IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GATEMBU, MUMBI NGUGI & ODUNGA, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E486 OF 2025

BETWEEN

KEEKONYOIKIE COMMUNITY TRUST.....APPLICANT

AND

MOSES MASEK MONIK.....1ST RESPONDENT THE CHIEF LAND REGISTRAR....2ND RESPONDENT
THE PRINCIPAL SECRETARY, MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT...3RD RESPONDENT

(Applications to strike out the appellant's Notice of Appeal dated 14th February filed on 18th February 2020 and the Memorandum and Record of Appeal and preliminary objection dated 16th October 2025; review and setting aside of the consent order entered into on 16th July 2025; and contempt of Court in respect of the order made on 16th July 2025, all arising from the judgment of the Environment and Land Court at Nairobi (L. Komingoi, J) delivered on 6th February 2020

in

ELC Case No. 1227 of 2013)

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RULING OF THE COURT

1. At the centre of this dispute is the question of the rightful office holders of the applicant, ***Keekonyoike Community Trust*** (the Community). As a result of that, ELC Suit No. 410 of 2025, ***Keekonyoike Community Trust (suing through the duly elected Trustees) v Moses Parantai and***

Another was filed before the Environment and Land Court (ELC). In that suit, the

ELC found that the purported elections that gave rise to the filing

of that suit were invalid and directed that fresh elections be conducted within 90 days of the delivery of the decision, which was handed down on 25th June 2025. Subsequently, two camps emerged, both claiming to be the right office holders of the Community. One camp is led by the 1st respondent, Moses Masek Monik, who claimed that at the elections conducted on 7th June 2024, he was elected as the chairman, together with Hannah Silapei Tuuko, Emmanuel Litei Shokore, Parsereti Ngomea Ngussur, John Kamunye Kiok, Peris Katito George and Sentero Ole Ntaingomo as trustees of the Community (the Monik group). The other camp is led by Moses Parantai (the previous chairman), and comprising of Nkaru Pulei, Makarious Leisanka Tuukuo, Moses Orkeri Mparaia, Beatrice Tumuti Kosiom, Kelero Ene Kenoi and Lawrence Ole Sentero (the Parantai group) as trustees of the Community. Their position is that no elections were conducted on 7th June 2024 as alleged by the Monik group.

2. According to the Monik group, following their elections into office, the Parantai group declined to hand over to them the titles to the properties held by the Community, and it was that refusal that led to the filing of ELC Misc. Application No. E008

of 2025, from

which this appeal arises. It is important to emphasise that the

said proceedings were commenced by the Monik group in the name of Keekonyokie Community Trust. In those proceedings, the Monik group sought orders directing the 2nd respondent, the Chief Land Registrar, to issue a provisional title in respect of LR No. 12418 Ngong/Ngong (the suit property) to be held in trust for the Community by them. On 25th June 20205 the learned Judge (Komingoi, J.) directed Moses Parantai to deliver the original title to the 2nd respondent within 72 hours of the ruling and in default, the 2nd respondent to issue a provisional title to the Monik group. That order having not been complied with, on 1st July 2025, a provisional title to the suit property was issued to the Monik group.

3. Dissatisfied by the said decision, the Parantai group filed this appeal, again in the name of the Community, and filed an application dated 26th June 2025 seeking that the orders issued on 25th June 2025 be stayed pending the hearing and determination of this appeal. On 16th July 2025, this Court, in the presence and by consent of learned counsel, **Mr. Havi,** for the applicant, **Prof. Ojienda,** learned Senior Counsel, for the 1st respondent and learned counsel **Mr. Motari** for the 2nd and 3rd

respondents, directed, *inter alia*, that:

1. ***Mr. Moses Parantai shall deposit at the Court of Appeal Registry in Nairobi the original certificate of title for the property known as Land Reference Number 12418, Grant No I RN 6404 by close of business on 18th July, 2025.***
2. ***Mr. Moses Masek Monik shall deposit at the Court of Appeal Registry in Nairobi the provisional certificate of title for the property known as Land Reference Number 12418, Grant No I RN 6404 which was issued pursuant to the orders of the Environment and Land Court made on 25th June, 2025 in Kajiado Misc Appln No E008 of 2025 by close of business on 18th July, 2025.***
3. ***Pending the hearing and determination of the appeal herein from the ruling and order of the Environment and Land Court at Kajiado made on 25th June, 2025 in Kajiado Misc Appln No E008 of 2025, an order of injunction be and is hereby issued restraining the Respondents from alienating, encumbering, or subdividing any part of the parcel of land known as Land Reference Number 12418, Grant No I RN 6404.***

4. Connected with the above orders, three applications and a preliminary objection were filed. The first application, brought by the firm of Prof. Tom Ojienda & Associates on behalf of the 1st respondent, Moses Masek Monik, is dated 17th July 2025 (the striking out application). It seeks to have the Notice of Appeal and the Record of Appeal struck out. It is supported by an affidavit sworn by Moses Masek Monik on 17th July 2025.

5. It is based on the grounds: that following the issuance of the

provisional title, the suit property was allocated to the members

of the Community, and that on 8th July 2025, the provisional title was surrendered to the 2nd respondent in order to effectuate the conversion and subdivision and thereafter the title ceased to exist; that the process of subdividing the suit property commenced immediately and a total of 3,620 new titles were processed in favour of the appellant's members as per the allocation register presented to the 2nd respondent and that in the letter dated 3rd September 2025, the 2nd respondent confirmed to the 1st respondent's counsel that the suit property, which is the subject of this appeal, ceased to exist and its register closed; that all the actions taken between 25th June 2025 and 16th July 2025 were above board as there were no orders barring the issuance of the provisional title or the subsequent subdivision and processing of titles; and that the appeal has been overtaken by events.

6. In addition, it was averred: that Moses Parantai lodged the present appeal purporting it to have been lodged by the appellant, in whose favour the decision was made; and that on 16th July 2025, the Community's trustees resolved that the appellant, having been successful in the ELC and the orders

issued having been effected, the appeal be withdrawn.

7. The 1st respondent similarly filed a notice of preliminary objection to the appeal in which it contended: that this Court lacks jurisdiction to hear and determine the appeal, the subject matter (the suit property) having ceased to exist upon surrender of the title on 8th July 2025; that the appeal has been overtaken by events as a result of the subdivision of the suit property and the creation and issuance of subsequent titles to third parties; and that Moses Parantai, Nkaru Pulei, Makarious Leisanka Tuukuo, Moses Orkeri Mparaia, Beatrice Tumuti Kosiom, Kelero Ene Kenoi and Lawrence Ole Sentero (the former trustees), purportedly suing as trustees of the appellant, having challenged the election and appointment of the new trustees in High Court Constitutional Petition No. E481 of 2025, the Memorandum of Appeal dated 25th June 2025 should be struck out and or dismissed with costs on the grounds of *sub judice*.

8. Submitting on both the said application and the preliminary objection, the 1st respondent relied on: ***Julius K. Atunga v Naumy Jebyegon Kemboi [2014] KEELC 448 (KLR)*** where the Court found that a case cannot exist in the absence

of a subject matter; the case of ***Center for Rights Education and Awareness & Another v John Harun Mwau & 6 Others [2012]***

eKLR stressing that there must be a decision on an issue or issues against which the appellant is complaining in order for him to be said to be an aggrieved person; the case of ***Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] KECA 250*** cited in ***Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229*** and ***Law Society of Kenya v Communications Authority of Kenya & 10 Others [2023] KESC 27*** and ***Trimborn Agricultural Engineering Ltd v David Njoroge Kabaiko & 2 Others [2000] eKLR*** to support the view that Moses Parantai, not being the Chairman of the appellant, cannot purport to advance an appeal on its behalf but could only do so on his own behalf as an aggrieved party; the case of ***Trusted Society of Human Rights Alliance v Matemo & 5 Others [2014] KESC 32*** in support of the contention that the 1st respondent, having not been a party in the proceedings appealed from, is an improper party before the Court; and

that a suit can be struck out if a wrong party is joined in it.

9. In addition, the 1st respondent filed an application dated 17th July 2025 (the review application) in which he sought an order for review and setting aside of the consent order entered into on

16th July 2025. The application was similarly supported by an affidavit sworn by Moses Masek Monik on 17th July 2025.

10. According to the deponent, the confirmation by the 1st respondent's counsel, during the recording of the consent order compromising the application for stay, that the provisional title would be deposited in court, was made in the belief that the said title was in the custody of the Monik group; that it came to the attention of counsel that the said title was surrendered to the 2nd respondent and was therefore not in the custody of the trustees, thus rendering it impossible to comply with the said orders; that the consent order, as drafted, purportedly granted an injunction restraining the respondents from alienating, encumbering or subdividing any part of the suit property which order did not form part of the terms consented to by counsel for the 1st respondent during the hearing of the application and is therefore a misrepresentation; that the provisional title was surrendered to the government in consideration of conversion and sub-division scheme on 8th July 2025, which fact was not disclosed to the 1st respondent's counsel before the hearing and subsequent acquiescence to the consent order; and that

the

steps that had already been taken prior to the application on 16th

July 2025 were not brought to the attention of the 1st respondent's counsel, hence he was not aware that there was nothing to deposit in court.

11. Submitting in support of this application, the 1st respondent cited the case of ***Tropical Food Products International Limited v Eastern and Southern African Trade and Development Bank [2007] KECA 91*** citing ***Hirani v Kassam (1952) 19 EACA 131***, ***BensonMbuchu Gichuki v Evans Kamende Munjua & 2 Others [2004] KECA 142*** citing ***Flora N Wasike v Destimo Wamboko [1982-88] 1 KAR 625***, ***Greenfield Investments Limited v Baber Alibhai Mawji [1988] KECA 143*** and ***Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] KECA 390*** for the proposition that a consent order can be varied or discharged if shown to have been obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if it was given without sufficient material facts or in misapprehension or in ignorance of material facts or, in general, for a reason which would enable the court to set aside an agreement or contract.

12. On the other hand, by an application dated 1st September 2025

expressed to be brought on behalf of the appellant, drawn by the

firm of Havi & Co Advocates, it is sought that Moses Masek Monik and the Chief Land Registrar, David Nyandoro, be committed to civil jail for a period of time to be determined by the Court for disobedience of the order made on 16th July 2025; and that they be directed to surrender all certificates of title issued as a result of and arising from the subdivisions of the suit property, to be dealt with on the directions of the Court after hearing of the appeal.

13. The said application was based on the fact that while the applicant complied with the order of the Court and surrendered the original certificate of title for the suit property as directed, the 1st and 2nd respondents refused to surrender the provisional certificate of title for the suit property in compliance with the order and instead proceeded to subdivide the suit property and issue certificates of title for the subdivisions to third parties. According to the deponent of the supporting affidavit, the order having been made by consent of all the parties' advocates and having been forwarded to all advocates by the Court, the 1st and 2nd respondent are deemed to have had notice thereof. He deposed that the 2nd respondent, despite request from

the

applicant, refused to confirm whether it had obeyed the order. It

was averred that the certificates for the subdivisions of the suit property were signed in the course of the previous week but were backdated to misrepresent that they were signed before the making of the order.

14. In the submissions dated 1st September 2025 in support of the application, the applicant cited the case of ***Hadkinson v Hadkinson (1952) 2 All ER 567***, stressing the obligation to obey court orders unless discharged or set aside; ***Shimmers Plaza Limited v National Bank of Kenya Limited (2015) eKLR*** as authority for the position that an order made in the presence of counsel is binding on parties for whom they are acting; ***Macfoy v United Africa Company Limited (1961) 3 All ER 1169***, ***Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation (1998) eKLR***, ***Safaricom Limited v Ocean View Beach Hotel Limited (2010) eKLR*** and ***William Muthee Muthama v Bank of Baroda (2014) eKLR*** for the position that any action taken in contravention of the law or in

disobedience of a valid court order is a nullity.

15. In response to the application, the 1st respondent swore an affidavit on 25th October 2025 in which he reiterated his averments in support of his application for review and setting

aside the orders issued on 16th July 2025 and deposed: that subsequent to the issuance of the decision being appealed against, on 27th June 2025, the 2nd respondent, owing to the default by Moses Parantai to surrender the original title, issued a Certificate of Provisional Title of even date to the new trustees to hold in trust for the appellant; that subsequently, on 4th July 2025, the new trustees executed a surrender of the provisional certificate, which was received and registered on 8th July 2025; that therefore, at the hearing of the application for stay on 16th July 2025, the new trustees had ceased being in possession of the provisional certificate and had nothing to surrender to the Court, hence the instructions to file the application dated 17th July 2025; that a finding of contempt of court orders can only be made where a person directed to do or refrain from doing something not only knew of the directions, but was also in a position to effect them but chose not to; that he was not in possession of the provisional certificate and could not therefore surrender it to court; that the subdivision commenced upon the registration of the surrender, the effect of which was that the original title number, as exhibited in the provisional certificate,

ceased to exist and thus its register was closed; that it is not true

that the surrender was backdated as alleged; and that the application ought to be dismissed.

16. In its submissions, the 1st respondent cited: the cases of ***Michael Sistu Mwaura Kamau v DPP & Others [2018] KECA 359***, ***Ambala & Another v Ambala & Another; Butt & Another (Contemnor) [2023] KECA 867*** and ***Republic v Mohammed & Another [2018] KESC 51*** in support of the position that a person may only be committed for contempt if proved to have wilfully and deliberately disobeyed a court order; the South African case of ***Consolidated Fish (Pty) Ltd v Zove 1968 (2) SA 517 (C) 524D***, cited with approval in ***Mukuha v Gashwe & 14 Others [2023] KECA 1482*** for the proposition that a deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe that he/she is entitled to act in the way claimed to constitute the contempt, hence good faith avoids infraction; the case of ***Gatharia K. Mutitika v Baharini Farm Ltd (1985) KLR 227*** as cited in ***Ubora Housing Co-***

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Society Ltd v Tripple Two Properties Ltd & 7 Others ***[2023] KECA 675*** for the holding that the standard of proof in contempt applications is higher than on the balance of probabilities; the case of ***Krystalline Salt Limited & 3 Others v Cabinet***

Secretary, Ministry of Mining and Petroleum & Another [2023] KECA 1488 to highlight the position that a finding of contempt should be made cautiously and with great restraint. It was contended by the 1st respondent that in this case, the disobedience was neither wilful nor deliberate and that the 1st respondent acted promptly to remedy the mistake by seeking to review and set aside the order of 16th July 2025.

17. The 2nd and 3rd respondents' position was: that the applicant served/launched and booked the court order at the 2nd respondent's registry on 14th August 2025; that going by the averments made by the applicant, the subdivisions before the court are dated 14th July 2025; that the actions alleged by the applicant to constitute contempt were done before the court issued the orders; that there is no evidence of any action, subdivision and issuance of any title post the court order, hence the allegations that the same was backdated is not supported by any evidence; and that the contempt allegation has not been proved to the required standards.

18. When the matter was called out for hearing on 27th October 2025, learned counsel, ***Mr Nelson Havi,*** appeared with ***Mr Kyobika*** for

the appellant, learned Senior Counsel, ***Prof. Ojienda***, appeared

for the 1st respondent, while learned counsel, ***Mr Motari***, appeared for the 2nd and 3rd respondents. Mr Havi informed the Court that he was relying on the submissions filed in support of the appeal as well as those in support of the application for contempt, while Prof. Ojienda informed us that he was relying on the same submissions in support of his application for striking out and the preliminary objection and separate submissions filed in support of the application for setting aside the consent order. Mr Motari disclosed that he was supporting Prof. Ojienda's position. Counsel augmented the written submissions with oral highlights.

19. We have considered the applications, the affidavits filed in support of and in opposition thereto, and the parties' submissions. For good order, we wish to first deal with the application seeking to set aside the consent order because its determination will inform our decision as to whether or not to proceed and determine the application for contempt.

20. The substance of the said application is that at the time of recording of the said consent, Prof Ojienda was not aware of the fact that the provisional title certificate had ceased to exist,

having been surrendered by the trustees of the appellant to the

2nd respondent in order to effectuate the conversion and subdivision of the suit property. To the extent relevant to the matter before us, the decision of this Court in ***Diamond Trust Bank of Kenya Ltd v Ply & Panels Limited & Others [2004] 1 EA 31*** identified the guiding principles regarding consent orders and their binding effects, which we summarise as follows:

> ***(a) Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement. See Brooke Bond Liebig (T) Ltd v Mallya [1975] EA 266; Flora Wasike v Destimo Wamboko [1988] KLR 429; (1982-88) 1 KAR 266; Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another Civil Appeal No. 276 Of 1997.***
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> ***(b) Advocates have ostensible authority to reach a compromise on behalf of their clients and so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and has apparent authority to compromise all matters connected with the action. See***

***Shah v Westlands G S P Ltd.* [1965] EA 642; *Karani & 47 Others v Kijana & 2 Others* (1987) KLR 557.**

(c) The burden on a party who alleges that there was in fact no consent or that the consent was invalid is a heavy one.

(d) The compromise of a disputed claim made bona fide is a good consideration and the Court cannot interfere with it unless in the

circumstances which would afford a good ground for varying or rescinding a contract between parties. See Hiram v Kassam (1952) 19 EACA 131.

(e) If the representee, having discovered the misrepresentation, either expressly declares his intention to proceed with the contract, or does some act inconsistent with intention to rescind the contract, he is bound by his affirmation.

(f) Where the impugned consent judgement has been executed, the Courts are less likely to set aside the consent judgement. See Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469.

21. It is therefore clear that the Court has the power to set aside a consent order, although that power is restricted and the conditions therefor circumscribed.

22. In this case, as we have stated above, the ground upon which it is sought to set aside the consent order issued on 16th July 2025 is that the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, the material facts being the non-existence of the provisional certificate of title for the suit property which the court had, by consent of the parties, directed Mr. Moses Masek Monik, the 1st respondent, to deposit at the Court's Registry in Nairobi by close of business on 17th July 2025.

23. Although the appellant did not respond to this application for review of the consent order, since we are called upon to determine whether the consent order entered before this Court ought to be set aside, it is our duty to interrogate the grounds upon which the order is sought and determine whether the application meets the threshold for its grant. This Court in ***Board of Trustees National Social Security Fund v Micheal Mwalo*** ***[2015] eKLR*** expressed itself on the grounds for setting aside a consent order by holding that:

> ***"The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court." [Emphasis added]***

24. In ***Geoffrey M. Asanyo & 3 Others v Attorney General*** ***[2018] eKLR***, the Supreme Court had this to say regarding challenges against consent orders:

> ***"[98] In the matter before us, we thus note that neither before this Court nor any of the Superior Courts, was it argued or alleged that***

the Consent as filed by parties was entered into through coercion, misrepresentation and/or fraud. In

essence, the elements/principles for setting aside such a consent were never alleged and/or proved."

25. In this case, it is not contended that the consent was entered into through coercion, misrepresentation and/or fraud. It is, however, alleged that at the time of the recording of the consent, Prof Ojienda was not aware of the true position regarding the status of the suit property. We associate ourselves with this Court's position in ***Flora N. Wasike v Destimo Wamboko [1988] KLR 429; 1 KAR 625; [1976-1985] EA 625*** that:

> ***"Prima facie a consent order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."***

26. This Court in ***Diamond Trust Bank of Kenya Ltd v Ply &***

Panels Limited & Others (supra) this Court held that:

> ***"So long as a counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and has apparent authority to compromise all matters connected with the action."***

27. In our view, an advocate has ostensible authority to compromise a suit and, therefore, as was held by Georges, CJ in ***Tulsidas***

Khimji v Yusufali Gulamhussein Essaji & Another [1969] EA

401:

> ***"An order made by consent should rarely be reviewed or varied where both parties are represented by counsel at the hearing. There must be a change of circumstances, which could not have been envisaged at the time of the making of the original order."***

28. In this case, we are told that Prof. Ojienda was not aware of the circumstances prevailing on the ground as regards the suit property. When counsel enter into consents on behalf of their clients, it is presumed that they have taken instructions from their clients to do so. In this age, it only takes a phone call to get the instructions from the client. While we appreciate that the Court may, where satisfactory evidence is placed before it that the consent was entered into without sufficient material facts, or in misapprehension or in ignorance of material facts, set aside the consent, to justify the Court in doing so, there must be compelling evidence placed before the Court in support of that contention. Bare allegations that counsel or the client was not aware of the material facts will not suffice. It behoves counsel who records the consent to explain to the Court the circumstances under

which the consent was recorded. In this

case, no affidavit was sworn by Prof. Ojienda explaining the

circumstances under which he entered into the consent without being possessed of material facts. In the circumstances, we are not persuaded that the consent entered into before this Court on 16th July 2025 was arrived at without material facts.

29. Accordingly, we find no merit in and dismiss the application dated 17th July 2025.

30. We now proceed to deal with the application dated 1st September 2025 by the Community, seeking that Moses Masek Monik and the Chief Land Registrar, David Nyandoro, be committed to civil jail and for the surrender of all certificates of title issued as a result of and arising from the subdivisions of the suit property. It is not in dispute that the 1st and 2nd respondents did not comply with the order of this Court issued on 16th July 2025 directing the deposit, at this Court's registry, of the provisional certificate of title for the suit property. The 1st respondent's position was that it was unable to comply with the Court order due to the fact that he no longer has the title, having surrendered it to the 2nd respondent who proceeded to cancel it upon the issuance of the subdivision titles. According to him, at the hearing of the

application for stay on 16th July 2025, the new

trustees had ceased being in possession of the provisional

certificate and had nothing to surrender to the Court. The 1st respondent's position was supported by the 2nd respondent who confirmed that the applicant served and booked the court order at the 2nd respondent's registry on 14th August 2025, yet the subdivisions were done on 14th July 2025. Both the 1st and 2nd respondents denied that the subdivision titles were backdated. No evidence was placed before us to prove that the new titles were backdated as alleged by the appellant.

31. We are alive to this Court's decision in ***Mutitika v Baharini***

Farm Limited [1985] KLR 229 in which it was held at page 234

that:

> ***"In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."***

32. The Supreme Court of Canada in ***Carey v Laiken 2015 SCC 17,***

[2015] 2 S.C.R. 79, a decision cited by this Court in Krystalline

Salt Limited & 3 Others v Cabinet Secretary, Ministry of Mining and Petroleum & Another (supra) held that:

> ***"The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: see,***

e.g., Hefkey v Hefkey, 2013 ONCA 44, 30 R.F.L. (7th) 65, at para. 3. If contempt is found too easily, 'a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect': Centre commercial Les Rivières ltée v Jean Bleu inc., 2012 QCCA 1663, at para. 7. As this Court has affirmed, 'contempt of court cannot be reduced to a mere means of enforcing judgments': Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc, [1992] 2 SCR. 1065, at p 1078, citing Daigle v St-Gabriel-de- Brandon (Paroisse), [1991] RDJ 249 (Que. C.A.). Rather, it should be used 'cautiously and with great restraint': TG Industries, at para 32. It is an enforcement power of last rather than first resort: Hefkey, at para 3; St Elizabeth Home Society v Hamilton (City), 2008 ONCA 182, 89 OR (3d) 81, at paras 41- 43; Centre commercial Les Rivières ltée, at para. 64."

33. In ***Re Bramblevale*** (1970) 1 Ch. 128, it was appreciated that:

"Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved."

34. Based on ***Republic v Mohammed & Another* [2018] KESC 51**, and having considered the averment in the supporting affidavit as well as those in the replying affidavits, we are not satisfied that the 1st and 2nd respondents wilfully disobeyed this Courts orders issued on 16th July 2025. The material placed before us falls short of the threshold for finding the 1st

and 2nd respondents guilty of contempt of Court.

35. Consequently, we dismiss the application dated 1st September 2025.

36. We now proceed to deal with the 1st respondent's application dated 17th July 2025 (the striking out application) and the preliminary objection dated 16th October 2025, both of which sought to have the appeal struck out. The preliminary objection was based on the grounds that this Court lacks jurisdiction to hear and determine the appeal, the subject matter (the suit property) having ceased to exist upon surrender of the title on 8th July 2025, hence the appeal has been overtaken by events. The second ground is that Moses Parantai, Nkaru Pulei, Makarious Leisanka Tuukuo, Moses Orkeri Mparaia, Beatrice Tumuti Kosiom, Kelero Ene Kenoi and Lawrence Ole Sentero purportedly suing as trustees of the appellant, have challenged the election and appointment of Moses Masek Monik (the 1st respondent), Hannah Silapei Tuuko, Emmanuel Litei Shokore, Parsereti Ngomea Ngussur, John Kamunye Kiok, Peris Katito George and Sentero Ole Ntaingomo in High Court Constitutional Petition No. E481 of 2025, hence the matter is *sub judice*. Our short answer to the preliminary objection, based on *sub judice,* is that this

appeal arises from the decision of the learned Judge in which it was directed that:

> ***(a) Moses Parantai Ole Shukuru is hereby directed to surrender the Original Title to L.R No. Ngong/Ngong/12418 to the 1st Respondent within Seventy two (72) hours of the date of this Ruling.***
> ***(b) In default of (i), the 1st Respondent do issue and register a Provisional Certificate of Title to L.R No. Ngong/Ngong/12418 in the names of Moses Masek Monik, Hannah Silapei Tuuko, Emmanuel Litei Shokore, Parsereti Ngomea Ngussur, John Kamnuye Kiok, Peris Katito George, and Sentero Ole Ntaingono (the duly elected Trustees of Keekonyikie Community Trust).***
> ***(c) Each party to bear their own costs.***

37. Suffice it to say that, *prima facie*, the subject matter of this appeal is not substantially the same as the subject matter of the said Constitutional Petition.

38. As regards the allegation of surrender of title, that is a factual issue and since it is disputed, it cannot, strictly, be a basis for raising a preliminary objection. (See ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696)***. Secondly, the mere fact that the subject matter of appeal has been altered does not necessarily drive an aggrieved party from the seat of justice unless it is shown that the party contributed to that state of affairs. While, due

to the alteration in

the state of affairs, the Court may not grant certain remedies, it does not follow that the appeal must be terminated, without it being heard on its merits. The preliminary objection fails and is dismissed.

39. Finally, the application dated 17th July 2025 seeks to have the Notice of Appeal and the Record of Appeal struck out on the ground that the appellant is not a party aggrieved by the decision being appealed against. It is true from the ruling appealed against that the applicant was ***Keekonyokie Community Trust (Suing through the duly appointed trustees)*****.** It is not in doubt that the orders issued were in favour of that applicant. It is also true that the appellant in this appeal is, similarly, ***Keekonyokie Community Trust,*** hence the applicant before the ELC court is the appellant before us. While, ordinarily, a party who has wholly succeeded in a suit is not expected to appeal against the decision, we appreciate that nothing bars a party who is dissatisfied with certain aspects of a decision from appealing against that part notwithstanding that it, substantially, succeeded in the matter. In this case, there exists a dispute as to who are the validly elected trustees of ***Keekonyokie Community Trust.***

That issue

is yet to be fully resolved. It is not a matter which can be

determined summarily in an application for striking out an appeal, which ought to be based on facts that do not require detailed investigations and analysis to be undertaken. We, at this stage, decline to enter into that investigation so as not to prejudice the pending appeal.

40. In the premises, we dismiss the application dated 17th July 2025.

41. As none of the parties has wholly succeeded in these applications and preliminary objection, we make no order as to costs

42. It is so ordered.

Dated and delivered at Nairobi this 13th day of February 2026.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.