



Yahya v Board of Trustees of Kibra Nubian Community Land & another (Miscellaneous Civil Application E123 of 2024) [2026] KEHC 3639 (KLR) (Civ) (19 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E123 OF 2024
JN MULWA, J
MARCH 19, 2026**

BETWEEN

JAMALDIN YAHYA APPLICANT

AND

**THE BOARD OF TRUSTEES OF KIBRA NUBIAN COMMUNITY
LAND 1ST RESPONDENT
THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

RULING

1. Before the Court for determination is the motion dated 09/06/2025 filed by The Board of Trustees of Kibra Nubian Community Land (hereafter 1st Respondent) as against Jamaladin Yahya and The Independent Electoral and Boundaries Commission seeking inter alia -:
 - a. That the honorable Court be pleased to review its decision of 15/10/2024 and set aside all consequential orders therein upon determination of the motion;
 - b. That the honorable Court be pleased to dismiss the Applicant's amended notice of motion for being an abuse of the Court process.
 - c. That the costs of the motion be provided for.
2. The motion is brought pursuant to Section 1A, 1B, 3A of the *Civil Procedure Act* (CPA) and Order 45 Rule 1 of the Civil Procedure Rules (CPR), on grounds amplified in the supporting affidavit sworn by Suleiman Juma Aganas, on even date, who cites being the chairperson of the 1st Respondent.



3. Jamaldin Yahya (hereafter the Applicant) opposes the motion by way of grounds of opposition dated 21/10/2025.
4. The Independent Electoral and Boundaries Commission (hereafter the 2nd Respondent) on its part, opposes the motion by way of a replying affidavit dated 18/02/2026 deposited by Douglas Bargorett, who cites being counsel having conduct of the matter on behalf of the 2nd Respondent.
5. Directions were taken on disposal of the motion by way of written submissions, neither of the parties complied despite being accorded ample opportunity. Having considered the affidavit material on record, the Court postulates that the issues for determination concern-
 - a. Whether the Court ought to review its decision of 15/10/2024 and set aside all consequential orders therein?
 - b. Whether the Court ought to dismiss the Applicant's amended notice of motion dated 21/03/2024 for being an abuse of the Court process?
 - c. Who ought to bear the costs of the application?

Whether the Court ought to review its decision of 15/10/2024 and set aside all consequential orders therein?

6. At the risk of repetition, the Court has considered the rival material by the parties. The Applicant's motion invokes inter alia the provisions of Order 45 Rule 1 of the CPR alongside Section 3A of the CPA. The latter provision specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court", to wit, this Court's inherent powers was judiciously addressed by the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR and requires no restatement.
7. The former provision on its part provides for review and the grounds upon which an application for review ought to be premised upon. Notably, the instant motion stems from the orders of this Court issued on 15/10/2024 referring the dispute between the Applicant and the 1st Respondent hereto to Arbitration.
8. That said, it is not clear why counsel for the 1st Respondent while preparing the instant motion, would present the trouble-inviting pair of words "...reviewand set aside..." knowing all too well the purport of the specific word vis-à-vis the pertinent facts herein.
9. As may concern review of a Court's decision or order pursuant to Order 45 (1) of the CPR, the Court of Appeal in *Jason Ondabu t/a Ondabu & Company Advocates & 2 Others v Shop One Hundred Limited* [2020] KECA 134 (KLR) observed that an application for review involves exercise of judicial discretion. That said, there are legions of authorities on the principles governing a motion brought under Order 45 (1) of the CPR, which stipulates specific grounds upon which review may be sought.
10. Gleaning through the 1st Respondent's grounds and affidavit in support of the motion, it is apparent that both barely disclose any of the specific grounds under the said Order upon which the review prayer is predicated, despite the Applicant's invocation of Order 45 (1) of the CPR. Thus, it is difficult to see the relevance of the said provision, in the instant proceedings.
11. Nevertheless and as earlier noted, the Applicant has also invoked Section 3A of the CPR, which to my mind would perhaps have more bearing on the matter before the Court.



12. It is undisputed that the vide this Court's orders issued on 15/10/2024, the dispute between the Applicant and members of the 1st Respondent was referred to Arbitration, on application by the Applicant vide his amended motion dated 21/03/2024.
13. The 1st Respondent through Suleiman Juma Aganas, deposes that on 16/02/2024, this Court gave interim orders staying the 1st Respondent's elections of which were to be conducted on the weekend of the latter date. That upon disposing of the Applicant's amended motion, this Court referred the dispute to arbitration, all the while, the Applicant was enjoying the interim relief halting the elections of the 1st Respondent's trustees. He goes on to depose that despite issuance of this Court's order on 15/10/2024, no arbitration of the dispute has even been undertaken or proceeded.
14. That the Applicant upon being questioned by this Court on several occasions, as to the issue, asserted that the matter has been proceeding through mediation yet the latter had specifically sought to have matter determined by way of arbitration on the backdrop of the Kibra Nubian Community Land Trust Deed of Amendment and Restatement supplement to the Trust Deed Dated 2013 registered 30/11/2022. He states that the Applicant therefore cannot assert that it is proceeding with mediation in the absence of the Respondents herein, and an Alternative Dispute Resolution (ADR) mechanism, contrary to what they had sought before this honourable court.
15. That the Applicant is holding the Respondents hostage having received a favorable ruling on 15/10/2024 and stay orders having been issued more than a year ago on 16/02/2024 whereas the delay in conducting the elections has started causing disharmony in the community and some of the trustees who wish to retire have also been caught in the storm. Therefore, the honourable Court ought to set aside its decision of 15/10/2024 and all consequential orders and dismiss the amended motion dated 21/03/2024 with costs.
16. As earlier noted, the Applicant opposes the 1st Respondent's motion by way of grounds of opposition by taking issue with the motion on the following grounds-; that the Court became functus officio following the rendering of its decision of 15/10/2024 remitting the dispute between the parties to Arbitration pursuant to Section 7 and 10 of the Arbitration Act; that the prayer seeking to have the Applicant's amended motion dismissed is untenable given that the said motion has since been spent; that the grounds in support of the 1st Respondent's motion are insufficient and do not meet the threshold set out under Order 45 of the CPR; that the Court is divested of any jurisdiction to entertain the instant motion as the Court has become functus officio; that no proper provision of the Arbitration Act has been invoked by the 1st Respondent in making the motion before this Court whereas the latter has wrongly relied on inapplicable provisions of the CPA; and that the parties herein out of their own volition have already concluded a parallel alternative dispute resolution process vide mediation that was commenced and concluded outside the Court thus resulting in a mediation agreement dated 30/01/2025.
17. The 2nd Respondent in its response, essentially supports the position taken by the 1st Respondent in urging the setting aside of this Court's orders and dismissal of the Applicant's amended motion.
18. Concerning the Applicant's objection that the 1st Respondent's motion does not meet the threshold set out under Order 45 of the CPR, the Court has addressed itself to the issue earlier in this ruling. Nevertheless, as to whether the Court is functus officio on the matter, it has since been settled within our jurisdiction that the principle and or doctrine known as functus officio goes to the jurisdiction of this Court to entertain proceedings before it.
19. The Supreme Court of Kenya while expounding on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR cited with approval an excerpt



from an article by Daniel Malan Pretorius, in “The Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832:

“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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

20. The Supreme Court also relied on the holding in the case of Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550 to the effect that;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors, nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.” (Emphasis added).

21. Here while I agree, that the purport of the Applicant’s amended motion dated 21/03/2024 had been dealt with vide this Court’s ruling rendered on 15/10/2024, by presenting the instant motion that 1st Respondent seeks to change this Court judicial mind premised on the circumstances succeeding this Court’s orders referring the matter to arbitration.

22. In exercising such discretionary jurisdiction, the Court must be careful to not sit on appeal over its own decision. That said, what I gather to be the gist of the 1st Respondent’s motion, is not an invitation to arrive at a different determination but rather to set aside and or discharge this Court’s orders, for want of compliance on the part of the Applicant. Therefore, this Court reasonably believes it is not functus officio on the matter, to wit, its jurisdiction has been properly invoked.

23. Moving on to the crux of the motion, it is settled that the discretion of the Court to set aside an order is unfettered and that a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in their favor. In the case of Shah –vs- Mbogo and Another [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

“The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

24. The principles enunciated in Shah –vs- Mbogo (supra) were amplified further by Platt JA in Bouchard International (Services) Ltd vs. M’Mwereria [1987] KLR 193. Although the courts in the above cases were contemplating applications to set aside ex parte judgments, the principles pronounced therein would apply in equal degree in this matter.

25. Here, the Court had referred the matter to arbitration via its orders issued on 15/10/2024 with a rider that parties appear before it for mention for a status report on 20/02/2025. When parties appeared before this Court on the latter date, counsel appearing for the 1st & 2nd Respondent intimated that



- there was non-compliance with the Court's orders meanwhile on the part of the Applicant, while indeed confirming that there was non-compliance, he did indicate that parties were in the process of an agreement.
26. When parties subsequently attended to the matter before this Court on 09/04/2025, counsel appearing for the Applicant indicated that there was another suit that had been filed before the Environment and Land Court that has since been referred to mediation. Counsel for the Respondents meanwhile informed the Court that they were unaware of any such proceedings and urged the Court to lift its orders issued on 15/10/2024, to wit, this Court ordered that the Applicant to decide what it intends to do with the matter within 30 days therefore and thus slated the matter for mention on 24/06/2025.
 27. On the latter date and subsequently on 15/07/2025, parties did confirm that arbitration was yet to take off however there was indication that there was mediation proceedings in respect of other suits related to the instant matter. The Respondents however took issue with the fact that they were not parties to the mediation proceedings alluded to by the Applicant.
 28. On 24/09/2025, upon hearing representation by the parties, this Court accorded them an opportunity to attempt Court annexed mediation with a mention for 08/10/2025 being issued to confirm progress of the matter or others. As at the latter date, there was no consensus on mediation, to wit, the Court directed that the matter proceeds as filed. It is on the premise of the above that the parties find themselves deliberating over the 1st Respondent's application.
 29. As can be noted from the forestated facts, this Court's order on 15/10/2024 was deliberate, unambiguous and unequivocal. What is before this Court is a miscellaneous matter commenced by way of notice of motion later amended seeking among other orders stay orders and reference of the matter to arbitration. There was no substantive suit accompanying the motion, to wit, upon delivery of this Court's order on 15/10/2024, the same extinguished the instant proceedings.
 30. However, as can be noted from the forestated, since issuance of the said order no attempts at arbitration have been undertaken whereas the Applicant has alluded to mediation, of which, as rightly argued by the Respondents, was not the purport of this Applicant's amended motion and resultant order of this Court issued on 15/10/2024. It is trite that Court orders are not issued in vain. The Applicant had sought the opportunity to refer whatever dispute existed between himself and the Respondents to arbitration. He has failed to take up the said opportunity despite being accorded ample opportunity to do so.
 31. The exhortation of Article 159(2)(b) of *the Constitution* that justice shall not be delayed is replicated in Section 1A and 1B of the CPA by which parties and counsel are duty bound to co-operate with the Court in furthering the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes. Regarding the latter provisions, the Court of Appeal stated the following in *Karuturi Networks Limited & another v Daly & Figgis Advocates* [2009] KECA 8 (KLR)

“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court.”
 32. Here, it is apparent that the Applicant's actions are in contravention of the above proviso and to sustain the orders of this Court rendered on 15/10/2024, only serves to prejudice the parties that were dragged



to the instant proceedings. In any event, it was the Applicant who instituted these proceedings and further sought to refer the matter to arbitration. He seems uninterested in doing so despite having been accorded the opportunity. Therefore, the Court is inclined to set aside and vacate its orders issued on 15/10/2024, and does so accordingly.

Whether the Court ought to dismiss the Applicant's amended notice of motion dated 21/03/2024 for being an abuse of the Court process?

33. As rightly, noted by the Applicant, the purport of the order of this Court issued on 15/10/2024, disposed of the amended notice of motion dated 21/03/2024. Therefore, in light of this Court's earlier finding set aside its orders of 15/10/2024, it would be moot to address the question of dismissing the Applicant's amended motion dated 21/03/2024, as the same had since been conclusively determined by this Court on 15/10/2024.

Who ought to bear the costs of the motion?

34. As to the question of costs, applying my mind to the provisions of Section 27 of the Civil Procedure Act (CPA), I award costs of the motion to the 1st Respondent.

Orders Accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 19TH MARCH, 2026.

.....

JANET MULWA.

JUDGE

