



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MALINDI

ELC CASE NO. 107 OF 2008

1. ROSE KAVITA MWIVITHI

2. JULIUS MWIVITHI NZUKU

3. TIMOTHY MUCHINA CHEGE

PLAINTIFFS

=AND=

NZUKU MWIVITHI.....

APPLICANT

=AND=

1. TRIX FARIDA MWIVITHI

2. STELLA WANZA MWIVITHI.....INTERESTED

PARTIES

=AND=

THE HON. ATTORNEY

GENERAL & 5

OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. The applicant in the Notice of Motion dated 15th August, 2025, seeks the following orders and reliefs:

a) Spent.

b) That the deceased, 2nd Plaintiff Julius Nzuku Mwivithi, be and is substituted with (i) Nzuku Mwivithi, (ii) Trix Farida Mwivithi, (iii) Stella Wanza Mwivithi, and (iv) Rose Kavitha Mwivithi as the appointed legal representatives of the deceased.

c) That the Honourable Court do, and hereby issue an order directing the Principal Secretary, Chief State Counsel, or any designated counsel of the Office of the Attorney General, Department of Justice, Sheria House, to deposit any further payments in this case relating to the 1st and 2nd Plaintiffs herein into the Judiciary Revenue Account

Malindi Law Court, in trust for and on behalf of the estate of the deceased 2nd Plaintiff.

- d) That the Honourable court do, and hereby make a determination that the next amount payable to the 1st and 2nd Plaintiff is Kshs. 207,034,178.70 less Kshs. 23,740,000.00 paid on a pro rata basis, leaving an outstanding sum of Kshs. 183,294,178.70 exclusive of any accrued interest up to date.***
- e) That, the Honourable court do, and hereby, make an order of determination that in the interest of the ascertained beneficiaries of the estate of the late 2nd Plaintiff, the release of the funds so deposited with the Judiciary in trust, do pend, and abide by the determination mode of the sharing the funds as may be determined by the outcome of HC P&A No. E007 of 2024(re Estate of Julius Mwivithi Nzuku-Kitui).***
- f) That the Honourable court do, and hereby, direct that the counsel on record for the 1st and 2nd Plaintiff(deceased), be at liberty, upon deposit of funds with the judiciary, to deposit any agreed fee note invoice, or a certificate of taxation of advocates' fees, either with this court or with HC P&A No. E007 of 2024 Re Estate of Julius Mwivithi Nzuku-***

Kitui, as a creditor to the estate for consideration during distribution or sharing of the funds.

g) That the Honourable court do, and hereby make an order, in the alternative to prayer 6 above, that the counsel on record for the 1st and 2nd Plaintiff (deceased) be at liberty to apply to the court to appropriate their fees and costs for the funds deposited in court.

h) That the Honourable court be at liberty to issue any further orders, or directions in these proceedings as the ends of justice of the case and the parties may demand and/or require.

i) That the costs of this application be provided for.

2. The 1st and 3rd plaintiffs/respondents opposed the applicant's application dated 15th August 2025 through a replying affidavit sworn on 19th September 2025 and a notice of preliminary objection dated the same day. The replying affidavit, sworn by Rose Kavita Mwivithi, sets forth the grounds, while the notice of preliminary objection from 15th August 2025 lists several grounds as specified therein.

3. The application and the preliminary objection were heard simultaneously, and the parties filed their written submissions as directed by the court.

4. I acknowledge receipt of submissions from Mr. Kilonzi, learned counsel for the applicants, and Mr. Kilonzo, learned counsel for the respondents, with much appreciation, as they went a long way toward resolving the issues raised in the motions at hand.
5. After reviewing the materials and submissions placed before me, the issues I frame for the determination of this court are whether the application and the orders sought are sustainable and whether the preliminary objections raised are justified.
6. When considering the issues raised, I concluded they could be addressed at once.
7. This matter commenced in 1997 and concluded by decree dated 25th September, 2015, issued on the 17th November, 2015, which stated that the said decree dated 25th September, 2015, was adjusted by consent. Therefore, on 23rd January, 2019, this Honourable court issued an Adjusted Decree by Consent dated 25th January, 2019. A perusal of the adjusted decree stipulates how the parties are to comply with it.
8. Mr. Kilonzi, for the applicant, urges that the adjusted consent never removed the 2nd plaintiff from the award, as declared by

the court; instead, by design, the name of the 2nd plaintiff was omitted in the consent, but the award remained unchanged.

9. The respondents' counsel, Mr. Kilonzo, argues that the applicant's application is incompetent, lacks a legal and factual basis, and constitutes an abuse of the court process. The Court lacks jurisdiction because the Adjusted Consent is final, and the Court, after recording it, became *functus officio* upon its issuance. The applicant cannot address the issues raised without a review or an application to set aside the Adjusted Consent.

10. Counsel for the respondents, Mr. Kilonzo, has cited multiple judicial precedents addressing the doctrine of *functus officio*. See **Merry Beach Limited and The Attorney General & 18 Others in Civil Appeal No.34 of 2017, Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR, Telkom Kenya Ltd v Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Ltd) [2014] KECA 600 (KLR), Raila Odinga & 2 Others v. IEBC & 3 Others [2013] eKLR,** and

Mombasa Bricks & Tiles Ltd & 5 Others v. Arvind Shah & 7 Others [2018] eKLR.

11. He contends that it is evident from the record that this matter was finalized on the 25th January, 2025, when the court issued an Adjusted Consent, that the said decree has been partially perfected, and that, based on the aforementioned, this court is estopped by the doctrine of *functus officio* from determining this application. The provisions of the law and case law give an exception to the court dealing with matters after judgment and a decree has been issued, only in relation to making clerical amendments to the decree, which, in this case, the applicant has not sought. Permitting this application will be tantamount to this honorable court sitting in appeal against its own orders, which is legally untenable. This application ought to have been filed before the Court of Appeal.

12. In a rejoinder, counsel for the applicants, Mr. Kilonzi, contends that we have a plaintiff and a decree-holder who passed away after judgment and during execution proceedings. Accordingly, under Section 34 of the Civil Procedure Act, the question of the legal representatives of that deceased decree-

holder arises, and it is determinable by this court in this suit. The nature of the proceedings before the court is of the kind that may be called post-judgment execution or the management of the satisfaction of the decree. He posits that, in fact, there are an avalanche of other provisions in both The Civil Procedure Act and the Rules that permit the court to take proceedings after judgment, such as execution (arrest, attachment, objection proceedings, garnishee proceedings, objection to assessment of costs, stay of execution proceedings, preservation orders, injunction pending appeals, substitution of parties, etc.).

13. In answer to this question, in my view, a review of the proceedings clearly indicates that the judgment and decree of this court were entered during the lifetime of the deceased 2nd plaintiff, and that counsel for the 1st and 3rd plaintiffs is well aware of this, having represented all the plaintiffs in the matter. Nowhere in the initial judgment and decree did this court remove the name of the 2nd plaintiff. Mr. Kilonzi, for the applicant, is therefore correct in asserting that, since the 2nd plaintiff passed away and left a decree fit for execution, the

natural course is to substitute him, which is the purpose of this application.

14. Regarding whether the adjusted consent decree removed the 2nd plaintiff from the proceedings and whether it affected the entitlements and benefits accruing from the initial decree as adjusted by consent, Mr. Kilonzo submitted that it did. In contrast, Mr. Kilonzi, for the applicant, disagrees. The answer can be found in the proceedings and in Mr. Kilonzi's submissions, which I agree with. The deceased 2nd plaintiff, although his name was omitted from the adjusted decree, is still considered a party because he left an estate under the court decree. The beneficiaries are currently pursuing the matter. The adjusted consent decree did not contain a clause that dropped the 2nd plaintiff from the proceedings, and so, unless otherwise legally demonstrated, the 2nd plaintiff's name remains. It goes without saying that the 2nd plaintiff is a party, albeit deceased. The omission of the 2nd plaintiff's name cannot be explained, since, as already alluded to, there is nowhere in the proceedings where his name was dropped or struck out, nor are there any orders to that effect. The adjusted

consent decree reduced the awards to the plaintiffs but did not address the removal of the 2nd plaintiff's name. No more has been demonstrated to support any contrary view, and even if it were, it would be nothing but mischief.

15. It follows then that the successors of the 2nd plaintiff are entitled to benefit from the proceeds emanating from the lawful decree of this court.

16. Since an award is owing to the plaintiffs (the modified decree by consent did not remove the 2nd plaintiff from the proceedings) under the order of this court, the extensive orders sought by the applicant cannot be granted via this application. Instead, the matter should be dealt with in the succession cause or during taxation. The issues raised by the PO are also not germane. I will issue substitution and preservation orders solely in the following manner to abide by the outcome and distribution of the 2nd plaintiff's estate in **Kitui Succession Cause No. E007 of 2024:**

a) That the deceased, 2nd Plaintiff, Julius Nzuku Mwivithi, be and is hereby substituted with: (i) Nzuku Mwivithi, (ii) Trix Farida Mwivithi, (iii) Stella Wanza Mwivithi, (iv) Rose

Kavitha Mwivithi as the appointed legal representatives of the deceased.

- b) An order, be and is hereby issued directing the principal Secretary Chief State Counsel, or any designated counsel, Office of The Attorney General, Department of Justice, Sheria House, to deposit any further payments in this case relating to the 1st and 2nd Plaintiffs herein in the Deposit Account of Malindi Law Court,(to be provided by the Deputy Registrar of this Court) in trust for and on behalf of the estate of the deceased 2nd Plaintiff pending the distribution by the Kitui Succession Cause No. E007 of 2024.***
- c) That this court cannot reasonably determine the other orders sought in view of the Kitui succession cause.***
- d) No order as to costs concerning the application and the PO.***

Dated, signed, and delivered electronically in Nyeri on January 28, 2026.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Kilonzi for the Applicants

Ms. Kinyakanga for the Respondents

Mr. Mwendwa for the Interested Parties

Kendi: Court Assistant