empower the Deputy Registrar and the Land Registrar to execute documents and take steps that ultimately result in discharge of the suit property and to do so without hearing the bank which is the chargee. I am alive to the fact that there is judgment and decree on record. However, the judgment and decree do not include the kind of relief that is now sought. If the parties needed those kinds of reliefs, they should have pleaded them from the onset and given the trial Court an opportunity to consider and pronounce itself on them.
19. Further, every Court is required to determine whether it has jurisdiction to determine what is placed before it. Jurisdiction cannot be conferred even by consent of the parties or by innovation whether in drafting of pleadings or on the part of the Court. If the Court proceeds in a matter in which it lacks jurisdiction, even if the parties cheer, urge and nudge it on, its determination will amount to a nullity. The Supreme Court reiterated the position in *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR.
20. In the present scenario, my jurisdiction is limited to hearing and determining Notice of Motion dated 6th May 2025. Judgment having been delivered by the trial Court based on the pleadings that were before it and a decree having issued which is now the subject of an appeal, can this Court grant the orders now sought? I am not persuaded that I can. The Court is *functus officio*. It is acutely important that the judgment and decree remain the very same one in respect of which the appeal was filed.
21. The doctrine of *functus officio* was discussed by the Supreme Court in *Raila Odinga & Others v IEBC & Others* [2013] eKLR as follows:

“We, therefore, have to consider the concept of “*functus officio*,” as understood in law. Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference



to its Application in Administrative Law,” [2005] 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”

22. Owing to the Court being functus officio and in view of the audi alteram partem rule in so far as the Court is unable to hear the bank which is affected, I am persuaded that I do not have jurisdiction to change the judgment and decree herein in the manner sought or to deprive the bank of its security in the suit property in the circumstances obtaining. Any attempt to grant the orders sought would be an exercise in futility.
23. In view of the foregoing discourse, I dismiss Notice of Motion dated 6th May 2025 with costs to the Plaintiff. To conclusively determine the dispute, the parties should expeditiously prosecute the appeal pending in the Court of Appeal.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 15TH DAY OF OCTOBER 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Anyona for the Plaintiff

Mr Ngala holding brief for Mr Bonuke for the Defendant

Court Assistant: B Kerubo

