

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELCC NO. 5 OF 2017

THOMAS KIMAGUT SAMBU.....
....PLAINTIFF

VERSUS

NATIONAL LAND COMMISSION.....1ST
DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND
DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD
DEFENDANT

RULING.

Introduction.

- 1.** This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 7th March, 2025. The application is expressed to be brought under **Order 10 Rule 11** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**.

- 2.** The application seeks the following orders;

1. Spent

- 2. That this Honourable Court be pleased to set aside its finding that it is functus officio in this matter.**
- 3. That this Honourable Court be pleased to reinstate the suit in respect of the 1st and 2nd acquisition for hearing and determination on its merits.**
- 4. That a declaration that the issuance of a decree following the determination of an interlocutory application does not render the Court functus officio with respect to the 1st and 2nd acquisitions.**
- 5. That a declaration that the decree issued on 4th October 2019 is limited to the third acquisition of the Plaintiff's land and does not encompass the pending dispute in respect of the first and second acquisitions.**
- 6. That this Honourable Court be pleased to make such further orders as may be just and necessary to meet the ends of justice.**
- 7. That the costs of this application be provided for.**

3. The application is based on the grounds on its face and the supporting affidavit of **Thomas Kimagut Sambu** sworn on 7th March, 2025.

Factual Background.

4. The Plaintiff/Applicant commenced the present proceedings vide the Complaint dated 20th January, 2017 which was amended on 3rd May, 2017. The Plaintiff/Applicant further amended his complaint on 20th April, 2018 wherein he seeks the following prayers;

a. That there be a declaration that the portions of the parcels of lands compulsorily acquired by the 1st Defendant comprised in both the Plaintiff's parcels of lands namely LR No's Kericho/Kipchimchim/656 and 3027 measuring 3.2 acres.

b. A declaration that the aforesaid 3.2 acres are valued at Kshs. 134, 295,000 for purposes of compensation.

c. A declaration that the Plaintiff is entitled to Ksh. 18, 273, 316/= being the value of building materials as well as Ksh. 730,000/= and Ksh. 27,000/=

respectively being the costs incurred by the Plaintiff in preparing of building plan and advertisement of change of user.

d. A declaration that the 2nd Defendant having paid Kshs. 41,478,195 out of Kshs. 153, 325,316/= to the Plaintiff, a sum of Kshs. 111,847, 121/= remains to be paid.

B. That there be a declaration that the Plaintiff is entitled the sum (sic) of kshs. 48,620,000/= being loss suffered by him pursuant to compulsory acquisition of his portions of lands vide Kenya Gazette Notice No. 2029 dated 2nd March, 2018.

C. An order directing the 1st and 2nd Defendants to jointly and severally forthwith make prompt payment of Kshs. 48,620,000/= being just and full compensation to the Plaintiff in respect of the third compulsorily acquired portions of his lands namely LR No. Kericho/Kipchimchim/656 and 3027 so acquired vide Kenya Gazette Notice No. 2029 dated 2nd March, 2018.

e. That the Plaintiff is entitled to general damages, exemplary damages and aggravated damages.

f. The Defendants be ordered to pay costs of the suit.

5. The 2nd Defendant/Respondent filed its Statement of Defence on 5th June, 2017 wherein it denies the averments in the Amended Plaint and seeks that the Plaintiff/Applicant's suit be dismissed with costs.
6. The 3rd Defendant/Respondent entered appearance on 8th June, 2017 but has not filed any statement of defence.
7. The application under consideration first came up for hearing on 13th March, 2025 when the Court directed that it be served upon the Respondents.
8. The application came up for hearing on 23rd April, 2025 when Counsel for the Plaintiff/Applicant sought that the matter be referred to mediation. Counsel for the 2nd

Defendant/Respondent sought time to seek instructions on the proposal for mediation.

9. As a consequence, the hearing of the application was rescheduled to 5th May, 2025. On the said date, Counsel for the 2nd Defendant/Respondent informed the Court that his client was not amenable to mediation. The Court then issued directions that the application be canvassed by way of written submissions.
10. Counsel filed written submissions and the same were highlighted on 3rd December, 2025 and the matter was reserved for ruling.

The Plaintiff/Applicant's Contention.

11. The Plaintiff/Applicant contends that vide Gazette Notice No. 1821 dated 18th March, 2016, the 1st Defendant/Respondent compulsorily acquired 0.2599 Ha of land parcel No. **Kericho/Kipchimchim/656** and 0.1723 of land parcel No. **Kericho/Kipchimchim/3027** for the construction of the

Kericho-Kisumu interchange. He goes on to state that this was the first acquisition of his land.

- 12.** The Plaintiff/Applicant also contends that by Gazette Notice No. 10642 dated 23rd December, 2016, the 1st Defendant/Respondent compulsorily acquired an additional portion measuring 0.2713 Ha comprised in land parcel No. **Kericho/Kipchimchim/656**. He goes on to state that this was the second acquisition.
- 13.** The Plaintiff/Applicant further contends that he was dissatisfied with the compensation awarded for the first and second acquisitions and he therefore filed the present suit.
- 14.** It is the Plaintiff/Applicant's contention that while the suit was pending, the Defendants/Respondents unlawfully acquired an additional 0.267 Ha of his land. He goes on to state that this was the third acquisition and it took place on 28th February, 2018 without due notice or compensation.

- 15.** It is also the Plaintiff/Applicant's contention that after the third acquisition, he filed an application seeking leave to amend the Plaint and seek compensation for the same.
- 16.** It is further the Plaintiff/Applicant's contention that the Court heard the said application and awarded him Kshs. 14,927,000/= for Kericho/Kipchimchim/656 and kshs. 3,473,000/= for Kericho/Kipchimchim/3027 together with exemplary damages of Kshs. 200,000/=.
- 17.** He contends that his advocates on record extracted a decree dated 4th October, 2019 in order to commence execution with regard to the third acquisition.
- 18.** He also contends that the decree only pertains to the third acquisition. He goes on to state that the dispute concerning the first and second acquisitions has not been determined.
- 19.** He further contends that this Court erroneously held that it is *functus officio*. He goes on to state that this is because the

substantive suit regarding the first and second acquisitions has not been heard and determined on its merits.

- 20.** It is his contention that he is advised by his advocates on record that the doctrine of *functus officio* has been misapplied as it was made upon hearing an interlocutory application. He goes on to state that this has created a substantial miscarriage of justice that requires immediate correction.
- 21.** It is also his contention that unless the Court sets aside its finding and reinstates the suit for hearing, he will suffer grave injustice and irreparable harm as he will be denied a right to fair hearing on the substantive claim.
- 22.** It is further his contention that the Defendants/Respondents will not suffer any prejudice if the application is allowed as prayed.

23. He ends his deposition by stating that it is in the interest of justice that the application be allowed as prayed.

The 2nd Defendant/Respondent's Response.

24. In response to the Plaintiff/Applicant's application, the 2nd Defendant/Respondent filed Grounds of Opposition dated 16th April, 2025.

25. They are as follows;

a. That the Honourable Court, having delivered a considered ruling to the effect that it is functus officio in this matter, is divested of jurisdiction to further entertain or reopen the matter.

b. The Applicant, being dissatisfied with this Honourable Court's finding that it is functus officio, invoked the remedy of review which was duly heard and dismissed with costs, thereby

conclusively determining the Court's position on the matter.

c. That the current application is a thinly veiled appeal disguised as a fresh Motion, and amounts to an abuse of the Court process, as it seeks to reopen issues that have already been adjudicated upon.

d. That it is trite law that a Court cannot sit on appeal over its own decision. The proper recourse available to the Applicant, if dissatisfied with the ruling and subsequent dismissal of the review application, lies in the Court of Appeal, not in the same Court.

e. That the doctrine of functus officio is a jurisdictional principle, which once determined and reaffirmed upon review, bars further reconsideration of the same cause by the same Court.

f. That the Applicant is improperly attempting to relitigate matters that were, or ought to have been, raised at the time of review, and has not demonstrated any exceptional circumstances or new evidence to

justify revisiting settled judicial findings.

g. That the Application is speculative, vexatious, and amounts to forum shopping, intended to delay the conclusion of proceedings and obstruct the ends of justice.

h. That no sufficient or legally sustainable grounds have been laid to warrant the orders sought, and the Application should therefore be dismissed in limine with costs to the Respondents.

The 3rd Defendant/Respondent's Response.

26. In response to the Plaintiff/Applicant's application, the 3rd Defendant/Respondent filed Grounds of Opposition dated 23rd April of May 2025(sic).

27. They are as follows;

a. That the Application is grossly misconceived in law, fatally

defective, frivolous, vexatious and therefore should be dismissed with costs to be borne by the Applicant.

b. That the Application is res judicata and a grave abuse of the Court process. The Court has already pronounced itself on the issue of the 1st and 2nd acquisitions vide rulings dated 29th August 2018, 16 May 2024 and 6th February 2025.

c. That this Court is now functus officio, having heard, determined and entered said rulings wherein the issue of the 1st and 2nd acquisitions was considered.

d. That the decree issued on 4th October 2019 clearly captures the Applicant's claim that the area acquired by the 1st and 2nd Respondents measures 3.2 acres. This shows that the 1st and 2nd acquisitions were considered in the Court's ruling dated 29th August 2018 and in the subsequent rulings.

e. That there are no grounds or sufficient reasons raised to set aside

the finding of this Court that it is functus officio.

f. That since the Court clearly pronounced itself on the issue of functus officio, the Applicant cannot seek to relitigate the same over issue in the same Court, his only redress lies in the Appellate Court.

g. That the Application is brought under an incorrect provision of the Civil Procedure Rules. The Applicant cites Order 10 Rule 11 of the Civil Procedure Rules, which provides for setting aside judgments entered where such judgment has been entered under Order 10. (sic)

h. That judicial time is a scarce resource and should not be used to examine or adjudicate issues that are res judicata.

Issues for Determination.

28. The Plaintiff/Applicant filed his submissions on 15th July, 2025, the 2nd Defendant/Respondent filed its submissions on

24th September, 2025 while the 3rd Defendant/Respondent filed its submissions on 15th September, 2025.

29. The Plaintiff/Applicant submits on whether or not this Honourable Court is *functus officio*.
30. The Plaintiff/Applicant submits that this Court is not *functus officio* as it has not heard and determined issues relating to the first and second acquisitions.
31. The Plaintiff/Applicant reiterates the averments in his affidavit in support of the application and submits that the Defendants/Respondents have not controverted them.
32. The Plaintiff/Applicant relies on the judicial decision of **Coftea Machinery Services Limited vs Akiba Bank Ltd & 2 Others [2004] eKLR** in support of his submissions.
33. The Plaintiff/Applicant relies on the judicial decision of **Raila Odinga vs IEBC [2013] eKLR** and reiterates that the Court has not heard and/or determined the issues with respect to

the first and second acquisitions as reflected in the Amended
Plaint dated 20th April, 2018.

- 34.** The Plaintiff/Applicant relies on the judicial decision of **Jersey Evenery Port Ltd vs AL Thanis [2002] eKLR** and submits that he cannot file an appeal as contended by the 2nd and 3rd Defendants/Respondents as the Court has not made a determination on the first and second acquisitions.
- 35.** The Plaintiff/Applicant concludes his submissions by urging the Court to allow his application as prayed.
- 36.** The 2nd Defendant/Respondent submits on whether the Court having already rendered itself *functus officio* and re-affirmed that position on review, retains jurisdiction to entertain the present application.
- 37.** It is the 2nd Defendant/Respondent's submissions that once a Court has rendered itself *functus officio*, it cannot reopen or re-adjudicate the matter except as expressly permitted under the law. The 2nd Defendant/Respondent relies on the

judicial decision of **Telkom Kenya Limited vs John Ochanda [2014]eKLR** in support of its submissions.

- 38.** It is also the 2nd Defendant/Respondent's submissions that the Plaintiff/Applicant contends that the dispute concerning the first and second acquisitions has not been heard and determined.
- 39.** It is further the 2nd Defendant/Respondent's submissions that while that may be factually correct, it does not alter the jurisdictional reality that this Honorable Court has already declared itself to be *functus officio*.
- 40.** The 2nd Defendant/Respondent submits that once the Court has declared itself thus, its hands are tied irrespective of whether aspects of the claim remain unresolved.
- 41.** The 2nd Defendant/Respondent also submits that the Plaintiff/Applicant already invoked the remedy of review which was heard and dismissed.

42. The 2nd Defendant/Respondent further submits that this dismissal, conclusively re-affirmed the *functus officio* position.
43. It is the 2nd Defendant/Respondent's submissions that the proper recourse available to the Plaintiff/Applicant lies not in re-approaching this Court, but in the appellate forum.
44. The 2nd Defendant/Respondent relies on the judicial decision of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR** and submits that the application under consideration is inviting this Court to sit on appeal over its own ruling.
45. The 2nd Defendant/Respondent concludes its submissions by urging the Court to dismiss the Plaintiff/Applicant's application.
46. The 3rd Defendant/Respondent submits on the following issues;

a. Whether the Court should set aside its finding that it is functus officio in this matter.

b. Whether the doctrine of functus officio can be applied to an interlocutory determination.

c. Whether the application is barred by res judicata.

d. Who should bear costs of the application.

47. On the first issue, the 3rd Defendant/Respondent submits that the application under consideration has been filed under **Order 10 Rule 11** of the **Civil Procedure Rules**.

48. The 3rd Defendant/Respondent also submits that neither the ruling delivered on 16th May, 2024 and the ruling delivered on 6th February, 2025 was delivered under **Order 10** of the **Civil Procedure Rules**.

49. The 3rd Defendant/Respondent further submits that the Court cannot therefore exercise its power to set aside its finding under **Order 10 Rule 11** of the **Civil Procedure Rules**.

- 50.** The 3rd Defendant/Respondent relies on the judicial decision of **Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550** as was cited in **Odinga vs Independent Electoral & Boundaries Commission & 3 Others [2013] KESC 8 (KLR)** and submits that the Court declared itself *functus officio* in the ruling delivered on 16th May, 2024.
- 51.** It is the 3rd Defendant/Respondent's submissions that the Court delivered a ruling on 6th February, 2025 where it declined to review the ruling delivered on 16th May, 2024.
- 52.** It is also the 3rd Defendant/Respondent's submissions that the Plaintiff/Applicant's claims regarding compensation have been exhaustively addressed by the Court in its rulings delivered on 29th August, 2018, 16th May, 2024 and 6th February, 2025.
- 53.** It is further the 3rd Defendant/Respondent's submissions that the Plaintiff/Applicant extracted a decree that was issued on 4th October, 2019.

54. The 3rd Defendant/Respondent submits that the said decree captures the Plaintiff/Applicant's claim which was that the area acquired by the Defendants/Respondents measures 3.2 acres.
55. The 3rd Defendant/Respondent also submits that this shows that the first and second acquisitions were considered by the Court in the ruling delivered on 29th August, 2019.
56. The 3rd Defendant/Respondent further submits that the Court is therefore *functus officio* and the application under consideration should be dismissed.
57. On the second issue, the 3rd Defendant/Respondent relies on the judicial decisions of **Serve in Love Africa (Sila) Trust vs Abraham Kiptarus Kiptoo & 2 Others [2019] KEELC 3669 (KLR)**, **Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550** as was cited in **Odinga vs Independent Electoral & Boundaries Commission & 3 Others [2013] KESC 8 (KLR)** and submits that once an

interlocutory order has been perfected, the Court becomes *functus officio*.

- 58.** The 3rd Defendant/Respondent also submits that a Court becomes *functus officio* over an issue whenever it hears it and determines it during the pendency of a suit.
- 59.** On the third issue, the 3rd Defendant/Respondent relies on **Section 7** of the Civil Procedure Act, the judicial decision of **Njangu vs Wambugu & another Nairobi HCC No. 2340 of 1991 (unreported)** as was cited in **Kennedy Mokuia Ongiri vs John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] KEELC 1631 (KLR)** and submits that the Plaintiff/Applicant has been making relentless attempts to re-litigate its claims before this Court.
- 60.** The 3rd Defendant/Respondent reiterates that the Court has already pronounced itself in the rulings delivered on 29th August, 2018, 16th May, 2024 and 6th February, 2025 and

since the application under consideration raises the same issues, it is an abuse of the Court process.

- 61.** The 3rd Defendant/Respondent relies on the judicial decision of **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] eKLR** and urges the Court to dismiss the Plaintiff/Applicant's application with costs.
- 62.** Counsel for the Plaintiff/Applicant and 2nd Defendant/Respondent requested and were given opportunity to highlight their submissions on 3rd December, 2025. Counsel for the 3rd Defendant/Respondent elected not to highlight his submissions.
- 63.** On the said date, counsel for the Plaintiff/Applicant submitted that three portions of the suit parcels of land were acquired by the Defendants/Respondents through three separate gazette notices.

- 64.** He also submitted that while the Plaintiff/Applicant's claim for the first and second acquisitions was pending in Court, the Defendants/Respondents acquired a third portion.
- 65.** He further submitted that subsequently, the Plaintiff/Applicant filed an application seeking to amend the Plaint to include the third acquisition.
- 66.** It is Counsel's submissions that on 29th August, 2018, the Plaintiff/Applicant was awarded kshs. 18,400,000/= for the third acquisition.
- 67.** Counsel also submitted that the first and second acquisitions have not been determined as there is no ruling or judgement on them.
- 68.** Counsel further submitted that the 2nd and 3rd Defendants/Respondents contend that following the ruling delivered on 29th August, 2018, the Court became *functus officio* and the application under consideration is therefore *res judicata*.

69. Counsel reiterated that the Plaintiff/Applicant has not been compensated for the first and second acquisitions and submitted that this contention has not been controverted by the Defendants/Respondents.
70. He submitted that the Plaintiff/Applicant can only go on appeal if there was a determination on the first and second acquisitions.
71. Counsel cited the judicial decision of **Jersey Evenery Port Ltd vs AL Thanis [2002] eKLR** and submitted that the decree was issued in regard to the third acquisition.
72. Counsel for the 2nd Defendant/Respondent submitted that the Plaintiff/Applicant has filed numerous applications in the present matter.
73. He also submitted on 30th June, 2023, the Plaintiff/Applicant filed an application seeking leave to further amend the Plaintiff.

- 74.** He further submitted that the 2nd Defendant/Respondent filed Grounds of Opposition wherein it stated that the Court is *functus officio* as the Plaintiff/Applicant had already filed his bill of costs which was taxed and executed.
- 75.** Counsel for the 2nd Defendant/Respondent submitted that the Court delivered a ruling on 16th May, 2024 and found that it (the court) is *functus officio*.
- 76.** Counsel also submitted that the Plaintiff/Applicant was dissatisfied by the said ruling and filed an application for review which application was dismissed on 6th February, 2025.
- 77.** Counsel for the 2nd Defendant/Respondent further submitted that the only recourse available to the Plaintiff/Applicant is to file an appeal against the ruling delivered on 6th February, 2025.

- 78.** It is counsel for 2nd Defendant/Respondent's submission that the application under consideration which seeks to set aside the finding that the Court is *functus officio* is an appeal disguised as a fresh motion.
- 79.** Counsel also submitted that the Plaintiff/Applicant is inviting this Court to sit on appeal on its own decision and his application should therefore be dismissed with costs.
- 80.** In a rejoinder, Counsel for the Plaintiff/Applicant reiterated that the decree is in respect of the third acquisition and it does not relate to the first and second acquisitions.
- 81.** Counsel for the Plaintiff/Applicant submitted that there is a mistake on the face of the record and the Court has jurisdiction to do justice and set aside the ruling delivered on 16th May, 2024.

Analysis and Determination.

82. Having considered the Plaintiff/Applicant's application, the responses thereto and the rival submissions, It is my view that the following issues arise for determination;

a. Whether the application dated 7th March, 2025 is res judicata.

b. Whether the instant application is merited.

c. Who should bear costs of the application.

A. Whether the application dated 7th March, 2025 is res judicata.

83. The 3rd Defendant/Respondent submits that the application under consideration is *res judicata*.

84. The 3rd Defendant/Respondent also submits that the Court has pronounced itself on the issues raised in the application under consideration in the rulings delivered on 29th August, 2018, 16th May, 2024 and 6th February, 2025.

85. The Plaintiff/Applicant did not specifically submit on the issue of *res judicata* but instead submits that the Court is yet to make a determination on the first and second acquisitions by the Defendants/Respondents of portions of the suit parcels of land.

86. **Section 7** of the Civil Procedure Act provides:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

**87. In Communications Commission of Kenya & 5 others -
v- Royal Media Services Limited & 5 others [2014]**

eKLR the Supreme Court expressed itself as follows on the issue of *res judicata*:

“[317] The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....

[319] There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should

be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89. (Emphasis supplied)”

88. The Court of Appeal in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others** [1996] KECA 102 (KLR) held as follows;

“...That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”

(Emphasis mine)

89. Under prayer (2) of the application under consideration, the Plaintiff/Applicant is seeking for the following order;

“2. That this Honourable Court be pleased to set aside its finding that it is functus officio in this matter.”

90. A perusal of the Court record shows that the Court made a finding that it is *functus officio* in the ruling delivered on 16th May, 2024. This ruling was with respect to the Plaintiff/Applicant’s application dated 30th June, 2023 wherein the Plaintiff/Applicant sought the following orders:

“1. That this Honourable Court be pleased to grant leave to the Plaintiff to further Amend his Amended Plaint dated 20th April, 2018.

2. That draft (sic) Amended Plaint be deemed as duly filed upon payment of requisite fees.

3. That costs of the application be provided for.”

91. In its ruling delivered on 16th May, 2024 this Court at paragraphs **28** and **31** observed and held as follows:

“28. I have asked myself whether amending the Applicant’s further amended Plaintiff would be for the purpose of determining the real question in controversy between the parties keeping in mind that the Court had already pronounced itself in its ruling of 29th of August 2018 wherein the decree had been issued and the Applicant had taxed their bill of costs, wherein I am not satisfied as to the truth and substantiality of the proposed amendment...”

31. The Orders of 29th of August 2018 having been perfected into an order/decreed where the parties were now at an execution stage, I thus find that the Court is now functus officio, the application dated the 30th June, 2023 is herein dismissed with costs.”

92. The Plaintiff/Applicant being dissatisfied with the said ruling filed the application dated 11th June, 2024 which sought the following orders;

1. That the application is certified urgent and service of the same be dispensed with in the first instance.

2. That this Honourable Court be pleased to review and or set aside its orders given on 16th May, 2024.

3. That costs of application be provided for.

93. In the said application, the Plaintiff/Applicant contended that there was an apparent error on the face of the record as the ruling delivered on 29th August, 2018 was in respect of the third acquisition and that the claim for the first and second acquisitions was still pending.

94. The Court dismissed the said application on 6th February, 2025 and held as follows;

“73. As stated, the Plaintiff/Applicant contends that there is an error apparent on the face of the record as the Court in its ruling delivered on 16th May, 2024 held that the Court had pronounced itself in its ruling delivered on 29th August, 2018 and a decree issued and yet the ruling delivered on 29th August, 2018 was with respect to an interlocutory application. The Plaintiff/Applicant also contends that the decree issued on 4th October, 2018 was erroneously issued.

74.As aforementioned in the preceding paragraphs, an error apparent on the face of the record must be self-evident. In the event that a party argues that the decision of the Court was erroneous, the proper recourse would be to file an appeal.

75. In the present matter it is my view that the Plaintiff/Applicant is essentially contending that the decision of this Court in its ruling delivered on 16th May, 2024 was erroneous. My view, therefore, is that this can only be a ground of appeal and not review.

76. The Plaintiff/Applicant has not demonstrated that there is an error apparent on the face of the record to warrant the review of the orders issued by this Court on 16th May, 2024.

77. Consequently, I find that the Plaintiff/Applicant's application dated June 11, 2024 lacks merit and it is hereby dismissed with costs to the 2nd and 3rd Defendants/Respondents."[Emphasis Mine]

95. Essentially, in the application dated 11th June, 2024, the Plaintiff/Applicant sought that the Court reviews and/or sets aside the ruling delivered on 16th May, 2024. The effect of

setting aside the ruling of 16th May, 2024 would have been that the orders of *functus officio* would also have been set aside. The Court declined to do so.

96. The prayers sought in the application under consideration have been set out in the preceding paragraphs but I will summarise them as follows:

a. Prayer (2) of the application under consideration seeks that the Court sets aside its finding that the Court is functus officio

b. Prayer (3) seeks that the suit be reinstated for the hearing and determination of the first and second acquisitions.

c. Prayer (4) seeks a declaration that the issuance of the decree following the determination of an interlocutory application does not render the Court functus officio

d. Prayer (5) seeks for a declaration that the decree issued on 4th October, 2019 is limited to the third acquisition of the Plaintiff/Applicant's land.

- 97.** Therefore, prayers (3), (4) and (5) of the application under consideration can only be considered after determination of prayer (2).
- 98.** Prayer (2) seeks that the Court sets aside its finding that the Court is *functus officio*. This finding was made in the ruling delivered on 16th May, 2024.
- 99.** It is therefore evident that in both the applications dated 11th June, 2024 and 7th March, 2025, the Plaintiff/Applicant is basically seeking that the findings made in ruling delivered on 16th May, 2024 be set aside.
- 100.** Put simply, in the application dated 11th June, 2024, the Plaintiff/Applicant sought that the ruling delivered on 16th May, 2024 be reviewed and/or set aside (This is the ruling in which the Court declared that it was *functus officio*). In the application under consideration, the Plaintiff/Applicant seeks that the Court sets aside the finding that the Court is *functus*

officio (Which finding was made in the ruling delivered on 16th May, 2024).

101. The instant application is the second attempt by the Plaintiff/Applicant in having the Court have another look at the ruling delivered on 16th May, 2024. The first one was as a “review” and the instant application as “setting aside”.

102. Both applications were based on the same grounds. That is, that the Court has not made a determination on the first and second acquisitions of portions of the suit parcels of land.

103. It is my finding that the instant application is seeking similar orders as in the application dated 11th June, 2024. The application dated 11th June, 2024 was heard and determined on its merits. It is needless to say that the parties in both applications are the same.

104. Therefore, I find that the application under consideration is *res judicata*.

B. Whether the instant application has merit.

105. Based on my finding that the instant application is *res judicata*, it shall not be necessary to interrogate its merits.

C. Who should bear costs of the application.

106. The general rule is that costs shall follow the event. This is in accordance with the provisions of **Section 27** of the **Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

107. Taking the foregoing into consideration, I find that the application dated 7th March, 2025 is *res judicata* and it is hereby dismissed with costs.

108. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 12TH DAY OF MARCH, 2026.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Mr. Koko for Mr. Migiro for the Plaintiff/Applicant.

Mr. Willy Enok for the 2nd Defendant/ Respondent.

Mr. Ojwang for the 3rd Defendant/Respondent.

No appearance for the 1st Defendant/Respondent.

Court Assistant; Mr. Joseph Makori.