

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC PETITION NO. E013 OF 2020

BENEDICT MUKUMA KIMAU::::::::::::::::::1ST RESPONDENT/PETITIONER

MUMBUA KIMAU::::::::::::::::::2ND RESPONDENT/PETITIONER

VERSUS

CHIEF LANDS REGISTER::::::::::::::::::1ST APPLICANT/RESPONDENT

NAIROBI COUNTY LAND REGISTRAR::::::::::::2ND APPLICANT/RESPONDENT

MACHAKOS COUNTY LAND REGISTRAR:::::3RD APPLICANT/RESPONDENT

RULING

The application is dated 15th September 2025 and is brought under Order 45 Rule 1 and Order 1 Rule 10(2), Order 8 Rule 3(1), Order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 1A,1B & 3A of the Civil Procedure Act seeking the following orders;

1. THAT this Honorable Court be pleased to review and set aside the judgment delivered on 28th May 2021 and the subsequent order issued on 4th June 2021 in this case on grounds of newly discovered and material evidence.

2. THAT upon grant of prayer (1) above, this Honorable Court be pleased to enjoin David Moraa Nyanganyi and Mohammed Ahmed as additional Respondents in this suit.
3. THAT this Honorable Court be pleased to grant leave to the Applicant to file a Response to the petition.
4. THAT the costs of this application be provided for.

It is based on the following grounds that the judgment in this matter was delivered on 28th May 2021 compelling the respondents to register and issue the petitioners/respondents with a title deed in respect of UNS. RESIDENTIAL PLOT NO. 443 ATHI RIVER. That an order was subsequently issued on 4th June 2021. That no appeal has been preferred against the said judgment or Order. That if the applicants herein were to effect the judgment of the Court, it would amount to cancellation of title to land yet only the Court has power to cancel title to land. That the Applicant has recently discovered new and important evidence in regards to ownership of the suit property which would not be obtained or produced at the time of hearing despite the exercise of due diligence. That the new evidence necessitates the joinder of parties who are adversely affected by the judgment of this Honorable Court and who are not aware of the judgment. That the intended parties sought to be enjoined to this suit are necessary parties for the full and effective adjudication of the dispute as the new evidence links them directly in regards to ownership of the

suit property. That unless the judgment is reviewed and the parties enjoined, the 3rd parties shall suffer grave prejudice and injustice. That it is only just and mete that the judgment issued by this Honorable Court be set aside. That no prejudice will be suffered if this application is allowed.

The Applicants submitted that the discovery of new evidence referred to relates to information only discovered when the petitioner during the process of compliance with the court order issued on 18th October 2023 introduced in court through an affidavit a letter dated 9th July 2024 from the director land administration addressed to Planland Geoconsult indicating that the suit property indicated in the judgment as UNS. RESIDENTIAL PLOT NO. 443 ATHI RIVER was now upon survey identified as L.R No.29681. As could be deduced from the replying affidavit of the Chief Land Registrar, Nyandoro Nyambaso (Annexure WMM 1) the office of the 1st and 3rd applicants can only issue title as directed in the judgment upon un-surveyed plot being surveyed, a reference number being given and a lease issued from the director Land Administration.

The Applicants submit that they have proven that this new information could not possibly have been within their knowledge at the time judgment was delivered and could thus not be produced in court by them at the time when the decree was passed or the order made. The applicants humbly pray that the Honorable Court does find

that prayer 1 of the application merited and that the applicants have met the standard of proof for the same

With respect to prayer 2 of the application, the applicants submit upon discovery of land reference number, they have also established that a lease was prepared and issued to David Moraa Nyanganyi on 11th February, 2016 who has since transferred the land to Mohammed Ahmed who is the currently registered.

The applicants submit that the said David Moraa Nyanganyi and Mohammed Ahmed are necessary parties to this suit in that the issuance of title to the petitioner/respondent herein directed by the court in the judgment would result to 2 titles having been issued for the same property and or cancellation of a title issued to a third party without affording them an opportunity of being heard.

The Respondents submission is that the application is not only misconceived but legally untenable, brought in bad faith and amounts to an abuse of the court process. It seeks nothing more than to re-open a matter that was procedurally heard, determined, finalized and whose orders remain uncomplied with to date.

This honorable court having proceeded with this matter to its logical conclusion and having reached its decision on the merit of the case that was before it, the court became functus officio and there is nothing for it to review or set aside. As things stand, if the respondents were aggrieved with the decision of this Honorable Court,

what they should have proceeded to do was to appeal the said decision and not to seek a review as is currently sought.

They submit that the Applicants are attempting to re-litigate a matter that was conclusively heard and determined by this Honorable Court by invoking incredible procedures not known in law such as post judgment joinder of parties and the alleged discovery of new evidence that has always been in their possession. The Respondent/ Applicants clearly intended and currently intend to waste precious judicial time having sat pretty on their rights for years, watching the matter proceed from the side lines despite service and finally when execution by way of contempt becomes apparent, they now make the current application to set aside all that has been happening. This ought not be entertained.

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

“A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of

review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

“An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made...”

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

“(1). Any person considering himself aggrieved-

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

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

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

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

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

“Any person who considers himself aggrieved-

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

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

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

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

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

From the above provisions of the law, authorities cited and facts of this case the applicant stated that The applicants submitted that the discovery of new evidence referred to relates to information only discovered when the petitioner during the process of compliance with the court order issued on 18th October 2023 introduced in court through an affidavit a letter dated 9th July 2024 from the director land administration addressed to Planland Geoconsult indicating that the suit property

indicated in the judgment as UNS. RESIDENTIAL PLOT NO. 443 ATHI RIVER was now upon survey identified as L.R No.29681.

I have perused the court file and find that the application proceeded by way of written submissions. It is in evidence that the Respondents failed to participate throughout the trial despite having been served and have come up with this application after contempt proceedings. The Respondents have adduced evidence that as far back as 2019 they had applied for a caution on the suit land (application marked BMK9) and only came to court after the Applicants failed and or refused to register the suit land in their name. The court further delivered a ruling dated 18th October 2023 stating that the Petitioner was to furnish the Respondents with all the requisite documents for registration of their title and the same to be registered within 60 days. The Respondent submitted in that application that they would be ready to register the title once the Petitioner furnishes them with the documents. I concur with the Respondent's submissions that this matter and the instant application cannot fulfill the elements for granting a review. I find that there is no omission or error on the face of the record in the instant case. All the issues raised in this application were considered and determination made in the said judgement and subsequent ruling. I find that there is no sufficient grounds in this case to review the judgement. I note that this application for review is dated 15th September 2025 and the judgement was delivered on 28th May 2021, the Applicants are guilty of laches.

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

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon--

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions. ---”

The Supreme Court of Kenya in the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *“The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law”* (2005) 122 SALJ 832 which reads;

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a

person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

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

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

It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered as is the case herein. Having discharged its duty on this suit this court is therefore *functus officio*, defined in Black's Law Dictionary, Ninth Edition as *“having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully*

accomplished.” In the circumstances, the court is wary of the Applicants’ invitation to re-engage with this dispute. If dissatisfied with the judgment the Respondent ought to go on appeal. Having found that this court is functus officio and rejecting the application for review I find that the application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2026.

N.A. MATHEKA

JUDGE