

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCC No. 109 OF 2021

ABEL KURURA TINEGA (Suing as legal representative of the Estate of NAHASON TINEGA KURURA) PLAINTIFF

VERSUS

SHADRACK ORINA MOGENI 1ST DEFENDANT
HEZRON NYANGAU MOGENI 2ND DEFENDANT
EVANS GESORA MOGENI 3RD DEFENDANT

RULING

1. Judgment was delivered in this matter on 25th July 2024 by Mugo Kamau, J. as follows:

In the premises, I do not find any grounds of denying the Estate of Nahason Tinega Kurura of a fairly and lawfully acquired Title to land and the Plaintiff succeeds in this Suit and I hereby enter judgement in his favour in the following terms: -

a. A Declaration do hereby issue that the estate of Nahason Tinega Kurura is the rightful

owner of the parcel of land known as Title No Title No Settlement Fund Trustee/Ekerubo/26.

b. The Land Registrar, Nyamira is hereby ordered to ensure the property known as Title No Title No Settlement Fund Trustee/Ekerubo/26 remains in the name of Nahason Tinega Kurura pending the process of Succession and distribution to its rightful Dependants.

c. A Declaration do issue that the Defendants are not entitled to enter, remain or use the suit property known as Title No Settlement Fund Trustee/Ekerubo/26.

d. A permanent injunction do issue to restrain the Defendants whether by themselves, their servants and/or agents or otherwise howsoever from entering, remaining or using, alienating the suit property and from interfering with the Plaintiff and other Dependants of the Estate of the Deceased quiet possession and enjoyment of the suit property namely Title No Settlement Fund Trustee/Ekerubo/26.

e. An order be and is hereby issued that the Defendants do vacate the suit property Title

No Settlement Fund Trustee/Ekerubo/ 26 forthwith and in default thereof an order of eviction do issue against the Defendants, their servants and/or agents.

f. The prayer for General Damages for trespass is disallowed for want of proof.

g. The Counterclaim dated 9/11/2007 and amended on 27/10/2015 be and is hereby dismissed in its entirety with costs to the Plaintiff.

h. On the issue of costs, the same follow the event and I accordingly order that the Defendants do pay the costs of this suit to the Plaintiff in addition to those of the Counterclaim.

2. Upon delivery of the judgment, the Defendants filed Notice of Motion dated 7th October 2024, through which they sought, among other reliefs, stay of execution of the judgment and the decree pending hearing and determination of an appeal. When the application came up for inter parte hearing on 16th October 2024, the parties recorded the following consent:

By Consent all parties herein;

1. The firm of Macharia Gaitho and Murigu Advocate LLP is hereby allowed to come on record for the Defendants/Judgment Debtors in place of the firm of Momanyi Aunga and Co. Advocates.

2. It is hereby agreed that the Judgment Debtors are granted a stay of execution pending the hearing and determination of the Intended Appeal to the Court of Appeal in the following terms.

a. A Title Deed in respect of the parcel of land known as L.R. NO. SETTLEMENT FUND TRUSTEE/EKERUBO/26 shall be deposited with the Deputy Registrar of this Court within the next 14 Days from today.

b. The Defendants/Judgment Debtors shall vacate the suit land i.e. LR. NO. SETTLEMENT FUND TRUSTEE/EKERUBO/Z26 on or before 16/10/2025.

c. All the trees and any permanent structures including the fence and any permanent crops shall not be uprooted or harvested by the Judgment Debtors.

d. In case the Judgment Debtors or any of them defaults any of the conditions (b) and (c), above this stay of execution shall forthwith lapse and the Decree Holder shall be at liberty to execute the decree.

3. Later, the Defendants filed Notice of Motion dated 27th August 2025, which is the subject of this ruling. The following orders are sought in the application:

- I. That this Application be certified as urgent and heard on a priority basis owing to the imminent threat of eviction and disruption of the Applicants' long-standing occupation.*
- II. That this Honourable Court be pleased to extend and/or renew the stay of execution orders issued on 16th October 2024 by the Honourable Justice Mugo Kamau in Nyamira ELC No. 109 of 2021, pending the hearing and determination of the intended appeal.*
- III. That pending the hearing and final determination of Kisumu Civil Appeal No. E253 of 2024, this Honourable Court be pleased to stay execution of the Judgment and Decree issued on 25th July 2024 and 16th August 2024 respectively.*
- IV. That in the alternative, and pending the hearing and determination of the said appeal, the*

Plaintiffs/Respondents, their agents or assigns be restrained from interfering with the Defendants' peaceful occupation and use of 20 acres out of Title No. SETTLEMENT FUND TRUSTEE/EKERUBO/26.

V. That this Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances.

VI. That the costs of this Application be provided for.

4. The application is supported by an affidavit sworn by the Second Defendant. He deposed that being aggrieved with the judgment and decree, the Defendants filed Notice of Appeal dated 6th August 2025 followed by Kisumu Civil Appeal No. E253 of 2024 which was awaiting directions from the Court of Appeal. That the stay orders that were granted on 16th October 2024 were about to lapse yet the appeal remained unheard and that the Plaintiff had filed two post judgment applications seeking to evict them from the land despite pendency of the appeal.
5. The Second Defendant further deposed that the Plaintiff was likely to evict them thereby causing them irreparable harm and homelessness. He added that they made the application timeously to protect the subject matter of the appeal and that it was in the interest of justice that the order of 16th October

2024 be extended pending hearing and determination of Kisumu Civil Appeal No. E253 of 2024.

6. The Plaintiff opposed the application through an affidavit which he swore on 10th September 2025. He deposed that this court is *functus officio* and that the court cannot extend the orders. That the Defendants' claim that eviction would render them homeless was a red herring and the Defendants had cut down trees in defiance of the order of 16th October 2024.
7. The Defendants filed a further affidavit sworn by the Second Defendant. He deposed among other matters that the Defendants had fully complied with the order of 16th October 2024 and that the only portion of the said order that they wished to be varied is clause 2 (b) thereof which required them to vacate by 16th October 2025.
8. The application was canvassed through written submissions. The Defendants/Applicants filed submissions dated 2nd October 2025 while the Plaintiff/Respondent filed submissions dated 8th October 2025.
9. I have carefully considered the application, the affidavits and the submissions. The issues that arise for determination are whether the court has jurisdiction and if so, whether the stay order of 16th October 2024 should be renewed or extended.
10. Jurisdiction, as has often been stated, is everything. Without it, the proceedings come to a certain end and the court cannot

make any further step. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**. The Court of Appeal had occasion to address the issue of centrality of jurisdiction in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** as follows:

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.

11. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the Supreme Court held:

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. We agree with counsel for the first and second respondents . . . that the issue as to whether a Court of law

has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.

12. Thus, proceedings initiated or conducted without jurisdiction are futile and of no consequence as the Court of Appeal emphasised in **National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 Others** [2023] KECA 80 (KLR) where it held thus:

Jurisdiction, a mantra in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A Court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another;

(b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and, (c) the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The three ingredients must co-exist in order to infuse jurisdiction in a Court. Where a Court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity.

13. The Plaintiff has contended in his submissions that this court is *functus officio* in view of the consent order of 16th October 2024 and considering that there is an appeal in the Court of Appeal. The doctrine of *functus officio* is an embodiment of the adage “litigation must come to an end.”

14. In **Raila Odinga & Others vs. IEBC & Others [2013] eKLR**, the Supreme Court addressed the doctrine of *functus officio* thus:

“(18) 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.”

(19) 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.”

15. In the context of the present application, the litigation that the Plaintiff maintains must come to an end is on the issue of whether this court should grant stay of execution of the judgment and the decree herein pending hearing and determination of the Defendants’ appeal to the Court of Appeal. There is no dispute that the Defendants filed Notice of Motion dated 7th October 2024 through which they sought stay of execution of the judgment and the decree herein pending hearing and determination of their appeal. The application was compromised through the consent of 16th October 2024. The effect of the consent was that the Defendants were granted stay of execution pending appeal on agreed conditions.

16. While the Defendants have attempted both in the present application and their submissions to style the order of 16th October 2024 as interim stay, that is an inaccurate representation of the record. The order was made when their application came up for inter parte hearing. Upon adoption of the consent, the application was conclusively determined. The

court performed all its duties regarding the question of whether stay pending appeal could be granted. The court became *functus officio* as regards the nature and duration of stay orders that it could make and the conditions of or security for such an order. Consequently, the court lacks jurisdiction to hear and determine Notice of Motion dated 27th August 2025. The Defendants should prosecute their appeal in the Court of Appeal or pursue a fresh order of stay there.

17. Even if I had concluded that I have jurisdiction, I would still have dismissed Notice of Motion dated 27th August 2025 for the reason that the period within which the Defendants were to vacate was expressly agreed by consent and I see no valid reason to vary or set aside the consent herein.

18. In the end, owing to lack of jurisdiction, I strike out Notice of Motion dated 27th August 2025 with costs to the Plaintiff.

Dated, signed, and delivered at Nyamira, this 19th day of November 2025.

D. O. OHUNGO
JUDGE

Delivered in the presence of:

Ms Caleb for the Plaintiff

Mr Macharia for the Defendants

Court Assistant: B Kerubo