



**Ojwang v Ghelani & 5 others; Chaju Builders Limited (Interested Party) (Environment and Land Case 232 of 2013) [2025] KEELC 5729 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5729 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE 232 OF 2013  
SO OKONG'O, J  
JULY 31, 2025**

**BETWEEN**

**JACOB NYAKWA OJWANG ..... PLAINTIFF**

**AND**

**NATHWALAL NARISHIDAS GHELANI ..... 1<sup>ST</sup> DEFENDANT**

**JOSHUA OMARI T/A SEDIME AGENCIES ..... 2<sup>ND</sup> DEFENDANT**

**SAMWEL OGWENO OKECH ..... 3<sup>RD</sup> DEFENDANT**

**MATHEWS OWINYO ODERA ..... 4<sup>TH</sup> DEFENDANT**

**JOSHUA ONGWEN WAGUDE ..... 5<sup>TH</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR KISUMU ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**CHAJU BUILDERS LIMITED ..... INTERESTED PARTY**

**RULING**

1. The Plaintiff brought this suit against the Defendants on 17<sup>th</sup> September 2013. The Plaintiff averred that at all material times, the parcel of land known as Kisumu/Kanyakwar “B”/396 (hereinafter referred to as “the suit property”) was registered in the name of his deceased father, Augustinus Ojwang Okut (hereinafter referred to as “the deceased”). The Plaintiff averred that the deceased sold to the 1<sup>st</sup> Defendant a portion of the suit property measuring 8 acres. The Plaintiff averred that the transaction between the deceased and the 1<sup>st</sup> Defendant took place before land adjudication exercise in Kisumu/Kanyakwar “B” Registration Section.
2. The Plaintiff averred that during the land adjudication, the whole of the suit property, which measured 12 acres, was recorded and subsequently registered in the name of the 1<sup>st</sup> Defendant as the first



registered owner thereof on 23<sup>rd</sup> February 1983, although only a portion thereof, measuring 8 acres, had been sold to the 1<sup>st</sup> Defendant. The Plaintiff averred that the suit property was subsequently transferred and registered in the names of the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on 21<sup>st</sup> January 1999 and 23<sup>rd</sup> March 2011, respectively. The Plaintiff averred that the sale of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and the subsequent sale of the property by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were fraudulent and unlawful. The Plaintiff averred that the Defendants colluded to fraudulently and illegally deprive the Plaintiff of his deceased father's share in the suit property.

3. The Plaintiff sought judgment against the Defendants jointly and severally for;
  1. A declaration that the 1<sup>st</sup> Defendant was only entitled to a portion of the suit property measuring 8 acres.
  2. An order that the suit property be surveyed, subdivided and a portion thereof measuring 8 acres be registered in the name of the 1<sup>st</sup> Defendant and the remaining portion measuring 4 acres be registered in the name of the Plaintiff.
  3. A declaration that dealings with the suit property by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were fraudulent, void and should be cancelled.
4. The 1<sup>st</sup> and 5<sup>th</sup> Defendants filed separate statements of admission of the Plaintiff's claim on 11<sup>th</sup> December 2013. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants were said to have been served but failed to enter an appearance. The suit was heard as a formal proof, and judgment was entered for the Plaintiff against the Defendants on 18<sup>th</sup> May 2016. The court ordered that all entries in the register of the suit property, save for those in favour of the 1<sup>st</sup> Defendant, were illegal and fraudulent, and cancelled the same. The court ordered further that the Plaintiff as the administrator of the estate of his deceased father, Augustinus Ojwang Okut was entitled to a portion of the suit property measuring 4 acres (approximately 1.6 Ha.) while the 1<sup>st</sup> Defendant was entitled to a portion of the suit property measuring 8 acres (approximately 3.2Ha.) and that the suit property be subdivided and apportioned between the Plaintiff and the 1<sup>st</sup> Defendant in that manner. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were condemned to pay the costs of the suit.
6. On 22<sup>nd</sup> September 2016, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed an application dated 20<sup>th</sup> September 2016 seeking an order to set aside the judgment that was entered against them on 18<sup>th</sup> May 2016 together with all the consequential proceedings and orders arising therefrom on the ground that they were not served with Summons to Enter Appearance. On 26<sup>th</sup> October 2016, the court issued an order preserving and/or conserving the suit property together with the resultant titles pending the delivery of a ruling on the 3<sup>rd</sup> and 4<sup>th</sup> Defendant's application.
7. In a ruling delivered on 15<sup>th</sup> February 2017 (wrongly dated 15<sup>th</sup> February 2016), the court found that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not served, set aside the interlocutory and final judgment that were entered against them on 30<sup>th</sup> January 2014 and 18<sup>th</sup> May 2016 respectively and granted the 3<sup>rd</sup> and 4<sup>th</sup> Defendants leave to defend the suit.
8. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a joint statement of defence, and the suit was heard afresh. In a judgment delivered on 7<sup>th</sup> December 2021, the court found that the Plaintiff's deceased father had no interest in the suit property and that, in any event, the Plaintiff's claim against the 1<sup>st</sup> Defendant was time-barred having been brought 33 years after the 1<sup>st</sup> Defendant was registered as the owner of the suit property. The court found further that the Plaintiff failed to prove that his deceased father was defrauded of the suit property. The court held that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were bona fide purchasers of the suit property for value from the 2<sup>nd</sup> Defendant without notice of the alleged fraud. The court noted that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, who were the trustees of Afya Sacco Co-operative Society



Limited, Kisumu Branch, had already subdivided the suit property and allocated the subdivisions thereof to their members who were already in possession. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants produced in evidence copies of title deeds (73 in total) in the names of their members. The court dismissed the Plaintiff's suit with costs.

9. On 17<sup>th</sup> October 2024, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants moved the court by a Notice of Motion application dated 16<sup>th</sup> October 2024 seeking; an order to join Chaju Builders Limited to the suit for the purposes of the application, a declaration that the order issued by the court on 15<sup>th</sup> February 2017 setting aside the ex parte judgment that had been entered against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on 18<sup>th</sup> May 2016 also overturned the execution of the said judgment and rendered any transactions over the suit property, Kisumu/Kanyakwar "B"/396 null and void and restored the status quo prior to the said judgment which was that the suit property had been subdivided into Kisumu/Kanyakwar "B"/1689-1770, a declaration that the subdivision of the suit property into Kisumu/Kanyakwar "B"/2732(further subdivided into subplots 2745, 2746,2747 and 2748), 2733 and 2734 by the Plaintiff and subsequent transfer of the subdivisions to the names of the Plaintiff and Chaju Builders Limited was null and void by reason of the ruling and orders made by the court on 15<sup>th</sup> February 2017, and an order revoking, rescinding and/or cancelling the purported subdivision of the suit property as aforesaid and the rectification of the register of the suit property so as to restore the land parcels Kisumu/Kanyakwar "B"/1689-1770 in the names of the registered owners thereof. That is the application which is the subject of this ruling.
10. In the application, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that in September 2024, the Plaintiff and the agents of Chaju Builders Limited (hereinafter referred to only as "Chaju") entered the suit property and commenced excavation of murrum on the portions thereof. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that the Plaintiff also leased out portions of the suit property without the permission of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that upon making inquiries from the 5<sup>th</sup> Defendant on the status of the suit property, they discovered that the Plaintiff had proceeded to execute the judgment of the court delivered on 18<sup>th</sup> May 2016, which was set aside on 15<sup>th</sup> February 2017. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that the purported subdivision and sale of the portion of the suit property by the Plaintiff to Chaju were null and void as the same were based on a judgment that had been set aside.
11. The Plaintiff opposed the application through the grounds of opposition dated 2<sup>nd</sup> December 2024. The Plaintiff averred that the court lacked jurisdiction to entertain the application as the court was functus officio in the matter. The Plaintiff averred that the application was bad in law, frivolous and an abuse of court process.
12. The Interested Party (Chaju) opposed the application through a replying affidavit sworn by Cornel Opiyo Osano on 28<sup>th</sup> November 2024. Chaju averred that it entered into a sale agreement with the Plaintiff over land parcel, Kisumu/ Kanyakwar "B"/ 2734 on 5<sup>th</sup> February 2024 on the basis of a willing seller and a willing buyer. Chaju averred that before executing the agreement, a process of due diligence by the advocate who witnessed the agreement and subsequent conveyance of the title from the Plaintiff to Chaju found no encumbrance on land parcel, Kisumu/Kanyakwar "B"/2734.
13. Chaju averred that all reasonable diligence could not expose the fact that land parcel, Kisumu/ Kanyakwar "B"/2734 was a subject of a court litigation and that the Plaintiff did not disclose the fact that there was litigation over the said land. Chaju averred that the process of conveyancing and transfer of land parcel, Kisumu/Kanyakwar "B"/2734 to Chaju was smooth and subsequently a title deed was issued in the name of Chaju.
14. Chaju averred that it was an innocent purchaser of land parcel, Kisumu/Kanyakwar "B"/2734 for value without notice of any defect on the title or any act of fraud relating to the title of the property, hence



should not be made to suffer the consequences of acts or omission if any. Chaju averred that it had taken possession of land parcel, Kisumu/Kanyakwar “B”/2734 and was engaged in serious economic activities on the same.

15. Chaju averred that the proceedings leading to the final judgment were in respect to the suit property, and at no time were pleadings amended to include the subdivided parcels which came into existence during the lifetime of the suit. Chaju averred that the final decree issued by the court on 21<sup>st</sup> June 2022 had only addressed the suit property which was not in existence at the of the decree hence the decree was incapable of being executed.
16. Chaju averred that the application was misplaced as it had been overtaken by events hence ought to be dismissed with costs. Chaju averred that the court lacked jurisdiction to entertain the application as there was already a final judgment and decree; thus, the court was functus officio and should put down its tools. Chaju averred that it was a total stranger to the allegations made in the application since it was not privy to the dispute between the parties to the suit and should not be punished unfairly.
17. The Application was argued by way of written submissions.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ submissions**

18. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed submissions dated 10<sup>th</sup> March 2025. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants framed the following issues for determination, which they submitted on;
  - i. Whether the court is functus officio.
  - ii. Whether the ruling dated 15<sup>th</sup> February 2017 (erroneously captured as 15<sup>th</sup> February 2016) quashed or set aside the judgment and decree of 18<sup>th</sup> May 2016 and all consequential orders.
  - iii. Whether the ruling reinstated the titles of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/ Applicants.
  - iv. Between the judgment of 7<sup>th</sup> December 2021 and the ex-parte judgment of 18<sup>th</sup> May 2016, which one is the final pronouncement of the court and whether there can be two Judgments in a suit by the same court?
19. On the first issue, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiff and Chaju had alleged that the court lacked jurisdiction to entertain the application, the final judgment having been delivered on the 7<sup>th</sup> December 2021. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the issue before the court was whether the ruling of 15<sup>th</sup> December 2017 discharged, set aside and/or quashed the ex-parte judgment of 18<sup>th</sup> May 2016 which nullified the titles registered in the names of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and their members namely (L.R No. Kisumu/Kanyakwar 'B/ 1689 - 1770). The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the issues raised in the application could not be addressed in a new suit but in the same suit that had passed the decree. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that it was the decree that was set aside that was being sought to be addressed in this case, and whether the titles of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were restored by the setting aside of the ex-parte judgment. In support of this submission, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants relied on *Carol Silcock v. Kassim Sharrif Mohamed* [2013] eKLR.
20. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that they could not lodge a new suit over the subdivision of the suit property and transfer of a portion thereof to Chaju. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the new suit would be res judicata. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the proper court to deal with issue of execution of the decree in question would be this court. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the final judgment and decree made on the 7<sup>th</sup> December 2021 declared that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were the bona fide purchasers of the suit property for value. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants



submitted that this court had jurisdiction to declare that the transactions made through the ex-parte judgment of 18<sup>th</sup> May 2016 were null and void as the order setting aside the ex-parte judgment was never reviewed or set aside. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the court made a pronouncement that the only valid titles were land parcels, Kisumu/ Kanyakwar ' B/ 1689 -1770. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the court would not be sitting on an appeal on its own decision but will be affirming the decision by declaring that any other titles other than the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' titles were null and void and that was the import and tenor of the ruling and order of 15<sup>th</sup> February 2017 that set aside the ex-parte judgment.

21. On the second issue, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that to set aside a judgment, decree, award, or any proceedings is to cancel, annul, or revoke them at the instance of a party unjustly or irregularly affected by them. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that in this case, the Plaintiff had obtained an ex-parte judgment alleging that he had served summons upon the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that they moved the court through the application dated 20<sup>th</sup> September 2016 seeking orders that the ex-parte judgment was irregular and that they had been condemned unheard as the summons were never served upon them. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the court in its ruling delivered on the 15<sup>th</sup> February 2017 set aside both the interlocutory judgment and the ex-parte judgment. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the ex-parte judgment of 18<sup>th</sup> May 2016 was annulled, cancelled and/or revoked, hence the directions that were given that the hearing of the suit starts afresh. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that Order 10 Rule 11 of the Civil Procedure Rules provides that a judgement entered under the said order may be set aside and/or varied and any consequential decree. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the judgment, having been set aside, the Plaintiff could not purport that the suit property belonged to him. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that with the setting aside of the ex-parte judgment, every transaction based on the said judgment and/or decree was affected, hence the same stood set aside, annulled, revoked and/or cancelled by the orders setting aside the decree that the Plaintiff was riding on. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that judgment of 18<sup>th</sup> May 2016, having been cancelled and/or set aside the same ceased to exist as it was no longer there. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the judgment died a natural death by the stroke of the pen and only a review or an appeal to the Court of Appeal challenging the ruling could reinstate the judgment and/or the transactions by the Plaintiff based thereon. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the ruling setting aside the ex-parte judgment/decree rendered the execution of the said decree null and void as the execution too was set aside by virtue of the judgment and/decree being set aside by the court.
22. On the third issue, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that Order 21 of the Civil Procedure Rules provides for judgments and decrees. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that Order 21 Rule 1 of the Civil Procedure Rules is to the effect that upon a hearing being conducted, the court shall pronounce a judgment. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that in this case, there was an ex-parte judgment pronounced on the 18<sup>th</sup> May 2016. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, having not been served with summons, successfully moved the court to set aside the judgment and the hearing of the suit commenced afresh. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that a party aggrieved with the ruling had the option of invoking Order 45 of the Civil Procedure Rules on review of judgments and orders or Order 42 of the Civil Procedure Rules that provides for appeals. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiff pursued neither of the two and the hearing of the suit proceeded afresh as ordered by the court. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that in a judgment delivered on 7<sup>th</sup> December 2021, the court declared that the titles of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were validly acquired and the allegations of fraud had not been proved by the Plaintiff. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiff could not purport to be holding titles emanating from the suit



property as if there were two judgments of the court. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that despite the Land Registrar being served with the orders of the court; both the order setting aside the ex-parte judgment and the decree of 7<sup>th</sup> December 2021, he declined to restore the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' titles. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiff and Chaju could not purport to be holding genuine titles, the same having been affected by an order setting aside the judgment/decree that led to their registration.

23. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiff and Chaju had not controverted the averments contained in the supporting affidavit by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiff only filed grounds of opposition, while Chaju filed a replying affidavit in which it raised only the issue of *functus officio*. In support of this submission, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants relied on *James Muniu Mucheru v. National Bank of Kenya Limited* [2019] eKLR and *Mbuthia Macharia v. Annah Mutua Ndwiga & Another* [2017] eKLR. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that once an order for setting aside an ex-parte judgment has been issued, the judgment and/or decree sought to be set aside is no longer available. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that it becomes extinct and can only be resurrected by way of a review or an appeal. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that all the transactions that were grounded and/ or pegged on the judgment/decree that was set aside becomes revoked and/or annulled.

#### **The Interested Party's (Chaju) submissions**

24. Chaju filed submissions dated 29<sup>th</sup> January 2025. Chaju submitted that the issue for determination was whether the orders sought by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants could be granted. Chaju submitted that it was not a party to this suit in which the orders on which the application was based were issued. Chaju submitted that it would be absurd for its title to be revoked, yet it was not part of the proceedings of the court when the final judgment was delivered by the court. Chaju submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had sought to cancel its title at the point of execution of the judgment.
25. Chaju submitted that it purchased the land parcel, Kisumu/Kanyakwar "B"/2734 after conducting due diligence, which found no encumbrance on the title of the property. Chaju submitted that Articles 22 and 23 of *the Constitution* give the High Court authority to uphold and enforce the Bill of Rights. In support of this submission, Chaju relied on *Winnie Mambui Kibinge & 2 Others v. Match Electricals Limited*, Civil Case No. 22 of 2010 and *Paul Gitonga Wanjau v. Gathuthi Tea Factory Company Ltd & 2 others* [2016] KEHC 7263 (IUR).
26. Chaju submitted that it was an innocent purchaser of the land parcel, Kisumu/Kanyakwar "B"/2734 for value. Chaju submitted that the doctrine of innocent purchaser for value without notice protects buyers who purchase property without knowing of any third-party claims or encumbrances. Chaju submitted that the doctrine of innocent purchaser for value is a fundamental principle of property law in Kenya. Chaju submitted that Section 80 (2) of the *Land Registration Act* protects its title. Chaju submitted that it would be a miscarriage of justice for the court to nullify its title without a formal suit by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and without a proper trial in which it would have an opportunity to defend itself and safeguard its interest. Chaju submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had not demonstrated that they acquired the land parcel, Kisumu/Kanyakwar "B"/2734, fraudulently. In support of this submission, Chaju relied on *Katende v. Haridar & Company Limited* [2008] 2 E.A 173.
27. Chaju submitted that it had demonstrated that it purchased and obtained a title for land parcel, Kisumu/ Kanyakwar " B" / 2734, lawfully after conducting due diligence. Chaju submitted that the other issue that the court should determine is whether orders can be issued in respect of a title that has



ceased to exist. Chaju submitted that the register for land parcel, Kisumu/Kanyakwar "B"/2734 in its possession was opened on the 15<sup>th</sup> August 2016. Chaju submitted that the register for the suit property, Kisumu/Kanyakwar "B"/396, was closed upon subdivision. Chaju submitted that the conservatory orders that had been issued by the court could not affect the title that was issued to Chaju in respect of land parcel, Kisumu/Kanyakwar "B"/2734. Chaju submitted that the pleadings filed in the main suit concerned the suit property and not land parcel, Kisumu/Kanyakwar "B"/2734. Chaju submitted that the orders, judgment and decree issued by this court were not enforceable against it as it was not a party to the suit and the title to its land parcel, Kisumu/Kanyakwar "B"/2734 was not mentioned in the judgment or decree. Chaju submitted that the only recourse available to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants if they were aggrieved by the title in the possession of Chaju was to file a new suit against Chaju and challenge how that title was obtained, rather than using this application to challenge the title with finality.

28. On the issue of whether the court was functus officio, Chaju relied on *Petition No. 5 of 2013, Raila Odinga v. Independent Electoral and Boundaries Commission and others, Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195 and Erasmias Sasaka Wachilonga v. Simon Wachilonga Toli & 3 Others [2018] KEELC 4845 (KLR)*. Chaju submitted that this court was functus officio and could not entertain the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' application, which the court was urged to dismiss with costs.

### **Analysis and Determination**

29. I have considered the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' application, the affidavit filed in support thereof, the grounds of opposition and replying affidavit filed in opposition thereto and the submissions by the advocates for the parties. The issue arising for determination is whether the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are entitled to the orders sought in the application.

30. Section 34 of the *Civil Procedure Act* provides as follows:

- “(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.”

31. In *Raila Odinga v. IEBC & 3 others (supra)*, the Supreme Court cited with approval a paragraph from the text, ‘The origins of the functus officio doctrine with specific reference to its application in administrative law’ by ‘Daniel Malan Pretorious’ where the author stated as follows: -

“...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.”



32. The Supreme Court also referred to the case of Jersey Evening Post Limited v. A Thani (2002) JLR 542 at page 550 where the court stated that:

“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.”

33. I find no merit in the Plaintiff's and Chaju's argument that this court is functus officio. The court has power under Section 34 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya to deal with disputes of this nature. Although Chaju was not a party to this suit, its claim over Kisumu/Kanyakwar "B"/2734 is rooted in the judgment that was made by this court in favour of the Plaintiff on 18<sup>th</sup> May 2016. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants' claim over the suit property and its purported subdivisions, Kisumu/Kanyakwar "B"/2732, 2733 and 2734 as against the Plaintiff was fully heard and finally determined. It was not necessary to file a fresh suit against the Plaintiff and Chaju. Chaju was joined in the present application and allowed to defend its claim over Kisumu/Kanyakwar "B"/2734. It has failed to establish any lawful interest in the property. The facts of the case and the law would not change even if a fresh suit were filed. In any event, Chaju had the right to request that it be allowed to tender oral evidence or to cross-examine the deponent of the affidavit in support of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' application. Section 34(2) of the *Civil Procedure Act* allows the court to conduct proceedings under Section 34 as a suit where necessary. Chaju could have employed any of the foregoing procedural safeguards in case it wished to tender oral evidence in the matter. Having not done so, it cannot claim that it was not given an opportunity to defend its title, the existence of which has not even been established, as will be seen later in the ruling.

34. On the merit of the application, it is common ground that on 15<sup>th</sup> February 2017, the court set aside the ex-parte judgment that had been entered against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on 18<sup>th</sup> May 2016. I agree with the 3<sup>rd</sup> and 4<sup>th</sup> Defendants that the setting aside of the said ex-parte judgment overturned the execution of the same judgment and rendered any transactions over the suit property, Kisumu/Kanyakwar "B"/396, null and void. As correctly submitted by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, the orders of 15<sup>th</sup> February 2017 restored the status quo before the said ex-parte judgment, which was that the suit property had been subdivided into Kisumu/Kanyakwar "B"/1689-1770. Even before the orders of 15<sup>th</sup> February 2017 were issued, the court had on 26<sup>th</sup> October 2016 issued an order preserving the suit property together with the resultant titles that the Plaintiff had created pending the delivery of a ruling on the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' setting aside application.

35. It is common ground that after the said judgment was set aside, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were granted leave to defend the suit. The suit was heard afresh and a final judgment on merit was delivered on 7<sup>th</sup> December 2021. In the judgment, the court found that the Plaintiff's deceased father had no interest in the suit property and held that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were the bona fide purchasers of the suit property for value from the 2<sup>nd</sup> Defendant. The court dismissed the Plaintiff's suit with costs.

36. From the evidence on record, the Plaintiff subdivided the suit property on 15<sup>th</sup> August 2016 into Kisumu/Kanyakwar "B"/2732, 2733 and 2734. See the certificates of official search annexed to the Plaintiff's affidavit filed in court on 16<sup>th</sup> April 2018. This was immediately after the judgment that was delivered in his favour on 18<sup>th</sup> May 2016, which was set aside on 15<sup>th</sup> February 2017. It was the



judgment of 18<sup>th</sup> May 2016 that conferred upon the Plaintiff an interest in the suit property and its subdivisions, namely, Kisumu/Kanyakwar “B”/2732, 2733 and 2734. Following the setting aside of the said judgment of 18<sup>th</sup> May 2016, the ownership of the suit property and the purported subdivisions reverted to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ title to the suit property was confirmed in the final judgment of the court delivered on 7<sup>th</sup> December 2021. The Plaintiff never appealed this judgment nor sought its review. Any claim that the Plaintiff may have had over the suit property was extinguished by this judgment of 7<sup>th</sup> December 2021. As correctly submitted by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, the order of 15<sup>th</sup> February 2017 setting aside the judgment of 18<sup>th</sup> May 2016 and the final judgment of 7<sup>th</sup> December 2021 nullified any dealings that the Plaintiff may have had with the suit property including the purported subdivision of the suit property into Kisumu/Kanyakwar “B”/2732, 2733 and 2734.

37. Chaju has contended that it was not a party to the suit when the orders dismissing the Plaintiff’s claim over the suit property were made. Chaju could not have been made a party to the suit. Chaju came to the picture on 5<sup>th</sup> February 2024 when the Plaintiff purported to sell to it the land parcel, Kisumu/Kanyakwar “B”/2734. This sale took place 2 years after the final judgment was made in this suit on 7<sup>th</sup> December 2021. The Plaintiff had no interest in the suit property and its purported subdivisions, Kisumu/Kanyakwar “B”/2732, 2733 and 2734, when he purported to sell land parcel, Kisumu/Kanyakwar “B”/2734 to Chaju. The purported sale was an act of fraud and pure contempt of the judgment of the court made on 7<sup>th</sup> December 2021. In *Kenya Tea Growers Association v. Francis Atwoli and 5 others* [2012] eKLR, Lenaola J. cited with approval the case of *Clarke and others v. Chadburn & others* [1985] 1 ALL E.R (pc), 211 in which the court observed that:

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

38. The purported sale of land parcel, Kisumu/Kanyakwar “B”/2734 to Chaju was illegal, null and void and could not confer any interest upon Chaju protectable by law. In *Macfoy v. United Africa Co. Ltd.*(1961) 3 All E.R 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

39. However innocent Chaju may have been when purchasing the land parcel, Kisumu /Kanyakwar “B”/2734 from the Plaintiff, it could not acquire a title in the property which the Plaintiff did not have. I have noted that although Chaju claimed that the suit property had been transferred to it and that it had a title, no title was attached to its replying affidavit. The only evidence Chaju placed before the court was that of the purported agreement of sale between it and the Plaintiff in respect of land parcel, Kisumu/Kanyakwar “B”/2734. A sale agreement does not amount to a title. In the absence of a certificate of search or a register of the land parcel, Kisumu/Kanyakwar “B”/2734, there is nothing to



prove that Chaju is registered as the owner of Kisumu/Kanyakwar “B”/2734 which registration would not have made any difference any way.

## **Conclusion**

40. In conclusion, I find merit in the 3<sup>rd</sup> and 4<sup>th</sup> Defendant’s application dated 16<sup>th</sup> October 2024. The application is allowed on the following terms;
1. Chaju Builders Limited is joined in the suit as a party for the purposes of the application.
  2. I declare that the order issued by the court on 15<sup>th</sup> February 2017 (erroneously indicated as 15<sup>th</sup> February 2016) setting aside the ex parte judgment that had been entered against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on 18<sup>th</sup> May 2016 also overturned the execution of the said judgment and rendered any transactions over the suit property, Kisumu/Kanyakwar “B”/396 null and void and restored the status quo prior to the said judgment which was that the suit property had been subdivided into Kisumu/Kanyakwar “B”/1689-1770.
  3. I declare that the subdivision of the suit property, Kisumu/Kanyakwar “B”/396 into Kisumu/Kanyakwar “B”/2732 (further subdivided into subplots 2745, 2746, 2747 and 2748), 2733 and 2734 by the Plaintiff and subsequent transfer of the subdivisions to the names of the Plaintiff and Chaju Builders Limited was null and void by reason of the ruling and orders made by the court on 15<sup>th</sup> February 2017.
  4. The purported subsequent subdivision of the suit property, Kisumu/Kanyakwar “B”/396 into Kisumu/Kanyakwar “B”/2732 (further subdivided into subplots 2745, 2746, 2747 and 2748), 2733 and 2734 and the transfer and registration of the purported subdivisions in favour of the Plaintiff and Chaju Builders Limited are hereby cancelled and the Land Registrar Kisumu County shall rectify and restore the register of the land parcels Kisumu/Kanyakwar “B”/1689-1770 in the names of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/registered owners thereof.
  5. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants shall have the costs of the application to be paid by the Plaintiff and the Interested Party, Chaju Builders Limited.

**DELIVERED AND SIGNED AT KISUMU ON THIS 31<sup>ST</sup> DAY OF JULY 2025**

**S. OKONG’O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Indimuli for the Plaintiff

Mr. Indimuli h/b for Mr. Nyamweya for the 1<sup>st</sup> Defendant

Mr. Mulisa for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Mr. Ogonda for the Interested Party

Ms. J. Omondi-Court Assistant

