Syokimau Bright Homes & another (Suing on its Behalf and on Behalf of over 5,000 Members of Athi-River Local Community) v East African Portland Cement Company Limited & 273 others (Environment and Land Case 43 of 2019 & 155 of 2016 (Consolidated)) [2025] KEELC 5715 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5715 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND CASE 43 OF 2019 & 155 OF 2016 (CONSOLIDATED)

NA MATHEKA, J

JULY 30, 2025

BETWEEN

SYOKIMAU BRIGHT HOMES ..... PLAINTIFF

SUING ON ITS BEHALF AND ON BEHALF OF OVER 5,000 MEMBERS OF ATHI-RIVER LOCAL COMMUNITY

AND

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED .... DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE 155 OF 2016

BETWEEN

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED ..... PLAINTIFF

AND

SAMMY KATHILU & 272 OTHERS & 272 OTHERS & 272 OTHERS ..... DEFENDANT

RULING

1. The application is dated 24th January 2025 and is brought under Articles 50, 159 of *the Constitution* of Kenya 2010; Order 45, Order 50 of the Civil Procedure Rules 2010 seeking the following orders;

    1. That the Application be certified urgent, service dispensed with and heard ex-parte in the first instance.

2. That pending interpartes hearing of this Application, this Honourable Court be pleased to issue a stay of execution order against the Judgment delivered on 29th October, 2024 and all consequential orders thereto;

3. That pending hearing and determination of this Application, this Honourable Court be pleased to issue a stay of execution order against the Judgment delivered on 29th October, 2024 and all consequential orders thereto;

4. That this Honourable Court be pleased to review the Judgment dated 29th October, 2024 to the extent that the Applicant herein is not liable to pay and/or contribute to the damages awarded as mesne profits.

5. That this Honourable Court be pleased to set aside the proceedings of 20th January, 2025 in their entirety.

6. That costs of this Application be provided for:

2. It is based on the grounds that the Plaintiff/Applicant herein instituted the instant proceedings vide a Plaint dated 18th November, 2016 at Nairobi being Nairobi ELC. No. 1190 of 2015 seeking inter alia a declaration that it (the Plaintiff) be granted first priority to purchase 1000 acres constituting LR. No. 8784/4 from the Defendant and injunctive orders restraining the Defendant from evicting the Plaintiff, alienating or otherwise disposing off of the suit property. The Plaintiff's suit was subsequently transferred into this Honourable Court wherein it became Machakos ELC Case No. 43 of 2019; at which point, the court, seized of several matters involving the Defendant, directed the Plaintiff to peruse Machakos ELC. No. 155 of 2016, East African Portland Cement company -vs- Sammy Kathilu & 272 others. Without the participation and/or concurrence of the Plaintiff, this matter was consolidated with 5 others with Machakos ELC. Case No. 155 of 2016 being selected as the lead file. Unaware of the same, the Plaintiff, through counsel then on record made several attempts at tracing Machakos ELC. Case No. 43 of 2019 to the extent of applying for its reconstruction.

3. This court has carefully considered the application and submissions therein. The Respondent submitted that the remedy of review is not available for the Applicant. In the case of Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171 is relevant. It was held, that;

> A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;
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> "An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made..."

4. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

(1). Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

5. The aforesaid rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states as follows:

Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act.

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

6. Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In Court of Appeal, Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau, the Court of Appeal held that;

> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law."

7. From the above provisions of the law, authorities cited and facts of this case the applicant stated that whereas the Plaintiff/Applicant herein expressed an intention to withdraw the instant proceedings with no order as to costs and duly filed a Notice of withdrawal to that effect, this Honourable Court directed that the issue of withdrawal would be handled at the point of Judgment. Judgment was delivered on 29th October, 2024; which outlined the rights and/or liabilities of various parties in the consolidated suits directing them to inter alia vacate the suit properties and pay to the Defendant/ Respondent herein mesne profits assessed at Kshs. 5,000,000. The aforesaid Judgment was silent on the issue of withdrawal thereby obligating the Plaintiff/Applicant and its members to vacate LR. No. 8784 and contribute to the aforestated mesne profits awarded to the Plaintiff. However, it has since emerged

that the Defendant/Respondent herein has erected perimeter wall over the said property thereby hindering any attempts at compliance with this Honourable Court's Judgment. Notwithstanding the foregoing, the Plaintiff/Applicant despite being included in the Judgment was not heard on its interest in LR. No. 8784/4 occasioning real prejudice to its members. The Plaintiff and/or its members are as such in limbo uncertain of their fate an imperiled of being subjected to contempt proceedings.

8. I have perused the court file and find that on this matter ELC No. 43 of 2019 formerly Nairobi ELC Case No. 1190 of 2015 was consolidated among others and proceeded under the lead file Machakos ELC Case No. 155 of 2016. I find that judgement in the lead file was delivered on the 29th October 2024 by Lady Justice Christine Ochieng. I concur with the Respondent's submissions that this matter and the instant application cannot be separately prosecuted because it was consolidated with the other matters and the suit property in question is among those dealt with in ELC Case No. 155 of 2016 being the lead file. I find that there is no omission or error on the face of the record in the instant case. I find that there is no sufficient in this case to review the judgement and/or the execution. I note that this application for review was filed on 25th February 2025 and the judgement was entered on 29th October 2024, the Applicant is guilty of laches.

9. I find that this court is now functus officio. In the case of Telkom Kenya Ltd vs John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd (supra), the Court of Appeal held as follows on the functus officio doctrine;

> 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 Nazarire 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. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions. ---"

10. The Supreme Court of Kenya in the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 which 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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

11. Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of functus officio in the following terms-

> Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

12. It is clear that the doctrine of functus officio does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered as is the case herein. Having discharged its duty on this suit this court is therefore

functus officio, defined in Black's Law Dictionary, Ninth Edition as "having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." In the circumstances, the court is wary of the Applicants' invitation to re-engage with this dispute. Having found that this court is functus officio and rejecting the application for review all the other orders before me must fail. I find that the application is not merited and I dismiss itwith costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY 2025.

N.A. MATHEKA

JUDGE