



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

COUNTY COURT NAME: MOMBASA ENVIRONMENT AND LAND COURT

CASE NUMBER: ELCC/6/1972

RUWA MWAMUNDA MWANJEMO AND NDORO KALAMA SHAIB AND 4 OTHERS VS JONATHAN  
NJENGA KAGIRI AND 9 OTHERS

#### RULING

This ruling is in respect of three applications dated 3rd September, 2025, 11th September, 2025 and 15th September, 2025. The application dated 3rd September, 2025 was filed by the 1st Applicant and sought the following orders:

- a. Spent
- b. Spent
- c. Spent
- d. This Honorable Court be pleased to review and set aside the judgment delivered on 15/5/2014, decree issued on 24/7/2014, order issued on 24/7/2014, warrants of eviction given on 17/12/2014, fresh decree issued on 2/12/2024, order issued on 2/12/2024, warrants of eviction given on 2/12/2024, order issued on 12/6/2025 and all other consequential orders arising from the judgment of 15/5/2014.
- e. Costs of this Application be provided.

The application is supported by the annexed affidavit of Trevor Irungu Kanja, sworn on 3rd September 2025. He deponed that he is the director of the applicant who was not a party to the suit and was not otherwise heard before the judgment of 15th May, 2014, the consequential decrees and or the order of 12th June, 2025 were made despite the Applicant at all material times being a registered owner of the sub-division of the suit property formerly known as Sub-Division No. 6802 (Original Sub-Division Number 4187/2.) He asked the court to grant the orders sought.

The Plaintiffs filed Grounds of Opposition dated 6th September, 2025. They stated that this Honourable Court dealt with the issue of the sub-division of the suit land whereby plot numbers MN/1/4186 CR NO 17043 and MN/1/4187 CR 17042 each measuring 17,24 acres. The Plaintiffs stated that the sub-division was done on 26th November, 1984 and it was unlawful being in contempt of existing court orders issued on 21st November, 1972. They stated that on 18th October,



2000, the court reiterated that the Court orders of 21st November, 1972 were still in force. The Plaintiffs stated that the sale of land to the Applicant was against the doctrine of *lis pendens*.

Jumwa Katana Ruwa, the 5th Plaintiff, filed Replying Affidavits dated 15th August, 2025, 5th September, 2025 and 27th October, 2025. The 5th Plaintiff deponed that the suit land belongs to the Plaintiffs and the Title deed issued to Jonathan Njenga Kagiri was obtained fraudulently. He deponed that the Applicant traces its title from a fraudulent transaction and cannot benefit from such a background. It was his deposition that the 1st, 2nd and 3rd Defendants were parties to this suit and they testified confirming that they stole the land from the Plaintiffs. He deponed that the person who sold the land to the Applicant was heard by this Honourable Court and the Applicant cannot claim to have been condemned unheard.

He deponed that when the case was filed, the land had not been subdivided and the subdivision was done while there were court orders. It was his deposition that the Applicant is not a party to this suit and cannot cause the Judgment to be set aside. He asked the court to allow them to benefit from the fruits of their judgment.

Monica Wanjiru Mburu, an administrator of the 2nd Defendant's Estate, filed Replying Affidavit dated 28th October, 2025. She deponed that she does not object to the applications filed by the Interested parties /Applicants in the applications dated 3rd September, 2025, 11th September, 2025 and 15th September, 2025.

The 2nd and 3rd Applicants filed a Notice of Motion application dated 11th September, 2025 and sought the following orders:

- a. Spent
- b. Spent
- c. Spent
- d. THAT the Honourable court be pleased to set aside the judgment and decree of this court issued on 24th July 2014, re-open the proceedings and allow the applicants to file and serve defence, witness statements and bundle of documents and to participate in the trial.
- e. THAT the certificate of Title issued on 3.7.2025 over CR NO 7981/1 (Plot LR No. 423/1/MN) be cancelled forthwith.
- f. THAT the costs of the application be provided for.

The application is supported by the annexed affidavit Idris Zoeb Kurban Hussein Ezzi sworn on 11th September, 2025. He deponed that he is a Director and shareholder of the 2nd Applicant company. He deponed that the trial judge was aware about the existence of parties who had acquired land from the 1st, 2nd and 3rd Defendants. He deponed that steps should have been taken to register the court order against the original plot and the resultant subdivisions, the amendment of the plaint to include the purchasers and an advertisement about the existence of this suit in the daily Newspapers. He deponed that had this happened, the applicants would have moved the court before judgment. He asked the court to set aside the judgment.

The Plaintiffs filed Grounds of Opposition dated 27th October, 2025. They stated that the applicants are claiming to be innocent purchasers for value without notice yet the root of their respective titles is illegal. They stated that the judgment of this Honourable Court has already been executed and the court is *functus officio*.

The 4th, 5th, 6th and 7th Applicant's filed a Notice of Motion application dated 15th September,



2025 seeking the following orders:

- a. Spent
- b. Spent
- c. Spent
- d. The Court proceedings, Judgment dated 15.05.2014 the Decree extracted therefrom, and the Orders given on 11.06.2025 and issued on 12.06.2025 in the matter be reviewed and set aside.
- e. The provisional certificate of title issued in favour of JUMWA KATANA RUWA the 5th Plaintiff pursuant to a judgment dated 15.05.2014 and Court Order of 11.06.2025 for the land known as TITLE NO. CR 7981, PLOT NO. 423//MN be revoked and nullified from the Land records forthwith.
- f. The costs of the application be provided.

The application is supported by the affidavit of Abdulhakim Abeid Khamis sworn on 15th September, 2025. He deponed that the applicants acquired various parcels of land as innocent purchasers for valuable consideration without notice on diverse dates from Troyka Limited. He deponed that there having been knowledge of existence of third parties with proprietary interest in the sub-divisions who were affected by the Court proceedings and decision there has been an infringement on the right to fair hearing for failing to effect pleadings on the interested parties. He deponed that an inquiry was made to the Law Society of Kenya on the Law firms/Advocates indicated to have participated in practice in the early 1970's and based on the response dated 11th September, 2025, a number of advocates and/or law firms shown to have participated in the proceedings of 1972 (Ben Ochieng & Compnay and Sultan Fadhil & Company) were not then in existence. It was his deposition that the alleged court proceedings, judgment, decree and orders are fraudulent, null and void. He asked the court to grant the orders sought.

Jumwa Katana Ruwa, the 5th Plaintiff, filed a Replying Affidavit dated 2nd October, 2025. He deponed that this case was fully heard and judgment was delivered. He deponed that all the Applicants were aware of the case as the Plaintiffs were forcefully evicted from the suit premises with the last brutal action by the 1st, 2nd and 3rd Defendants having taken place sometimes in 2013. He deponed that they were forced to file this case to pursue their rights and they have been waiting for over fifty years.

#### 1ST APPLICANT'S SUBMISSIONS

Counsel for the 1st Applicant filed submissions dated 4th November, 2025 and identified the following issues for determination:

- a. Whether the order of 16th September, 2025 joining the Applicant to the suit after the judgment of 15th May, 2014 was lawful?
- b. Whether the Applicant has locus standi to apply for review of the order of 12th June, 2025, judgment of 15th May, 2014 resulting decrees and all consequential orders?
- c. Whether there are sufficient reasons for reviewing and setting aside the judgment delivered on 15th May, 2014 resulting decrees issued on 24th July, 2014 and 2nd December, 2024 and all consequential orders including the order issued on 12th June, 2025?

On the first issue, counsel submitted that the order of 16th September, 2025 joining the Applicant to the suit after the judgment of 15th May, 2014 is not lawful. Counsel submitted that there were no proceedings to which the applicant and other persons could be lawfully joined as judgment had



already been delivered eleven years earlier. Reliance was placed on the cases of Everton Coal



Enterprises Limited vs Karanja & 5 others [2023] KESC 98 (KLR), JMK vs MWM & another [2015] KECA 524 (KLR) and Absolom Opini Mekenye vs James Obegi [2018] KEELC 596 (KLR).

On the second issue, counsel submitted that the applicant being a person considering himself aggrieved, the Applicant has sufficient locus standi to apply for review of the order of 12th June, 2025, the judgment of 15th May, 2014 and the resulting decrees and all consequential orders. Counsel relied on the provisions of Order 45 Rule 1 (1) of the Civil Procedure Rules. On the third issue, counsel submitted that the Applicant was not heard before the judgment, resulting decrees and all consequential orders were made despite the Applicant at all material times being a registered owner of the sub-division of the suit property. Counsel relied on the cases of Alton Homes Limited & another vs Davis Nathan Chelogoi & 5 others [2020] eKLR, David Oloo Onyango vs Attorney General [1987] eKLR and Law Society of Kenya vs Attorney General & another [2019] KESC 16 (KLR). Counsel urged the court to allow the application dated 3rd September, 2025 with costs.

#### 2ND AND 3RD APPLICANTS SUBMISSIONS

Counsel for the 2nd and 3rd Applicants filed submissions dated 28th October, 2025. Counsel submitted that the judgment is void and should be set aside for failure to join the Applicants as Defendants which condemned the Applicants unheard. Counsel submitted that the Applicants derive their title from the line of the 2nd Defendant who died many years before the judgment was delivered. Counsel submitted that the consequence of this is that by the time the judgment was delivered, the suit against the 2nd Defendant had abated.

Counsel submitted that the court is faced with a judgment which has cancelled title deeds of individuals because they derive title from the Defendants. Counsel submitted that the judgment against the 2nd Defendant is null and void and there is nothing positive which can emanate there from. Counsel asked the court to allow the application as prayed. Reliance was placed on the cases of Phoenix of E.A Assurance Company Limited vs S.M Thiga t/a Newspaper Service (Civil Appeal 244 of 2010) [2019] KECA 767 (KLR), James Kanyiita Nderitu and another vs Marios Philotas Ghikas & Another 2016 KECA 470 (KLR), Ngare vs Ogamba [2025] KEELC 6952 (KLR), Kenya Farmers Co-operative Union Limited vs Charles Murgor (Deceased) T/A Kaptabei Coffee Estate [2005] KEHC 1743 (KLR), JMK vs MWM & Another 2015 KECA 524 (KLR), Central Kenya Ltd vs Trust Bank & 4 others, CA No 222 of 1998 and Funzi Development Ltd & others vs County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR.

#### 4TH, 5TH, 6TH AND 7TH APPLICANT'S SUBMISSIONS

Counsel for the 4th, 5th, 6th and 7th Applicants filed submissions dated 4th November, 2025. Counsel submitted that the 2nd Defendant died on 24th September, 1999 and the 3rd Defendant died on 18th January, 1988. Counsel submitted that the Court orders on the Plaintiff's Notice of Motion dated 11th March, 2025 that directed the Land Registrar to reconstruct the Land Registry records in respect of Parcel No. MN/II/423 CR 7981 and issuance of Provisional Title to Jumwa Katana Ruwa were on the basis that there was service including on the said two Defendants of an application made through Osundwa & Company Advocates for the Plaintiffs.

Counsel submitted that the said service is said to have taken place on 11th September, 2024, 18th March, 2025, 20th May and 22nd May 2025 which is untenable as the said Defendants were long deceased. Counsel submitted that the Plaintiff's pleadings were filed by unqualified persons under the Advocates Act. Reliance was placed on the cases of Peterson Ndung'u & 5 others vs Kenya



Power & Lighting Co. Ltd [2018] eKLR, Chumo Arap Songok vs David Kipyego Rotich [2006] eKLR and Benjamin Macfoy vs United Africa Company Limited [1961] 3 ALL ER pg 1169-1173. Counsel submitted that the court record is not in tandem with the known practice of recording court proceedings.

Counsel went on to submit that the Applicants as the registered owners of thirty-two parcels were not in any way involved or served to be heard before their titles were cancelled/interfered with. Counsel submitted that the right to be heard is not subject to limitation according to the Constitution of Kenya. Counsel relied on the cases of Alton Homes Ltd & Another vs Davis Nathan Chelugoi & 5 others [2020] eKLR and Tarak Khawaja & 5 others vs The Registrar of Societies & 9 others [2017] eKLR. Counsel asked the court to grant the orders sought.

#### PLAINTIFFS SUBMISSIONS

Counsel for the Plaintiffs filed submissions dated 4th November, 2025. Counsel summarized the issues raised in the three applications as follows:

- a. Whether the suit was filed in Court?
- b. Whether the Advocates who handled this case were qualified?
- c. What is the root of the Applicant's titles?
- d. Whether the Applicants are innocent purchasers?
- e. Whether the Judgment and decree should be set aside?

Counsel submitted that this case was filed and duly heard. Counsel submitted that all advocates appeared before the Honourable Judges. Counsel informed the court that the parties who appointed their advocates have not denounced them. Counsel submitted that in 1972, there were few practicing Advocates such that there was no room for one to pass-off as an Advocate without being noted.

It was Counsel's submission that it is evident that the 1st, 2nd and 3rd Defendant's wives were aware about this suit. Counsel submitted that the 1st Defendant Jonathan Njenga Kagiri obtained the land fraudulently. Counsel submitted that the Applicants have explained that they bought the land while this case was pending and there were orders of injunction against the 1st, 2nd and 3rd Defendants restraining them from sub-dividing, selling and or transferring the land. Counsel further submitted that the three defendants disobeyed the Court orders and decided to sell the land. Counsel submitted that setting aside the Judgment in order to hear the Applicants is futile.

The Plaintiffs counsel went on to submit that there was no appeal against the Judgment of this Honourable court. Counsel submitted that the alleged death of the 2nd and 3rd Defendant's does not affect the Plaintiff's claim and the main protagonist of the fraud is the 1st Defendant. It was counsel's submission that that applicants have no other evidence on how Jonathan Njenga Kagiri got the land and they have no defence to the Plaintiff's claim that Jonathan Njenga Kagiri stole the land. Reliance was placed on Article 40 of the Constitution of Kenya and Section 26 of the Land Registration Act. Counsel urged the court to dismiss the applications as they are the product of an illegal transaction that was nullified by the Court.

Counsel relied on the following cases: Women Finance Trust vs Salome Wathaka Kinyua & Rahab Njeri Civil Appeal No 180 of 2012 [2019] KEHC 1301 KLR, T.J.F Kajwang vs Law Society of Kenya (2002) KEHC 1141 KLR, National Bank of Kenya Limited vs Anaj Warehousing Limited, Kyalo Komu vs Felix Maliti Mulimgata, Kitui Civil Appeal No 22 of 2017, Katende vs Haridas and Company



Limited EA LR (2008) 2 EA 173, Albert Mae Gacie vs Attorney General & 4 others (2006) eKLR, Arthi Highway Developers Limited vs West End Butchery Limited & 6 others (2015) KECA 816 KLR, Dina Management Limited vs County Government of Mombasa & 5 others (2023) KESC 30 (KLR), Munyu Maina vs Hiram Gathiha Maina, Nyeri Civil Appeal No 341 of 1996, John Otieno Obade & 299 others vs Teresia Wairimu Kirima & Ann Wangari Kirima (2023) KEEC 20868 (KLR), East African Portland Cement Co Ltd & 6 others vs Kathilu & 322 others [2024] KEELC 7095 (KLR), Commissioner for Human Rights and Justice & Another vs Ibrahim Mwanje Nzai & another Mombasa ELCPET/16/2021 and Musau vs Muleu & 3 others (2024) KEELC 7397 (KLR).

#### ANALYSIS AND DETERMINATION

The issue for determination is whether this court should set aside or review the judgment delivered on 15th May, 2014 the resulting decrees and all consequential orders?

Order 45 of the Civil Procedure Rules 2010 states:

“45. 1(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order may apply for a review of judgment to the court which pass the decree or made the order without unreasonable delay”

Similarly, Section 80 of the Civil Procedure Act states as follows:

“80. 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.”

The Plaintiffs contend that the judgment of this Honourable Court has already been executed and the court is functus officio. The Supreme Court in Odinga v Independent Electoral & Boundaries Commission & 3 others [2013] KESC 8 (KLR) stated as follows on the doctrine of functus officio; “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”

The Court of Appeal in *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] KECA 600 (KLR) held as follows; “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.”

In the case of *Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006* cited with approval the case of *Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR* the Court of Appeal held as follows:

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

The applicants contend that they had a right to be heard and they ought to be enjoined in the suit before any decision was rendered. In the case of *Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998* the Court of Appeal held that:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the Applicant was denied the right to defend itself. The Applicants were notified on every step the Respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the Applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the Applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

The 5th Plaintiff has informed this court that the person who sold the land to the 1st Applicant was heard by this Honourable Court and the 1st Applicant cannot claim to have been condemned unheard. The Plaintiffs contend that the 1st, 2nd and 3rd Defendant’s wives were aware about this suit and the 1st Defendant Jonathan Njenga Kagiri obtained the land fraudulently. Counsel for the Plaintiffs informed this court that the Applicants have explained that they bought the land while this case was pending and there were orders of injunction against the 1st, 2nd and 3rd Defendants restraining them from sub-dividing, selling and or transferring the land. In the case of *Ruaha Concrete Company Limited & 2 others v Paramount Universal Bank Ltd & 2 others* [2009] KEHC 2095 (KLR), the Court enumerated the fundamental principles of non-disclosure of material facts as follows:

- a) the Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
- b) The duty of disclosure therefore applies not only to material facts known to the Applicant but also



- to any additional facts which he would have known if he had made sufficient inquiries.
- c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.
  - d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application.
  - e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
  - f) Finally, it is not every omission that the injunction will be automatically discharged

I find that the Applicants herein ought to be heard. The Plaintiffs herein cannot claim that since the 1st Defendant was already a party to the suit, there was no need for the Applicants joinder. Consequently, I issue the following orders:

- a. The Judgment dated 15th May, 2014 the Decree extracted therefrom, and the Orders given on 11th June, 2025 and issued on 12th June, 2025 in the matter are hereby set aside.
- b. The parties herein shall file and serve their trial bundles and the court shall hear the matter be heard on the 21st 22nd to 24th July 2026. Mention on 13th May 2026 for further directions.
- c. Each party shall bear their own costs in respect of the applications dated 3rd September, 2025, 11th September, 2025 and 15th September, 2025.

SIGNED BY/FOR:  
HON. JUSTICE ANTONY O. OMBWAYO

