

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC MISC APPLICATION NO. E018 OF 2025**

**TITUS MBURU MUGECHA .....**

**PLAINTIFF**

**VERSUS**

**LUCAS GAKORI MAINA ..... 1<sup>ST</sup>**

**DEFENDANT**

**MUKA MUKUU FARMERS COOP SOCIETY LTD ..... 2<sup>ND</sup>**

**DEFENDANT**

**RULING**

1. What is before me for determination is the Plaintiff/Applicant's Notice of Motion dated 3<sup>rd</sup> March 2025 seeking the following orders:
  - a) *Spent*
  - b) *That the honourable court be pleased to call for Thika Chief Magistrate's Court MCELC No. 48 of 2019 and review the order made on the 11<sup>th</sup> day of July 2023 and set the same aside and all consequential orders thereof.*
  - c) *That the costs of this application be provided for.*
2. The Application is anchored on the grounds set out on the face of the application and the supporting affidavit sworn by the Plaintiff/Applicant on even date. The Applicant depones that the suit in the trial court was instituted by the 1<sup>st</sup> Defendant/Respondent against himself, the 2<sup>nd</sup> Defendant/Respondent and Peter Kamau Mugecha (deceased), his

late brother. He contends that the suit was initiated through a Plaint dated 4<sup>th</sup> October 2012 filed in the High Court at Nairobi, Environment and Land Court Division, being ELC Case No. 672 of 2012. He further states that the matter was later transferred to the Chief Magistrate's Court at Thika, where it proceeded as MCLE No. 48 of 2019, and that both he and the deceased filed a defence and counterclaim therein.

3. He avers that the dispute concerned a boundary disagreement on Plot No. 3-035, which was owned by himself and the Peter Kamau Mugecha(deceased), and on Plot No. Mithini M 229 within LR No. 10967, which had been issued by the 2<sup>nd</sup> Defendant/Respondent. The Applicant depones that during the pendency of the proceedings, the parties agreed on the boundaries relating to the 1<sup>st</sup> Respondent's land on 18<sup>th</sup> October 2022 and that a surveyor was appointed and subsequently visited the suit land. He states, however, that in the intervening period, his brother (Peter Kamau Mugecha), who had been the 1<sup>st</sup> Defendant in the trial court, passed away on 28<sup>th</sup> April 2023 before the Surveyor's Report could be formally adopted by the court.
4. He further avers that when the matter came up in court on 11<sup>th</sup> July 2023, the Surveyor's Report was adopted by the parties notwithstanding the fact that their Advocate on record had informed the court that she had not been in contact with her instructing client, who was by then deceased. He contends that the Consent order recorded on that date erroneously reflected that all parties had consented to the adoption of the Surveyor's Report.

5. The Applicant states that their Advocate was thereafter granted an opportunity to move the court appropriately and that the file was marked as settled. He maintains that it was evident from the circumstances that their Advocate may not have had the requisite instructions to record the Consent in light of the deceased's demise.
6. He further depones that upon notifying their Advocate of the death of the deceased, the family instructed her to file an application seeking substitution of the deceased with his daughter, one Eunice Wanjiku Kamau. He states that the said application was heard and determined by a Ruling delivered on 16<sup>th</sup> April 2024, in which the court, while expressing no objection to the substitution in principle, found the application to be devoid of merit.
7. The Applicant avers that the court thereafter issued mention dates for directions on 6<sup>th</sup> August 2024, 22<sup>nd</sup> October 2024, and subsequently 18<sup>th</sup> February 2025. He states that on the mentioned date of 18<sup>th</sup> February 2025, both his Advocates and Counsel for the Respondents appeared in court and sought to take pre-trial directions with a view to fixing the matter for hearing.
8. He depones that the court, however, directed that the matter had already been settled by way of the Consent Order dated 11<sup>th</sup> July 2023. The Applicant emphasized that the Surveyor's Report dated 26<sup>th</sup> November 2022 was inconclusive, as it expressly stated that he and the deceased were not in agreement with its findings.

9. The Applicant further states that their Counsel had informed the court that she lacked instructions from her instructing client at the time the Consent was recorded and that, for that reason, the Consent should not be allowed to stand. He avers that the court granted him leave to move the court appropriately and that the closure or marking of the matter as settled did not accord with the sequence of events that had transpired before the trial court.
10. He contends that he had been advised by his current Advocates, whose advice he believed to be true, that any mistake on the part of Counsel should not be visited upon an innocent litigant. He further depones that the dispute was longstanding and ought to have been determined on the basis of evidence rather than through a contested Consent.
11. The Applicant asserts that the determination on the issue of substitution of the deceased was unsatisfactory and that the court ought to invoke its supervisory jurisdiction to review the impugned orders in order to ensure proper administration and dispensation of justice. He further contends that the court possessed the requisite jurisdiction to supervise subordinate courts within its jurisdiction so as to safeguard the interests of justice.
12. He further avers that he believed the court should review the directions and orders issued on 18<sup>th</sup> February 2025, guided by the proceedings and the Consent order of 11<sup>th</sup> July 2023, in order to prevent distortion of the integrity of court proceedings. He maintains that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents would not suffer any

prejudice if the orders sought were granted and that it is in the interest of justice and fairness for the court to allow the application.

13. The 1<sup>st</sup> Respondent opposes the Application through a Replying Affidavit sworn by him on 4<sup>th</sup> October 2025. The 1<sup>st</sup> Respondent faults the Applicant for failing to seek leave of court or obtain Consent from the firm of M/s Wambui Ngugi & Company Advocates (his former Advocates) for the firm of Kanja & Njoroge Advocates to come on record on his behalf, given that Judgment has been rendered.
14. The 1<sup>st</sup> Respondent asserts that the Applicant is seeking to challenge the decision of Thika Magistrate's Court ELC Case No. 48 of 2019 otherwise than by way of appeal or judicial review. He adds that the Applicant ought to have appealed, as the Application challenges the merits of the trial magistrate's decision delivered on 16<sup>th</sup> April 2024 and the subsequent decision of 18<sup>th</sup> February 2025 which upheld the directions closing the matter pursuant to the Consent dated 11<sup>th</sup> June 2023.
15. The 1<sup>st</sup> Respondent avers that on 24<sup>th</sup> October 2022, the lower court issued an order directing that a survey be conducted to determine the boundary between Plot No. M229 belonging to him and Plot No. 3-035 belonging to the Applicant. He reiterates that the survey exercise was carried out and that a Surveyor's Report was filed in court on 23<sup>rd</sup> March 2023. He adds that thereafter a Consent order agreeing with the findings of the surveyor's report was adopted by

the Advocates on record on 11<sup>th</sup> July 2023 after the court-ordered survey exercise had been conducted.

16. The 1<sup>st</sup> Respondent avers that through the suit at the lower court, he sought orders requiring the Applicant to mark out boundaries for his plots namely Mithini 229, 131, 163, 13 and 186. He states that the dispute as pleaded in the plaint dated 4<sup>th</sup> October 2012 was filed to cause the Applicant and the deceased to vacate and remove the developments undertaken on Plot No. Mithini M229.
17. He adds that through their Defence and Counterclaim dated 16<sup>th</sup> April 2019, the Applicant and Peter Kamau Mugecha (deceased) sought a permanent injunction stopping trespass on their Plot No. 1264 (3-035).
18. The 1<sup>st</sup> Respondent asserts that on or about 16<sup>th</sup> April 2019, the Applicant, and his Co-Defendant Peter Kamau Mugecha (deceased), signed a Consent in the lower court authorising Peter Kamau Mugecha to plead, appear and/or act for and on behalf of the Applicant in the proceedings. He contends that following the death of the deceased, the Applicant cannot disown the Consent or the proceedings that followed.
19. It is the 1<sup>st</sup> Respondent's position that the trespass complained of in the Plaint and the boundary dispute were addressed and concluded through the survey exercise and the Consent adopted by the court, thereby concluding the matter. He reiterates that the Consent adopted by the court related only to the boundary between Plot No. 3-035 and Plot No. 229 and not Plot No. 131. He adds that there

exists another plot situated between the Applicant's Plot No. 3-035 and his Plot No. 131 whose owner is not a party to this suit. He adds that beacons were placed on Plot No. 131 and that there was no interference with the Applicant's family plot No. 3-035.

20. The 1<sup>st</sup> Respondent asserts that both the Applicant and Peter Kamau Mugecha (deceased) were present during the survey exercise as reflected in the surveyor's report dated 22<sup>nd</sup> November 2022 and filed in court on 23<sup>rd</sup> March 2023.
21. The 1<sup>st</sup> Respondent avers that the substitution of Peter Kamau Mugecha (deceased) was not necessary as the Applicant, who was his co-defendant and joint owner of the land, survived him and was already on record.
22. He maintains that the Consent was adopted by the parties through their Advocates after full participation in the survey exercise and that the same cannot be set aside in the absence of proof of fraud, mistake, or misrepresentation. The 1<sup>st</sup> Respondent further states that the Surveyor's Report was undertaken pursuant to a court order and that no contrary expert report has been produced.
23. The 1<sup>st</sup> Respondent avers that on 16<sup>th</sup> April 2024, the lower court dismissed the application dated 14<sup>th</sup> September 2023 which sought substitution of the deceased with his daughter and marked the matter as closed in line with the Consent dated 11<sup>th</sup> July 2023.
24. On the allegation that the Surveyor's Report reduced the Applicant's land parcel by 8 acres, the 1<sup>st</sup> Respondent's position is

that the same ought to have been brought up during the adoption of the Consent into an order. He adds that the Applicant's then Counsel consented to the Surveyor's Report.

25. The 2<sup>nd</sup> Respondent challenges the Application through a Replying Affidavit sworn by its Chairman **Dominic Nthwao**, on 23<sup>rd</sup> May 2025.
26. He contends that the suit in the lower court concerned a boundary dispute over Plot numbers "M" 229, 131, 163, 12 & 186 and Plot 3-035 between the Applicant, the 1<sup>st</sup> Respondent and Peter Kamau Mugecha (deceased).
27. It is the 2<sup>nd</sup> Respondent's position that on 18<sup>th</sup> October 2022, all the parties entered into a Consent which was adopted as an order, by which they agreed that a Surveyor do carry out a survey exercise to establish the boundaries on Plot No. M 229 and 3-035 situate on L.R. No. 10967, Oldonyo Sabuk, and thereafter file a report in court.
28. The 2<sup>nd</sup> Respondent's Chairman asserts that pursuant to the said Consent, a survey exercise was duly conducted by Boma Surveyors in the presence of all the parties and a survey report dated 26<sup>th</sup> November 2022 was prepared and filed in court. The 2<sup>nd</sup> Respondent's Chairman further contends that on 11<sup>th</sup> July 2023, the said survey report was adopted by the court with the concurrence of all the parties through their respective Advocates, and that no objection was raised by any party at the time of adoption.
29. It is the 2<sup>nd</sup> Respondent's position that although the 1<sup>st</sup> Respondent passed away on 28<sup>th</sup> April 2023, his demise did not in any way

affect the survey exercise, which had been procedurally conducted in the year 2022 when he was alive and present during the exercise. The 2<sup>nd</sup> Respondent's Chairman asserts that the survey report had already been prepared and filed in court prior to the demise of the 1<sup>st</sup> Respondent.

30. The 2<sup>nd</sup> Respondent's Chairman contends that the Applicant is aggrieved by the decision of the lower court given on 11<sup>th</sup> July 2023 which marked the case as closed in view of the aforementioned Survey Report which was adopted in court. He faults the Applicant for failing to file a Memorandum of Appeal to challenge the orders of the lower court with which he is dissatisfied.
31. It is the 2<sup>nd</sup> Respondent's contention that the supervisory powers of the High Court over subordinate courts ought to be exercised sparingly and should not be used to interfere with the independent decision-making of subordinate courts.
32. The 2<sup>nd</sup> Respondent's Chairman maintains that the Application before this Court is misconceived, incompetent, and an abuse of the court process hence it ought to be dismissed.
33. The application was canvassed by way of written submissions and all the parties filed their submissions.

### **ANALYSIS AND DETERMINATION**

34. I have carefully considered the Application, the responses to the Application and the rival Submissions. The singular issue for determination is whether this Honourable Court should exercise supervisory jurisdiction to review, vary or set aside the orders made by the Thika Chief Magistrate's Court on 11<sup>th</sup> July 2023.

35. The Applicant urges this Court to invoke what he terms its supervisory jurisdiction, contending that the subordinate court erred in adopting a Surveyor's Report by Consent at a time when one of the Defendants had already passed away, and that this Court is empowered under Article 165(6) of the Constitution to intervene.
36. On the other hand, the 1<sup>st</sup> Respondent submits that the Applicant is improperly inviting this Court to sit on appeal over a Consent Order, and that no basis has been laid for the exercise of supervisory jurisdiction, the Magistrate's Court having acted within jurisdiction and in accordance with the law.
37. The Environment and Land Court is established under Article 162(2) (b) of the Constitution as a court of equal status with the High Court. It is equally settled that Article 165(6) and (7) expressly confer supervisory jurisdiction on the High Court, and not on courts established under Article 162.
38. However, jurisprudence has consistently clarified that specialised courts, including the Environment and Land Court(ELC) , exercise a limited supervisory or oversight role over subordinate courts only in respect of matters falling within their specialised jurisdiction, and only where jurisdictional error, illegality, or procedural impropriety is demonstrated.
39. The Applicant correctly cited the decision in **Lariak Properties Limited vs Metro Pharmaceuticals Limited [2022] eKLR** recognising that the ELC, by virtue of its appellate mandate over

subordinate courts, may exercise supervisory control to keep such courts within the bounds of their jurisdiction. However, that power is not general, automatic, or appellate in disguise.

40. From the record and the submissions placed before this Court, the following matters stand out. (i) The dispute before the Magistrate's Court was an issue of trespass and a boundary dispute, matters squarely within its delegated jurisdiction under the Environment and Land Court framework. (ii) The Magistrate's Court ordered a survey, which was conducted in the presence of the parties and culminated in a survey report that was subsequently adopted by Consent on 11<sup>th</sup> July 2023.
41. A Consent order, once lawfully recorded, has the force of a contract and can only be set aside on grounds such as fraud, collusion, mistake, misrepresentation, or illegality. Mere dissatisfaction with the outcome does not suffice. The Applicant previously moved the Magistrate's Court by way of a review application dated 14<sup>th</sup> September 2023 which was heard and dismissed vide the Ruling dated 16<sup>th</sup> April 2024. No appeal was preferred against that Ruling.
42. The present Application before this Court substantially invites the Court to revisit the merits of the consent order and the Magistrate's reasoning, rather than demonstrating that the subordinate court acted without jurisdiction or in excess of jurisdiction. Supervisory jurisdiction is not intended to provide a litigant with a second bite at the cherry, nor to reopen matters that have been conclusively

determined by a court of competent jurisdiction. To do so would offend the principles of finality of litigation.

43. This Court is not persuaded that the Applicant has demonstrated: (i) that the Magistrate's Court acted without jurisdiction; (ii) that it acted in excess of its statutory mandate; or (iii) that the proceedings were tainted by illegality, irrationality, or procedural impropriety warranting supervisory intervention. What is before the Court is, in substance, an invitation to sit on appeal over a consent order of a subordinate court, a course that is not available through supervisory jurisdiction.
44. Accordingly, this Court finds that no proper basis has been laid for the exercise of its supervisory jurisdiction to disturb the orders of the Thika Chief Magistrate's Court made on 11<sup>th</sup> July 2023, and the Applicant's invitation to that effect must fail.
45. Consequently, I find that the Application dated 3<sup>rd</sup> March 2025 lacks merit and it is hereby dismissed with costs.

**Dated signed and delivered virtually at Thika this 16<sup>th</sup> day of December 2025.**

**J. M ONYANGO  
JUDGE**

**In the presence of:**

1. Ms Kanja for Mr. Njoroge for the Applicant
2. Ms Waiyego for Mr Mbiyu Kamau for the 1st Respondent

3. Miss Kyule for Mr Ayieko for the 2nd Respondent

Court Assistant: Hinga

ORIGINAL