REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC NO. E001 OF 2021 (OS)

HATHINGE SELF HELP GROUP (with a membership of 293 members sued through their registered officials JAMES NZELU MUSEMBI, DANIEL MUTINDA NDWIKI AND HARRISON MUTUNGA WAMBUA) .....PLAINTIFF

VERSUS

CO-OPERATIVE BANK HOUSING COOPERATIVE SOCIETY LTD.....DEFENDANT

RULING

1. Before this court for determination is an unopposed notice of motion dated 6/03/2024 filed by the defendant post judgment after the plaintiff's suit was dismissed by this court on 6/03/2024. The motion is moved within the provisions of **Section 1A, 1B, AND 3A** of the **Civil Procedure Act, Section 152E** of the **Land Act 2012, Order 22 Rule 20** of

the **Civil Procedure Rules 2010** and all enabling provisions of the law and seeks the following reliefs from this court: -

a) Spent

b) The honourable court be pleased to issue orders of eviction of the plaintiffs from all three parcels of land known as L.R. NO. 14750/33, 14750/34 and 14750/35 (hereinafter referred to as "the suit property" and vacant possession of the property to be delivered to the defendant.

c) That the OCS Athi River Police Station do offer security in ensuring compliance with prayer (b) above.

d) That the costs of the suit be provided for.

2. The motion is based on the grounds listed on its face and the supporting affidavit of John Kimutai Ng'eno, sworn on the instant date. In summary, he states that the plaintiffs initiated legal proceedings on January 18, 2021, seeking ownership of the suit property through adverse possession. This suit was dismissed with costs on March 6, 2024, by **Lady Justice A. Nyukuri.** Notwithstanding this ruling, the respondents persist in unlawfully occupying and damaging the suit properties, thereby denying the defendant access to their property.

3. Thus, the defendants plead for eviction orders against the plaintiff to prevent irreparable harm and have also requested

police assistance to ensure security during the execution of these orders, highlighting the urgency of the matter and the need for judicial intervention.

4. When this came up for hearing on 5/06/2025**, Mr Mungata**, counsel for the defendant, argued the motion orally and urged the court to grant it, and consequently, the motion was reserved for hearing today. Thus, having considered the motion, the grounds, supporting affidavit, relevant law, and prevailing jurisprudence, the singular issue for determination is **whether the motion is merited.**

5. In dealing with this issue, it is important to highlight the relevant provision of law as invoked by the defendant, which is **Section 152E** of the **Land Act**, which states explicitly as follows:-

"(1)If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

(2)The notice under subsection (1) shall—

(a)be in writing and in a national and official language;

(b)in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

(c)specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

(d)be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area."

6. However, in this instance, the court rendered a substantive judgment on 6th March 2024, dismissing the plaintiff's claim of adverse possession against the defendant over land parcel no. **LR No. 14750/2 ("mother parcel").** It emerged during the hearing that the mother parcel was no longer in existence, as it had long been subdivided to create the suit properties

7. This may explain the reasons why the defendant did not file a counterclaim for eviction as envisaged by provisions outlined in **Explanation (4)** of **Section 7** of the **Civil Procedure Act,** which stipulates that any matter that could and should have been included as a ground of defence or attack in such litigation shall be regarded as directly and substantially in issue in that litigation and as affirmed in the Court of Appeal

decision of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] KECA 248 (KLR).**

8. Following this, and be that as it may, having rendered a final judgment on the dismissal of the suit regarding adverse possession over the mother parcel, it is the considered view of this court that it is now *functus officio,* which is essentially the common law doctrine which prevents the reopening of a matter once the court has rendered its final decision. It bars a merit-based decisional re-engagement with the case once final judgment and/or ruling has been entered and a decree/order thereon issued. Its origins, purpose and exceptions are highlighted in the decision of **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR)** in the following manner:-

> ***"It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);***
>
> ***"The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire***

Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. ***Where there had been a slip in drawing it up, and,***
2. ***Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"***

9. The Supreme Court of Kenya decision of **Odinga v Independent Electoral & Boundaries Commission & 3 others [2013] KESC 8 (KLR)** cited with approval the book of **Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832,** that explicated this legal concept in the following manner:-

"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 <u>the same matter.</u>… 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) <u>final and conclusive</u>. Such a decision cannot be revoked or varied by the decision-maker."

10. It therefore follows that the exception to the doctrine is found in our **Section 99** of the **Civil Procedure Act,** which allows courts to correct clerical or arithmetical mistakes or errors arising therein from any accidental slip or omission either on its own motion or on the application of any of the parties. Accordingly, the reliefs sought in the motion are an abuse of the court process as they do not seek to correct any errors in the ruling.

11. As this court concludes, it is worth pointing out that, as held in **Kagembe v Kamwara [2023] KEELC 18958 (KLR),** it can approach the court by a separate suit either as a substantive suit over the suit properties, which usually applies to complex cases, or under the paradigm of the **Land Act.** In **Kagembe *(Supra),*** the court held: -

There is a common ground that the suit property is registered in the name of the Applicant. The Respondent is currently in occupation of the suit property although his claim for the property by adverse possession in Chuka ELC (OS) E001 of 2021

was dismissed by the court vide a judgment delivered on November 9, 2022. The Applicant has now moved this court for an order of eviction… While I do not wish to go into the application herein at this stage so as not to preempt the trial, it is my considered view that as long as the Applicant has complied with the provisions of sections 152A to 152 H of the Land Act, the Applicant would be entitled to make an application for eviction where he has demonstrated ownership of the suit land. This is more so because the said provisions do not expressly provide a different mode in which one should approach the court for an order of eviction. In addition, section 152F of the said Act provides for relief against a notice of eviction.

12. In the end, the court finds that the plaintiff's notice of motion dated 6/03/2024 is not merited and is dismissed. Since it was not opposed, the plaintiff shall bear its own costs of the motion.

Orders accordingly.

Delivered and Dated at Machakos this 16th day of December, 2025.

HON. A. Y. KOROSS

JUDGE
16.12.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant

Mr. Kivui holding brief for Miss Nzili for respondent.

N/A for applicant.