

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLC No. E006 OF 2025

SAMUEL NYARORI ONDIEKI 1ST
PLAINTIFF
JULIUS MUIRURI ONDIEKI 2ND
PLAINTIFF
(Suing on behalf and as donee of power of attorney from
Ondieki Ogoto Ongaga)
MARY NYABOKE KIRIAGO 3RD
PLAINTIFF

VERSUS

THE DIRECTOR SURVEY OF KENYA
NYAMIRA COUNTY 1ST
DEFENDANT
THE CHAIRMAN BOARD OF MANAGEMENT
METAMAYWA PIMARY SCHOOL 2ND
DEFENDANT
THE COUNTY DIRECTOR OF EDUCATION,
NYAMIRA COUNTY 3RD
DEFENDANT
COUNTY (CEC) MEMBER FOR EDUCATION BOARD,
NYAMIRA COUNTY 4TH
DEFENDANT

RULING

1. The Plaintiffs moved the Court on 14th February 2025 through
Plaint of even date. They averred that the First and Second
Plaintiffs (donees) were suing on the strength of a Power of
Attorney donated to them by Ondieki Ogoto Ongaga (donor)
while the Third Plaintiff was suing as administrator of the

estate of Benjamin Kiriago Onkendi (deceased). That the donor was the registered proprietor of the parcel of land known as Kisii/Gesima Settlement Scheme/228 while the deceased was the registered proprietor of the parcel of land known as Gesima Settlement Scheme/196. The two parcels are hereinafter referred to collectively as suit properties.

2. The Plaintiffs further averred that without any colour of right, the Defendants damaged a section of the suit properties measuring approximately 6 acres and cut down trees thereon without permission. They added that the Defendants had continued to trespass on and damage their properties, thereby causing them loss, anguish and great inconvenience.
3. Consequently, the Plaintiffs prayed for judgment as follows:
 - a) *A declaration of this court that the Respondents have unlawfully trespassed on and occupied land Reference Number GESIMA SETTLEMENT SCHEME/196 & GESIMA SETTLEMENT SCHEME/228 belonging to the Plaintiffs.*
 - b) *An order for eviction to remove the Defendants from the impugned land.*
 - c) *Compensation for special and aggravated damages caused since occupation to-date.*
 - d) *Costs of this suit be awarded to the Plaintiffs to be paid by the Defendants.*

e) Any other Relief that this Honourable Court deems fit in the circumstances.

4. Shortly after filing the Plaint, the Plaintiffs filed Notice of Motion dated 7th March 2025, which is the subject of this ruling. The following orders are sought in the application:

1. [Spent]

2. THAT this Honourable Court be pleased to issue an order compelling the Director of Survey to produce and hand over the survey report in compliance with the Court orders issued on 22nd July, 2021 and 26th July, 2021 by Honourable Justice J.M. Onyango.

3. THAT this Honourable Court be pleased to issue such further or other orders as it deems fit in the interest of justice.

4. THAT the costs of this application be provided for.

5. The application is based on the following grounds as listed on its face:

1. The Honourable Court had previously issued an order directing the Director of Survey to conduct a survey on the subject suit properties.

- 2. The Director of Survey has failed and/or refused to produce and hand over the survey report despite repeated requests.*
 - 3. The continued withholding of the survey report is prejudicing the Applicant's case and will cause unnecessary delays in the determination of the matter.*
 - 4. The Applicants are apprehensive that unless this Court intervenes, the report may not be produced within a reasonable time, thus frustrating the enforcement of the Court's orders.*
 - 5. The Applicants intend to use the report as evidence in this matter, as it is of material importance and may be the backbone of the suit.*
 - 6. It is in the interest of justice that this Honourable Court compels the Director of Survey to produce the said survey report forthwith.*
6. The application is supported by an affidavit sworn by Samuel Nyarori Ondieki, the First Plaintiff. He deposed that pursuant to orders made by the Court on 22nd July 2021 and 26th July 2021, the Director of Survey was directed to conduct survey on the suit properties and that despite numerous follow-ups, the Director of Survey had failed, neglected or refused to produce the report.

7. The First Plaintiff added that the delay in producing the report was causing him hardship and delaying conclusion of this matter. He further deposed that he intended to use the report as evidence in this case and that it may be the backbone of his case. He annexed copies of orders issued on 22nd July 2021 and 26th July 2021 in **Kisii ELC Misc. No. 7 of 2021 Samuel Nyarori Ondieki and another v District Land Registrar Nyamira and another.**
8. The First to Third Defendants opposed the application through Grounds of Opposition dated 28th October 2025. They contended therein that the Court lacked jurisdiction in view of the provisions of **Section 34 (1)** of the **Civil Procedure Act** and **Order 22 rule 6** of the **Civil Procedure Rules**, that they were strangers to the ex parte orders issued on 22nd July 2021 and 26th July 2021, that the Court is under no legal obligation to gather evidence on behalf of litigants since it is a neutral arbiter, that the Plaintiffs would not suffer any prejudice since they were at liberty to engage a private surveyor to survey the properties and file a report in Court and lastly, that the application lacked merit and was an abuse of the Court process.
9. The application was canvassed through written submissions. The Plaintiffs filed submissions dated 24th November 2025 while the First to Third Defendants filed submissions dated 6th

February 2026. The Fourth Defendant neither filed a response nor submissions.

10.I have carefully considered the application, the supporting affidavit, the Grounds of Opposition and the submissions. The issues that emerge for determination are whether the Court has jurisdiction and whether the orders sought should issue.

11.As has often been restated by the Courts, jurisdiction is everything. Without it, the proceedings come to a certain end and the court cannot take any further step. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR** and **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**.

12.In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the Supreme Court emphasised the issue thus:

A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

13. The First to Third Defendants have contended in their submissions that this Court lacks jurisdiction in view of the provisions at **Section 34 (1)** of the **Civil Procedure Act** and **Order 22 rule 6** of the **Civil Procedure Rules**.

14. **Section 34 (1)** of the **Civil Procedure Act** provides:

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. [Emphasis added]

15. On the other hand, **Order 22 rule 6** of the **Civil Procedure Rules** provides as follows:

Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof... [Emphasis added]

16. The First to Third Defendants have argued that the orders issued on 22nd July 2021 and 26th July 2021 in **Kisii ELC Misc. No. 7 of 2021 Samuel Nyarori Ondieki and another v District Land Registrar Nyamira and another** were made

in a different matter by a Court of concurrent jurisdiction and that that all questions relating to the execution of that order should be determined by the Court that made the order as opposed to this Court.

17. The Plaintiffs have not addressed the issue of jurisdiction in their submissions despite that issue having been prominently raised in the Grounds of Opposition. That notwithstanding, a reading of the Plaintiffs' submissions leaves no doubt that they are seeking to enforce the orders of 22nd July 2021 and 26th July 2021 through the present application. So intent are they on that course that they have gone as far as raising arguments on contempt of Court and the jurisdiction of the Court to compel obedience while pursuing the ends of justice. They have characterised the said orders as interlocutory as opposed to a final decree.

18. There is no dispute that the orders of 22nd July 2021 and 26th July 2021 were made by the Environment and Land Court at Kisii. While that Court has a concurrent jurisdiction with this Court, the fact remains that the orders were made by the Environment and Land Court at Kisii and not the Environment and Land Court at Nyamira. They were made in a different case from the present one.

19. The First to Third Defendants have referred this Court to the case of **CM Advocates LLP v Cole & Moikobu (Sued as the**

Administrators of the Estate of Josephine Eleanor Moikobu) & 3 others [2025] KEELC 6583 (KLR) where the Court considered the interplay between **Section 34 (1)** of the **Civil Procedure Act** and **Order 22 rule 6** of the **Civil Procedure Rules** and an attempt to enforce orders made in a previous suit through a new suit. The Court held as follows:

Indeed, a reading of the two provisions shows that the proper forum for determining issues relating to the execution, discharge, or satisfaction of a decree or indeed an order, is the court that issued the same, unless there has been transfer of the decree/order. ...

Further, the court in Michael Oringo Alusi & 2 Others vs Jobson Salano Mulanda[2016]eKLR persuasively stated that issues arising from proceedings anticipated under Section 34, however weighty, do not require the filing of a separate suit.

20.I find the above finding persuasive and applicable to the present circumstances. While the Plaintiffs have attempted to create a distinction between a decree and an order, none exists in the circumstances obtaining herein. The Plaintiffs have not previously obtained a transfer of the orders issued on

22nd July 2021 and 26th July 2021 in **Kisii ELC Misc. No. 7 of 2021** to this Court for enforcement.

21. There is sound logic in the requirement that orders and decrees be enforced by the Courts that made them. It may very well be that the orders have since been varied or set aside. In a worst case scenario, this Court may find itself making orders in conflict with the record in the other case. More importantly, it is for the Court in **Kisii ELC Misc. No. 7 of 2021** to determine whether the orders bind the First to Third Defendants.

22. By “the Court in **Kisii ELC Misc. No. 7 of 2021**” I mean not just the physical location of the Court. It includes the particular case file such that even if the matter were in Nyamira ELC, enforcement of the orders must be pursued in the particular case file in which they were made.

23. In view of the foregoing discourse, I hold that this Court lacks jurisdiction to hear and determine Notice of Motion dated 7th March 2025. I strike out the application with costs to the First to Third Defendants.

Dated, signed, and delivered at Nyamira, this 26th day of February 2026.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Plaintiff

Mr Ndiritu for the 1st to 3rd Defendants

No appearance for the 4th Defendant

Court Assistant: B Kerubo