

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT**  
**KERUGOYA**

**ELCC NO. 10 OF 2015 (O.S)**

**ANTONY KAMAU WANJOHI** (Suing as the legal  
representative of the estate of **Wanjohi Ngando**)  
..... **APPLICANT**

**VERSUS**

**NJERI MACHARIA** (Sued as the administrator of  
the estate of **Macharia Ng'ang'a**, Deceased) ..... **1<sup>st</sup>**  
**RESPONDENT**

**BERNARD KAMAU WAGAKORU &**  
**JAMES MBUGUA WILLIAM** (sued as the legal  
representative of **Wagakoru Kamau**, Deceased) ..... **2<sup>nd</sup>**  
**RESPONDENT**

*[Notices Of Motion dated 20<sup>th</sup> February 2025 and 24<sup>th</sup> June  
2025]*

**RULING**

**Application dated 20<sup>th</sup> February 2025:**

1. Anthony Kamau Wanjohi, the applicant, filed the notice of motion dated 20<sup>th</sup> February 2025, seeking for inter alia, orders for stay of execution of the judgment delivered on

12<sup>th</sup> April 2024; leave for change of advocates; an order directing the manner of subdivision of **Land Parcel No. Kiine/Ruiru/35** in accordance with a proposed sketch map; and compensation in the sum of **Kshs. 8,825,000/=**, being half the value of developments allegedly undertaken on the land.

2. The application is premised on the grounds on its face, and supported by his affidavit sworn on the same date, deposing inter alia that pursuant to the judgment of this Court, the suit land **measuring approximately 3.8 hectares** is to be subdivided into two equal portions between the estates of Wanjohi Ngando and Wagakoru Kamau; that the family of the late Wanjohi Ngando has been in occupation of the suit land since the 1960s and has extensively developed the same; that multiple households comprising his own family, that of his brother, and their descendants reside on the land, with permanent homesteads established thereon; that they have done the detailed developments on the land, including planting coffee, eucalyptus, macadamia, and other crops, which he values collectively at over **Kshs. 17,000,000/=**, and annexes a valuation report in support thereof; that unless the subdivision is undertaken in a manner that preserves the existing homesteads, the families will suffer displacement and destruction of property; that the subdivision should be carried out in accordance with a sketch map annexed to his affidavit, which, in his view,

achieves equality while preserving occupation; that in the alternative, he contends that since the developments were undertaken by his family, the Respondents ought to compensate him to the extent of half their value before subdivision is effected; that the developments were undertaken without knowledge of any prior dealings affecting the land and that the Respondents have not been in occupation.

**Replying Affidavit:**

3. The application is opposed by the Respondents through the replying affidavit sworn by Bernard Kamau Wagakoru on the 28<sup>th</sup> March 2025, inter alia deposing that the application is incompetent for failure to comply with the procedural requirements relating to change of advocates, and that the Applicant is not properly before the Court; that the Applicant has failed to comply with prior court orders, including those issued on 17<sup>th</sup> September 2024, and is therefore undeserving of the Court's discretion; that the application as an abuse of the court process and an attempt to reintroduce, through the back door, issues that have already been conclusively determined by the Court, including a previously dismissed application for stay of execution; that there has been no hostility or obstruction on their part and the survey process has already substantially been undertaken, save for the placement of beacons; that the application is intended to delay and obstruct their enjoyment of the fruits of a valid judgment, and they urge the Court to dismiss it.

**Application dated 24<sup>th</sup> June 2025:**

4. The Respondents filed the notice of motion dated 24<sup>th</sup> June 2025, seeking for orders to facilitate the implementation of the decree issued on 23<sup>rd</sup> May 2024, including authorization for the Deputy Registrar to execute all necessary documents in place of the Applicant; an order allowing the Land Registrar to dispense with production of documents held by the Applicant; provision of police security during the survey and partition exercise, and recovery of costs associated with the process. The application is predicated on the grounds on the face of it and supported by the affidavit of Bernard Kamau Wagakoru, sworn on 24<sup>th</sup> June 2025, in which he inter alia deposed that following the judgment, the Respondents took steps to implement the decree, including engaging a surveyor and involving local administration; that these efforts were met with resistance from the Applicant, including alleged threats of violence during attempts to mark boundaries; that the Applicant has failed and/or refused to execute essential documents, including those required for Land Control Board consent, survey processes, and registration, and has declined to surrender the title; that the respondents actions have frustrated the implementation of the decree, necessitating the Court's intervention to compel compliance and ensure execution proceeds.

## **Replying Affidavit:**

5. The application is opposed by the Applicant through his replying affidavit sworn on 8<sup>th</sup> October 2025, in which he deposed to among others that he is willing and ready to execute all necessary documents and facilitate the partition process; that he has not refused to cooperate and contends that the Respondents have not demonstrated any instance of refusal or neglect on his part sufficient to warrant invocation of coercive mechanisms such as execution by the Deputy Registrar; that the application is unnecessary and unmerited, save for the request for provision of security during the partition exercise, which he does not oppose.
6. Both applications were canvassed together through written submissions. The learned counsel for the Applicant filed their submissions dated 9<sup>th</sup> October 2025, on both applications, submitting inter alia that the Applicant's application is properly before the Court, as the issue of representation has been regularized pursuant to **Order 9 Rule 9 of the Civil Procedure Rules.**

Counsel further invoked the Court's inherent jurisdiction under **Sections 1A, 1B and 3A of the Civil Procedure Act**, urging that the Court retains power to issue directions necessary to ensure that its judgment is implemented in a manner that does not occasion injustice.

The counsel submitted that the Applicant's family has been in long occupation and has extensively developed the land, and that equity demands either preservation of the homesteads through a structured subdivision or compensation for the developments. In respect to the Respondents' application, counsel submitted that there is no basis for invoking **Section 98 of the Civil Procedure Act** as the Applicant has not refused to execute documents, and that the application is therefore unwarranted, save for the provision of security.

7. The learned counsel for the Respondents filed their submissions on both applications dated 16<sup>th</sup> July 2025 inter alia maintaining that the Applicant's application is an abuse of process and an attempt to reopen matters already determined by the Court. They submitted that the Court is functus officio on the issues of subdivision and parties' respective shares, and cannot vary its judgment under the guise of implementation.
8. They further submitted that the Applicant has been obstructive and unwilling to facilitate execution, thereby justifying the orders sought in their application, including execution of documents by the Deputy Registrar.
9. The following are the issues arising in both applications for the court's determination:

- a. *Whether the application dated 20th February 2025 is properly before the Court.*
  - b. *Whether this Court can, at the stage of execution, direct the mode of subdivision of Land Parcel No. Kiine/Ruiru/35 or order compensation for developments thereon.*
  - c. *Whether the Respondents have made out a case for the invocation of Section 98 of the Civil Procedure Act and related facilitative orders in the application dated 24th June 2025.*
10. The court has carefully considered the grounds on the two applications, affidavit evidence by both sides, submissions by the parties' learned counsel and comes to the following conclusions:
- a. The Respondents challenged the competency of the application dated 20<sup>th</sup> February 2025, on the basis that counsel for the Applicant was not properly on record, as there has been no compliance with **Order 9 Rule 9 of the Civil Procedure Rules. Order 9 Rule 9** provides that where there is a change of advocates after judgment, such change shall not be effected without leave of the Court or consent between the outgoing and incoming advocates.
  - b. The record shows that the application dated 20<sup>th</sup> February 2025 was a composite application which,

among other prayers, sought for leave for the **firm of Mbugua Waihiga & Co. Advocates** to come on record in place of the previous advocates. **Order 9 Rule 10** permits such a composite application, but requires that the question of representation be determined first.

From the proceedings on record, the prayer for leave for the counsel to come on record was canvassed and allowed by the Court. The effect of that order is that the **firm of Mbugua Waihiga & Co. Advocates** is properly on record for the Applicant. In the circumstances, the objection as to competency cannot be sustained.

- c. The question of whether this Court can, at the stage of execution, direct the mode of subdivision of **Land Parcel No. Kiine/Ruiru/35** or order compensation for developments thereon, goes to the core of the Applicant's application. The Applicant invites the Court to do two things: first, to direct that the subdivision of the suit land be undertaken in accordance with a proposed sketch map so as to preserve existing homesteads; and secondly, to order compensation for developments allegedly undertaken on the land. The starting point is the judgment of this Court delivered on 12<sup>th</sup> April 2024, in which the Court conclusively determined the

parties' respective interests on the suit property and ordered that **Land Parcel No. Kiine/Ruiru/35** be subdivided into two equal portions between the estates of Wagakoru Kamau and Wanjohi Ngando. That determination settled both the question of entitlement and the extent of shares.

d. The doctrine of *functus officio*, as articulated by the Supreme Court in the case of **Raila Odinga & 2 Others versus IEBC & 3 Others (2013) eKLR**, is that once a court has performed its function and rendered a final decision, it cannot revisit the merits of that decision, save as provided by law. The Court stated that:

***“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."***

- e. What the Applicant seeks, though framed as a matter of implementation, in substance invites the Court to reconfigure the manner in which the decree is to be realized, and in effect to introduce considerations that were not part of the judgment, namely preservation of homesteads and compensation for developments thereon. In my view, directing the specific manner of subdivision beyond the decree of equal division would amount to varying the judgment. The decree did not provide for a conditional or structured subdivision based on occupation patterns, nor did it reserve the issue for later determination.

Similarly, the claim for compensation for developments is not an incidental question of execution. It is a substantive claim grounded in an alleged investment in the land. To entertain it at this

stage would be to introduce a new cause of action or reopen matters that ought to have been canvassed at trial.

- f. Even when viewed through the lens of equity, the Court cannot ignore the fact that the Applicant has admitted through the depositions filed that he has been in occupation of the entirety of the suit land, including the portion adjudged to belong to the Respondents. Equity does not aid a party to derive benefit from a position that is inconsistent with the rights of another as declared by a court of law.

The Court's inherent powers under **Sections 1A, 1B and 3A of the Civil Procedure Act** are not a licence to revisit or vary a final judgment. They exist to facilitate the ends of justice within the framework of the law, not outside it. Accordingly, the applicant's prayers seeking to direct the mode of subdivision and for compensation are not tenable.

- g. Through the application dated 24<sup>th</sup> June 2025, the respondents seeks for the intervention of this Court under **Section 98 of the Civil Procedure Act** to authorize execution of documents by the Deputy Registrar, and to dispense with production of documents, on the basis that the Applicant has failed

and/or refused to cooperate in the implementation of the decree.

**Section 98 of the Civil Procedure Act** empowers the Court to step in where a party has refused or neglected to execute documents necessary to give effect to a decree. The jurisdiction is therefore coercive in nature and must be exercised upon clear demonstration of non-compliance.

h. In the present case, the Respondents have deponed to difficulties encountered in the execution process, including alleged hostility and lack of cooperation by the applicant. However, the material placed before the Court does not disclose a clear and unequivocal refusal by the Applicant to execute any specific documents. Significantly, the Applicant has now, through his deposition on record, expressed willingness to execute all necessary documents to facilitate the partition. In those circumstances, the ends of justice would be better served by granting the Applicant a defined opportunity to comply with the decree, by among others executing the necessary documents.

11. That having come to the foregoing conclusions on the two applications, the court finds and orders as follows:

**a. That the applicant's notice of motion dated 20<sup>th</sup> February 2025 is without merit and is dismissed with costs.**

**b. The respondents' notice of motion dated 24<sup>th</sup> June 2025 is meritorious and is allowed in the following terms:**

**i. That the Applicant is directed to execute all necessary documents required to give effect to the decree herein within thirty (30) days from the date of this ruling.**

**ii. In default of such execution, the Deputy Registrar of this Court shall upon lapse of the thirty days be authorised to execute all such documents on behalf of the Applicant, and the same shall be deemed as valid and binding as if executed by the Applicant himself, pursuant to Section 98 of the Civil Procedure Act.**

**iii. That the O.C.S Baricho Police Station shall provide security, upon payment of any applicable official fees if any, to ensure the peaceful implementation of the decree.**

**iv. The respondents are granted costs.**

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 15<sup>TH</sup>  
DAY OF APRIL 2026.**

**Kibunja**

**JUDGE**

**In the presence of:**

Applicant -

Respondents -

Kinyua - Court Assistant

**Kibunja**

**JUDGE**

**S. M.**

**ELC**

**S. M.**

**ELC**