

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ELC (OS) NO 17 OF 2021

**ISHMAEL OWANO
OWAYA.....PLAINTIFF**

VERSUS

**LONAH BOL OKURO.....1ST
DEFENDANT**

**CLIFF ORIWO OKURO.....2ND
DEFENDANT**

**THOMAS OCHIENG OJANGA.....3RD
DEFENDANT/APPLICANT**

RULING

1. The 3rd Defendant/Applicant filed the instant application dated 18th September, 2025 seeking the following orders:

1. ...Spent.

2. THAT the Applicant be enjoined as the 3rd Defendant in this suit.

3. THAT the judgment delivered herein on 1st March 2022 be declared a nullity and set aside ex debito justitiae, as it was issued without enjoining or hearing the registered owner of the suit property, whose ownership was disclosed in the Plaintiff's documents on record.

4. THAT the matter be reopened and heard afresh with the Applicant as a party, so that all issues relating to the ownership of the suit land may be effectually and completely adjudicated.

5. THAT a temporary stay of all dealings, subdivisions, transfers, or alterations in respect of land parcel Kanyada/Kanyabala/3647 as it were on the 1st of March 2022 do issue pending the hearing and determination.

6. THAT the costs of this application be in the cause. and the suit be borne by the plaintiff.

2. The application was based on the grounds set out and the supported by the affidavit of Walter Thomas Ochieng Ojanga sworn on the same day. He stated that he was the registered owner of land parcel Kanyada/Kanyabala/3647, having been issued with a title deed in 2015.

3. He further stated that in the year 2022, judgment was delivered in this matter without his participation, yet the Plaintiff's own pleadings and documents expressly indicated that he was the registered proprietor.

4. He stated that despite this fact, the Honourable Court failed to enjoin him but instead proceeded to determine ownership of his land in his absence. He added that the same was a fundamental procedural

irregularity and a violation of his right to a fair hearing under Article 50 of the Constitution.

5. He went on to state that the said judgment was a nullity and should be set aside *ex debito justitiae*, as no person should be deprived of property without being heard. He also stated that the Plaintiff has since violated the stay order issued in 2022 and the pending appeal process by unlawfully subdividing, transferring, and altering the titles.
6. He stated that unless this court enjoins him and sets aside the 2022 judgment, he stood to suffer irreparable prejudice as his proprietary rights under Article 40 of the Constitution will be permanently extinguished without ever being heard.

Response

7. The Plaintiff filed his replying affidavit sworn on 9th October, 2025 where he averred that the application was an abuse of the court process. He averred that the court had already rendered itself on the ownership of the suit property and that the court lacked the jurisdiction to entertain the application.
8. He further averred that there was (*sic*) no live proceedings in this court hence the Applicant cannot be joined as a party. He added that the Applicant bought the property from the 1st and 2nd Defendants hence

he could bring any claim in regard to the suit property through a separate substantive suit.

- 9.** He averred that the court had already rendered itself on the instant matter and that there was currently an appeal challenging the said judgment. He averred that the court was functus officio.
- 10.** He averred that the right forum for the instant application was at the Court of Appeal. He added that the Applicant has filed this application in an attempt to reopen a case that had been concluded three years ago.
- 11.** He also averred that stay orders were issued the Respondents in the main suit delayed for more than 2 years before filing their record of appeal. He added that the Respondent has not sold the suit land to any person as alleged.
- 12.** He went on to aver that no evidence has been tendered to the effect that the Applicant occupied the suit land as a buyer. He added that the alleged subdivisions were done before the suit was filed.
- 13.** In response, the Applicant filed a supplementary affidavit sworn on 9th December, 2025. He stated that on 8th of December 2025, he filed a Notice and Affidavit informing the Honourable Court of ongoing attempts by third parties to interfere with the fair administration of justice in respect of the ruling scheduled for 15th December 2025.

14. He further stated that after filing the said affidavit, the Plaintiff approached him where he signed a declaration Letter disowning this case and a sworn Supporting Affidavit confirming he never filed any civil or criminal case against the family of Christopher Okuro Aruji.

15. He stated that the Plaintiff confirmed that he had not initiated these proceedings and further admitted that he had signed documents which he did not understand.

Submissions

16. The Applicant filed his submissions dated 16th October, 2025 where he identified four issues for determination. The first issue was whether the Applicant should be enjoined as the 3rd Defendant. While submitting in the affirmative, he relied on **Order 1 Rule 10(2) of the Civil Procedure Rules** and argues that he was true registered owner of the suit property, and his presence is indispensable for the fair adjudication of this dispute.

17. He submits that the persons who formerly held 1013 had no locus standi in relation to Kanyada/Kanyabala/3647. He relied on a number of cases including, **Wambui Gikonyo v Stephen Nyaga [2017] eKLR** and **MK v MWM & Another [2015] eKLR (Court of Appeal)**.

18.The second issue was whether the 2021 judgment should be set aside as a nullity *ex debito justitiae*. He submits in the affirmative and argues that the 2021 judgment was rendered in violation of **Article 50 of the Constitution** (right to a fair hearing) and **Article 40** (right to property), as it determined ownership of land belonging to a person who was not a party to the proceedings.

19.He cited the case of **Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55** and **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR**.

20.The third issue was whether the Plaintiff should be punished for contempt of court. The Applicant submits in the affirmative and argues that the Plaintiff willfully disobeyed court and appellate stay orders by subdividing, transferring, and selling portions of the Applicant's land which conduct undermines the dignity of the court and the administration of justice. He relied on **Section 5 of the Judicature Act, Section 29 of the Environment and Land Court Act** and the case of **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR**.

21.The final issue was whether this Court should issue restoration, eviction, and enforcement orders. He submits in the affirmative and argues that the Plaintiff had settled part of the family and three

additional individuals on the suit land, placed illegal beacons, demarcated plots, and therefore unlawfully claimed portions of the land.

22.It was his submission that their continued occupation of the land was not only unlawful but also served to perpetuate the original contempt and frustrate the administration of justice. He argues that the Honorable Court was therefore empowered to order their immediate eviction, bar them from re-entering the land, and treat their presence as part of the Plaintiff/Contemnor's scheme to defeat justice. He cited the case of **Ochola Kamili Holding Ltd v Guardian Bank Ltd [2018] eKLR**

23.He further filed a supplementary submission where on the issue of the court being functus officio, he submits that the doctrine did not bar a court from correcting or setting aside a judgment that was obtained without jurisdiction, by fraud, or violation of natural justice.

24.It was his submission that the 2021 judgment was rendered against non-parties, over a non-existent title, and without hearing the registered owner. He argues that the Court remained seized of jurisdiction to correct the error and restore its own record. He relied on the case of **Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR.**

25. He also submits that the existence of an appeal does not divest this Court of its jurisdiction where the appellate court has expressly directed that a party pursue remedies in the trial court. He argues that the Court of Appeal in Kisumu Civil Appeal No. E030 of 2023 advised the Applicant to seek joinder and relief here. He submits that the appeal could not cure or determine a judgment rendered against a non-party but that only this court could.

26. He went on to submit that the Defendants before the appellate court have no ownership interest in parcel Kanyada/Kanyabala/3647, and therefore lacked capacity to appeal or to defend any proceedings relating to 3647. He relied on **Section 24(a) and 25(1)** of the **Land Registration Act, 2012** and the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**.

27. It was his submission that the Defendants' appeal was incompetent ab initio, as they were appealing over property they don't own and had no standing to defend.

28. Counsel for the Plaintiff filed his submissions dated 21st October, 2025 where he identified three issues for determination. The first issue was whether the Applicant can be added as a defendant/interested party post judgment which is already being challenged at the court of appeal.

29. While submitting in the negative, he relied on the case of **Kimwele V Kubora & another; Mwasya & 5 Others (Interested Parties) [2025] KEELC 5636 (KLR)** and the Supreme Court application no. **E026 of 2023 Everton Coal Enterprises Limited V Rose Wakanyi Karanja and 5 Others.**

30. The second issue was whether the court should set aside the judgment in lieu of the pending appeal before the court of appeal. He submits that there was a pending appeal case No. E030 of 2023 in Kisumu awaiting for the record of appeal to be filed and/or directions to be taken on the appeal.

31. It was his submission that the present application would jeopardize the appeal. He added that the Applicant had already been added as an interested party and thus allowing the application will prejudice the proceedings pending before the court of appeal.

32. The final issue was whether the application dated 18th September, 2025 is merited. Counsel submits in the negative and argues that the Applicant is attempting to reopen a case that had already been concluded three years ago.

33. He submits that being that the 1st and 2nd Defendants lodged an appeal, the right forum to address the Applicant's case would be at the

Court of Appeal where the proceedings were active. He added that the Applicant was already an interested party in the Appeal.

34.The application was not opposed by the Defendants. They thus did not submit. The Applicant made further but short submissions. In brief he stated that he was not included in the proceedings before this court yet he was the owner of the suit land. He argued that his rights then were violated and he ought to be joined in the proceedings to ventilate his case.

Analysis and determination

35.This court has considered the application and is of the view that the main issue for determination is whether the application is merited.

36.The Applicant claims that he ought to be joined as a 3rd Defendant being that the matter was heard and determined when he was not a party to the case. He further claimed that since he was the registered owner of the suit property, he ought to have been joined so that the matter could be conclusively heard and determined.

37.He also claimed that the judgment rendered was irregular since the court dealt with the issue of ownership of land when the registered owner was not a party to the suit hence the same ought to be set aside.

38.The Plaintiff on the other hand contends that the suit having already been heard and determined, the same was *functus officio* and the only remedy the Applicant had was in the Court of Appeal.

39.He further contends that the Applicant had already been joined as an interested party in the appeal case and therefore allowing the instant application would prejudice the case in the court of appeal.

40.It is not in contention that this court heard and determined the matter regarding ownership of the suit property Kanyada/Kanyabala/3647 and judgment

41.It is not in dispute that there is a pending appeal, being, Kisumu Civil Appeal No. E030 of 2023 where the 1st and 2nd Respondents filed the same appealing against the judgment of this court. It is also not in dispute that the Applicant is not a party to the court of appeal case pending hearing and determination.

42.**Order 1 rule 10(2) of the Civil Procedure Rules** provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as

plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

43.It is this court's view that a party can only apply to be enjoined in a matter which is active or alive in court and where issues are yet to be determined. It not in contention that the suit herein was already heard, determined and judgment entered and as such no proceedings were alive for the Applicant to be joined. In addition, by the court rendering itself in the judgement, the suit had already reached its final conclusion thus functus officio.

44.In **Election Petitions Nos. 3, 4 & 5 Raila Odinga & others v IEBC & others [2013] eKLR** the Supreme Court of Kenya while expounding on the doctrine of functus officio cited with approval an excerpt from the article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," [2005] 122 SALJ 832. The excerpt reads:

“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.”

45. Also, in the **Court of Appeal** case of **Telcom Kenya Ltd v John Ochanda [2014] eKLR I**, the court held as follows:

“Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon-

The general rule that 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 of the appellate division.”

46. Be that as it may, the subject matter is currently before the Court of Appeal which appeal is pending and therefore, this court lacks the requisite jurisdiction to hear and determine the instant application. The subject matter is currently pending before a court of a different jurisdiction in this case the Court of Appeal in Kisumu.

47. The Applicant contends that he was directed by the Court of Appeal to pursue the said issue of joinder in the ELC court. Does this court then retain the jurisdiction to handle the matter? In **Sheila Kabole Mabwa v Joshua Angelei & 4 others [2021] eKLR**, this Court held as follows:

***“33. Therefore, this court is of the considered view that any issue that a party wishes to raise in relation to the subject of this suit ought to raise the same in the Court of Appeal where the matter rests at the moment. In so far as this Court is concerned at this stage, there are no proceedings pending before it to ground the Applicant’s right to move the Court to be enjoined. This view, coupled with the discussion above about momentary suspension of jurisdiction, lead this Court to find that the correct forum that the instant application ought to have been filed in.*”**

34. Illustratively, in the competitive world where it is survival for the fittest, nature has given vultures 'jurisdiction' (the self-conscious right) over eating meat from carcasses. Thus, for those who believe in the Holy Scriptures of the Bible, at one time the Great Teacher said, in Luke 17: 37, "For wherever the carcass is, there vultures will be gathered together". In this example, the subject matter over which a court has jurisdiction may be equated to a "carcass" and the "vultures", litigants who desire to hew the "carcass". Hence by comparison with this wise saying, once an appeal was preferred against the judgment of this Court, there is no "carcass" in it at this stage: it has moved to and is in the Court of Appeal. There the vultures should gather the relief of hewing the carcass. The call by the Applicant for a gathering in this Court at this stage is misplaced."

48. This court is of the view that as of now there is no 'carcass' for any vulture to gather here to eat from, that is to say, there is no live subject before this court for it to cause any applications for review or setting aside to be made. If the court were to set aside the judgment or enjoin a party it would upset the subject that is before the Court of

Appeal which would in turn upset the entire issues before that court. Again, it is not in dispute that he has not annexed any copy of the application made in the Court of Appeal for joinder as well as any decision of the Court of Appeal for this court to be appraised of such information.

49.The upshot of the above is that the application is dismissed with no order as to costs.

50.It is so ordered.

Ruling **dated, signed** and **delivered** virtually via the **Teams Platform** this **15th** day of **December 2025**.

Hon. Dr. *iur* Nyagaka

Judge

From 12:43 PM in the presence of,

Ms. Kimberly Advocate for the Plaintiff

Mr. Bruce Odeny Advocate for the Defendants

Thomas Ojanga the proposed 3rd Defendant