

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**ELC LC NO 161 OF 2013**

**JOHN NJOGU MBUGUA & 78 OTHERS - INTERESTED PARTIES/ APPLICANTS**

**AND**

**CHARLES NGARUIYA & 8 OTHERS ..... PLAINTIFF/1<sup>ST</sup> RESPONDENT**

**HARAKA FARMERS LTD ..... DEFENDANT/2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF SURVEYS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a Preliminary Objection dated 12<sup>th</sup> January 2026, by the Plaintiff Respondents to the Notice of Motion dated 16<sup>th</sup> June 2025, on the following grounds:
  1. ***THAT the application is bad in law, incompetent, unsustainable, otiose, a non-starter and the same does not lie.***
  2. ***THAT the application is an abuse of the process of court and fatally defective.***
  3. ***THAT the application is res judicata as it seeks to re-open the case that has already been determined.***
  4. ***THAT the nature of the orders sought do not warrant the intervention of the court since the court is functus officio.***

5. ***THAT the Applicants are cunningly seeking to introduce matters of evidence in the new application yet they had an opportunity and occasion to do so during the hearing of the suit. .***
6. ***THAT the Application seeks to introduce new parties in the proceedings without following the laid down procedures and thereby rendering the application defective and bad in law.***
7. ***THAT the application amounts to no more than a backdoor attempt to have the case re heard and rely on matters and materials that could have been introduced at the hearing.***
8. ***THAT the Applicants are merely seeking to challenge the judgment of the court in . their application which is not the proper approach to a person aggrieved by the judgment of the honourable court.***
9. ***THAT the application is speculative and most of the prayers sought are premature and more of fishing expedition by the Applicants which if granted would amount to a fresh hearing of the case complete with submission of reports and evidence and visits by the Deputy Registrar.***

10. *THAT the application should not see the light of day under the existing adversarial legal dispensation in the country since the Applicant wish to have the court convert itself into an inquiry forum which proposition would only find footing in an inquisitorial judicial system.*
  
11. *THAT the Application seeks to have the court join in the fray and become an active participant in the dispute thereby leaving a vacuum for an adjudication.*
  
12. *THAT the application is inviting the court to participate in an exercise that would undermine the principals of separation of powers yet the court is not vested with the resources and administrative competence to engage in matters relating to survey of land as the responsibility falls in the ambit of other government departments.*
  
13. *THAT the court cannot participate in assisting parties to source for evidence as it expects the parties appearing before it to present materials before it and therefore in so far as the Applicants have not presented such evidence before the court and are rather calling upon the court to assist them in procuring information the application cannot stand.*

14. ***THAT on the whole, the application is dead on arrival and can only be struck out and/or dismissed with costs.***

**PLANTIFF/RESPONDENTS'SUBMISSIONS**

2. Counsel for the Plaintiffs filed submissions dated 26<sup>th</sup> January 2026, in respect of the Preliminary objection to the Application dated 16<sup>th</sup> June 2025, whereby the Respondent filed grounds of opposition dated 24<sup>th</sup> October 2025.
3. The Applicants in their Application dated 16<sup>th</sup> June 2025, sought the following orders:
  - a) ***Spent***
  - b) ***The Honourable court be pleased to direct the Deputy Registrar to visit the locus in quo in regard to LR Nos 6569/5 (Haraka A farm) and LR No 7819 (Haraka B farm) and file a report on the current status of the parcels and the current occupants of the position and or in the alternative the Applicants be allowed to file their own expert reports on the current status of the parcels and the current occupants of the land for consideration by the court.***
  - c) ***The Honourable court be pleased to direct the 3RD RESPONDENT- the DIRECTOR OF SURVEYS to file a report on the compliance of the order of the court issued on 12<sup>th</sup> July 2022 to the effect that "An***

*order that the director of surveys shall prepare a fresh registry index map (RIM) adopting as faithfully as possible the layout, positioning, boundaries and contents and other pertinent features of the demarcation conducted by the farm mapping unit in 1977 so as not to disturb member's developments as far as practicable and the fresh RIM shall observe the ground occupation and developments effected on the ground by the plaintiffs and all original members of the defendant company as long as that occupation is on the basis of the demarcation by the farm mapping unit done in 1977" with leave to the Applicants to cross-examine them on method.*

- d) The Honourable court be pleased to stay the publication and application of the current RIM for LR Nos 6569/5 (Haraka A farm) and LR No 7819 (Haraka B farm) in issuance of fresh titles pending the Hearing and determination of this application by the court.*
- e) The Honourable court be pleased to allow Interested Parties /Applicants to appoint their own expert survey to work in conjunction with the 3<sup>rd</sup> Respondent- the Director of Surveys in preparation of the RIM in compliance with the orders of the court on 12<sup>th</sup> July 2022.*

***f) The Honourable court be pleased to direct the 3rd Respondent the Director of Surveys to prepare a fresh RIM in conjunction with the experts appointed by the Applicants and upon preparation n of the same, the same shall be used to prepare and issue the new titles as per the orders of the court.***

***g) The costs of the application be provided for.***

4. Counsel submitted that this Honourable Court, delivered a comprehensive, final, and executable judgment in this matter, conclusively determining the rights of all parties in relation to LR Nos. 6569/5 and 7819 (Haraka A and B Farms) on 12<sup>th</sup> July 2022.
5. It was counsel's submission that the judgment, which stands undisturbed by any successful appeal or review, expressly declared the contested Registry Index Map (RIM) illegal and a nullity, affirmed the occupation rights of original members (The Plaintiffs) based on the 1977 demarcation, and issued mandatory orders for the preparation of a fresh RIM by the Director of Surveys to this effect.
6. Mr. Karanja stated that the application is a strategic ploy to reopen a case which had already been adjudicated upon, and indefinitely delay the implementation of this Court's lawful decree. It is a backdoor appeal, a disguised review, and a collateral attack on a judgment that was finalized.

7. Counsel identified two issues for determination as to whether the Preliminary Objection dated 12<sup>th</sup> January 2026 is merited, and whether the Application dated 16<sup>th</sup> June 2025 should be struck out with costs.
8. On the first issue, whether the Preliminary Objection dated 12<sup>th</sup> January 2026 has merit, counsel relied on the cases of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, and **Oraro v Mbaja [2005] eKLR**, on the definition of a preliminary objection, and submitted that this court is *functus officio*; the Application is *res judicata*; and is an abuse of the court process.
9. Mr. Karanja further submitted that the court lacks jurisdiction to entertain the issues raised in the application and relied on the case of **Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**. On the issue of *functus officio*, counsel submitted that once a court has rendered a final decision on merits, its authority over that matter extinguishes, save for the narrow exceptions of slip correction under Section 99 of the Civil Procedure Act and relied on the Supreme Court of Kenya case of **Mengineya Salim Murgani v Kenya Revenue Authority [2014] eKLR**, and the case of **Telkom Kenya Limited v John Ochanda [2014] eKLR**.
10. According to counsel, the Judgment dated 12<sup>th</sup> July 2022, was unambiguous and final which made declaratory orders and gave specific, mandatory directions to the Director of Surveys. That the current Application, which seeks orders for the Deputy Registrar to visit the locus, for the filing of "expert reports," for a stay of the current RIM,

and for the Applicants' own surveyor to work with the Director, is a "merit-based decisional re-engagement."

11. In effect, it is asking the court to re-enter the arena, supervise the implementation of its own order, and potentially arrive at findings that could contradict or vary the final judgment, which is prohibited by the doctrine of *functus officio* as was held in the Court of Appeal case of Kenya **Commercial Bank Ltd v Kuboka [2025] eKLR**. Counsel submitted that the remedy lies in an appeal.
  
12. On the issue as to whether the application is *res judicata*, counsel relied on Section 7 of the Civil Procedure Act and the case of **George Gikubu Mbutia & 3 Others v Small Enterprises Finance Ltd [2015] eKLR**, and submitted that the principle applies to interlocutory applications within a suit and not limited to the suit in general.
  
13. It was counsel's submission that the Applicants' complaint is that the RIM prepared pursuant to the Court's order does not, in their view, conform to the 1977 layout or their ground developments. Further, this is a matter pertaining to the execution or implementation of the judgment, and if they believed the Director of Surveys was misapplying the Court's order, the proper procedural channel was to seek appropriate enforcement or compliance mechanisms within the context of the existing suit, or to challenge the Director's actions separately.

14. According to counsel, bringing a fresh, substantive application seeking varied and supplementary orders is to invite this court to re-litigate an issue that was substantially dealt with in the concluded suit, hence it is *res judicata*. Counsel cited the cases of Peter **Odiwuor Ngoge t/a O.P. Ngoge & Associates v Onyango & 5 others** [2021] KESC 10 (KLR) and Florence **Seyanoi Kibera v Deborah Achieng Aduda** [2019] eKLR.
  
15. Mr. Karanja stated that the prayers seeking the court to direct the Deputy Registrar to "visit the locus in quo" and file a report, or to allow the Applicants to appoint a private expert to "work in conjunction with" the Director of Surveys, are judicial overreach, and cited the Court of Appeal case of **Ndutu & Others v Kenya Breweries Limited** [2023] KEHC 20976 (KLR), where the court in dismissing a similar post-judgment application, underscored that courts cannot convert themselves into forums for endless inquiry. The role of the Court ended with the pronouncement of judgment and the issuance of clear orders and urged the court to uphold the preliminary objection and dismiss the application dated 16<sup>th</sup> June 2025, with costs.

#### **INTERESTED PARTIES (APPLICANTS'SUBMISSIONS)**

16. Counsel filed submissions and opposed the preliminary objection vide a replying affidavit and relied on the cases of **Somoni v Muangi (Appeal E109 of 2024)** [2025] KEHC 9582 (KLR), **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696,**

**Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR, Catherine Kawira v Muriungi Kirigia [2016] eKLR , Muumbo & another (C/o Muigai Kemei & Associates Advocates) v Mwingi View Point Lodge Limited & 8 others (Environment & Land case 10 of 2023) [20241 KEELC 6921 (KLR), Mwalungu Mwambui Nyiyo & 201 others v Total Oil Products (East Africa) Limited & another (2021) eKLR, and Attorney General & another v Andrew Mwaura Githinji & another [2016] eKLR.**

17. Counsel submitted that the subject application seeks to interrogate whether the Director of Surveys followed the clear orders of the court in preparing the RIM presented before the court. The Application requires the court to make findings of fact whether the Director of Surveys has complied with the orders of the Honourable court issued on 12<sup>th</sup> July 2022, hence the issues cannot be litigated vide a preliminary Objection.
18. On the issue whether the application is res judicata, counsel relied on the cases of **Said v Principal Secretary, Ministry of Defence (Miscellaneous Civil Application E083 of 2023) [2024] KEHC 271 (KLR) (Judicial Review)** cited the case of **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi — Chairman, Samuel Njuguna Secretary Joseph Kimiri — Treasurer & 8 others v Cabinet Secretary For Transport & infrastructure & 5 others [20141 eKLR,** where it was held that a court of law always retains residual powers to implement its orders and to contend that the court has

no power to give orders whose effect would be to implement the decision given by the Court is misconceived.

19. It was counsel's submission that the assertion that this court has no powers to supervise the Director of Surveys in implementing the orders dated 12<sup>th</sup> July 2022, by the Court, is misconceived. Further that the gist of the application is therefore for the Director of Surveys to provide an after report on how and if they have complied with the orders on the court cited above hence the prayers, where the Applicant/interested parties have discovered that the discrepancies between the map as issued and the situation on the ground are widespread with members complaining of outright grabbing, being given reduced plots, encroachment and the aforementioned illegal sub-division.
20. Counsel urged the court to dismiss the preliminary objection and allow the application as prayed.

### **ANALYSIS AND DETERMINATION**

21. The issues for determination are whether the Application dated 16<sup>th</sup> June 2025 is an abuse of court process and whether the court is *functus officio*. Whether the preliminary objection has merit.
22. It is trite law that for a preliminary objection to be valid, firstly, it must raise a pure point of law. Secondly, the objection should be argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

23. In the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, Law JA stated as follows:

*“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

24. The Respondent raised the issues of *res judicata*, jurisdiction of the court being *functus officio* on the matter, which are pure points of law as defined in what a preliminary objection is. This is a matter that was heard and determined and a judgment delivered on 12<sup>th</sup> July 2022.
25. The Applicants complain that the RIM prepared pursuant to the Court's order does not, in their view, conform to the 1977 layout or their ground developments. It was counsel’s submission that application seeks to interrogate whether the Director of Surveys followed the clear orders of the court in preparing the RIM presented before the court, hence the Application requires the court to make findings of fact whether the Director of Surveys has complied with the judgment of the Honourable court issued on 12<sup>th</sup> July 2022.
26. Once the court renders a judgment with finality, it becomes *functus officio*, apart from exceptional cases where the court is dealing with mere typographical errors; the court should not re-litigate a matter that has

been heard and determined on merit. A party that has not been heard on merit can make an application for setting aside of an irregular judgment or review where they have discovered new and crucial evidence not available at the time of judgment, if there is a mistake/error apparent on the face of the record, or for other sufficient reasons.

27. This is not an application for review of the judgment, but one that wants the court to interrogate the Judgment and vary the orders by calling additional evidence from the Director of Surveys and directing the Deputy Registrar to visit the site and do a report on the status of the suit land. This amounts to reopening the case.
28. The **Black's Law Dictionary, 9<sup>th</sup> Edition** defines the doctrine of *functus officio* as:

*“[having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”*

29. Similarly in the case of **Raila Odinga vs Independent Electoral & Boundaries Commission & 3 others (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling)**, the Supreme Court while expounding on the doctrine cited 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** that:

*“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.”*

30. In the Court of Appeal in the case of **Telkom Kenya Limited Versus John Ochanda (suing on his own behalf 1990 former employees of Telkom Kenya Limited 2014 (KLR)**, the court held as follows:

*“It is apparent from the record that in ordering that certain materials be placed before him by way of affidavit long after judgment had been entered; the learned judge had the noblest and best of intentions in trying to give effect to the judgment of Mwera J. In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him. He had himself earlier acknowledged that his hands were tied and also noted that he could not amend the judgment as had been sought. The court's only recourse would have been to review the judgment and having refused to do so, it was rendered *functus officio*.”*

31. The court further enumerated the parameters of *functus officio*, that a matter must not be reopened before a court that rendered the final decision in the same matter; that a court can only exercise decision making powers once in respect of the same matter; and that this doctrine

does not apply to correction of clerical errors or where there is an error in expressing the intention of a court.

32. In the case of **Silvanus Kizito vs Edith Nkirote Mwiti [2021] eKLR**, the court held that a court does not become *functus officio* merely because it has delivered judgment, as it may still deal with incidental matters such as stay, review, settlement of the decree, and execution proceedings. This residual jurisdiction enables the court to ensure that its judgment is effectively implemented.
33. The Applicants want the court to believe that the application is for the implementation of the decree, but from the application, it is apparent that the Applicants require more than the implementation of the decree. The Applicants want the court to vary the judgment, which does not fall under the exceptions to the application of the doctrine of *functus officio*. I find that the court is *functus officio* and cannot deal with the application as drafted.
34. Having found that the court is *functus officio*, the preliminary objection is hereby upheld, and the application dated 16<sup>th</sup> July 2025 is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup>  
DAY OF MARCH 2026.**

**M. A. ODENY  
JUDGE**