REPUBLIC OF KENYA
IN THE HGIG COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW DIVISION
PETITION NO. 17 OF 2018

THERESIA RUNJI…….1ST PETITIONER
MARIETA GITONGA CHEGE……..….2ND PETITIONER
NAOMI KIIO……..3RD PETITIONER
-VERSUS-
SAMMY MACHARIA KARA…….……..RESPONDENT
MIRITINI FREE PORT LIMITED…….INTERESTED PARTY

RULING

1. The application before court is the petitioners' motion dated 4 August 2025 in which the petitioners seek the order that:

> ***"2…the respondent be ordered to deposit the sum of Kenya Shillings One Billion Two Hundred Million (1,200,000,000/=) in a joint account in the names of parties advocates herein within a specified period of time."***

2. The application is supported by the affidavit of one Joseph Mbugua Gichanga who has introduced himself in the affidavit as "*the duly appointed, ordained and nominated done (sic) of the special power of attorney by David Macharia also known as Sammy Macharia Kara vide Power of Attorney PA/19103 dated 11th October. 2017. Theresia Runji also known as Theresia Runji Gichoni vide Power or Attorney PA/19104*

dated 11th October, 2017 and Marieta Gitonga Chege vide Power of Attorney PA/19106 dated 11th October."

3. The deponent has sworn that on 17 January 2024, this Honourable Court issued an order for the maintenance of the *status quo* in respect of the release of "the said sum of money". A ruling in the application in which this order was made was set to be delivered on 26 September 2024.
4. It is alleged that the "the said sum of money" is held by the respondent without earning any interest. Although the deponent has sworn that the respondent holds "the said sum of money" he has sworn in paragraph 6 of his affidavit as follows:

> ***"i) The Respondent has in the recent past engaged the petitioners with a view to resolving the dispute between the Petitioners and the Respondent amicably. On 9th July. 2025 when the parties herein attended the Court of Appeal in Mombasa COACA No. E024 of 2020; National land Commission vs Theresia Runji & 4 Others and COACA NO. E044 OF 2021; Miritini Freeport Limited vs Theresia Runji & 4 Others the parties expressly indicated to the court that indeed the parties were at a very advanced stage of settling the matter. l annex a copy of the order dated 9th July, 2025 issued by a Court of Appeal, a letter requesting for the said order dated 2nd August. 2025 and a court***

receipt, which are all marked as annexture "JMG-3". The matters were stood over generally to enable the parties to finalize on the intended consent. As far as I am concerned, the matters could have been fully settled had the Respondent been holding the deposit or Kenya Shillings One Billion Two Hundred Million (l,200,000,000/=) and I therefore have reason to believe that the Respondent has misused the said deposit. In fact the Respondent expressly told me that the only reason why the matter has not been settled is on account of the unavailability of funds."

5. The deponent has sworn further "*that the only reason why the said settlement has not materialised is on account of the respondent's persistent plea that it is not holding any money that may be used to settle the dispute herein*".
6. That notwithstanding, the petitioners swear that the "*two affected parties, Kabale Tache and Gerishom Otachi to personally show cause as to what happened to the said deposit of money as it is apparent that they have acted in contempt of the court order and should be made to answer and if necessary, be punished for the same*".
7. The respondent appears not to have responded to the application but there is on record an affidavit on record sworn on behalf of the respondent by

one Brian Ikol. There is overwriting on the year it is sworn and therefore the exact date it was sworn is not clear.

8. Nonetheless, I find the affidavit relevant in the determination of this application to the extent that it speaks to the issues raised in the petitioners' application.
9. In the affidavit, Ikol has sworn that indeed the petitioner's petition was allowed on 12 November 2019. The respondent appealed against the decision of this Honourable Court to the Court of Appeal; the latter granted stay of execution of the judgment in Mombasa Civil Application No. 10 of 2020.
10. The substantive appeal was set to be heard on 31 January 2024. According to Ikol, the issues raised in this application are active before the Court of Appeal. Since the orders for stay of execution of the judgment have not been varied, reviewed or set aside, this Honourable Court has no jurisdiction to entertain this application.
11. In any event, there is no evidence that any funds have been remitted to the 1st respondent by Kenya Railways Corporation or any other entity. Further, the interested party was fully compensated on account of compulsory acquisition of part of its property being MN/Vi/4805 for purposes of construction of the standard gauge railways where the Kenya Railways Corporation was the acquiring authority. In the circumstances,

no compensation is due and owing to the interested party for purposes of the standard gauge railway.

12. I have had the opportunity of reading the judgment dated 12 November 2019, determining the petitioners' petition. In allowing the petitioners' petition the court (Ogola, J.) held as follows:

> ***"54.In conclusion this Court finds and holds that the petition herein has been proved on a balance of probability, and that the Petitioners are entitled to orders, which I grant as follows:***
>
> ***i)That the Respondent abused their statutory powers in refusing to compensate the Petitioners.***
>
> ***(ii)An order directing the Respondent, to forthwith tabulate, assesses and compensate the Petitioners the value of their property Plot Nos. 3912 and 3913/VI/MN (being the disputed part of the suit property Plot No. MN/VI/ 4805) as at the date of lawful acquisition plus interests thereon at Commercial rates.***
>
> ***(iii)An order that the Petitioner is entitled to damages pursuant to paragraph 52 herein as part of the compensation to be awarded by the Respondent from the date of lawful acquisition until payment in full with interests thereon at commercial rates.***

(iv)For avoidance of doubt, this Judgment relates only to part of the suit property being plot Nos. 3912 and 3913/VI/MN (being 3.997 Ha.) claimed by the Petitioners. This means that the Respondent's Determination dated 1.12.15 to the extent that it relates to the unchallenged portion of the suit property belonging to the Interested Party herein remains as it is and undisturbed by this Judgment.

(v) Costs of the petition shall be borne by the Respondent."

13. Nowhere in this judgment did the court make any determination and, neither is it even suggested that the respondent held and continues to hold the sum of Kshs. 1,200,000,000/=, or any other sum for that matter, which the petitioners would seeking to be held in some joint account. The judgment was clear that a valuation of a specific property had to be done and compensation made.

14. Going by their own depositions, the petitioners are uncertain the sum of Kshs, 1,200,000,000/= is held by the respondent. I understand this to be what the petitioners mean when they swear through their representative as follows:

"As far as I am concerned, the matters could have been fully settled had the Respondent been holding the deposit or Kenya Shillings One Billion Two Hundred Million (l,200,000,000/=)…I

therefore have reason to believe that the Respondent has misused the said deposit. In fact the Respondent expressly told me that the only reason why the matter has not been settled is on account of the unavailability of funds…the only reason why the said settlement has not materialised is on account of the respondent's persistent plea that it is not holding any money that may be used to settle the dispute herein."

15. Would there any basis for the petitioners to seek for an order for any particular sum to be deposited in a joint account in these circumstances? I doubt there is.

16. It would also appear that the petitioners harbour the thought that the respondent has, somehow, ignored, neglected or simply refused to comply with the decree arising from the judgment they obtained in this matter. In paragraph 7 of the supporting affidavit, they have sworn as follows:

"That in the circumstances, it is appropriate for the two affected parties, Kabale Tache Arero and Gerishom Otachi to personally show cause as to what happened to the said deposit of money as it is apparent that they have acted in contempt of the court order and should be made to answer and if necessary, be punished for the same."

17. If this is the petitioners' position, then the appropriate course would have been for the petitioners to initiate contempt of court proceedings against the respondent's officer or officers responsible for the settlement of the court decree.

18. But it has emerged that the execution of this Honourable Court's judgment has been stayed by the Court of Appeal in Civil Application No. 10 of 2020. The stay was granted on 20 November 2020. In the absence of any evidence that the stay has been lifted, the petitioners' attempt to execute the judgment in whatever manner would be an exercise in futility

19. Stay of execution aside, having rendered itself with finality on the dispute before it, it would not be open to this Honourable Court to make the kind of order sought in this application which, in my humble, introduces new elements in the judgment and would drastically vary its terms.

20. In the wake of its judgment, the court is as good as *functus officio.* This principle and the circumstances when it is not be strictly applied was considered the High Court of South Africa **In Re Securebt (Pty) Ltd versus Norris & Another (216992021) 2023 ZAGPJHC1038.**

21. While relying on **Firestone South Africa (Pty) Ltd v Gentiruco AG, Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298,** which is an earlier decision by the Supreme Court of South Africa, the court held as follows:

"[20] The general principle is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. "the General Principles, now well established in our law, is that once a court has duly pronounced a final Judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio; its jurisdiction having been fully and finally exercised, its authority over the subject matter has ceased".

[21] An ambiguity or a patent error or omission has been described as an ambiguity or an error or omission as a result of which the judgment granted does not reflect the real intention of the judicial officer pronouncing it, in other words, the ambiguous language or the patent error or the omission must be attributable to the court itself.

[22] In many cases the common law principle that there are exceptions to the functus officio rule, which allows a court to vary its own judgment, have been restated. For purposes of this judgment the court will only refer to a few cases starting with the

oft-quoted judgment in Firestone South Africa (Pty) Ltd v Gentiruco AG, Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) where the court, considering common law, recognised a number of exceptions to the functus officio rule. These are:

20.1 Supplementing of a judgment. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, cost or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant.

20.2 Clarification of the judgment. A court may clarify a judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense or substance" of the judgment or order.

20.3 Correction of errors in a judgment. The court may correct a clerical, arithmetical or other error in the judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance."

22. And in **Jersey Evening Post Limited v Al Thani [2002] JLR**, which case was cited by the Supreme Court in the case of **Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others 2013 eKLR**, it was held that:

> ***"…A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus when its judgment or order has been perfected."***

23. It has not been suggested that there are any clerical, arithmetical or other errors in the judgment that require to be corrected to give it its true intention. And if there was any need for "perfection" of the judgment, there is no evidence that the petitioners, or any other party in the proceedings for that matter, has ever moved this Honourable Court in that direction. Even if the court, on its own motion, was of the mind that the judgment required "perfection", there would be no plausible reason why it has not "perfected" the judgment, six years after it was delivered.

24. A fortiori, the judgment is now the subject of an appeal in the Court of Appeal and, therefore, the Court of Appeal is now seized of jurisdiction to determine the dispute between the parties. This court no longer has any

authority to determine the matter and it will do well to avoid making any order that may effective compromise order of stay that has been granted or preempt the outcome of the pending appeal. For the foregoing reasons, the petitioners' application is dismissed. I make no orders as to costs.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus
JUDGE