Kemoni & another v Omwoyo (Environment and Land Case 105 of 2021) [2025] KEELC 8401 (KLR) (3 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8401 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT AND LAND CASE 105 OF 2021

DO OHUNGO, J

DECEMBER 3, 2025

BETWEEN

YOBENSIA KEMUNTO KEMONI ..... 1ST PLAINTIFF

MARGARET NYAITONDI GWOMA ..... 2ND PLAINTIFF

AND

GEOFFREY MANGERA OMWOYO ..... DEFENDANT

RULING

1. This is an old matter which was filed in the High Court at Kisii on 14th August 2001 through Plaint dated 14th August 2001. The matter was heard and determined through judgment delivered on 30th September 2010 by Asike-Makhandia, J. (as he then was). The Court ordered a re-survey of plot numbers Matutu Settlement Scheme/214 and 215 "to accord with the subdivision and transfer and mutation forms executed by the parties in 1980 by which land parcel 214 measures 15.5 acres and land parcel 215 measures 4 acres." The Court also granted costs of the suit to the Plaintiffs.

2. Dissatisfied with the judgment, the Defendant filed Kisumu Civil Appeal No. 20 of 2014 in the Court of Appeal. The Court of Appeal delivered judgment on 4th March 2016 thus:

> Taking all the above into consideration, we are satisfied that the order sought by the respondents to re-survey the two parcels of land, Nos. 214 and 215 and re-adjust the measurements thereof to be 15.5 and 4.0 acres respectively was well founded and meritoriously granted.
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> We find no merit in this appeal. Consequently, it is dismissed with costs to the respondent.

3. Before the Court for determination through this ruling are two applications: the Defendant's Notice of Motion dated 22nd April 2025, and the Plaintiffs' Notice of Motion dated 23rd September 2025.

4. Notice of Motion dated 22nd April 2025 is brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and seeks the following orders:

    a. That the dispute before court is not a boundary dispute hence the dispute is a land case which has to be solved first before visiting the site.

    b. That since the dispute is a land case the land registrar be restrained from visiting the site for a boundary.

5. The application is supported by an affidavit sworn by the first Plaintiff, and is based on the following grounds:

    1. The applicant is the registered owner of land parcel no Matutu Settlement Scheme/215.

    2. The respondents are the owners of land parcel No. Matutu/Settlement Scheme/214.

    3. The court of appeal judgment delivered on the 4th day of March 2016 stated clearly that there be a re-survey of the two parcels no 214 and 215 and re-adjust the measurements thereof to 15.5 and 4.0 acres respectively.

6. The Defendant deposed in his affidavit that it was true that there was a decree issued by the High Court for re-survey of plot number Matutu Settlement Scheme/214 and 215 to measure 15.5acres and 4.0 acres. He stated that the re-survey was not to affect the original land purchased and the compound where the permanent houses were constructed but instead would affect the other side. He stated that the land to be surrendered was the vacant land without buildings and free to be curved out.

7. The Plaintiffs opposed the application through a replying affidavit sworn on 20th May 2025 by the First Plaintiff. She deposed that the application was overtaken by events since the Land Registrar had visited the land and marked boundaries separating land parcels Matutu Settlement Scheme/214 and 215. That the Land Registrar had already changed the register to accord with the measurements on the ground and that they had fenced off their land parcel No. Matutu Settlement Scheme/214 from the applicant's parcel. She added that litigation must end and that the decree had never been implemented due to numerous applications by the applicant. She urged the Court to dismiss the application with costs.

8. On the other hand, the Plaintiffs' Notice of Motion dated 23rd September 2025 is brought under Order 22 Rule 18 of the Civil Procedure Rules, Sections 1A and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution*. The application seeks the following orders:

    1. That the Honourable court be pleased to issue Notice to show cause why the defendant's/ respondent's semi-permanent structures on land parcel No. Matutu Settlement Scheme/214 should not be demolished.

    2. That failure to show cause as in in (1) above an order for demolition of the defendant's/ respondent's structures illegally built on land parcel No. Matutu Settlement Scheme/214 be issued forthwith.

    3. That the OCS Matutu Police Station do ensure compliance and provide security during the exercise.

    4. That the costs of this application be provided for.

9. The application is supported by an affidavit sworn by Yobensia Kemunto Kemoni and is based on the following grounds:

1. That the decree was issued by this court on 1st day of March 2011 and its over 10 years now.

2. That the Land Registrar/Surveyor visited the land parcels No. 214 and 215 and beacons placed on the ground on the 16/4/2025.

3. That the structures were found to be on land parcel No. Matutu Settlement Scheme/214 measuring 15.5 acres.

4. That the respondent should move his structures to his land parcel No. Matutu Settlement Scheme/215.

5. That the respondent shall not be prejudiced in anyway in the event the application is allowed.

6. That the application is highly merited and should be allowed as prayed.

10. Yobensia Kemunto Kemoni deposed that the Plaintiffs were the registered proprietors of land parcel number Matutu Settlement Scheme/214 measuring approximately 15.5 acres and that the Land Registrar marked boundary features on 23rd April 2025. That the Defendant had encroached on 5 acres of the parcel, built structures therein and failed to vacate. She added that the structures should be demolished and that there is no reason execution should not issue yet judgment was delivered over 10 years ago.

11. The Defendant opposed the application through a replying affidavit which he swore on 6th October 2025. He deposed that the Plaintiffs had jumped the gun in bringing the application before taking other steps such as joint survey, amendment of titles and payment for destruction of his trees. That the judgment gave the Plaintiffs vacant possession but did not allow destruction of his houses. He added that he was the registered proprietor of land parcel number Matutu/Settlement Scheme/215 measuring 5.13 acres and that the said parcel had not been resurveyed together with Matutu/ Settlement Scheme/214 measuring 14.37 acres.

12. The Defendant further deposed that the judgment had not been implemented on the ground since the surveyor was paid but had not shown up. He also stated that the Land Registrar did not attend the site with the surveyor as required and that consequently, his permanent building was to be spared. He further deposed that it was true that the decree had not been implemented but blamed the failure on the Plaintiffs' action of destroying his trees. He therefore urged the Court to dismiss Notice of Motion dated 23rd September 2025 with costs.

13. The two applications were canvassed through written submissions. The Plaintiffs filed submissions dated 14th October 2025 while the Defendant filed submissions dated 22nd October 2025.

14. I have carefully considered the application, the replying affidavit and the submissions. The issues that arise for determination are whether the Court has jurisdiction and whether the orders sought should issue.

15. Jurisdiction, as has been stated severally, is everything. It is the entry point in any matter that a Court is called upon to determine. The first question that every Court of law must always ask itself before embarking on hearing and determining any dispute is whether it has jurisdiction. That enquiry must be made whether or not the parties raise the issue. As the Court of Appeal stated in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR:

> ... 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. ...

16. A Court of law cannot take any valid step in the absence of jurisdiction. The Court's jurisdiction flows from either *the Constitution* or legislation or both and it can only exercise jurisdiction as conferred on it by law. See Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR. Any order or step taken by a Court in the absence of jurisdiction is a nullity. See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.

17. One way in which a Court can lose jurisdiction is when it is functus officio as far as its power to determine the parties' respective claims in the matter goes. The doctrine of functus officio is an embodiment of the adage "litigation must come to an end."

18. In Raila Odinga & Others vs. IEBC & Others [2013] eKLR, the Supreme Court explained 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:
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> > "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."
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> (19) This principle has been aptly summarized further in Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550:
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> > "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."

19. Both the Plaintiffs and the Defendant have brought their respective applications under Sections 1A and 3A of the *Civil Procedure Act*. The Plaintiffs have additionally relied on Article 159 of *the Constitution*. In so doing, the parties have invoked the overriding objective and the Court's inherent power to do justice.

20. Suffice it to state that neither the O2 principle nor the noble pursuit of justice can confer jurisdiction where none exists. The Court of Appeal emphasised as much in Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR where it held:

> Jurisdiction is a weighty fundamental matter ... It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

21. The parties herein formulated their respective cases through their pleadings which they then ventilated at trial and judgment was subsequently delivered on 30th September 2010. In doing so, the Court and even the parties were bound by the pleadings that the parties placed before the Court. Any prayers that the parties did not seek could not be granted.

22. The judgment of the Court and the decree in this matter could not be clearer. The Court simply ordered that there be a re-survey of plot numbers Matutu Settlement Scheme/214 and 215 "to accord with the subdivision and transfer and mutation forms executed by the parties in 1980 by which land parcel 214 measures 15.5 acres and land parcel 215 measures 4 acres." The decree did not order any demolition. If the parties wished to have an order of demolition, they should have sought it in the pleadings that they filed prior to determination of the suit. Similarly, if the parties think that the Court erred in not granting demolition, they should have raised that on appeal. The Court having performed its duty by delivering the judgment, I have no jurisdiction to alter the judgment and decree in the manner sought in Notice of Motion dated 23rd September 2025.

23. Regarding Notice of Motion dated 22nd April 2025, the Defendant is contending therein that the dispute before the Court is not a boundary dispute and that consequently, the Land Registrar has no business visiting the suit parcels. He contends that the case "has to be solved first before visiting the site." Judgment having been delivered herein, the case was "solved" over a decade ago. Issues of whether the Land Registrar could go to the site are no longer before the Court for determination. It must also be remembered that the Land Registrar is not a party to this case and cannot therefore be restrained as sought without being given an opportunity to be heard. I find that the Court is also functus officio as regards Notice of Motion dated 22nd April 2025.

24. In view of the foregoing discourse, this Court lacks jurisdiction to hear and determine the Defendant's Notice of Motion dated 22nd April 2025 and the Plaintiffs' Notice of Motion dated 23rd September 2025. I strike out both applications. Considering that the outcome is the same on both sides, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 3RD DAY OF DECEMBER 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Plaintiffs

Mr Sagwe for the Defendant

Court Assistant: B Kerubo