

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT OF KENYA AT MILIMANI
ELCA NO. E058 OF 2025

GEORGE GITONGA MUCHIRI T/A

FANCY AUCTIONEERS

APPELLANT

REAL DEVELOPMENT COMPANY LIMITED

APPELLANT

VS

IGNATIUS MURAGE THUNGUTHA

RESPONDENT

MARY WAITHERA GIKONYO

RESPONDENT

- **1ST**

- **2ND**

- **1ST**

- **2ND**

JUDGEMENT

1. The Appellants instituted this Appeal vide the Memorandum of Appeal dated 21/3/2025. The Appellants are dissatisfied with the Ruling and the orders issued by Honourable Lucy Ambasi, Chief Magistrate, in Milimani Civil Misc. Application No. E598 of 2024 on 21/3/2025. The grounds for appeal are that;

- a. The Learned Magistrate erred in law and fact in failing to consider the submissions and evidence by the Appellants herein.
- b. The Learned Magistrate erred in law and fact in failing to appreciate that Order 1 Rule 10 of the Civil Procedure Rules 2010 on joinder of parties applies in a suit as opposed to a miscellaneous application.
- c. The Learned Magistrate erred in law and in fact in failing to appreciate that a miscellaneous application is not a pleading within the meaning of Section 2 of the Civil Procedure Act as read

together with Section 19 of the Civil Procedure Act and Order 3 (1) of the Civil Procedure Rules 2010.

- d. The Learned Magistrate erred in law and in fact by granting permanent injunction orders in a miscellaneous application without a substantive suit for determination.
 - e. The Learned Magistrate erred in law and fact by failing to appreciate the operative of Order 2 Rule 6 of the Civil Procedure Rules 2010 that temporary injunction must be anchored in a suit seeking permanent injunction.
 - f. The Learned Magistrate erred in law and fact in granting permanent orders at an interlocutory stage.
 - g. The Learned Magistrate erred in law and in fact by sitting on an appeal by reviewing its own orders in a miscellaneous application.
 - h. The Learned Magistrate erred in law and in fact by failing to appreciate that the court had become functus officio by issuance of the orders of 25/4/2024 allowing distress for rent.
 - i. The Learned Magistrate erred in law and in fact by failing to appreciate the import of Rule 9 of the Auctioneers Rules.
2. The Appellants therefore pray for orders that;
- a. The Appeal be allowed and the Ruling and Orders issued on 21/3/2025 be set aside in its entirety.
 - b. The orders issued on 25/4/2024 be reinstated.
 - c. The Respondents be condemned to pay the costs of this Appeal.
3. The background of the appeal, as noted in my Ruling of 26/6/2025, is that the 1st Appellant, having been instructed by the 2nd Appellant/Landlord, moved the Subordinate Court via the application dated 20/3/2024 seeking orders of security from the Police Officers to enable him to break in and remove all proclaimed goods or any other attached goods belonging to the Tenant, the 1st Respondent herein, so as to recover rent arrears of Kshs. 4,550,000. The application was based on the grounds that the Tenant, the 1st Respondent herein, had defaulted in payment of

rent, hence the need for distress for rent. The proclamation of goods was carried out, but the Tenant was denying access to the premises, thereby frustrating the attachment. The Appellant submitted a Lease Agreement dated 1/11/2022 between the 2nd Appellant and the 1st Respondent herein.

4. On 22/4/2024, the Court granted the Auctioneer orders to break in and remove proclaimed goods and issue a notification of sale. The orders were, however, not to be used for eviction or demolition. The orders were issued on 25/4/2024.
5. Vide the application dated 7/6/2024, the 2nd Respondent moved the Lower Court seeking to be joined as an interested party in the proceedings, a stay of execution of the orders issued on 25/4/2024, a review and/or setting aside of the said orders, among other orders. The 2nd Respondent averred that the 1st Appellant and the 1st Respondent had colluded and forcefully evicted her together with her children from the suit premises using the said orders. She further alleged that they had carted away her household items and locked her out of the premises.
6. She further stated that the 1st Respondent is her ex-husband, having dissolved their marriage on 31/5/2024. She argued that the suit property is matrimonial property and that they never remitted any rent to the 2nd Appellant/Landlord. She explained that the property is subject to matrimonial property proceedings before the High Court, specifically in Matrimonial Cause E008 of 2024, which seeks the division of the property. She affirmed that these proceedings are still pending before the High Court.
7. Upon hearing the application, the Learned Magistrate, Hon. Lucy Ambani, delivered her Ruling on 20/3/2025, in which she allowed the joinder of the 2nd Respondent herein as an interested party and stayed the execution of the orders issued on 25/4/2024. She further granted a review and/or varied the orders of 25/4/2025, in view of the fact that the orders had been used to evict the applicant contrary to the express

orders of the Court. The Court further directed the Appellants to reopen the premises and grant the 2nd Respondent herein unrestricted access thereon. The orders were issued on 21/3/2025.

8. In her Ruling, the Learned Magistrate held that the matter before her did not raise the issue of matrimonial rights over the subject property. The Court stated that it was not in any way determining the matrimonial rights of the parties to ownership of the property but rather that the application before her was for distress for rent.
9. The appeal was admitted and, by consent of the parties, was canvassed through written submissions. The Appellants' submissions are dated 30/10/2025, whereas the 2nd Respondent's submissions are dated 10/12/2025. The 1st Respondent did not participate in these proceedings.

The written submissions

10. The Appellants identified four issues for determination. The first issue is whether the trial court was functus officio when it delivered the impugned ruling. The Appellants argue that once the court granted the orders sought by the 1st Appellant under Rule 9 of the Auctioneers Rules, it became functus officio. They maintain that its jurisdiction was fully exhausted and could not be re-invoked to re-open or decide on substantive matters. They further assert that once the court had duly discharged its mandate by delivering its decision, it could not then revisit, vary, or entertain new issues in the same case. To support this, the Appellants cite the Supreme Court decision in *Raila Odinga & 2 Others -vs- IEBC & 3 Others (2013) e KLR*.
11. The Appellants assert that the miscellaneous application invoked under Rule by the 1st Appellant sought police assistance in the discharge of his statutory duty to levy distress. They argue that the purpose of such an application is to facilitate peaceful execution. It cannot give rise to a suit capable of supporting further substantive litigation. They contend that once the court orders were fully discharged, the file ceased to have any pending controversy before it. They maintain that the court became

functus officio and lacked jurisdiction to entertain a subsequent and unrelated application seeking joinder, injunctions, and substantive orders altering rights between third parties. Thus, the Learned Magistrate acted ultra vires in reopening the matter, entertaining new parties, or granting substantive reliefs.

12. The second issue concerns whether there was a proper suit to justify the issuance of the impugned orders. The Appellants argue that there was no suit within the meaning of the Civil Procedure Act. They contend that once the orders sought in the miscellaneous application were granted, no suit remained to confer jurisdiction on the court to entertain new applications. Furthermore, they assert that, pursuant to Sections 2 and 19 of the Civil Procedure Act, read together with Order 3 Rule 1 of the Civil Procedure Rules, a suit can only be instituted by way of a plaint or in such other manner as may be prescribed. They emphasise that a Notice of Motion is not an originating process but is only used for interlocutory applications within an existing suit. They accuse the subordinate court of assuming jurisdiction over the 2nd Respondent's Notice of Motion dated 6/6/2024, as the orders imply the existence of a substantive suit whose matter is pending before the court for determination.
13. The Appellants further argue that, in the absence of a suit, there can be no joinder of a party where no suit exists. They assert that without a suit, there is nothing to join. Additionally, the Appellants accuse the subordinate court of granting both temporary and permanent injunctions, which presupposes the existence of a substantive suit prior to the issuance of injunctive relief. They contend that the ruling is based on an unsustainable ground.
14. The third issue concerns whether joinder can occur in a miscellaneous application. The Appellants cite the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and argue that joinder can only be made in pending proceedings. They contend that once the miscellaneous

proceeding seeking police assistance was granted and executed, it became spent. Therefore, the purported joinder was void ab initio.

15. The final issue is whether the learned Magistrate considered the evidence that the subject property's value exceeded Kshs. 20,000,000/=. The Appellants argue that the learned Magistrate acted beyond her pecuniary jurisdiction of Kshs. 10,000,000/=. They contend that the value of the subject property exceeded Kshs. 20,000,000/=. The Appellants also assert that the learned Magistrate erred in failing to consider this fact. They urge the court to allow the appeal as prayed for in the Memorandum of Appeal.
16. The 2nd Respondent identified six issues for determination. The first issue is whether the Magistrate erred in joining the 2nd Respondent under Order 1 Rule 10 of the Civil Procedure Rules; on this first issue, the 2nd Respondent cites Order 1 Rule 10 (2), which empowers the court to join a party whose presence is necessary for the effective and complete determination of issues. She asserts that, as a co-owner and occupant of the premises, which is her matrimonial home, her rights were directly affected by orders executed against her home without her knowledge or service. Her joinder was therefore essential to safeguard her constitutional right to a fair trial under Article 50 (1) of the Constitution.
17. Regarding the grant of reliefs in a miscellaneous application, the 2nd Respondent refers to Article 159 (2)(d) of the Constitution, which mandates courts to administer justice without considering procedural technicalities. Consequently, the label "miscellaneous application" cannot exclude a court's substantive jurisdiction to issue preservative orders when a right is at risk. It was therefore appropriate for the Learned Magistrate to issue the reliefs sought to safeguard the 2nd Respondent's rights.
18. Turning to the third and fourth issues regarding whether the Learned Magistrate validly reviewed her own orders and functus officio, the 2nd

Respondent asserts that the Learned Magistrate correctly invoked the powers under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules in reviewing its own decision to correct an order that could have resulted in an injustice. The 2nd Respondent further contends that the order of 24/4/2024 was interlocutory and did not determine the substantive rights of the parties, hence the court was not functus officio. She cites the Court of Appeal case of Telkom Kenya Ltd -vs- John Ochanda (2015) e KLR, which clarified that functus officio does not prevent a court from revisiting its interlocutory orders or rectifying obvious errors.

19. Regarding whether the Appellants complied with the Auctioneers Rules, the 2nd Respondent argues that the Appellants failed to adhere to mandatory provisions of the Auctioneers Rules, 1997, including Rule 9, which requires a valid proclamation and inventory before attachment. To support this, she cites the case of Hudson Kariuki Njiru t/a Vision Auctioneers -vs- Kanyi (2024) KEHC 1187, where the court held that failure to serve a proper proclamation or prepare an inventory renders a distress process null and void and exposes the auctioneer to liability. The court further cited the Distress for Rent Act (Cap 293) and Rule 12 of the Auctioneers Rules, noting that non-compliance with these procedures strips the process of legality. She submits that the Appellants acted contrary to law and were therefore fully supported by statute and precedent. The auctioneers were permitted to conduct distress for rent but instead used the orders for eviction, contrary to the orders issued by the court.
20. The final issue is whether the ruling was against the weight of evidence. The 2nd Respondent submits that the Magistrate considered affidavits, the execution records, and the affidavit of service, and found collusion and blatant abuse of court orders, with findings based entirely on uncontroverted evidence. The Appellants have not demonstrated error in law or fact to justify interference by the Appellate Court. Accordingly,

the 2nd Respondent prays that the court dismisses the appeal in its entirety, affirms the ruling and orders of the lower court, and awards costs.

Analysis and Determination

21. I have considered the Appeal, the record of appeal and the rival submissions, I am of the considered view that the issues for determination are;
- a. Whether a miscellaneous application is a pleading
 - b. Whether the subordinate court was functus officio when it granted the orders sought by the 2nd Respondent.
 - c. Whether the Learned Magistrate erred in granting the orders issued on 20/3/2025.
 - d. Whether the appeal is merited

Whether a miscellaneous application is a pleading

22. In the case of Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR it was held that an appellate court should not readily interfere with the exercise of judicial discretion by the court appealed from unless:
- a. The judge misdirected himself in law; or
 - b. The judge misapprehended the facts; or
 - c. The judge took into account considerations which he should not have taken into account; or
 - d. That he failed to take into account considerations of which he should have taken account; or
 - e. That his decision albeit a discretionary one, was plainly wrong.
23. In determining this appeal, the court shall determine whether the subordinate court exercised its discretion judiciously by issuing the orders subject of this appeal.
24. Turning to the first issue, the Appellants argue that the Learned Magistrate erred in law by issuing substantive reliefs when there was no suit. They contend that a miscellaneous application is not a pleading, and

once the orders sought therein are resolved, the application becomes spent.

25. It is trite that pleadings form the backbone of any suit. What then is a suit? The word seems to have several meanings:

Black's Law Dictionary 7th Edition paragraph 1448 defines suit as "any proceedings by a party or parties against another in a court of law.'

26. 'Suit of a Civil nature' is defined to be a civil action. 'a Civil Action' is an action brought to enforce redress to protect a private or Civil Right.

27. Section 2 of the Civil Procedure Act defines 'suit' as all Civil proceedings, commenced in any manner prescribed. 'Prescribed' under Section 2 means prescribed by rules. 'Rules' means Rules and forms made by the Rules Committee to regulate the procedure of courts.

28. Order 3 Rule 1 (1) of the Civil Procedure Rules 2010 provides that: -
(1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

29. What is a pleading? Section 2 of the Civil Procedure Act defines pleading as follows:-

"pleading" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant;"

30. In the Tanzanian case of Salim Said Mtomekela Versus Mohamed Abdallah Mohamed, Dar-es-salaam Court Of Appeal Civil Appeal No. 149 Of 2019 (Mugasha. J.A. Kihwelq. J.A., Rumanyika. J.A p the court held: -

"Pleading in law means, written presentation by a litigant in a lawsuit setting forth the facts upon which he/she claims legal relief or challenges the claims of his opponent. It includes claims and counterclaim but not the evidence by which the litigant intends to prove his case ... That said, since the pleading is a basis upon which

the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored.

31. Section 19 of the Civil Procedure Act further provides that every suit shall be instituted in such manner as may be prescribed by the rules. From a reading of Section 19, it seems that the rules applicable to filing of suits are not only found in the Civil Procedure Rules meaning that other statutes may contain Rules on how suits will be commenced. For example, the Probate and Administration (P&A) Rules prescribe the manner in which a Succession Cause may be commenced.
32. My understanding of the above provisions and decision is that a suit can only be initiated before the court through a Plaint, Originating Summons, or Petition. I believe that miscellaneous civil applications are most appropriate for matters that are uncontested or where the parties' rights are not at issue. These applications are made when the court's discretion is sought or a procedural matter is to be endorsed. In such cases, the court is not being asked to determine any rights of the parties.
33. In the instant case, however, the 1st Appellant filed a miscellaneous application before the subordinate court seeking substantively for orders that;
 - a. This Honorable Court be pleased to grant me or my authorized agents, Police assistance into the premises occupied by Ignatius Murage Thungutha situated at along Kumbe Road, House No. 10, Karen, Nairobi for the purpose of maintaining law and order and enable me break-in and remove all proclaimed goods or any other attached goods belonging to the tenant and issue notification of sale for purpose of auctioning to recover rent in arrears totaling Kshs. 4,550,000/= plus other incidental costs of the attachment.

- b. The Officer commanding Hardy Police Station or an officer under his command do hereby give assistance for the purpose of maintain law and order.
 - c. The costs of this application be borne by the Tenant in any event
34. The Miscellaneous application is anchored on the provisions of Section 2 of the Auctioneers Act and Rule 3 (a) and (b) and 9 (1) of the Auctioneers Rules of 1997.
35. Rule 9 of the Auctioneers Rules, 1997 particularly provides that:
- 1. Where an auctioneer has reasonable cause to believe that-
 - a. He may have to break the door of any premises where goods may be seized or repossessed; or
 - b. may be subject to resistance or intimidation by the debtor or other person; or
 - c. a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.
 - 2. An application under this rule shall be by motion by way of a miscellaneous application supported by an affidavit and may be heard ex parte.
36. The Court of Appeal in the case of Speaker of National Assembly -vs- Kamau (2008) 425 held that where there is a clear procedure for seeking redress of a grievance sought to be addressed in an Act of Parliament i.e. Civil Procedure Act, that procedure should be strictly adhered to. The court stated that;
- a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure be been strictly followed.”
37. It is therefore my finding that, although a miscellaneous application is generally not a pleading suitable for use at the commencement of a suit,

where an Act of Parliament or Rules thereunder prescribe it as a form of instituting a claim, then it must be followed.

38. It is equally surprising that the Appellants are challenging their own pleadings. Nothing stopped them from moving the court in another manner if any.

Whether the subordinate court was functus officio when it granted the orders sought by the 2nd Respondent.

39. The doctrine of functus officio serves as a jurisdictional bar preventing a Court from revisiting the merits of a case, which is why it must be determined at the earliest opportunity. Without jurisdiction, the Court must discontinue its proceedings.

40. According to the Black's Law Dictionary 11th Edition, the term functus officio means;

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

41. The doctrine of functus officio was defined by the Court of Appeal in the case of Telkom Kenya Ltd -Vs- John Ochanda [2014] eKLR as follows:

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“Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon-The general rule that the final decision of a Court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”

42. In Raila Odinga -vs- IEBC & 3 Others Petition No. 5 of 2013 (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) the Supreme Court also referred to the case of Jersey Evening Post Limited -Vs- A. Thani [2002]Jlr 542 at pg. 550 where the Court stated:-

“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 functions, 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.”

43. The Supreme Court went on to hold as follows:

“It is a legal and constitutional obligation of any court, from the basic level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the court’s jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the court is satisfied and it declares as much. Even though, therefore, the court concluded the hearing of the petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the petition, remained uncompromised. The court therefore could, as it did, issue summons in the cause of its orders made during the pendency of the main hearing.”

44. The learned judges of the Court of Appeal in the case of Telkom Kenya Limited vs John Ochanda (Suing on his own behalf and on behalf of 996 Former employees of Telkom Kenya Limited) [2014] eKLR were of the following opinion:

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once a final judgment has been entered and a decree thereon

issued. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd Vs Ai Thani [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“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 functions, 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 or adjudication must be taken to a higher court if that right is available.”

45. From the foregoing authorities, it is clear that for the court to determine that it is functus officio, it must have performed all its duties and possess no further authority or legal competence because its duties and functions have been fully fulfilled. The court must also be satisfied that the judgement has been perfected.

46. In the present case, the court, upon considering the 1st Appellant’s application, issued orders on 25/4/2024. The learned magistrate directed the OCS Hardy Police Station to provide security to enable the 1st Appellant to break into the suit premises and remove all proclaimed goods or any other attached goods belonging to the tenant. Order 3 particularly stated that;

3. The officer commanding Hardy Police Station or an officer under his command do hereby give assistance for the purposes of maintaining law and order PROVIDED IT IS UNDERSTOOD THAT THIS IS NOT AN ORDER FOR EVICTION OR DEMOLITION.

47. However, while executing the said order, it turned out the Appellants flagrantly abused the issued orders and caused the eviction of the 2nd Respondent, who was occupying the subject premises and not the 1st

Respondent. Evidently, the 2nd Respondent has proprietary rights over the property, and evicting her could only be lawful according to the law.

48. Rules of natural justice require that a party be given an opportunity to be heard before a decision is made against her. It is well established that courts are the guardians of the rule of law and the defenders of the Constitution. Article 50 affirms the right to a fair hearing and also states, inter alia, that a party must be provided with sufficient time and facilities to prepare a defence and to present and challenge evidence against her.
49. The substantive powers for review of a judgement or an order made by a court are provided for under Section 80 of the Civil Procedure Act; while Order 45 of the Civil Procedure Rules 2010, provide the procedural requirements. Section 80 of the Civil Procedure Act provides that: -
- “Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
50. The Learned Magistrate, having found that her orders had been abused, judiciously exercised her discretion in reviewing the orders issued on 24/4/2024. Permitting the execution of the 24/4/2024 orders without review and including the 2nd Respondent would have caused injustice to the 2nd Respondent.
51. It is therefore my finding that there was sufficient reason for the subordinate court to review its orders. The court's intention in issuing the orders of 24/4/2024 was solely for the police to maintain law and order during the breaking-in and attachment of the proclaimed goods. The orders were not meant to be used to evict anyone.

Whether the Learned Magistrate erred in granting the orders 20/3/2025.

52. The Appellants contend that the Learned Magistrate erred in granting a temporary injunction and that she lacked the pecuniary jurisdiction to determine the matter. On pecuniary jurisdiction, the Appellants argue that the suit premises are valued above Kshs. 20 million. They state that the Learned Magistrate ignored the evidence adduced before her and proceeded to determine a dispute beyond the pecuniary jurisdiction of Kshs. 10 million of a Senior Principal Magistrate.
53. I note that the Learned Magistrate explicitly stated that she was not considering the question of matrimonial property or determining the ownership rights of the parties regarding the suit property. The matter before the court concerned the provision of security for the recovery of rent in arrears amounting to Kshs. 4,550,000/=, plus other incidental costs related to the attachment. Clearly, ownership of the suit property is not at issue before the trial court. The cause of action is based on distress for rent arrears of Kshs. 4,550,000/= plus other incidental costs of the attachment. Therefore, the assertion of lack of pecuniary jurisdiction has no valid basis.
54. Turning to the argument regarding the grant of the temporary injunction in the absence of a proper suit seeking permanent orders, I have examined the 2nd Respondent's application dated 7/6/2024. Prayer No. 6 reads as follows.
6. That the Honourable Court be pleased to grant a temporary injunction restraining the Respondents themselves, officials, agents and /or employees or whomsoever is acting on their behalf from selling, disposing or whatsoever dealing adversely with the Applicants household goods pending the hearing and determination of this Application.
55. The prayer was pending the determination of the 2nd Respondent's application. It was therefore no longer relevant by the time the Ruling was delivered. The Learned Magistrate erred in issuing a prayer that had already become spent. In any case, the 2nd Respondent's proprietary

interests concerning the proclaimed goods that had been removed were addressed by prayer 7, which was also granted.

56. Suffice it to state that, in the absence of a pending substantive suit seeking a permanent injunction, there was no justification for issuing a temporary injunction. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties. In the instant case, there was no pending suit to warrant the issuance of an interim injunction.

57. Therefore, it is my conclusion that the Learned Magistrate made an error in granting the temporary injunctive orders.

Whether the appeal is merited

58. For the reasons that I have stated in this judgement, I find that the appeal partially succeeds. Consequently, I allow the instant appeal in the following terms: -

- a. The order of temporary injunction granted as prayer 5 [five] issued on 21/3/2025 is hereby set aside.
- b. Each party shall bear its own costs of the appeal.

59. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF MARCH 2026 VIA MICROSOFT TEAMS.

**J G KEMEI
JUDGE**

Delivered online in the presence of;

1. Ms. Mwikali HB for Njeru Nyaga for the Appellants
2. Ms. Kamau HB for Swaka for the 2nd Respondent
3. N/A for the 1st Respondent
4. C/A - Ms. Yvette Njoroge

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