

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELC A E012 OF 2023

JOHN M'MAITIMA M'MWARAMAAPPELLANT

VERSUS

**STANLEY M'ITWAMWARI M'IPWI [sued as the legal representative of
the estate of the PETERO M'IMPWE NABEA.....RESPONDENT**

***[Being an appeal from the judgement of the Hon. L N Juma SRM IN MERU
Chief Magistrate Court ELC Case No. 63 of 2019]***

RULING

1. What is before me is the Notice of Motion Application dated the 15.12.2025 brought pursuant to the provisions of **Sections 1 A, 1B and 3A of the Civil Procedure Act, Chapter 21 laws of Kenya**; and all enabling provisions of the law and wherein the Applicant has sought the following reliefs:
 - i. *This Application be certified urgent.*
 - ii. *That the Honourable Court do issue order to cancel and/or revert back P/No. Ntima/Igoki/5232 and Ntima/Igoki/5233 and the original P/No. Ntima/Igoki/1504 to enable the sub division and transfer of ½ a share of L/R Ntima/Igoki/1504 to the Appellant as per the Judgment of the High Court dated 16th November, 2023.*
 - iii. *That the Honourable court be pleased to order for the dispensation of the original title of P/No. Ntima/Igoki/1504 to enable sub division and transfer of ½ a share of L. R. Ntima/Igoki to the Appellant as per the judgment of the High Court dated 16th November, 2023.*
 - iv. *The costs be provided for.*
2. The subject application is premised on the various grounds which have been enumerated in the body thereof. In particular, the Applicant has

contended that this Honourable court rendered a Judgment on the 15.11.2023; that a decree was thereafter extracted and sealed; the decree underscored that the Applicant was entitled to $\frac{1}{2}$ share of LR. No. Ntima/Igoki/1504; that the decree is pending execution and implementation.

3. Moreover, it has been contended that despite the fact that the decree is pending implementation, the original property has since been sub-divided culminating into the creation of LR. Nos. Ntima /Igoki 5232 and 5233, respectively. Further, and in addition, it has been posited that the subdivision of the original parcel of land has defeated the implementation of the decree of the court.
4. Flowing from the foregoing, the Applicant has therefore sought the intervention of the court to cancel to the sub-division[s] arising from LR No. Ntima/Igoki/1504; restore the title of the L/R No. Ntima/Igoki /1504; decree the transfer of $\frac{1}{2}$ share of LR No. Ntima/Igoki/1504 to the Applicant; and to direct the registration of the $\frac{1}{2}$ share in the name of the Applicant. Moreover, the Applicant has also sought an order dispensing with the production of the original certificate of title during the subdivision and consequential transfer of $\frac{1}{2}$ share to the Applicant.
5. The Respondent filed a replying affidavit sworn on the 19.01.2026 and wherein the Respondent has raised various issues. The issues highlighted by the Respondent are: The original parcel of land namely; LR. Ntima/Igoki /1504 was subdivided long before the filing of the suit; the Applicant herein ought to have conducted an official search before filing of the suit; the resultant subdivisions arose before the filing of the suit; the

orders of cancellation sought shall affect the rights of a 3rd party who was never heard; the orders of cancellation cannot issue on the basis of an application; the reliefs sought are at variance with the amended Plaintiff; the decree extracted is at variance with the Judgment of the court; the current application contravenes the doctrine of departure; and the court is being invited to sit on appeal on the decision of a court of concurrent jurisdiction.

6. The Respondent has therefore invited the court to find and hold that the subject application is premature, misconceived and legally untenable. The court has been implored to dismiss the application with costs to the respondent.
7. The subject application came up for hearing on the 09.02.2026, whereupon the advocates for the parties sought to canvass same by way of oral submissions. The court thereafter proceeded to and gave directions. For good measure, the application was prosecuted *vide* oral submissions. Moreover, the submissions by/on behalf of the parties are on record.
8. Having considered the Notice of Motion application and the supporting affidavit thereto; the replying affidavit sworn in opposition thereto; the oral submissions by the parties and upon taking into account the terms of the Judgment delivered on the 15.11.2023, I come to the conclusion that the determination of the subject application turns on three [3] main issues. The issues are: Whether this court is seized of jurisdiction to grant orders of cancellation [if at all] on the basis of an application; whether the subject application is at variance with the amended Plaintiff and the judgment of the court or otherwise, and whether the subject application

constitutes a subtle invitation to sit on appeal on the Judgment of a court of concurrent jurisdiction.

9. Regarding the first issue, it is important to highlight that the current application is seeking a precipitate and substantive relief, namely; cancellation of LR No. Ntima/Igoki/5232 and 5233, respectively, and restoration of the original title, that is, LR. No. Ntima/Igoki/1504. I beg to state that an order of cancellation of title is one that can only issue as a substantive prayer in the suit or proceedings. Moreover, a court of law must be convinced that a suitable basis has been established.

10. The powers of the court to cancel a certificate of title are underpinned by the provisions of **section 80 of the Land Registration Act, 2012**. The provisions under reference stipulate thus:

80. Rectification by order of Court

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

11. Is there a substantive suit in respect of which the order[s] sought can issue? The suit which was filed by the Applicant herein was heard and disposed of *vide* judgment rendered on the 15.11.2023. The court proceeded to and granted the reliefs that were sought. There was no relief for cancellation of titles. In this regard, the court did not grant any such order.

12. Be that as it may, and despite the existence of the judgment rendered on the 15.11.2023, the Applicant is now back seeking cancellation of title. I must state that if the subdivisions complained of arose during the original proceedings or after the delivery of judgment, this court would be seized of intrinsic [Inherent] jurisdiction to engage with cancellation. However, in respect of the instant matter, the impugned subdivision[s] arose long before the filing of the original suit. For good measure, evidence abound that the original property was sub-divided; and ceased to exist way back on the 20.07.1995.

13. In the circumstances, the question that does arise is whether the Applicant herein can obtain the substantive order of cancellation of title and rectification thereof, on the basis of an application? I am afraid that such an order cannot issue on the basis of an application, either in the manner sought or at all. Notably, the Applicant and his learned counsel need to go back to the drawing board and to discern the appropriate way forward, in an endeavor to address the stalemate. It cannot be remedied by adopting a short cut.

14. Turning to the second issue, it is common ground that parties, the Applicant herein not excepted, are bound by their pleadings. To this end, a party is prohibited from raising or canvassing new issues which were never captured in the body of the pleadings. In addition, a party cannot be allowed to partake of or procure a relief [if any] that was neither pleaded nor captured at the foot of the pleadings.

15. Furthermore, it is settled that where party is keen to partake of a new issue or relief, which had not been pleaded, then such a party is enjoined to amend the pleadings and incorporate the intended issues or reliefs. Absent amendments, a party cannot be allowed to smuggle the issue or relief through the window. The provisions of **Order 2 Rule 6 of the Civil Procedure Rules 2010**, are apt.

16. The significance of the doctrine of departure or better still, that parties are bound by their pleadings was underscored in the **case of Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School [2023] KECA 371 (KLR)**. The Court Of Appeal stated thus:

35. A case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. However, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. (See this court's decision in [Dakianga Distributors \(K\) Ltd v Kenya Seed Company Limited](#) (2015) eKLR).

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37. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. (See [Galaxy Paints Co. Ltd v Falcon Guards Ltd](#) (2000) 2 EA 385

and Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 others Civil Appeal No. 37 of 2003 (2004) 2 KLR 183).

17. The Applicant herein did not implead the prayer for cancellation of any title or rectification. Nevertheless, it is common ground that by the time the Applicant filed the suit in the subordinate court, the title in respect of LR. No. Ntima/Igoki/1504, had ceased to exist. In this regard, if there was need for cancellation, it behooved the Applicant and his counsel to specifically plead such a prayer. In the absence of such a prayer in the amended plaint dated 03.02.2021, the Applicant herein cannot bring forth the prayer *vide* a post Judgment application.

18. To my mind, the reliefs sought in the body of the post judgment application, are at variance with the amended Plaint. In this regard, the grant of the subject application shall constitute a contravention of the doctrine of departure. In any event, it is trite that in the adversarial system of law, there is no room for A O B. [See the holding of the court of appeal in the case of **Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR)**].

19. Turning to the last issue, namely; Whether the subject application constitute[s] a subtle invitation to the court to sit on appeal on the judgment of a court of concurrent jurisdiction or otherwise. I beg to state that the Applicant is seeking that the court directs that the ½ share of LR. No. Ntima/Igoki/1504 be transferred to and registered in the name of the Applicant. However, the judgment of the court spoke to the amended plaint dated the 03.02.2021. the prayer at the foot of the said amended Plaint spoke to and concerned “ a share” of LR No. Ntima/Igoki/1504.

20. The issue that requires determination is whether half share [1/2] is the same as “a share”. The learned judge granted the reliefs in line with amended Plaintiff. The Plaintiff was never re-amended.

21. The Applicant herein cannot now disingenuously seek to bring on board ½ share, without amending or re-amending the operative plaintiff. The approach being taken by the Applicant is unorthodox; and not acceptable in Law.

22. To my mind, the grant of the subject application would constitute a complete overhaul of the judgment. Such kind of an endeavor would be tantamount to sitting on appeal on the judgment of a court of concurrent jurisdiction. Certainly, the legal architecture does not allow one court to sit an appeal on the decision of another Court of equal Status. The only exception is where there is a suitable application for review, in the manner prescribed under the law. Absent such an application, this court is enjoined to defer to the judgment of Justice Nzili, Judge.

23. I must state that the application before hand if allowed, will amount to an appeal. It must be frowned upon. The Applicant must not be allowed to create judicial absurdity by seeking orders which will bring forth incongruence in the record of the court.

24. In the case of **Kenya Hotel Properties Limited v Attorney General & 5 others [2022] KESC 62 (KLR)**, the supreme court [the Apex Court] addressed the principle wherein a court of concurrent jurisdiction must defer to each other. Moreover, the apex court also underscore the rule of the thumb. The court stated thus:

55. We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the Appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves.

25. The excerpt above applies with equal force to the matter beforehand. I cannot add to the judgment of my learned brother words which were not intended. Furthermore, the issue beforehand is outside the purview/ambit of the slip rule. In this regard, the court cannot even pretend to deploy or invoke the provisions of **Section 99 of the Civil Procedure Act, Chapter 21 Laws of Kenya.**

Conclusion

26. From the analysis highlighted elsewhere hereinbefore, it is apparent that the subject application is not only misconceived, but legally untenable. The application does not sit well with the doctrine of departure. Moreover, the application seeks to invite the court to overhaul the judgment of a court of concurrent jurisdiction. Such kind of endeavor is not acceptable.

Final orders:

27. Consequently, and in the premises, the final orders are

- i. The Application dated 15.12.2025 be and is hereby dismissed.***

ii. Each party shall bear own costs of the application.

28.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF
FEBRUARY, 2026.**

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Naserian – Court Assistant

Ms. Mugwe holding brief Mr. Kariuki for the Respondent

N/A for the Appellant/Applicant.