



Estate Sonrisa Limited v Macharia & another (Civil Appeal E076 of 2023) [2026] KECA 39 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 39 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E076 OF 2023
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
JANUARY 30, 2026**

BETWEEN

ESTATE SONRISA LIMITED APPELLANT

AND

SAMUEL KAMAU MACHARIA 1ST RESPONDENT

LAND REGISTRAR-KWALE 2ND RESPONDENT

(An appeal from the Ruling and Order of the Environment and land Court at Mombasa (N. A. Matbeka, J.) delivered and issued on 21st March, 2023 and 9th May, 2023 respectively in Mombasa Environment & Land Court case No. 30 of 2014)

JUDGMENT

1. The maxim interest reipublicae ut sit finis litium, as articulated by Lord Diplock in *Hunter vs Chief Constable of the West Midlands Police* [1982] AC 529, underscores the public interest in the finality of litigation, and militates against proceedings arising from disregard of subsisting court orders. Disregard of such orders undermines the authority of the court, foments unnecessary litigation, and undermines the rule of law and the administration of justice.
2. At the core of this dispute between the 1st Respondent, Samuel Kamau Macharia the Appellant, Estate Sonrisa Limited, together with Ali Khan Ali Muses, are two parcels of land namely: Land parcel Kwale/Galu/Kinondo/50 (the suit parcel) and the acreage and boundaries of Land parcel Kwale/Galu/Kinondo/48 registered to Estate Sonrisa Limited, as registered proprietor. The 1st Respondent instituted proceedings against Ali Khan Ali Muse, alleging firstly, that he had fraudulently transferred the suit parcel and secondly, that Estate Sonrisa Limited had unlawfully encroached upon his land and that the Land Registrar, Kwale, the 2nd Respondent had issued them with title documents that improperly encroached onto his property, the suit parcel. He sought, among other reliefs, orders for



- the eviction of the Ali Khan Ali Muse and the Estate Sonrisa Limited, as well as the cancellation of any titles held by them in respect of the suit parcel.
3. In his defence, Ali Khan Ali Muse, stated that he had lawfully purchased the suit parcel in April 2007 and was thereafter duly registered as its proprietor. Estate Sonrisa Limited, on its part, asserted that it was the registered owner of the neighbouring parcel Galu/Kinondo/48 and denied having encroached upon the suit parcel. The Environment and Land Court was therefore called upon to determine two central issues: first, whether the 1st Respondent or Ali Khan Ali Muse, was the lawful owner of the suit parcel; and secondly, whether Estate Sonrisa Limited, as proprietor of Galu/Kinondo/48, had encroached upon the 1st Respondent's suit parcel.
 4. The dispute was heard by Mukunya, J, who delivered a judgment on 13th October 2014. On the question of ownership of the suit parcel, the learned Judge found that the valid and lawful title was held by the 1st Respondent and not Ali Khan Ali Muses, and consequently Ali Khan Ali Muses was ordered to remove his structures from the land within 30 days, failing which the 1st Respondent was at liberty to demolish them.
 5. On the issue of encroachment, the court found that the suit parcel measured 1.7 hectares, while Galu/Kinondo/48, owned by Estate Sonrisa Limited, measured 0.9 hectares, and not 1.9 hectares as asserted. The court directed that the beacons between the two parcels be fixed by a surveyor, taking into account the acreage indicated in the respective titles, and that the survey costs be shared equally between the parties. The court further ordered that any party found to have encroached upon the other's land was to demolish the encroaching structures and vacate within 60 days, failing which demolition could be undertaken with the assistance of court bailiffs and law enforcement officers. The court additionally directed that there was to be no interference or obstructed with any public access paths between the affected parcels.
 6. Aggrieved by the decision, Ali Khan Ali Muse and the Estate Sonrisa Limited, each filed separate appeals to this Court, being Civil Appeal No. 14 of 2016 (as consolidated) with Civil Appeal No. 32 of 2016. After re-evaluating the entire record as a first appellate court, this Court identified two central issues for determination: first, who between the 1st Respondent and Ali Khan Ali Muses was the lawful owner of suit parcel; and secondly, whether Estate Sonrisa Limited, the proprietor of Land parcel Kwale/Galu Kinondo/48, had encroached upon the suit parcel.
 7. On the question of ownership, the Court upheld the finding of the Environment and Land Court that the 1st Respondent was the lawful and bona fide registered proprietor of the suit parcel; that his title, issued in 1981 under the repealed Registered *Land Act*, was first in time and had been lawfully acquired following a clear and unbroken chain of transactions dating back to the original allocation in 1974.
 8. The Court further affirmed that the title held by Ali Khan Ali Muses, which was issued in 2007, was fraudulent. The court found that the documents underpinning Ali Khan Ali Muses' title were riddled with irregularities, including forged signatures, obsolete stationery, absence of mandatory statutory documents, and false identity particulars. As a result, this Court held that Ali Khan Ali Muses had not acquired an indefeasible title and that the registration in his favour was liable to cancellation.
 9. On the issue of encroachment, the Court upheld the trial court's finding that Kwale/Galu Kinondo/48, owned by Estate Sonrisa Limited, measured 0.9 hectares and not 1.9 hectares as contended. The Court observed that all official documents relating to the parcel—including the title deed, green card, official searches, valuation reports, planning approvals, and charge documents — consistently reflected the acreage as 0.9 hectares. This Court rejected reliance on surveys and correspondence that purported to show a larger acreage, noting that such surveys were conducted



without notice to neighbouring landowners and in contravention of the statutory procedure for boundary determination under the land registration regime.

10. The Court did not agree with the part of the trial court's Judgment that ordered demolition and eviction within 60 days upon a finding of encroachment, observing that, the trial court had acted prematurely by issuing demolition orders before the Land Registrar had first determined the boundaries between the two properties. The Court went on to order that the boundaries between the suit parcel and Kwale/Galu Kinondo/48 be ascertained by the Land Registrar, Kwale, together with the Government Surveyor, in accordance with the [Land Registration Act](#), to determine whether there was encroachment. It emphasized that only after the Land Registrar's determination could any aggrieved party approach the court for further relief.
11. In the result, this Court dismissed the consolidated appeals by Ali Khan Ali Muses and Estate Sonrisa Limited in their entirety, save for setting aside the orders relating to demolition and the sharing of survey costs, and directed each party to bear its own costs of the appeal.
12. Subsequent to delivery, by an order of 11th March 2021, this Court varied the Judgment and omitted the words:

“... in accordance with the acreage shown in the respective titles.”

13. But, notwithstanding the specific directions of this Court, what was to come thereafter was a myriad of unwarranted applications that unnecessarily involving courts at all levels of the judicial hierarchy. The applications included a Notice of Motion dated 14th July 2021 filed in Mombasa ELC No. 30 of 2014, Samuel Kamau Macharia vs Ali Khan Ali Muses, Estate Sonrisa Limited and the Land Registrar, Kwale seeking an order directing the Officer Commanding Station, Diani Police Station, to supervise execution of the decree;
144. On 24th January 2022, Mombasa CMCC Miscellaneous Application No. 36 of 2022, Samuel Kamau Macharia & Five Eleven Traders and Auctioneers vs Ali Khan Ali Muses and Estate Sonrisa Limited, was filed seeking an order that the police assist the auctioneer to execute the decree.
15. Then on 16th February 2022, Kwale ELC Miscellaneous Application No. E006 of 2022 Five Eleven Traders and Auctioneers vs Ali Khan Ali Muses and Estate Sonrisa Limited, was instituted, again seeking identical orders for police assistance to execute the decree of 13th October 2014.
16. And parallel to these execution proceedings, Kwale ELC Case No. E001 of 2021 Estate Sonrisa Limited vs the Land Registrar, Kwale, the Regional Surveyor (Coast Region), the Honourable Attorney General and Samuel Kamau Macharia, was instituted by way of a case stated under Section 86 of the [Land Registration Act](#).
17. In the meantime, while the applications persisted, the Land Registrar, Kwale requested the parties to attend a meeting to resolve of the boundary dispute. The exercise was conducted on 18th May 2021, and thereafter, the Land Registrar rendered a report on 2nd July 2021. The Appellant was dissatisfied with the findings of the report and filed a case stated dated 5th September 2022 in the Environment and Land Court seeking the following reliefs;
 - a) That the recommendations made by the County Land Registrar, Kwale in the report dated 2nd July 2021 be and are hereby declared null and void.
 - b. That the survey allegedly conducted on 8th May 2021, together with the reliance on an unauthenticated survey plan and the consequent



recommendations contained in the report of the County Land Registrar, Kwale dated 2nd July 2021, be and are hereby declared null and void.

- c. That it be declared that the Plaintiff's (1st Respondent) property, being Title No. Kwale/Galu Kinondo/48, measures 1.9 hectares, as correctly stated in the report of the 3rd Defendant/Respondent (the 2nd Respondent herein) dated 27th May 2021, annexed to the letter dated 21st June 2021.
- b. That a permanent injunction be issued restraining the Plaintiff/Respondent, whether by himself, his servants, employees, contractors, agents, assigns, or any other person acting on his behalf, from entering upon, interfering with, encroaching on, or otherwise dealing adversely with Land Parcel No. Kwale/Galu Kinondo/48, which has been in the occupation and possession of the 2nd Defendant/Applicant."

18. In response, the 1st Respondent filed a Notice of Preliminary Objection dated 21st October 2022 on the grounds:

- “ 1. That this Honourable Court is functus officio, having heard and determined this matter and the matter having been appealed.
2. That this suit was the subject of an appeal in Court of Appeal Civil Appeal No. 14 of 2016 consolidated with Civil Appeal No. 32 of 2016, where the report herein was requested from, hence this Court lacks jurisdiction to entertain this suit.
3. That in the circumstances, the suit is bad in law, incompetent and void ab initio, and the same should be struck out/dismissed with costs.”

19. On considering the Notice of Preliminary Objection raised by the 1st Respondent in opposition to the case stated filed by Estate Sonrisa Limited, the Environment and Land Court at Mombasa found that the dispute between the parties had been fully heard and determined in Mombasa ELC Case No. 30 of 2014, and that the Judgment of the trial court had subsequently been subjected to, and largely upheld by, this Court in Civil Appeal Nos. 14 and 32 of 2016 (consolidated), save that this Court disagreed with the order for demolition.

20. The Court concluded that the preliminary objection met the threshold requirements having raised a pure point of law, namely that it lacked jurisdiction and was functus officio and must therefore down its tools. The trial court took the view that it had already discharged its mandate in the matter and that any further engagement would amount to reopening a dispute that had been conclusively determined.

21. On the case stated, the court held that, since they arose from related proceedings, where an appeal from Kwale ELC Case No. E001 of 2021 Estate Sonrisa Limited vs the Land Registrar, Kwale, the Regional Surveyor (Coast Region), the Attorney General and Samuel Kamau Macharia, was pending before this Court, that this amounted to parallel proceedings and an abuse of the court process. In so finding, the trial court declined the invitation to re-engage with the issues raised for the reason that it would potentially conflict with the findings and directions of this Court. Accordingly, the Court upheld the preliminary objection and struck out the case stated with costs, thereby holding that it lacked jurisdiction to entertain the matter.

2.2 Aggrieved the Appellant has filed an appeal to this Court on grounds that: the trial court was in error in finding that it lacked jurisdiction to hear the case stated before it, in disregard of the provisions of the



- Civil Procedure Act and the Environment and Land Act, which grant the Environment and Land Court jurisdiction to settle questions arising from execution of decrees; in holding that it had no jurisdiction to hear the case stated before it, in disregard of the provisions of the Land Registration Act, which give parties the right to state a case for the opinion of the court where a party is aggrieved by a decision of the Land Registrar; in failing to evaluate and analysis of the decision of this Court in Civil Appeal No. 32 of 2016 consolidated with Civil Appeal No. 14 of 2016, and in concluding that it was functus officio; in failing to appreciate its directions in Miscellaneous Application No. E006 of 2022 and Kwale ELC No. E001 of 2021, for the Appellant’s case stated to be determined in in Mombasa ELC No. 30 of 2014, and by erroneously striking out the case stated with costs.
23. When the appeal came up for hearing on a virtual platform learned counsel Ms. Ang’awa and Mr. Havi, appeared for the Appellant, while learned counsel Mr. Orange appeared for the 1st Respondent. There was no appearance for the 2nd Respondent though duly served with the hearing notice. In their written submissions, counsel for the Appellant submitted that the Environment and Land Court was in error in holding that it lacked jurisdiction to entertain and determine the case stated; that the report by the Land Registrar, Kwale dated 2nd July 2021 was prepared pursuant to the directions of this Court in Estate Sonrisa Ltd & Another vs Samuel Kamau Macharia & Others, Civil Appeal No. 14 of 2016 consolidated with Civil Appeal No. 32 of 2016, and that the determination of encroachment was a condition precedent to the execution of the decree issued by the Environment and Land Court on 13th October 2014 as varied by this Court.
24. It was submitted that, by virtue of Section 4 of the Appellate Jurisdiction Act, the power to execute decisions of this Court lies with the High Court and, in land matters, with the Environment and Land Court. Counsel relied on the case of Global Vehicles (K) Ltd vs Lenana Road Motors Ltd (2017) eKLR and Lawrence Kairu Nyambura vs Symon Kabugi Kinyuru (2015) eKLR for the proposition that orders of this Court are enforceable by the Environment and Land Court. On that basis, counsel contended that the Environment and Land Court had jurisdiction to consider and determine the case stated filed on 5th September 2022.
25. On the issue as to whether the trial court was functus officio, counsel submitted that, under section 34 of the Civil Procedure Act, the Environment and Land Court was duty-bound to determine all questions arising between the parties in the execution of its decree. Reliance was placed on the case of South Nyanza Company Ltd vs Alfred Sagwa Mdeizi (2010) eKLR for the proposition that issues arising in execution fall within the jurisdiction of the court that passed the decree. Counsel further submitted that Section 86 of the Land Registration Act expressly empowers the Environment and Land Court to review decisions of the Land Registrar by way of a case stated, and that under Section 2 of the Land Registration Act, the “court” being the Environment and Land Court was seized of such matters.
26. It was argued that the issue as to whether Kwale/Galu Kinondo/48 had encroached on the suit parcel remained unresolved, that the decree had not been perfected; and that the court was therefore not functus officio. In support of this position, reliance was placed on the case of Raila Odinga vs Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR, where it was held that a court does not become functus officio where its judgment has not been fully perfected. On the totality of those submissions, counsel urged us to set aside the ruling of the Environment and Land Court delivered on 21st March 2023, and remit the case stated back to the Environment and Land Court for hearing and determination on its merits.
27. On their part, counsel for the 1st Respondent submitted that the appeal was devoid of merit and amounted to an abuse of the court process. Counsel contended that the Appellant was guilty of concealment of material facts, in that it had previously filed a similar case stated before the Kwale,



Environment and Land Court, which was struck out, and against which a Notice of Appeal had already been lodged. Notwithstanding that the suit was struck out, the Appellant proceeded to file a fresh case stated in Mombasa ELC No. 30 of 2014, thereby engaging in parallel and duplicative proceedings.

28. Counsel further submitted that the fresh case stated was filed after the Land Registrar conducted the site visit, and made findings on encroachment of Kwale/ Galu Kinondo/48 onto the suit parcel, and that execution had been completed. It was therefore argued that the Environment and Land Court correctly found that it was functus officio, the Judgment having been conclusively determined and substantially executed; that the case stated filed in Mombasa ELC No. 30 of 2014 was a clear abuse of the court process, and that the learned Judge properly struck it out. Counsel emphasized the cardinal principle that litigation must come to an end, and in conclusion submitted that the Appellant had become excessively litigious.
29. Counsel further submitted that, in Civil Appeal No. 14 of 2016 consolidated with Civil Appeal No. 32 of 2016, this Court conclusively determined that Kwale/ Galu Kinondo/48 measures 0.9 hectares, and directed that the extent of encroachment onto the suit parcel be ascertained. Pursuant to those directions, the Land Registrar and County Surveyor, in the presence of the parties and their advocates, visited the site and prepared a report conclusively finding that Kwale/ Galu Kinondo/48 had encroached onto the suit parcel; and that the Appellant had concealed this fact and had independently engaged a surveyor to fix boundaries unilaterally, whereupon it proceeded to occupy a portion of the 1st Respondent's land. Counsel urged the Court to find that the appeal was frivolous, lacked merit, and was intended to unlawfully extend the Appellant's land beyond what was reflected in its ownership documents.
30. The mandate of this Court on a first appeal as set out in Rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and draw its own independent conclusions. In *Peters vs. Sunday Post Limited* [1958] EA 424, the predecessor to this Court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

See also *Abok James Odera T/A A.J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where this Court held:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

31. Having considered the Record of appeal and the submissions by the parties, we consider the main issues for determination to be; i) whether the Environment and Land Court was functus officio; ii) whether, following determination of the dispute by the Environment and Land Court in ELC No. 30 of 2014 and the subsequent Judgment of this Court in Civil Appeal Nos. 14 and 32 of 2016 (consolidated), the Environment and Land Court lacked jurisdiction to entertain the Appellant's case stated; and iii) whether the Environment and Land Court had jurisdiction under Section 86 of the [Land Registration Act](#) to entertain the case stated.



32. In the instant case, after hearing an appeal from the Judgment of the Environment and Land Court delivered on 13th October 2014, in its Judgment of 24th April 2020, this Court substantially upheld the trial court's decision, in that, this Court found that the 1st Respondent was the lawful and bona fide proprietor of the suit parcel, and further affirmed that the title held by Ali Khan Ali Muses was fraudulent and incapable of conferring any proprietary rights. This Court also definitively held that Kwale/ Galu Kinondo/48, was owned by the Appellant, Estate Sonrisa Limited, and measured 0.9 hectares, and not 1.9 hectares as contended by the Appellant.
33. After so finding, this Court disagreed with the trial court's directions for demolition and eviction within sixty days, holding that:

“The only part of that order that we do not, with respect, agree with is where the Judge directed that, “any party found to have encroached on the other parties land shall have sixty days to demolish all structures that might have been erected therein and move and vacate their from”. By that order, the Judge, as it were, jumped the gun because the Registrar had, first, to conduct the proceedings and determine the extent of the parties' respective parcels, and cause to be defined by survey, the precise position of the boundaries in question. By section 79 (3A), 80, 86 and 91 (9) of the [Land Registration Act](#) that decision may be challenged in court. To stress the point., recited section 86, which states that:

“If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any grieved person shall state a case for the opinion of the Court and thereupon the court shall give it opinion, which shall be binding upon the parties”.

And in conclusion this Court stated:

“...We set aside that order and instead direct the Land Registrar Kwale, together with the Government Surveyor, Kwale County to determine whether Kwale/Galu Kinondo/48 has encroached upon the suit land.” (emphasis ours)

34. Having set aside a part of the trial court's decision, this Court referred the specific issue of encroachment to the Land Registrar, together with the Kwale County Surveyor to determine. It was made clear that there were outstanding boundary proceedings that had yet to be conducted to determine whether Kwale/Galu Kinondo/48 had encroached upon the suit parcel, including, the extent of the parties' respective parcels, and cause to be defined by survey, and the precise position of the boundaries in question.
35. Against that background, the Record shows that the Land Registrar conducted proceedings to ascertain whether there was encroachment of the suit parcel by Kwale/Galu Kinondo/48. Thereafter, the Land Registrar submitted a report on 2nd July 2021 to the parties. The Appellant was dissatisfied with the report and filed a case stated dated 5th September 2022 in terms of Section 86 of the [Land Registration Act](#) and returned to the trial court to seek the court's opinion on the decision of the Land Registrar. In the application the Appellant sought for; inter alia, declarations that the report of the Land Registrar dated 2nd July 2021 was null and void; that the survey conducted on 8th May 2021 was invalid, and that Kwale/ Galu Kinondo/48 measures 1.9 hectares, and an injunction restraining interference with that parcel.
3. In response, the 1st Respondent filed a Preliminary Objection to the effect that the trial court was functus officio and lacked jurisdiction to determine the case stated suit.



37. In determining the matter, the trial court found that it was indeed functus officio, and lacked jurisdiction to hear the case stated suit. In so finding, the court struck out the Appellant's application and had this to say:

“The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the 2nd Defendant's case as outlined are true (sic) not because without jurisdiction this court will not have any power to determine the case. This is because in any litigation jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the Court, the said Court must down its tools”.

The court went on to observe thus:

“This instance suit, the Plaintiff stated that the Court of Appeal delivered a conclusive judgement arising from Decree in this suit. The Judgement and Decree of this Court was upheld by the Court of Appeal, save for order directing Land Registrar to establish encroachment and not boundary dispute as alleged in the case stated”.

Finally, the court held:

“In the circumstances, the court is wary of the 2nd Defendants invitation to re-engage with this dispute in a manner that necessarily involves wading into a new controversy between the parties of giving opinions on the order of the Court of Appeal. I find that the Preliminary Objection is merited and the case stated /suit is therefore struck out with costs”.

38. Essentially, the trial court found that the Preliminary Objection founded, as a pure point of law had arisen in view of it having been rendered functus officio and that it lacked jurisdiction to render an opinion on the case stated.

39. In the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End [1969] Distributors Ltd*. E.A 696, Newbold P. outlined the threshold requirements for a finding that a Preliminary Objection succeeds and held:

“The locus classicus on Preliminary Objections is the now well established jurisprudence set in the East African Court of Appeal case decision in *Mukisa Manufacturing Co. Ltd –V- West End Distributors (1969) E.A.696* in which at page 700 Law JA. Stated that:

“....a preliminary objection consists of a point of law which has been pleaded, or which raises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

40. The Supreme Court endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696*, in the case of *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696*:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose



of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.

41. The supreme court in *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 23 of 2014, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, [2015] eKLR, further stated [paragraph 15]:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. See *Supreme Court Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015)”

So, was the trial court rendered *functus officio*? The phrase ‘*functus officio*’ is defined in *The Black’s Law Dictionary* (10th Edition) as being “(Of an officer or official) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

42. In the case of *Menginya Salim Murgani vs Kenya Revenue Authority* [2014] eKLR the Supreme Court held that:

“It is a general principle of law that a Court after passing Judgment, becomes *functus officio* and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

43. Similarly, this Court in the case of *Telkom Kenya Limited vs John Ochanda* (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, pronounced itself on the doctrine of *functus officio* thus:

“*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. 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:



Where there had been a slip in drawing it up, and, 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”

...

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *JERSEY EVENING POST LTD VS AI THANI* [2002] JLR 542 at 550, also cited and applied by the Supreme Court.”

44. And in the case of *Kenya Broadcasting Corporation vs Geoffrey Wakio* [2019] eKLR, the doctrine was reiterated thus:

“(35) To sum up, a court is functus when the proceedings are fully concluded and the judgment or order has been perfected. This, however, does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court including any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court. (See *Bellevue Development Company Limited v Vinayak Builders Limited & another* [2014] eKLR).”

45. After applying the criteria set out in the aforecited authorities to the circumstances of this case, we find that the trial court was not rendered functus officio in respect of the case stated since, there were still matters arising from this Court’s Decree that remained unperfected.

46. As a starting point, the Judgment of this Court, as varied was crystal clear and unambiguous. It is evident from the Judgment that this Court set aside the issue of encroachment between Kwale/Galu Kinondo/48 and the suit parcel, and referred it back to the Land Registrar together with the County Surveyor, Kwale to undertake such processes as are prescribed by law to determine whether there was encroachment upon the suit parcel. In accordance with those directions, it became incumbent upon the Land Registrar, to commence the process of establishing whether or not Kwale/Galu Kinondo/48 has encroached on the suit parcel. Given the Court’s directions, there is no question that the issue of encroachment remained unresolved.

47. Further, an examination of the ruling shows that, the trial court was alive to the existence of the outstanding issues. The court observed of the case stated that; “The Judgement and Decree of this Court was upheld by the Court of Appeal, save for order directing Land Registrar to establish encroachment and not boundary dispute as alleged in the case stated.” To our mind, this may be construed to mean that the court recognized the outstanding issue of encroachment raised by this Court, but took the view that the Appellant’s case stated was outside the purview of the court because, the pleading should have focused on encroachment, rather than the boundary dispute.

48. In this regard, Sections 19 and 20 of the *Land Registration Act* are of pertinence.



Section 19 concerns 6th boundaries. It states:

- “ 1. “If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
2. The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
3. Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.”

Section 20 is with reference to maintenance of boundaries. It specifies

- “ 1. Every proprietor of land shall maintain in good order the fences, hedges, stones, pillars, beacons, walls and other features that demarcate the boundaries, pursuant to the requirements of any written law.
2. The Registrar may in writing, order the demarcation within a specified time of any boundary mark, and any person who fails to comply with such an order commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings.
3. The Registrar may in writing, order which of adjoining proprietors shall be responsible for the care and maintenance of any feature demarcating a common boundary, and any proprietor so ordered to be responsible for the care and maintenance of the boundary feature who allows the boundary feature or any part of it to fall into disrepair, be destroyed or removed commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings.”

49. From these provisions, it can be discerned that the Land Registrar is the primary authority mandated to determine boundary disputes. In the execution of its statutory duties, the Land Registrar is empowered to summon evidence from the Survey records and other sources that may be deemed necessary, all of which matters remained to be resolved. So that, it mattered not that the dispute concerned encroachment or boundaries, as these matters are in reality two sides of the same coin. And whether the case stated concerned the encroachment or a boundary dispute, it remained within the realm of the outstanding dispute left to be resolved.

50. Again, it bears repeating that, this Court having identified the question of encroachment for determination by the Land Registrar, it meant that, until such time as the Land Registrar addressed the issue of encroachment, and the issue is resolved with finality, the acrimonious court battles would continue to be fomented unabated, as already seen above.



51. Consequently, in view of the distinct outstanding matters for determination in the parties' dispute, we find that the trial court misdirected itself in arriving at the conclusion that it was functus officio.
52. Next is the question as to whether the trial court had jurisdiction to determine the outstanding matters identified by this Court. As stated above, pursuant to this Court's directions, the Land Registrar submitted a report to which the Appellant disagreed. In seeking a recourse against the findings, the Appellant filed a case stated under Section 86 of the [Land Registration Act](#).

Section 86 (1) is categorical, and provides that:

“If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the court and thereupon the court shall give its opinion which shall be binding upon the parties.”

53. In other words, Section 86 of the [Land Registration Act](#) provides a statutory avenue for a party, aggrieved by the Registrar's decision to approach the court by way of a case stated for the opinion of the court under Sections 79(3A), 80, 86 and 91(9) of the [Land Registration Act](#).
54. Having been dissatisfied with the Land Registrar's report, the Appellant was entitled to invoke Section 86 of the [Land Registration Act](#) and filed a case stated for the opinion of the trial court. Since the provision was available to the Appellant, this is precisely what the Appellant did. Furthermore, it is not lost on us that, the very issue for determination was set aside pursuant to the express directions of this Court in Civil Appeal Nos. 14 and 32 of 2016 (consolidated) which had directed the outstanding issue of encroachment to be determined by the Land Registrar. The Appellant having sought the court's opinion under Section 86, it goes without saying that, the trial court was empowered, and had jurisdiction to proceed and issue an opinion on the Appellant's case stated, and we so find.
55. Before we conclude, there is a final issue which we consider is important to clarify. The trial Judge also declined to determine the case stated for the reason that, an appeal filed by the Appellant in respect of a similar case stated arising out of Kwale ELC No. E001 of 2021 Estate Sonrisa Limited vs Land Registrar Kwale & 3 Others was pending determination.
56. At the outset, it is important to observe that pursuant to Section 4 of the [Appellate Jurisdiction Act](#), the High Court, in this case, the Environment and Land Court was granted powers to execute the decisions of this Court. Since the issue arose out of a Decree of this Court, it was a matter well within the remit of the Environment and Land Court. It therefore had jurisdiction to hear and determine the case stated.
57. While it is true that the Appellant filed a case stated suit in the court at Kwale ELC No. E001 of 2021 Estate Sonrisa Limited vs Land Registrar Kwale & 3 Others, the court (Dena, J.) was clear that the dispute was not a fresh ownership contest, but a challenge to the manner in which the Land Registrar exercised his statutory mandate in fixing a boundary pursuant to this Court's directions in Civil Appeal Nos. 14 and 32 of 2016 (consolidated), and that instituting a fresh action offended against Section 34 of the [Civil Procedure Act](#). Although Sonrisa Estate Limited had invoked the correct statutory mechanism in principle under Section 86, the case stated was struck out for having been filed as a separate action instead of within the original proceedings, that is Mombasa Civil Case No. 30 of 2014. See also Five Eleven Traders & Auctioneers vs Muses & another [2022] KEELC 3304 (KLR): where after observing that the matter had generated multiple parallel suits in different courts, all revolving around the same decree and boundary determination, the court (Naikuni, J.) concluded that, execution and all questions arising from the decree in Mombasa ELC No. 30 of 2014 ought to be dealt with within that suit, and not through fragmented proceedings elsewhere.



58. Accordingly, it stands to reason that the suit having been struck out and the parties referred to the correct court pursuant to the outstanding Decree, clearly the Kwale case stated suit was not determined on its merits, and we see no reason for the trial Judge to have hesitated in hearing and rendering an opinion on the Appellant's case stated in Mombasa Civil Case No. 30 of 2014 as correctly filed.
59. In the final analysis, and having carefully considered the Record, the grounds of appeal, the rival submissions, and the applicable law, we are persuaded that the learned Judge of the Environment and Land Court was not functus officio in hearing and determining the Appellant's case stated, brought under Section 86 of the *Land Registration Act*, and neither did the court lack jurisdiction. In upholding the Preliminary Objection and striking out the Appellant's case stated, we find this to have been a misdirection requiring interference with that decision by this Court.
60. In sum, the appeal is merited and is allowed with costs to the Appellant. We hereby set aside the ruling of the Environment and Land Court delivered on 21st March 2023, and remit the Appellant's case stated dated 5th September 2022 back for hearing and determination in Environment and Land Court Case No. 30 of 2014.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JANUARY, 2026.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original Signed

DEPUTY REGISTRAR

