

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**KITALE**  
**ELC NO. 103 OF 2008**

**MANSUKHALAL JESANG MARU--DECREE**  
**HOLDER/APPLICANT**

**VERSUS**

**FRANK WAFULA-----JUDGMENT**  
**DEBTOR/RESPONDENT**

**RULING**

1. Through an application dated **19/9/2025**, the decree holder seeks an order that the OCS Kitale Police Station offer security to Lifewood Traders Auctioneers, together with the County Surveyor, during the eviction process of the judgment debtor from Land Title No. **Kitale Municipality Block 12/26** measuring **0.5532 Ha**.
2. The reasons are contained on the face of the application and on a supporting affidavit of Mansukhlal Maru, sworn on **19/9/2025**. The applicant deposes that after judgment on **16/10/2023**, in his favour, and a decree issued thereto, the respondent appealed to the Court of Appeal, whose judgment was delivered on **11/10/2024**, dismissing the appeal.

3. The applicant deposes that an application seeking certification to the Supreme Court was also dismissed by the Court of Appeal. Despite all these, the applicant deposes that the respondent is still on the decreed land in defiance of the decree, hence the need for eviction.
4. The applicant deposes that people are trying to interfere with the title on the map as per the letter dated **1/8/2025**, attached as annexure **MJM-(4)**. The applicant says that he has appointed an auctioneer as per annexure marked **MJM-(5)**, hence the need for the reliefs sought.
5. The application is opposed through a replying affidavit and preliminary objection dated **9/10/2025**, sworn by Frank Wafula. The respondent, while he admits that the decree issued on **16/10/2023** had given him **15** days to exit the land, failure of which he would be evicted, he says that after **23** months, the decree holder is yet to comply with **Order 22** of the Civil Procedure Rules and **Section 152B, C, E, and F** of the Land Act.
6. The respondent deposes that on **2/10/2025**, the Hon C.J. empowered a five-bench of the Supreme Court to determine his **Originating Motion No. E012 of 2025**, as per attached copies marked **FW-1(a)** and **(b)**, seeking leave to appeal and stay of

execution on account of conflicting judgments over the same parcel of land.

- 7.** The respondent deposes that whereas the Court of Appeal dismissed his appeal on **11/10/2024**, it did not invalidate or render useless the 1<sup>st</sup> decree rendered on **11/12/2015** and a consent decree adopted on **17/1/2022**, as per annexures marked **FW-2(b)**. It is deposed that neither of the two decrees has been set aside or appealed against; hence, they remain final, binding, and enforceable.
- 8.** The respondent deposes that the consent decree was validly entered with the full approval of the County Surveyor and the Trustees of Kitale Club in their capacity representing the plaintiff, being a life member No. **310**, and other members of the Club. The respondent deposes that the trustees of Kitale Club entered into a consent with him over **L.R. No. 2116/1124**, claiming his entire land, hence it binds the plaintiff.
- 9.** In view of that, the respondent deposes that the applicant cannot post judgment assert and is estopped from taking a contrary position from that consent decree, which he benefited from or failed to object to its adoption at the time. The respondent terms the notice of motion as inconsistent with the consent decree and an abuse of the court process.

- 10.** The respondent attached annexure **FW-(3)**, a copy of a replying affidavit at the Supreme Court by the applicant. The respondent terms the application as offending the judicial hierarchy and risks relitigating matters presently subjudice before the Supreme Court, which is likely to render a conflicting decision.
- 11.** The respondent deposes that on **23/6/2025**, this court issued a formal order closing this file after an earlier execution application was withdrawn, as per a copy annexed as **FW-(4)**, hence the present notice offends the order and invites the court to reopen a skeleton file.
- 12.** The respondent deposes that the applicant had previously kept the suit in abeyance to await the outcome of **Kitale CMC No. 334 of 2011**, as per annexure marked **FM-(5)**, which now shows abuse of process. The respondent deposes that the forfeiture notice dated **31/1/2011** issued to the plaintiff by the Land Registrar, extinguished any leasehold interest of the plaintiff, then **14** years ago, which has never been set aside as per annexure marked **FW-(6)**.
- 13.** The respondent deposes that the County Surveyor confirmed that his **L.R. No. 2116/1124** was not converted to **Kitale Municipality Block 12/26** and remains intact, and this court issued an order to the

said County Surveyor on **30/5/2018**, consistent with that position, as per annexure marked **FW-(7)**. The respondent deposes that in paragraph **206** of the judgment dated **16/10/2023**, it was established that the purported conversion lacked a gazette notice or lawful conversion instrument and was directly contradicted by the survey and court record.

**14.** The respondent deposes that the applicant misled the court to make a finding that a grant for **L.R. No 211/1124** did exist on **27/3/1992**. The respondent deposes that in paragraph **206** of the judgment, it was observed that there is no operative decree and cannot lawfully extinguish or override the existing final and binding decree alluded to above.

**15.** The respondent deposes that paragraph **206** is a mere *obiter dictum* and cannot nullify a consent decree or vested proprietary rights recognised under **Article 40** of the Constitution.

**16.** The respondent deposes that the applicant is under active investigation by the DCI, regarding the authenticity of land registration documents he used to obtain the judgment of this court, as per the letter dated **6/2/2025** and a response dated **20/2/2025**, attached as **FW8(a)** and **(b)**.

**17.** The respondent deposes that the applicant, having disclaimed the existence of **L.R. No. 2116/1124**

Kitale Municipality, lacks *locus standi* to litigate or seek an eviction order or derive title through an irregular judicial pronouncement of conversion. The respondent deposes that he stands to suffer prejudice and loss of his property if the application is allowed, after the initial one was withdrawn without leave to refile. The respondent says that in view of non-compliance with the execution law, “the closed order”, pending proceedings at the Supreme Court, and the previous binding consent decree, this application is an abuse of the court process.

**18.** The respondent deposes that under **Sections 59** and **60** of the Evidence Act, documents herein being official communication from the DCI and the Government Printers, there is no need for formal proof, and so is the consent decree and decree alluded to above, for this court to admit them.

**19.** In the preliminary objection dated **9/10/2025**, the grounds are that:

**(1)** *This court lacks jurisdiction post judgment to entertain the notice of motion dated **19/9/2025**, owing to the existence of a parallel and final decree in **Kitale CMCC No. 334 of 2011**, and in view of the pending ruling before a five-judge bench of the Supreme Court, in Originating Motion **No. E012 of 2025**, which is seized of constitutional and jurisdictional questions arising from the same subject matter.*

- (2) The application is barred by the doctrine of res judicata and amounts to an abuse of the court process in light of the existing final and unappealed first-in-time decree in **Kitale CMCC No. 334 of 2011** and the consent decree in **Kitale ELC No. 165 of 2014**, both conclusively determining proprietary rights between the same parties over the same property.
- (3) The notice of motion offends the doctrine of subjudice and constitutional avoidance, since the constitutional questions raised are now properly before the Supreme Court and fall outside the purview of a single judge bench of this court.
- (4) The plaintiff's application is incompetent, incurably defective, and incapable of conferring any lawful orders.
- (5) The notice of motion is defeated by the forfeiture notice (statutory notice) dated **31/1/2021** served by the District Land Registrar under the repealed Land Registration Act, Cap **300**, which extinguished any proprietary interest the plaintiffs purport to rely on in seeking eviction orders and which remain unchallenged and valid in law.
- (6) The judgment and decree dated **16/10/2023** are unconstitutional, procedurally void, and unenforceable for violating **Articles 40 and 50** of the Constitution by disregarding prior valid decrees that conclusively determined proprietary rights between the same parties.
- (7) The court is functus officio pursuant to the order issued on **23/1/2025**, formally closing the file and cannot lawfully reopen or re-adjudicate matters already determined.

- 20.** What the applicant is seeking is post-judgment assistance in the execution of a decree of this court dated **19/10/2023**, which was affirmed by the Court of Appeal on **11/10/2024**. The respondent opposes the same since there are rival bidding decrees, there is non-compliance with **Order 22** of the Civil Procedure Rules, and **Section 152 B, C, E, and F** of the Land Act. The respondent also says that there are pending proceedings at the Supreme Court; hence, this court should observe judicial hierarchy.
- 21.** As a starting point, withdrawal of a previous application of this nature and marking the file as closed in law did not act as a bar to the applicant from moving the court with a fresh post-judgment application to effect the decree of this court. The court, therefore, finds the objection unmerited.
- 22.** Coming to the preliminary objection. It has to align with established jurisprudence requiring preliminary objection to be based on settled legal points compatible with undisputed facts as held in **Salat - vs- Independent Electoral and Boundaries Commission & 7 others [2015] KESC 31 (KLR), Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & Others [2012] eKLR, Hassan Nyanje Charo -vs- Khatib Mwashetani & 3 others [2014] eKLR, Mukisa Biscuits Manufacturing Company Ltd -vs- West End**

**Distributors Ltd (1969) EA 696**, and in **Independent Electoral and Boundaries Commission -vs- Cheperenger & 2 others [2018] KESC 46 (KLR)**.

23. In **Oraro -vs- Mbaja [2005] eKLR**, the court said that a preliminary objection based on disputed facts or requiring evidence to sustain it does not fit the description alluded to in the cited case law. Grounds Nos. **(1)**, **(5)**, and **(6)** of the preliminary objection dated **9/10/2025** require ventilation by way of evidence.

24. *Res judicata* cannot be brought by way of a preliminary objection without reference to the pleadings, proceedings, judgments, rulings, or orders in the former suit, for the court to establish if elements under **Section 7** of the Civil Procedure Act, as held in **Maina Kiai & 2 others -vs- Independent Electoral and Boundaries Commission & 2 others [2017] [2017] KEHC 8646 (KLR)**, have been established.

25. What is before the court is an application for assistance in the execution process, after a successful judgment and decree, which the respondent has been unable to overturn on appeal. This court has no ruling on a similar application determined on merits, over the same issues, by a competent court, for the applicant to be said to be

seeking a second bite of the cherry, because the same court has already litigated over such issues.

**26.** Coming to *subjudice*, judicial hierarchy and constitutional avoidance, the respondent has not attached copies of pleadings showing that what is before the Supreme Court generally and in particular, whether the instant application or reliefs prayed for are also before the Supreme Court.

**27.** All that the respondent has attached is a communication of a ruling notice from the Apex Court. It is therefore not possible for this court to establish what is before the said court. Equally, the court has not been supplied with a stay of execution or stay of proceedings order from a higher court stopping the court from enforcing its decree.

**28.** In ***Independent Electoral & Boundaries Commission -vs- Cheperenger & 2 others [2015] KESC 2 (KLR)***, a preliminary objection based on incompetence, laches, lack of merit and the appeal being overtaken by events was disallowed by the Supreme Court, ruling that it was improperly being used as a sword rather than a shield to preclude the Independent Electoral and Boundaries Commission from the appellate justice and for not raising a pure point of law.

**29.** The court said that a preliminary objection must be a pure question of law which is not based on

contested factual disputes or touching on the exercise of discretion or requiring back up by way of evidence. The court said that the established jurisprudence requires that preliminary objections be based on settled legal points compatible with undisputed facts.

**30.** The respondent has also raised the issue of *sub judice*, whose aim is to prevent a conflicting decision by different courts. *Sub judice* is governed by **Section 6** of the Civil Procedure Act. It is invoked by establishing that there is more than one suit over the same subject matter pending in the same or any other court having jurisdiction to grant the relief claimed.

**31.** In ***Kenya National Commission on Human Rights vs Attorney General & Others [2020] eKLR***, the Supreme Court said:

“The term *subjudice* is defined in Black’s Law Dictionary, 9<sup>th</sup> Edition as ‘Before the court or judge for determination.’ The purpose of the *subjudice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same subject matter.” The court said that where two similar suits are filed, the latter

in time ought to be stayed in order to allow the determination of the one filed earlier.

- 32.** The court said that a party that invokes the doctrine must therefore establish that there is more than one suit over the same subject matter, the other suit was instituted before the other, that both suits are pending before courts of competent jurisdiction, and lastly, that the suits are between the same parties or their representatives.
- 33.** In this application, the respondent has not availed before this court copies of proceedings and pleadings showing that there is before a competent court a similar application for execution, over the subject matter before a competent court, with the other suit or application preceding the instant application.
- 34.** The next doctrine invoked is *stare decisis*, or the hierarchy of courts. This doctrine was discussed in **Geoffrey M. Asanyo & Others -vs- Attorney General [2020] eKLR**. The court said that under **Article 163(7)** of the Constitution, other than the Supreme Court, all courts are bound by the decision (s) of the Supreme Court.
- 35.** In **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & Others [2014] eKLR**, the court held that **Article 163(7)** of the Constitution was the

embodiment of the time-hallowed common law doctrine of *stare decisis*, holding that the precedents set by the Supreme Court are binding on all other courts of the land, whose utility and purpose as a constitutional imperative for the administration of justice is that the authority of decision be scrupulously respected by all courts upon which they are binding. The court said that without the doctrine, the administration of justice would become disordered, uncertain, and would undermine public confidence; that law which has been pronounced should be accepted and applied as the tradition requires.

**36.** In this application, the respondent has not availed anything to show that after his appeal and an application for certification of the matter as of public importance was rejected by the Court of Appeal, there is a substantive petition and an application for stay of execution and proceedings of this court at the Apex Court.

**37.** Jurisdiction is primordial in every suit. It has to be there when a suit or application is filed, as held in **Phoenix of E.A. Assurance Co. Ltd -vs- S.M. Thiga t/a Newspaper Service [2019] KECA 767.** If there is a stay order from the Apex Court, then this court would be said to be acting against stare

decisis or without jurisdiction. This court is a creature of **Article 162 2(b)** of the Constitution and the Environment and Land Court Act. It has the power to enforce the execution of its decree and orders unless the same have been stayed or set aside by a higher court than itself. See **Kenya Hotels Properties Ltd -vs- Attorney General & Others [2022] KESC 62 [KLR]**.

**38.** Lodging of a notice of appeal or proceedings before a higher court does not automatically stop or stay the execution of the judgment of a high court. There is no evidence that the Supreme Court, under **Section 23A** of the Supreme Court Act, has exercised its jurisdiction to order a stay of execution, injunction, or stay of proceedings or any other conservatory or interim orders, in favour of the respondent. See **Kenya Airports Authority -vs- Otieno, Ragot & Company Advocates (Petition. (Application) E011 of 2023) [2023] KESC 56 (KLR) (Civ) (16 June 2023) (Ruling)**.

**39.** The last two issues invoked by the respondent are that *res judicata* and there are other pending decrees, such that if the execution of the instant decree of this court is allowed, there will be a conflict.

**40.** The issue of *res judicata* was raised as a preliminary issue before the judgment of this court and dwelt with by a ruling dated **2/3/2023**. It was also declined in the judgment of the Court of Appeal at paragraph **55**. The issue of DCI investigations was also raised on appeal at paragraph **53** of the judgment. The same case applies to the conversion of title deeds at paragraph **53** of the Court of Appeal judgment.

**41.** Looking at all the foregoing issues raised both as a preliminary objection and in the replying affidavit, the same do not answer as to the justification why the respondent, in the absence of a stay order, is on the suit land already decreed to the applicant by a valid decree of this court affirmed by the Court of Appeal.

**42.** The upshot is that I find the application dated **19/9/2025** merited. It is allowed with costs.

**43.** Orders accordingly.

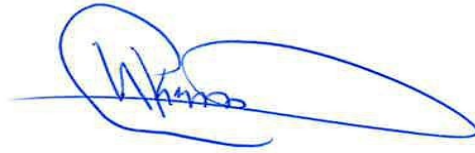
**Ruling dated, signed, and delivered** via **Microsoft Teams/Open Court** at **Kitale** on this **29<sup>th</sup>** day of **April 2026**.

**In the presence of:**

Court Assistant - Dennis

Imainata for Nyamu for the applicant present

Wafula in person present



**HON. C.K. NZILI  
JUDGE, ELC KITALE.**

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