Kiilu & Kiilu (Holders of a Registered General Power of Attorney on Behalf of Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited; John Muthomi & Co. Advocates (Respondent) (Environment and Land Case 34 of 2018) [2026] KEELC 624 (KLR) (5 February 2026) (Ruling)

Neutral citation: [2026] KEELC 624 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CASE 34 OF 2018

JO MBOYA, J

FEBRUARY 5, 2026

BETWEEN

GEORGE MUINDE KIILU & FRANCIS MUTUA KIILU HOLDERS OF A REGISTERED GENERAL POWER OF ATTORNEY ON BEHALF OF RHODA S. KIILU ..... PLAINTIFF

AND

JIANGXI WATER AND HYDROPOWER CONSTRUCTION KENYA LIMITED ..... DEFENDANT

AND

JOHN MUTHOMI & CO. ADVOCATES ..... RESPONDENT

RULING

1. The subject dispute brings to the fore the scope and tenor of the doctrine of Functus Officio; and whether the said doctrine is cast on stone or whether same has known exceptions. Furthermore, there is also the question pertaining to the implication of [sic] fraud on the doctrine. The scope, extent and tenor of the doctrine was deliberated upon by the court of appeal in the case of 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).

2. For coherence the court stated as hereunder:

> " 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;"

3. Back to the subject application. Before me is the application dated the 05/01/2026 and wherein the applicants [who are holders of a registered power of Attorney on behalf of Rhoda S. Kiilu] have sought a plethora of reliefs. The reliefs sought at the foot of the application are reproduced as hereunder:

   i. That this application be certified as urgent and be heard exparte in the first instant.

   ii. That pending inter-parties hearing, this Honorable Court be pleased to issue interim preservation orders restraining John Muthomi & Company Advocates, its partners, servants, agents, or any person acting under its authority from dealing with, transferring, dissipating, or otherwise interfering with the sum of Kshs. 50,000,000/= or any portion thereof, withdrawn pursuant to the orders of 12th April, 2023.

   iii. That pending inter parties hearing, this Court be pleased to issue an interim restitution order compelling John Muthomi & Company Advocates to deposit into Court the sum of Kshs. 50,000,000/=[fifty million shillings only], or such part thereof as may have been withdrawn, within a time frame fixed by the Court.

   iv. That pending inter parties hearing, the Deputy Registrar be directed to immediately place before this Honorable Court the full withdrawal record, including payment instructions, banking detail, and approvals relied upon.

   v. That pending inter parties hearing, the KCB Bank Branch Manager be compelled to supply us with bank statement for account number 1313XXX for period 12th April, 2023 to 31st December, 2023.

   vi. That pending inter parties hearing, the KCB Bank Branch Manager be compelled to supply us with details [Name , Date, Purpose, Receiving Bank Branch Account & Account Number] of all payments from account number 1313XXX totaling the sum of KES 50 million from the 12th April, 2023.

   vii. That upon inter-partes hearing, this Honorable Court be pleased to: Review, vary, and/or set aside in entirety the orders issued on 12th April, 2023 authorizing the withdrawal of KES 50,000,000/=.

   viii. That the Honorable court be pleased to declare that the application upon which the said orders were granted was founded on fraud, forgery, and material non-disclosure, and is a nullity ab intio.

   ix. That this Honorable court be pleased to order the permanent restitution to court of Ksh. 50,000,000/=, together with accrued interest, by John Muthomi & Co. Advocates, jointly and severally with any other culpable party.

   x. That the Honorable court be pleased to issue consequential directions, including referral of the matter to:Director of Public ProsecutionThe law Society of KenyaThe Asset Recovery CommissionThe Advocates complaints Commission.

   xi. The costs of this application be provided for.

4. The application is premised on various grounds which have been enumerated in the body thereof. Briefly, the applicants have posited that the respondent herein was retained to act for and on behalf of Rhoda S. Kiilu; the respondent indeed acted in the matter; judgment was thereafter delivered; upon the

delivery of judgement the Judgment debtor [JD] filed an application for stay of execution culminating into an order of stay being granted albeit on terms; the terms included deposit of Kshs. 70,000,000/= only in court pending the hearing and determination of the appeal to the court of appeal; thereafter the respondent mounted an application for withdrawal of an amount of Kshs. 50,000,000/= only; the amount of 50,000,000/= was ultimately released to the respondent.

5. Furthermore, it has been contended that the application which underpinned the withdrawal of the sum of Kshs. 50,000,000/= only, was supported by a fraudulent and forged affidavit; the affidavit was not signed by Rhoda S. Kiilu; the medical report attached thereto was a forgery; and the monies were never released and or paid out to Rhoda S. Kiilu at all.

6. The subject application is supported by three [3] sets of affidavits, namely; the supporting affidavit of George M. Kiilu; the confirmatory/disowning affidavit of Rhoda S. Kiilu ; and the supplementary affidavit sworn by George Muinde Kiilu sworn on 28/01/2026.

7. The contents of the various affidavits reiterate the averment that the affidavit that was deployed towards the release of the sum of Kshs. 50,000,000/= only to the respondent was never signed by Rhoda S. Kiilu. In addition, it has also been averred that the medical report attributed to Dr. Geoffrey Muganda was also a forgery.

8. Other than the foregoing, the named affidavits have also highlighted the position that the monies which were ultimately released to the respondent, were never disbursed to Rhoda S. Kiilu, namely the decree holder in the matter.

9. The respondent filed a replying affidavit sworn on the 26.01.2026 and grounds of opposition of even date. However, prior to the hearing, the respondent [himself an advocate of the high court of Kenya] sought leave to withdraw the replying affidavit and the grounds of opposition under reference. The request to withdraw the replying affidavit sworn on 26.01.2026 and the grounds of opposition of even date was granted. To this end, the two documents were marked as withdrawn and expunged from the record.

10. The respondent thereafter intimated to the court that same had filed the replying affidavit sworn on the 28.01.2026 and grounds of opposition of even date. Suffice it to state that the respondent sought to adopt and rely on the said replying affidavit and the grounds of opposition.

11. The respondent herein has acknowledged that same was indeed retained by Rhoda S. Kiilu in respect of the instant matter. Furthermore, the respondent has averred that subsequently an application was mounted seeking the variation of the orders of stay that had previously been granted on the 13/07/2022 and in particular, variation of the conditions of stay to facilitate release/payment of the sum of Kshs. 50,000,000/=. In addition, it has been contended that the application was made on behalf of Rhoda S. Kiilu and that the documentation that were relied upon were availed by the applicants herein.

12. Be that as it may, the respondent has posited that the dispute beforehand arose out of a disagreement as pertains to the fees payable to and in his favor. Moreover, it has also been averred that the disagreement was also contributed to by the refusal of the applicants to pay/meet some monetary promises [rewards] that had been made to some people as pertains to the subject matter.

13. Other than the replying affidavit [details in terms of the preceding paragraphs] the respondent also filed grounds of opposition and wherein the respondent has averred thus: the motion is bad in law, fatally flawed, and incurably defective; the court is bereft of jurisdiction to grant the motion; the applicants are on a fishing expedition; the court is being turned into an investigative agency/detective; the motion is res sub judice Meru HCRMISC. Application Number E048 of 2025; the motion does not meet the threshold for the grant of interlocutory and mandatory injunctions; the motion does not meet the

threshold of the provisions of Order 45 of the Civil Procedure Rules ; and the motion is frivolous, vexatious, and otherwise an abuse of the due process of the court.

14. The subject application came up for hearing on 29/01/2026, whereupon the applicants and the respondent agreed to canvass the application by way of oral submissions. The submissions by/on behalf of the parties are on record.

15. Briefly, the applicants contended that the respondent herein filed/mounted an application for release of sum of Kshs. 50,000,000/= only, which was part of the monies that had been deposited in court as security pending the hearing and determination of an appeal filed at the court of appeal [Nyeri]. It was contended that the application in question was supported by an affidavit which was attributed to Rhoda S. Kiilu, but which affidavit was never signed by the said Rhoda S. Kiilu. To this end, it has been submitted that the affidavit in question was a forgery and a fraud.

16. Additionally, the applicants have posited that Rhoda S. Kiilu has sworn a confirmatory affidavit, wherein same has disowned the impugned affidavit that was relied upon by the respondent. Furthermore, it has been submitted that the medical report which was annexed to the impugned affidavit has also been disowned and discounted by Dr. Geoffrey Muganda.

17. Secondly, it has been submitted that the process leading to the release and withdrawal of the sum of Kshs. 50,000,000/= Only to the respondent was wrought with manipulation, misrepresentation, fraud and forgery. In this regard, it has been submitted that fraud vitiates the legality of the impugned orders and thus renders same amenable to review and variation.

18. Thirdly, it has been submitted that the respondent herein has neither denied nor disputed that the money was indeed released and paid out to him. Moreover, it has also been contended that the respondent has not deponed to whether the money was paid out to Rhoda S. Kiilu.

19. Regarding the question as to whether the court is functus officio, the applicants have contended that the doctrine of functus officio has known exceptions, including fraud, forgery and misrepresentations. In this regard, it has been submitted that the court is seized of the authority to interrogate fraud and where same is proved to invalidate and rescind the orders procured by fraud.

20. As concerns the question of jurisdiction, the applicants have submitted that the Court is invested with inherent and intrinsic jurisdiction to ensure that its process are not being misused; abused; or manipulated.

21. Regarding the question whether the dispute beforehand concerns advocate client dispute, the applicant has submitted that the monies which were withdrawn and released to the respondent did not belong to Rhoda S. Kiilu. On the contrary, it has been submitted that the monies were deposited in court as security and therefore same ought to be retained by the court. Moreover, the applicants contended that the application is concerned with restoration of the security that was illegally and fraudulently released to the respondent.

22. As pertains to the contention that the subject application is barred by the doctrine of res sub judice on the basis of Meru HCR application number E048 of 2025, it has been contended that the said application and matter does not concern/involve the same parties. Furthermore, it has been submitted that the said matter does not seek the same reliefs, namely; restoration of the security that was fraudulently withdrawn.

23. Premised on the foregoing, the applicants have invited the court to find and hold that same have established and demonstrate a proper basis to warrant the review, rescission and the variation of the orders underpinning the release of the security.

24. The respondent adopted the contents of the replying affidavit sworn on the 28.01.2026 and the grounds of opposition of even date and thereafter highlighted six [6] key issues. The issues highlighted by the respondent include: the application is bad in law for being omnibus; the court is divested of jurisdiction to entertain the application; the subject application is prohibited by the doctrine of res sub judice ; the application barred by the doctrine of functus officio; the applicants has neither met nor satisfied the threshold for grant of review; the applicant have not proven and established fraud to the requisite standard ; and the court is being converted into an investigating agency/detective.

25. Regarding the contention that the application is omnibus, the respondent has submitted that the applicants have sought a plethora of reliefs, including interlocutory injunctions; mandatory injunctions; and permanent injunction, which are governed by different principles and procedure[s]. To this end, it has been submitted that the diverse reliefs sought cannot be issued or granted in the manner sought.

26. Secondly, the respondent has submitted that the court is divested of the requisite jurisdiction to entertain the subject application, insofar as the orders sought bear criminal connotation[s] and thus can only be addressed by the High Court or the Statutory Agencies clothed with the powers to undertake investigation and to procure documents for such investigations.

27. Thirdly, the respondent has submitted that the applicants had lodged a complaint with the police culminating in the filing of Meru HCCR Miscellaneous application number E048 of 2025; and wherein the police have since procured orders to investigate the designated accounts. It has been submitted that on the basis of the said proceedings before the High Court, the Subject matter is sub judice. The court has thereafter been invited to invoke and deploy the provisions of section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

28. The next issue that has been highlighted by the respondent touches on and concerns whether the applicants have established and demonstrated a basis for the grant of an order of temporary injunction; mandatory injunction; and permanent injunction. In this respect the respondent has submitted that the applicants have not satisfied the principles that govern the issuance of the orders of injunction or at all.

29. The respondent has thereafter addressed the court on the question of review and same has submitted that the applicants have not satisfied the stringent conditions that underpin the grant of an application for review. To this end, the court has been invited to find and hold that an application for review can only issue where the elements/ingredients espoused by order 45 of the civil procedure rules have been met.

30. Turning to the question of jurisdiction, the respondent has submitted that the court is devoid of jurisdiction to grant the reliefs sought. In particular, it has been submitted that where a court is divested of jurisdiction, the court ought to down its tools and not to terminate the matter in question.

31. The next issue that has been canvassed touches on and concerns fraud and forgery. It has been submitted that fraud and forgery are serious and grave averments and therefore the claimant is obliged to tender plausible; cogent; compelling; and concrete evidence and not bare allegations/assertions. Moreover, it has been submitted that fraud and forgery must be proven to a higher standard, namely; standard above the balance of probabilities.

32. Additionally, it has been submitted that even though it has been averred that Dr. Geoffrey Muganda has disowned the medical report, the said Dr. Geoffrey Muganda has not sworn an affidavit to assert the said allegations. In the absence of an affidavit by Dr. Geoffrey Muganda, it has been contended that the allegations on behalf of the said doctor are devoid of probative value.

33. On the other hand, it has been submitted that the respondent has sworn a replying affidavit and wherein same has denied/controverted the allegations of fraud and forgery. To this end, the respondent referenced paragraph 17 of the replying affidavit.

34. The respondent has further submitted that the dispute beforehand touches on and concerns advocate client relationship. In this respect, it has been submitted that there exists appropriate statutory fora meant to determine and address such dispute. In particular, it has been posited that the court has no such jurisdiction.

35. Next is the issue of whether this court can determine the criminal conduct of the respondent or otherwise. The respondent has submitted that the subject application is a disguised attempt by the applicants to invite the court to find and hold that the respondent is guilty of criminal conduct. Nevertheless, it has been posited that the determination of guilt or criminal culpability of a person falls under the criminal justice system and not otherwise.

36. Flowing from the foregoing submissions, the respondent has invited the court to find and hold that the subject application, which is contended to be omnibus, is misconceived and legally untenable. To this end, the court has been implored to dismiss the application and award costs to the respondent.

37. Having reviewed the application; the various affidavits in support thereof; the replying affidavit; the grounds of opposition and upon consideration of the oral submissions made by/on behalf of the parties, I come to the conclusion that the determination of the subject application turns on the following issues: Whether the application is prohibited by the doctrine of res sub judice or otherwise; whether the application is barred by the doctrine of functus officio ; whether the court is seized of jurisdiction to entertain and adjudicate upon the matter beforehand; whether the dispute before the court relates to an advocate client dispute or otherwise; whether fraud and forgery have been established; whether the applicants have established/demonstrated a basis for review or otherwise; and what reliefs [if any] ought to be granted.

38. Regarding the question of sub judice, it is important to highlight that the doctrine of sub judice bars or prohibits a court of law from proceeding with or entertaining a subsequent suit/matter, which touches on and concerns a similar set of issues that are pending before the same court or another court on the basis of a prior suit or proceedings. Where it is established that there is a similar suit or matter touching on the same question and which was filed prior, then the court is called upon to stay the subsequent suit pending the determination of the earlier suit. [See the Provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

39. However, before the court can invoke and rely on the doctrine of sub judice, it behooves the court to interrogate the identities of the parties; the nature of the dispute; the reliefs sought thereunder; and whether the court before which [sic] the prior suit is pending is seized of the requisite jurisdiction to entertain the matter. Moreover, the court is called upon to ascertain whether the ingredients highlighted by section 6 of the *Civil Procedure Act* has been met.

40. The ingredients/elements that underpin the doctrine of res sub judice were expounded by the supreme court of Kenya [the apex Court] in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR). The court observed thus:

> The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same

subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

41. According to the respondent, the subject application is sub judice Meru HCCR Misc. Application E048 of 2025 wherein it is stated that the applicants herein lodged a complaint with the police and thereafter the criminal investigation department [DCI] mounted an application seeking inter allia; to be supplied with bank statements in respect of account number xxx 353 – Kenya Commercial Bank Limited – Meru Branch; and an order freezing the named account. The documents relative to the said suit/matter have been annexed to the replying affidavit of the respondent.

42. I beg to state that the proceedings that have been referenced, namely; Meru HCCR Misc. Application E048 of 2025 concerns the County Criminal Investigations office – Meru County and the Manager Kenya Commercial Bank Limited – Meru Branch. Notably, the applicants herein are not parties thereto. In addition, the said proceedings do not touch on and or concern restoration of the sum of Kshs. 50,000,000/= only being part of the security that was deposited with this court and which is contended to have been released on the basis of [sic] forged/fraudulent affidavit.

43. Furthermore, it is not lost on me that the proceedings that have been referenced are criminal or quasi criminal in nature and thus same cannot yield the restorative orders that are sought before this court. In addition, there is no gainsaying that the provision of Sections 34 And 91 of the *Civil Procedure Act*, underscore that an application for restitution [like the one beforehand] can only be mounted in the suit that birthed the orders.

44. In view of the foregoing, I am not persuaded by the respondent's submissions that the subject application is defeated or barred by the doctrine of res sub judice. I am afraid the submissions in this respect were based on misapprehension of the doctrine under referenced.

45. Next is the issue the doctrine of functus officio. The respondent submitted that the application for review and variation of the condition that were granted at the foot of ruling that issued the orders of stay was heard and disposed of on merit. Furthermore, it was contended that the court reached and arrived at a considered decision after taking into account the submissions of all the concerned parties. According to the respondent this court[differently constituted] dealt with the matter of review and hence the current application is barred by the doctrine of functus officio. The court has been invited to find and hold that the applicants are non- suited.

46. On the contrary, the applicants have contended that even though the previous application for review and variation was heard and determined on merited, it is contended that the supporting affidavit which was relied upon was forged and fraudulent. To this end, the applicants have invited the court to take note of the contents of the confirmatory/ disowning affidavit sworn by Rhoda S. Kiilu on 5/2/2025: and wherein the named deponent has denied having sworn the impugned affidavit.

47. Moreover, it has been submitted that the deposition by Rhoda S Kiilu have neither been controverted nor challenged by the respondent. In this regard the crux of the matter before hand is that the impugned orders were procured and obtained by fraud; deceit; misrepresentation; and forgery.

48. Based on the forgoing contention, the applicants have posited that the doctrine of functus officio does not apply in the circumstances of the subject matter. In any event, it has been submitted that the doctrine of functus officio has exception inter alia fraud, deceit and illegality.

49. I have considered the rival submissions on the issue of functus officio. I do agree that where a court of competent jurisdiction has engaged with a particular question or matter and rendered a decision on merit, the same court or a court of concurrent jurisdiction cannot revisit the matter. The significance of this doctrine lies in finality of litigation.

50. Nevertheless, there is no gainsaying that like all other doctrines and concepts of law, the doctrine of functus officio has exceptions. Some of the known exceptions include fraud, deceit, misrepresentation or illegality. In this regard where an applicant anchors an application on the basis of fraud or deceipt; and same is able to provide plausible evidence, then the plea of functus officio cannot avail.

51. In the case of 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) the court of appeal expounded on the issue of functus officio and in particular highlighted that the doctrine has exception. The court stated thus

> " 24. 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;

52. What I hear that applicants to be stating is that the impugned order was obtained on the basis of fraud. The applicants would be called upon to tender plausible and cogent evidence to prove fraud. However, the invocation and reliance of fraud provides a window out of the doctrine of functus officio and the court is called to interrogate the plea of fraud and ascertain its veracity or otherwise.

53. My answer to issue Number two [2] is to the effect that the doctrine of functus officio does not avail to the respondent, and more particularly, on the face of the assertions touching on fraud; forgery; misrepresentation and depict.

54. Turning to the third issue namely; whether the court is seized of jurisdiction to entertain and adjudicate upon the matter beforehand; It is important to recall and reiterate that the respondent contended that the court is divested of the jurisdiction to entertain and adjudicate on the subject application. The respondent has raised various contention. First, the respondent has posited that the application is omnibus in so far as the applicants have sought a plethora of reliefs; including , temporary injunction; mandatory injunction and permanent injunction all in the same application.

55. It has been contended that the various reliefs that have been sought are governed by different procedures and principles. To the extent that they are governed by different procedures and principles, the court has been invited to find and hold that the application is muddled- up and therefore bad in law.

56. Be that as it may, I beg to point out that even where an application seeks various/ diverse reliefs which are governed by different procedures , the court is still clothed with jurisdiction to sieve the reliefs sought and to discern whether any of the multiple reliefs [if at all] can be granted or otherwise.

57. In the circumstances, I do not share In the submissions by the respondent that an omnibus application by and of itself must drive away the applicant from the seat of justice. Such kind of an endeavor would be antithetical to the rule of law.

58. The other aspect that founds the contention that the court lacks jurisdiction is to the effect that the applicants are seeking to invite this court to engage with a criminal process and in particular, to determine the guilt or criminal culpability of the respondent. I am afraid that this bit of submission is based on the misapprehension of the reliefs or better still the key reliefs that underpin the application.

59. Despite the side winds that surround the matter and the hullaballoo that surrounds the dispute, what I discern to be the gravamen of the application is refund/ restoration/ restitution of the sum of Kshs 50,000,000/= Only which was released to and there after withdrawn by the respondent [Sic] on the contention that same was to facilitate specialized treatment for Rhoda S. Kiilu.

60. I beg to clarify that the applicants have not sought to invite this court to try the respondent and to determine whether the respondent is guilty or otherwise. The determination of whether the respondent is guilty [If at all] lies in the criminal justice system , and if at all, the applicants would deem it appropriate then in the fullness of time that recourse remains available subject to evidence.

61. The next aspect that has been canvassed to persuade the court on the issue of jurisdiction, touches on and concerns the contention that dispute beforehand involves an advocate and client. In this regard, the respondent contended that such kind of a dispute can only be dealt with by the advocates complaints commission; or advocates disciplinary tribunal. It has been contended that the matter falls outside the jurisdictional remit of the court

62. In answer to the contention that the dispute beforehand is an advocate client dispute, I beg to state that the monies which are sought to be restituted/ restored, do not and did not belong to the client. In fact, the applicants herein are not stating that the respondent has failed to account for the monies paid to or held by him[Respondent] on behalf of the client. On the contrary, the money in question constituted security which should be held by the court pending the determination of the appeal before the court pf appeal.

63. If I hear the applicants correctly, same are contending that a fraud has been committed on the court and monies which should be within the custody of court have been released on the basis of mischief, fraud, and deceit.

64. In my humble view I do not see the advocate client dispute. To this end, the contention that the dispute is advocate client dispute; and hence falls outside the jurisdiction of the court is a smoke screen. The court is enjoined to look through and discern what exactly is the issue in contest. No amount of surplusage should blind the judicial eye of the court.

65. The next issue that falls for consideration is whether fraud and forgery have been established or otherwise. In an endeavor to address the question of fraud and forgery, it is imperative to take cognizance of the following;

    i. Rhoda S. Kiilu has sworn a confirmatory/ disowning affidavit

    ii. The said affidavit disputes the signature that was affixed / appended to the offensive affidavit which is said to be fraudulent

    iii. Rhoda S. Kiilu has deponed that' she did not receive any payment out of the 50,000,000/-

66. It is instructive to observe that the positive averments by Rhoda S. Kiilu have neither been responded to nor controverted by the respondent. In particular, I have perused the replying affidavit sworn on 28.1.2026 and no paragraph responds to the contents of the affidavit by Rhoda S. Kiilu. If anything, one would have expected the respondent to even provide the accounts as to what happened to the monies, and whether same; or apportion thereof was paid to [sic] the beneficiary.

67. Other than the foregoing, one would have expected the respondent to obtain an affidavit from the commissioner of oaths, namely; Mr Kevin Nyenyire [Advocate/ Commissioner for Oaths] who is said to have administered the oath at the foot of the impugned affidavit. Surely, if Rhoda S. Kiilu gave instructions and appeared before the commissioner of oaths; the truth or otherwise would become verifiable by the commissioner of oaths re affirming the position.

68. Additionally, the respondent herein was at liberty to take out a notice to cross examine Rhoda S. Kiilu as well as George Muinde Kiilu so as to interrogate the veracity of the deposition. Again , this window, which would have enabled the respondent to impeach the contents of the two [2] affidavits was neither seized or appropriated.

69. Then there is the issue of the forged medical report by Dr Geoffrey Maganda. Again, it is on record that the said doctor has disowned the medical report that was annexed to the impugned supporting affidavit and relied on by the respondent, while propagating the offensive application. The position taken by Dr. Maganda has also not been impugned or impeached. I must say that the respondent was at liberty to also demand the attendance of Dr. Maganda and to subject same to cross examination. However, this avenue was also not taken.

70. The totality of the evidence that has been brought before the court by/ on behalf of the applicants demonstrate some degree of fraud, deceit, misrepresentation and I dare add, forgery. These are not light issues, more particularly when same are being attributed to an advocate of the high court of Kenya and who by operation of the law is an officer of the court. [See section 55 and 56 of the *Advocates Act*]

71. I am alive to the fact that the plea of fraud, deceit and forgery are serious issues and must therefore be proven on the basis of plausible, compelling and credible evidence. Nevertheless, it Is important to underscore that in assessing the quality of evidence, the court must not lose sight of the standard of poof. For good measure, the standard of proof is not beyond reasonable doubt. On the contrary, it is the intermediate standard; namely; the one that lies between balance of probability and beyond reasonable doubt. [See Kuria Kiarie vs Sammy Magera 2018 eklr].

72. I must have said enough to demonstrate that I am persuaded on the question of fraud; deceit; and misrepresentation. This is worsened by the fact that Rhoda S. Kiilu on whose behalf the money is said to have been released is on record saying that she did not benefit from the money or any portion thereof.

73. Suffice it to reproduce a segment of the affidavit of Rhoda S. Kiilu speaking to the issue of the money that was [sic] released on her behalf and which money was purported to be meant to facilitate specialized treatment. She states thus:

Paragraph 8 of the confirmatory affidavit

> " That I did not consent to, approve, or benefit from the withdrawal of Kshs. 50,000,000/= or any part thereof, pursuant to the orders issued on the 12/04/2023."

74. The next issue that merits consideration is whether the applicants have established a basis to warrant review. It is common ground that any applicant, the current applicants no excepted, must establish and satisfy the conditions captured under the provisions of order 45 of the civil Procedure rules, 2010. In

particular, an applicant must demonstrate the existence of an error or mistake apparent on the face of the record; or discovery of new and important evidence which same could not have discovered at the time when the judgment or ruling sought to be impugned was delivered; or demonstrate the existence of sufficient cause.

75. The law as pertains to review has crystalized over time. However, it is important to reference the decision in case of Pancras T. Swai v Kenya Breweries Limited [2014] KECA 883 (KLR) where the court of appeal stated as hereunder:

> 29. .....The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason." The appellant did not bring his application within any of the limps nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in Wangechi Kimata & another vs. Charan Singh (C.A. No. 80 of 1985) (unreported) wherein this Court held that
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> > any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

76. From the foregoing decision, what is apparent is that a court of law confronted with an application for review on the basis of sufficient cause, is called upon to interpret the meaning of sufficient cause/ reason in liberal manner. Notably, the court is enjoined to give sufficient reason an interpretation that facilitate[s] the realization of the interest of justice and to avert injustice.

77. In addition, where a court is confronted with assertions that the impugned judgement or ruling was procured on the basis of fraud; deceit; misrepresentation; and illegality, then the court must endeavor to protect the integrity of its process.

78. The Supreme Court in the case of Narok County Government v Ntutu & 2 others [2018] KESC 11 (KLR) addressed the effect of an illegality on a judgment and its implications on public policy.

79. The court stated thus:

> We are in agreement with the learned judge of the High Court on her finding as it is trite law that, parties cannot consent to an illegality. Hence a consent that upsets the provisions of the *Constitution* also defeats the principle of legality and cannot stand."

80. In the case of Benjoh Amalgamated Ltd & another v Kenya Commercial Bank Ltd [2014] KECA 872 [EKL] the court of appeal addressed and considered the legal consequences of an order procured by fraud.

81. The court stated as here under

> 49. In Re Barrell Enterprises and Others [1972] 3 All ER 631the Court of Appeal, Civil Division, declined to open a concluded appeal and held that the discovery of fresh evidence was not a ground for allowing a further hearing before the Court of Appeal. The Court (as per Russel, L. J) stated (pg 636 letters f to g) that "...the cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present." ..... In Boslow v. Bagley & Co. Ltd [1961] 2 All ER 962, two decisions of the Court of Appeal had been given within a few days of each other giving markedly different decisions as to the appropriate damages for loss of an eye. One division thereupon reconsidered its decision and varied it to correspond with the other so as to avoid the injustice as between the two sets of litigants of one award being out of all proportion to the other. Said the Court-
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> > We can accept without difficulty the notion that if a judgment has been comes to setting aside a judgment on the ground that fresh evidence has been obtained it appears to us highly desirable that the Court of Appeal alone should have jurisdiction. Then the rules as to time for appeal, with the discretion to allow an appeal out of time, will apply. So will the code for deciding when fresh evidence should be admitted, now enshrined in the judgment of Denning LJ in Ladd v Marshall. There are however in the Supreme Court Practice and in textbooks statements to the effect that an action will lie to set aside a judgment on the ground of fresh evidence and it is necessary to consider whether these are well-founded. The Supreme Court Practice 1970 has this sentence: "If a judgment or order has been obtained by fraud or where evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.[emphasis supplied]

82. Moreover, the Supreme Court has itself considered the implication[s] of fraud and the effects thereof on a judgment or order. In particular, the supreme court has held that where it is shown or demonstrated that the judgement or order was procured by fraud, then the court would be seized of the residual jurisdiction to review its judgement or order.

83. In the case of Sonko v Clerk, County Assembly of Nairobi City & 11 others [2022] KESC 38 (KLR), the Supreme Court [apex court] stated as hereunder:

> 6 ....As a general rule, the Supreme Court cannot sit on appeal over its own decisions, or to review its decisions, save to correct obvious errors apparent on the face of the decision. However, in exercise of its inherent powers, the Court may, review its decision(s) "in exceptional circumstances, so as to meet the ends of justice". It will do so in instances where:
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> (i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
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> ii. The Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
>
> iii. Tthe Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
>
> iv. The Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision."

84. I am alive to the fact that the Supreme Court [the apex court] was engaging with the *supreme court act* and by extension its jurisdiction to review its judgement or orders [where necessary]. However, the golden thread that flows from the holding is to the effect that fraud; deceit or illegality founds a basis to invalidate or negate a judgment or order of the court.

85. From the foregoing analysis, what is apparent is that proof of fraud; deceit; misrepresentation; or forgery constitute a reasonable foundation upon which a court of law can review, vary, rescind and or set aside a previous order, irrespective of whether the impugned order was final in nature or otherwise.

86. Turning to the final issue, namely; the reliefs if any which ought to be granted. I beg to state that the applicants have sought a plethora of reliefs. However, the key and central reliefs which have been sought touch on review of the impugned orders; and restoration of the sum of Ksh 50,000,000/= Only, back to the judiciary and to be held as security pending the hearing and determination of the appeal.

87. While discussing the issue of review elsewhere herein before, I have found and held that the applicants have demonstrated a basis to warrant review of the impugned orders. For good measure, the applicants have demonstrated the existence of fraud, deceit and misrepresentation.

88. Additionally, it is worthy to point out that the impugned order which is the subject of the application culminated into the release and eventual withdrawal of the sum of Kshs. 50,000,000/= only, which had been deposited with the court on account of security for the due performance of the decree that may ultimately ensue. [See the provisions of order 42 rule 6[2] of the civil procedure rules].

89. Having come to the conclusion that the impugned ruling is amenable to review, the consequential issue that does arise, is what happens to the monies that were fraudulently and deceitfully released. To my mind, the monies in question belong to and should be under the custody of the judiciary pending the determination of the appeal before the court of appeal. In the circumstances, there is no gainsaying that the money in question ought to; and must be restored or restituted to the judiciary.

90. Before concluding this ruling, I beg to state that there is one question that was never answered by the respondent, either vide his replying affidavit or in the course of his submissions. The question relates to what happened to the sum of Kshs. 50,000,000/= only, which was released to and thereafter withdrawn by the respondent, taking into account the uncontroverted deposition by Ms. Rhoda S. Kiilu that same did not benefit from the money or portion thereof. Surely, the monies were alleged to have been withdrawn to facilitate her going for specialized treatment abroad. In this regard, courtesy demanded that an explanation be offered as to what happened to the money.

91. Be that as it may, and in the premises, I am convinced that the application by the by/on behalf of the applicants; and whose effect is to protect the integrity of court process, is meritorious.

Final Disposition.

92. From the foregoing, there is no gainsaying that the application deserves to be allowed. In the premises, I am minded to and do hereby allow the application on the following terms:

    i. The ruling and orders of the learned Judge dated the 12/04/2023; and the consequential Orders be and are hereby reviewed on the basis of fraud; deceit and misrepresentation.

    ii. The order of the learned judge directing that the sum of Kshs. 50,000,000/= only be released to the respondent herein [sic] on behalf of Rhoda S. Kiilu be and is hereby set aside.

    iii. The release of the sum of Kshs. 50,000,000/= only, which was held as security pending the hearing of the appeal to the court of appeal be and is hereby rescinded.

iv. The respondent to whom the money was released be and is hereby ordered and directed to refund/restore the entire sum of Kshs. 50,000,000/= only to the judiciary [Meru Law Courts] within a duration of 45 days from the date hereof.

v. The monies so restituted in terms of clause[iv] above shall be held as security for the due performance of the decree that may ultimately ensue from the court of appeal.

vi. In the event of default by the respondent to restore/restitute the sum of Kshs. 50,000,000/= only, to the judiciary in line with clause [iv] the applicant[s] shall be at liberty to revert to court subject to the provisions of the law.

vii. There are issues which have arisen in the course of the subject application and which bring to the fore aspects of cognizable offences [which may have occurred]. Consequently, there is need to have the criminal investigation department to undertake due investigations and thereafter to institute appropriate proceedings where apposite.

viii. To this end, I hereby direct that the ruling herein shall be served upon the Directorate of Criminal Investigations [DCI] and the Inspector General of Police for necessary action.

ix. The ruling herein shall also be served upon the Deputy Registrar of the Environment and Land Court – Meru; for further action.

x. Furthermore, the Ruling shall also be served upon the Law Society of Kenya [LSK] for action, where apposite.

xi. Costs of the application be and are hereby awarded to the applicants.

xii. Costs in terms of clause [x] be and are hereby certified in the sum of Kshs. 20,000/= only to be borne by the respondent.

xiii. Any other relief not expressly granted is hereby declined.

93. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF FEBRUARY, 2026

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant.

Mr. George Muinde Kiilu & Francis Mutua Kiilu [Attorneys of Rhoda S. Kiilu] – present in person.

Mr. John Muthomi – Respondent – present