

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISCELLANEOUS APPLICATION NO. E005 OF 2025

HUMPHREY NJONJO WAWERU
APPLICANT

VERSUS

FREDRICK WAITHAKA GITHURI RESPONDENT

RULING

1. Before this Court is a Notice of Motion dated 4th December 2025 in which the Applicant implores the Court to stay the execution of the eviction orders issued in a ruling delivered on 2nd December 2025. The Applicant further asks the court to revisit and set aside the eviction order.
2. The Applicant thus seeks the following orders:
 1. *Spent...*
 2. *Pending the inter-partes hearing of this application, Honourable Court be pleased to issue a stay of execution of the eviction orders issued in the ruling delivered on 2nd December 2025.*
 3. *At the inter-partes hearing and pending the determination of this application, this Honourable court be pleased to issue a stay of execution of the eviction order issued by this court vide the ruling of 2nd December 2025*

4. *In the alternative to orders (2) and (3) above and in the best interest of justice, this Honourable be pleased to grant status quo or conservatory orders preventing the eviction of the respondent from his home.*
 5. *This Honourable court be pleased to set aside the ruling issued on 2nd December 2025.*
 6. *Upon setting aside the ruling of this Honourable Court aforesaid, the court be pleased to strike out the miscellaneous application filed herein with costs to the Respondent/ Applicant.*
 7. *Costs hereof be awarded to the Respondent/ Applicant.*
3. The application is premised on the grounds on the face of it and the Supporting Affidavit Fredrick Waithaka Githuri sworn on even date.
 4. The Applicant contends that the Respondent obtained orders from this court by a ruling delivered on 2nd December 2025 which proceedings were commenced by way of a Miscellaneous application.
 5. In the Applicant's view, the proceedings were commenced in a manner that failed to properly invoke the jurisdiction of the Court. The Applicant contends that questions touching on ownership of property, as well as reliefs for eviction or vacant possession, are substantive matters that cannot properly be determined within the confines of a Miscellaneous application. According to the Applicant, such issues ought to be ventilated in a properly instituted suit where the parties are afforded the full procedural safeguards attendant to the determination of proprietary rights.

6. The Applicant contends that, unless this Court intervenes, the eviction will proceed, occasioning loss, damage, and prejudice that would be difficult, if not impossible, to remedy should the Court ultimately find merit in the present application.
7. In opposition to the application, the Respondent filed the Replying Affidavit of Humphrey Njonjo Waweru sworn on 16th December 2025. The Respondent contends that the Applicant's counsel is improperly on record.
8. The Respondent contends that this Court lacks jurisdiction to entertain the present application. It is argued that, having delivered its ruling on 2nd December 2025, the Court became *functus officio* and is therefore precluded from revisiting the matter or sitting, in effect, on appeal over its own decision.
9. The Respondent contends that the court is being invited to sit on appeal on its own decision and that there is no basis for "setting aside" the ruling. The Respondent maintains that the ownership of the suit property was already settled in **Milimani HC. Succession Cause No. 2322 of 1995** (consolidated with **P& A 1458 & 1733 of 1995**) and thus instituting the proceedings by a Miscellaneous Application was proper.
10. The Respondent maintains that the present application is an attempt to justify continued unlawful occupation of the suit property.

11. It is contended that the Applicant cloaks this application under the guise of a purported dispute, when in reality no genuine controversy exists for the Court's determination.
12. The Respondent avers that the Applicant had already been lawfully evicted from the suit property, but thereafter forcefully re-entered the premises by engaging individuals who violently broke into the suit property and assaulted the security personnel on site.
13. In sum the, the Respondent submits that the application is bereft of merit and should be dismissed with costs.
14. The Applicant filed a supplementary affidavit sworn on 23rd January 2026 reiterating his position and beseeching the Court to allow the application in the interest of justice.
15. The matter was canvassed by way of written submissions which were later orally highlighted by counsel for the parties.

Issues for Determination

16. Having considered the application, the Affidavit in support, the Replying Affidavit in opposition, the rival submissions and the relevant authorities, the issues that emerge for determination are:
 - i. Whether this Court has jurisdiction to entertain the present application*
 - ii. Whether the Applicant has made out a case for the grant of the orders sought.*

Analysis and Determination

17. The point of departure is jurisdiction. It is trite that a court must first be satisfied that it is properly seized of a matter before it can proceed further. In **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, the Court of Appeal made it plain that where a court finds it has no jurisdiction, it must down its tools.
18. The Respondent's objection is that this Court, having delivered its ruling on 2nd December 2025, is *functus officio* and therefore lacks jurisdiction to entertain the present application.
19. The doctrine of *functus officio*, was affirmed by the Supreme Court in **Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others [2013]** as follows:

"18. We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in ["The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,"](#) (2005) 122 SALJ 832, has thus explicated this concept:

"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."

19. This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550: “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.”

20. In essence, the doctrine of *functus officio* bars a court from revisiting the merits of its decision once it has rendered a final determination, save as provided by law.
21. This Court’s ruling delivered on 2nd December 2025 conclusively determined the question whether or not the Respondent was entitled to the eviction orders sought. In doing so, the Court did not adjudicate on ownership of the suit property. That question had long been settled in Milimani HC. Succession Cause No. 2322 of 1995 (consolidated with P& A) 1458 & 1733 of 1995). The Court merely gave effect to rights that had crystallised, and, upon consideration, found that the circumstances warranted the invocation of a miscellaneous application to obtain the eviction orders.
22. To the extent, therefore, that the present application invites this Court to set aside that ruling and to strike out the proceedings upon which it was founded, it falls afoul of the doctrine of *functus officio*.

Such relief can only be pursued within the strict confines of review under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, or on appeal before a superior court.

23. The present application is not properly anchored as a review, nor does it disclose the statutory grounds that would warrant the exercise of that jurisdiction. In that respect, this Court lacks jurisdiction to revisit its own decision.
24. That, however, is not the end of the matter. The law recognises a limited residual jurisdiction in the court to grant stay of execution pending appeal. Order 42 Rule 6(1) of the Civil Procedure Rules expressly empowers the Court to grant such relief for sufficient cause. This jurisdiction is preservatory in nature. It does not entail a reconsideration of the merits of the impugned decision.
25. As was articulated in ***Madhupaper International Limited v Kerr [1985] eKLR***, a court is not rendered *functus officio* merely because it has delivered its ruling; it retains jurisdiction to grant interim relief to preserve the subject matter pending appeal. Such jurisdiction, however, is discretionary and must be exercised with caution, particularly where the appeal is frivolous or where granting relief would inflict greater hardship than it would prevent.
26. The question, then, is whether the Applicant has brought himself within the parameters of this jurisdiction. Under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant must demonstrate that substantial loss may result unless the order is granted, that the

application has been made without unreasonable delay, and that such security as the Court may order has been offered. These are not idle requirements. They are the conditions upon which the Court's discretion is exercised.

27. In the present case, the eviction orders sought to be stayed were issued in enforcement of rights that had already been determined in **Milimani HC. Succession Cause No. 2322 of 1995 (consolidated with P& A) 1458 & 1733 of 1995**). The Court had satisfied itself that the Respondent was entitled to vacant possession, and that the use of a Miscellaneous Application was appropriate in the circumstances. The decree, therefore, is not of a tentative character. It is the culmination of rights that have already been adjudicated.
28. Moreover, the Respondent avers that the eviction has already been carried out and that the Applicant subsequently allegedly re-entered the suit property without lawful authority. The Applicant, in their Supplementary affidavit, disputes this account, contending that it was the Respondent who engaged individuals to effect the eviction. If the Respondent's version is accepted, the subject matter the Applicant seeks to preserve has already been overtaken by events. In such circumstances, a stay of execution cannot issue in vacuo, nor can it be used to legitimise an alleged unlawful re-entry.
29. Even assuming, for argument's sake, that execution is still imminent, the Applicant must demonstrate substantial loss. The mere fact of eviction, without more, is not sufficient where the

occupation complained of has already been found to be unlawful and where the rights of the opposing party have been conclusively determined. The Court cannot, under the guise of preserving the subject matter, impede the enjoyment of rights that have already accrued, absent compelling justification.

30. While this Court retains a narrow jurisdiction to grant a stay of execution under Order 42 Rule 6, the present application exceeds that remit. On the evidence before the Court, the Applicant has not satisfied the conditions for the exercise of this discretion, and the application therefore fails.

31. Accordingly, this Court finds as follows:

- 1. The Applicant has not demonstrated that the threshold for the exercise of the Court's residual jurisdiction to grant a stay of execution has been met.**
- 2. The application, insofar as it seeks to set aside the ruling of 2nd December 2025 or to strike out the proceedings upon which it was founded, is impermissible. That relief falls outside the ambit of the Court's jurisdiction and is barred by the doctrine of *functus officio*.**
- 3. The factual disputes raised, including the competing claims regarding the circumstances of eviction and re-entry, do not suffice to displace the rights already determined in the succession cause or to justify interim intervention.**
- 4. The prayers for stay of execution or preservative orders, while theoretically competent, are not**

supported by evidence sufficient to warrant the exercise of discretion in the Applicant's favour.

32. In the premises, the Notice of Motion dated 4th December 2025 is without merit and it is hereby dismissed in its entirety with costs to the Respondent.

Dated, Signed and delivered, virtually at Thika this 2nd day of March 2026.

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J. M. ONYANGO
JUDGE

In the presence of:

Mr. Oyando for the Applicant

Mr Mwangi for the Respondent