

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CIVIL SUIT NO. 192 OF 2017

**HUDSON KIHUMBA WANGUHU & 17
OTHERS....PLAINTIFFS**

VERSUS

**PAUL RICHU & 4 OTHERS as officials of THOME V
RESIDENTS WELFARE ASSOCIATION.....1st**

DEFENDANT

NAIROBI CITY COUNTY.....2nd

DEFENDANT

RULING

1. Before this court is the Applicant's Notice of Motion dated 18th September, 2024 brought pursuant to the provisions of **Article 159 (1)(c) of the Constitution, Section 1A& 3A of the Civil Procedure Act, CAP 21 and Order 46 Rule 20 of the Civil Procedure Rules** seeking the following reliefs:

- i. The court be pleased to refer the matter to a court appointed mediator.***
- ii. This Honourable Court do allow the applicants to reinstate temporary gates and other security measures pending the determination of mediation.***
- iii. This Honourable Court give such other or alternative orders as it may deem fit.***

iv. That costs be provided for.

2. The Motion is supported by grounds set out on the face thereof and supported by the affidavit of Mr Kimani Mbugua, the Chairman of the Applicant association.
3. He deponed that judgment in this matter was delivered on 30th May 2024 in favour of the Respondents and that vide the aforesaid judgment, the court ordered the Applicants to remove the gates and barriers on all public access roads within the estate until such a time that they were able to get written approval from the City County of Nairobi.
4. It was deposed that in the second part of the judgement, the court directed the Respondents, the residents of Thome V Estate and the Applicants to engage in a mediation process with the aim of reaching an agreement on the terms of the use of the barriers.
5. According to Mr Kimani, despite the foregoing, in purported execution of the judgment, the Respondents brought bulldozers and took down the gates, gate houses, toilets and other security infrastructure causing extensive damage to the tune of Kshs.513,200 and that the removal of the gates and barriers has exposed residents of Thome V Estate to heightened insecurity, leaving them vulnerable and apprehensive in the absence of any effective security measures.
6. He further stated that the Applicant through its officials has made efforts to engage the residents of Thome V Estate with a view to reaching a consensus on the

reinstatement of the gates. To that end, residents were invited to sign a resolution for presentation to the Nairobi City County Government and that out of the 116 property owners within the estate, 93 have expressed support for the reinstatement, including some of the Respondents in this matter.

7. He added that, despite these efforts, attempts to engage the Respondents through their advocates has been unsuccessful, with the overtures declined and that this is a fit case for exercise of the court's unfettered discretion to refer the matter for mediation for the parties to have a lasting and appropriate resolution to the dispute.
8. In response, the Respondents, through Anthony Kereu Murage, swore a replying affidavit on 29th October 2024. He deponed that following the delivery of judgment on 30th May 2024, the Applicant disregarded the court process, much as it had done during the hearing when its officials failed to attend court or tender any evidence.
9. He explained that their advocates forwarded a draft decree to the Applicant, but the same was ignored; that the decree was thereafter presented to the court for approval and execution, and upon being duly signed, it was served upon the Applicant's advocates both electronically and by way of hard copy on 4th July 2024 and that the Applicant took no steps to comply with or obey the decree, and equally ignored calls from their own advocates to implement the court's orders, including the removal of the gates and barriers as directed.

- 10.** Consequently, it was deposed, the Respondents took the initiative to supervise execution of the decree, which was carried out on 18th July 2024, when, under police supervision, all the unlawfully erected gates and barriers were fully removed.
- 11.** He further deposed that, instead of complying with the court's orders by settling the awarded costs and engaging the Respondents in good faith, the Applicants have proceeded as though the judgment does not exist. He contended that they have unilaterally passed resolutions and purported to bind the Respondents thereto, despite the subsisting court decree.
- 12.** According to him, this conduct demonstrates a deliberate disregard of both the court's process and its judgment, as evidenced by the Applicant's continued unilateral actions, including attempts to involve the Chief's office to facilitate the return of the gates in direct contravention of the court's orders.
- 13.** He added that the Applicant's proposal, as reflected in their meeting minutes, to reinstall the gates is not only misguided but unlawful, there being no court order authorising their reinstatement following their removal pursuant to the judgment of this court. He questioned whether, in the Applicants' view, administrative structures such as the sub-county administration could lawfully override or supersede a valid and binding court order.

- 14.** Mr. Murage, submitted that the present application is nothing more than an attempt to improperly draw this court back into a matter that has already been conclusively determined, with a view to aiding them in disregard of the judgment.
- 15.** He emphasized that the Applicant has consistently failed to comply with the court's directions, particularly the requirement to engage all stakeholders, and now seeks to impose its will under the guise of mediation. He maintained that the Respondents cannot be compelled into a mediation process at the unilateral instance of the Applicant.
- 16.** He urged that the court, having rendered its judgment, is now *functus officio* and cannot be invited to reopen the matter or issue fresh orders inconsistent with its final determination, and that the only outstanding issue is costs.
- 17.** On the allegation of insecurity, it was contended that the same is unfounded and merely advanced to elicit sympathy. It was submitted that no incidents of insecurity have been reported and that, on the contrary, residents are currently enjoying greater freedom and ease of movement within the estate. The previous regime, it was argued, had effectively subjected residents to unwarranted control, with the gates being used as instruments of extortion and harassment.
- 18.** In conclusion, it was deponed that the application has been overtaken by events, fails to meet the threshold for the grant of discretionary relief, and ought to be dismissed

with costs and that any attempt by the Applicants to reinstall the gates, as proposed in their meeting minutes, would be unlawful in the absence of a court order authorising such action, and cannot be justified on the basis of any administrative intervention purported to override the orders of this court.

19. No submissions were filed. [As at 1st April, 2026]

Analysis and Determination

20. Having considered the pleadings, the issues that arise for determination are whether this court is *functus officio*, and if not, whether an order referring the matter to mediation is merited.

21. The Applicant asks this court to refer the matter to mediation. The Respondents contests this asserting that this court, having delivered its judgment on 30th May 2024, is *functus officio* and therefore lacks jurisdiction to entertain the present application or grant any of the orders sought.

22. The **Black's Law Dictionary, 9th Edition** defines *functus officio* as:

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

23. In **Odinga vs Independent Electoral & Boundaries Commission & 3 others (Petition 5, 4 & 3 of 2013)**

[2013] KESC 8 (KLR) (Civ) (24 October 2013)
(Ruling), the Supreme Court while expounding on the doctrine cited an excerpt from an article by Daniel Malan Pretorius, in **“The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,”** [2005] 122 SALJ 832 that:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

24. From the foregoing, it is evident that the doctrine of *functus officio* is a well-settled principle of law aimed at safeguarding the finality of judicial decisions. Once a court has discharged its adjudicative mandate and rendered a final determination, its authority over the matter is exhausted, and it cannot reopen or revisit the same, save in the limited instances expressly provided for by law.
25. Nonetheless, like with all principles, there are exceptions. These were highlighted by the court in **Mombasa Bricks**

& Tiles Ltd & 5 Others vs Arvind Shah & 7 Others
[2018] eKLR, thus:

“I understand the doctrine, like its sister, the res-judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file...There are several proceedings that can only be undertaken after judgment and not before. The following are just but examples; Application for stay; Application to correct the decree; Application for accounts; Application for execution including garnishee applications;

Applications for review; Application under section 34 of the Act.

If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice.”

- 26.** The court is so guided.
- 27.** By way of a brief background, the Plaintiffs, now Respondents, instituted the suit seeking, *inter alia*, permanent injunctive relief restraining the 1st Defendants/Applicants from erecting or maintaining barriers, including gates, walls and other obstructions on public access roads within Thome V Estate, and a declaration that such barriers were unlawful.
- 28.** Their case was that, as registered proprietors within the estate, they had enjoyed unhindered access to their properties until the Applicant erected gates on public roads and imposed conditions, including mandatory financial contributions, even upon residents who were not members of the association. They contended that these actions infringed their constitutional rights, including the right to property, freedom of movement, and fair administrative action.
- 29.** Upon hearing the matter, this court found that Thome V Estate was not established as a gated community and that

the residents had independently acquired and developed their properties. The court further found that the Applicant's association, although established for legitimate purposes such as security, could not impose mandatory membership or financial obligations upon unwilling residents, or erect barriers on public roads without lawful authority and inclusive participation.

- 30.** Consequently, the court declared the gates and barriers erected on the public roads within the estate to be illegal and unlawful, and ordered their removal. The court also stated thus:

“That the 1st Defendant to remove the gates and barriers on all the public access roads within the Estate until such a time that it gets written approval of the 2nd Defendant, and the Plaintiffs and the majority of the residents of Thome V, including non-members of the 1st Defendant, through a mediation process, with the aim of reaching an agreement on the terms of the use of the barriers.”

- 31.** The Applicant has anchored the present application on this portion of the judgment, arguing that the court directed the parties to pursue a consensual resolution process, including mediation.
- 32.** A plain reading of the judgment, however, does not support that interpretation. While the judgment conclusively determined the rights of the parties, the court observed

that, given the nature of the dispute, the relationship between the parties, and the practical realities arising from the judgment, there remained room for a consensual resolution on certain aspects of implementation.

- 33.** It is in that context that the court referred to engagement or alternative dispute resolution mechanisms. Those observations were merely advisory in nature, made in furtherance of the court's constitutional duty to encourage alternative dispute resolution, and did not amount to a binding or enforceable order.
- 34.** It is important to distinguish between a formal directive of the court and a general recommendation. Where a court specifically orders parties to undertake a defined process, such as court-annexed mediation, failure to comply may properly invoke the court's supervisory or enforcement jurisdiction, since the court retains limited authority to ensure obedience to its orders. In the present matter, however, no such directive was issued.
- 35.** It must also be reiterated that alternative dispute resolution processes are voluntary and dependent on the goodwill and genuine participation of the parties. In the circumstances, the court cannot compel any of the parties to do so.
- 36.** Ultimately, the court finds that the present application is, in substance, an attempt to reopen matters that were conclusively determined by the judgment of the court. The reliefs sought do not fall within any of the recognised

exceptions to the doctrine of *functus officio* and are therefore untenable.

37. Accordingly, the Notice of Motion Application dated 18th September, 2024 is found to be unmerited and is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 30th day of April, 2026.

O. A. Angote
Judge

In the presence of;

Mr. Wachira holding brief for Mbigi for Applicant

No appearance for Respondent

Court Assistant: Tracy