

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLJR No. E005 OF 2025

BETWEEN

BENARD OOGA OGAO
APPLICANT

AND

**RICHARD MOGWASI (Acting as the Legal Representative of
the Estate of CHARLES ONYARI ONDIEKI
(Deceased) 1ST RESPONDENT**

**COUNTY LAND SURVEYOR NYAMIRA 2ND
RESPONDENT**

**COUNTY LAND REGISTRAR NYAMIRA 3RD
RESPONDENT**

ATTORNEY GENERAL
4TH RESPONDENT

LAND DISPUTES TRIBUNAL

**NYAMIRA COUNTY 5TH
RESPONDENT**

RULING

1. The Applicant moved the Court through Chamber Summons dated 23rd July 2025, seeking the following orders: -

1. This application be certified as urgent and service thereof be dispensed with in the first instance.

2. Leave be granted to the Applicant to apply for an order of CERTIORARI to remove into this Honorable court and

quash the decision of the NYAMIRA LAND DISPUTE TRIBUNAL rendered on 14th May 2008 and upheld by miscellaneous Application number 134 of 2011 before Kisii Chief Magistrate Court due to fraud or mistakes identified clearly in the County Land Registrar on 20th May 2024.

- 3. An order of Prohibition restraining the Respondents by themselves or their agents or servants from carrying out any activities on WEST MUGIRANGO/BONYAMATUTA/911 unless they adhere to lawful procedures of acquiring land but not fraud or mistakes.*
- 4. An order of Mandamus compelling the 2nd Respondent to stop any sub-divisions without the permission or consent of the Applicant because he never sold any land to the 1st Respondent or their agents or servants and they should claim their interest or money from their agents or those who sold land to them or their estates.*
- 5. The leave so granted do operate as stay for the decision of the 3rd Respondent try to allow subdivision without permission of the Applicant through report dated 20th May 2024.*
- 6. An order of prohibition be issued prohibiting Land Surveyor from continuing with survey and subdivision of parcel WEST MUGIRANGO/BONYAMATUTA/911 registered*

in the name of the Applicant - Benard Ooga Ogao because he is not willing to dispose the same.

- 7. That an urgent stay order be issued preventing implementation of judgements and Rulings in the following cases between the Applicant and Respondent or Agent concluded; ELC No. 1196 of 2011 - Environment and Land Court Nyamira, KISII HIGH COURT No. 266 of 2010, miscellaneous Application number 134 of 2011 before Kisii Chief Magistrate Court and Nyamira Land Dispute Tribunal pending the full hearing and determination of this application.*
- 8. An order of Mandamus be issued to the 3rd Respondent to supply the Honorable court with all records in relation to the parcel WEST MUGIRANGO/BONYAMATUTA/911 to enable the court make a decision whether to set aside the tribunal decision rendered on 14th May 2008 decision of the NYAMIRA LAND DISPUTE TRIBUNAL which decision was upheld by a miscellaneous Application number 134 of 2011 before Kisii Chief Magistrate Court.*
- 9. An Order of Certiorari be issued to quash the NYAMIRA LAND DISPUTE TRIBUNAL and order a retrial for fairness of justice because of fraud or mistakes clearly indicate in the County Land Registrar report dated 20th May 2024.*
- 10. The Costs of this application be in the cause.*

2. The application is brought under **Order 53 Rule 1 (1), (2)** and **(4)** of the **Civil Procedure Rules** and **Sections 8** and **9** of the **Law Reform Act**. It is supported by a Statutory Statement and verifying affidavit sworn by the Applicant. He deposed he is the registered owner of West Mugirango/Bonyamatuta/911 (suit property) and that he was issued with a title deed in the year 2000.
3. He further deposed that in 2005 or thereabout, the First Respondent trespassed into and occupied the suit property and started putting up a pit latrine on a portion of the suit property claiming ownership and brandishing title no. West Mugirango/ Bonyamatuta/2001. He stated that he moved to the Fifth Respondent and the Tribunal resolved that the First Respondent or agents and himself each had a title deed and the problem was just a boundary dispute.
4. He stated that he filed KISII HCCC NO. 266 of 2010 when the District Surveyor filed a report dated 9th March 2011 after visiting the disputed land and reported encroachment of West Mugirango/Bonyamatuta/911 by adjacent parcels and that West Mugirango/Bonyamatuta/2001 does not border his land and doesn't appear on the Registry Index Map.
5. He further stated that the suit was later transferred to Nyamira where the Court issued an order directing the Nyamira District Land Registrar and Surveyor to visit the suit land, ascertain the exact position of the boundary and make a report. That the

Fifth Respondent through its report dated 14th May 2008 concluded that each party's title was valid and gave recommendations to the surveyor on the new measurements.

6. He also stated that the First Respondent misled the Courts that he had a good title issued on 2nd August 2006 and registered in the name of Charles Onyari Ondieki for West Mugirango/Bonyamatuta/2001 which was fraudulently obtained without following the laid down procedure. He stated that his rights to own property had been infringed because he was being forced to transfer his land to strangers who had not claimed any benefits either through lease or sale agreements.
7. The First Respondent opposed the application through a replying affidavit sworn on 20th August 2025 and deposed that the present judicial review is filed in bad faith, an afterthought, misleading, misconceived, vexatious and that the same amounts to an abuse of the Court process.
8. He further deposed that the Applicant had contravened **rules 5 and 6** of the **Fair Administrative Action Rules 2024**. He stated that the Applicant is fond of filing applications concerning the subject matter herein which he tends not to bring to an end.
9. He deposed that the Applicant commenced the subject matter herein before the Fifth Respondent through Claim No. 11 of 2007 which was heard and determined against him and the verdict was adopted as judgment of' the Court vide Kisii Chief

Magistrate Court, Misc Civil Application No. 134 of 2011 which he failed to appeal against.

10. The First Respondent further deposed that the Applicant being aggrieved with the decision of the tribunal filed Kisii High Court Civil Case No. 266 of 2010 against the Respondent over the same subject matter. As time went by the said suit was transferred to Kisii Environment and Land Court as ELC No. 1196 of 2016 and later to Nyamira as ELC No. 26 of 2020 which was dismissed as *res judicata*.

11. He stated that the Applicant later filed an appeal in Kisii Civil Appeal No. 5 of 2024 over the same subject matter which appeal was dismissed for non-compliance. That the Applicant being dissatisfied with the decision, filed Nyamira High Court Petition No. E002 of 2024 which was dismissed with costs.

12. The Applicant filed a Supplementary affidavit sworn on 5th September 2025 and deposed that the circumstances had since changed since 2007 as the issue changed from a boundary issue to ownership. He stated that the Second and Third Respondents should avail the records to Court and that the genesis of this application is the discovery of fraud and intention to subdivide the suit property.

13. He also stated that his application was based on **Section 26** of the **Limitation of Actions Act** on discovery of fraud or mistake or ignorance of facts and that it is fair that the Court

through judicial review rectifies fraud or mistake or errors in the County Registrar's report.

14. The First Respondent filed a supplementary affidavit sworn on 21st October 2025 and deposed that a party seeking for writ of certiorari is required to seek for leave within six months after the date of the proceedings or such shorter period as may be prescribed by any Act. That however, the Applicant here has come to Court for the same sixteen years later.

15. The Applicant filed a further supplementary affidavit and deposed that the Land Disputes Tribunals were abolished, and the Environment and Land Court was given jurisdiction to deal with all matters being handled by the said Tribunal and therefore the Applicant had served the Fourth Respondent who is the Government Legal Officer.

16. The First Respondent later filed Notice of Preliminary Objection dated 3rd November 2025 in which he raised the following grounds:

1. The Applicant has come to court long after the stipulated period of three months from the date the grounds for the claim arose contrary to Order 53 rule 2 of the civil procedure rules, 2010.

2. The Applicant has not demonstrated sufficient or reasonable grounds for the delay to file judicial review to

the satisfaction of the court to enable it to apply its judicial discretion.

3. Defective application.

4. Time frame is a serious jurisdictional issue.

5. Consideration of sections 1A and 1B of the civil procedure Act as regards to overriding objectives and eventual determination of litigation.

17. This ruling is also in respect of the preliminary objection.

18. The Second, Third and Fourth Respondents filed Grounds of Opposition dated 7th November 2025 raising the following grounds:

i) That the Application offends the mandatory provisions of Order 53, rule 2 of the Civil Procedure Rules, 2010.

ii) That the applicant is guilty of laches and indolence which is inexcusable conduct which should not be entertained by a Court of Equity.

iii) That the applicant has not disclosed any justifiable reason for his inordinate delay in filing the present Application.

iv) That the Application is fatally defective, incurable, bad in law and legally untenable.

v) That the Application is time barred, lacks merit and amounts to a complete abuse of the court process.

- 19.They prayed that the application be dismissed with costs.
- 20.The objection and the application were canvassed through written submissions. The Applicant filed submissions dated 10th September 2025 while the First Respondent filed submissions dated 19th November 2025.
- 21.It was submitted on behalf of the Applicant that he never received any notice in relation to the subdivision of the suit property contrary to **Section 79 (1)** of the **Land Registration Act** and that the First Respondent on his own admission stated that he was not in any way interested in the suit property. That the Applicant relied on discovery of fraud or mistakes or ignorance of facts under **Section 26** of the **of the Limitation of Actions Act** as clearly indicated in the land offices reports.
- 22.It was submitted on behalf of the First Respondent that the Applicant failed to comply with the mandatory requirement **Order 53 (2)** of the **Civil Procedure Rules** and **section 9 (3)** of the **Law Reform Act** and that that the application was defective for having been filed out of time. That the issue went to the Court's jurisdiction and that the Court lacks jurisdiction to entertain the application.
- 23.The claim against the Fifth Respondent was withdrawn with no order on costs.

24.I have carefully considered the application, the affidavits filed, the preliminary objection and the submissions. The issues that arise for determination are whether the Court has jurisdiction and if so whether the reliefs sought should issue.

25.Jurisdiction, as has been severally restated by the Courts, is the entry point in any matter that a Court of law is called upon to determine. It is the very life and soul of any proceedings. 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**. A Court of law can only exercise jurisdiction as conferred by law and any attempt to arrogate to itself jurisdiction exceeding that which is conferred upon it by law is a futility. See **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** and **National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 Others [2023] KECA 80 (KLR)**.

26.The Applicant has moved the Court under **Order 53 Rule 1 (1), (2) and (4)** of the **Civil Procedure Rules** and **Sections 8 and 9** of the **Law Reform Act**. Pursuant to prayer 2 of the application, he is seeking leave to apply for an order of certiorari to remove into this Court and quash a decision rendered on 14th May 2008 by the Fifth Respondent.

27. Order 53 rule 2 of the Civil Procedure Rules provides as follows:

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

28. Similarly, **Section 9 (3)** of the **Law Reform Act** provides:

In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order,

decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

29. By his own account, the decision that he would like quashed through an order of certiorari was made on 14th May 2008. The present application was filed on 3rd August 2025, outside the stipulated period of six months. I agree with the First Respondent that the Court lacks jurisdiction to hear and determine the prayers in respect of certiorari. Specifically, I refer to prayer number 2 and 9 of the Chamber Summons.

30. Regarding the rest of the prayers, I note that prohibition and mandamus are mentioned but no leave in respect thereof is sought. The prayers for prohibition and mandamus are premature in the absence of leave. Even if leave was sought in respect of prohibition and mandamus, I would not have granted it since, as is manifest from the affidavits and statement of facts, the dispute has been litigated in Courts including the Environment and Land Court and the High Court. Judicial review is not available as a procedure for questioning the decisions of those Courts. Consequently, I find no merit in the rest of the prayers of the Chamber Summons.

31. Arising from the foregoing, I make the following orders:

a) Prayer number 2 and 9 of the Chamber Summons are struck out.

b) The rest of the prayers of the Chamber Summons are dismissed.

c) Costs to the First to Fourth Respondents.

Dated, signed, and delivered at Nyamira, this 11th day of March 2026.

**D. O. OHUNGO
JUDGE**

Delivered in the presence of:

No appearance for the Applicant

Mr Okemwa for the 1st Respondent

No appearance for the 2nd to 4th Respondents

Court Assistant: B Kerubo