

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT NAKURU**  
**ELC (OS ) NO.5 OF 2023**

**BENARD CHEPKWONY**

.....**PLAINTIFF**

**VERSUS**

**JOHNAH KIBET TERER.....DEFENDANT**

**SAMWEL KIPLANGAT MUTAI .....INTERESTED  
PARTY**

**R U L I N G**

1. This ruling is in respect of the Notice of Motion dated 19<sup>th</sup> December 2025 brought under **Section 1A 1B, 3A & 63 (3) of the Civil Procedure Act and Order 51 (1), Order 22 Rule 22, Order 10, Rule 11, Order 1 Rule 10 and all other enabling provisions of the Law).**
2. It Seeks orders:-
  1. Spent
  2. Spent
  3. That the Honorable Court be pleased to set aside the Judgement dated 8<sup>th</sup> April 2025.

4. That the Honorable Court be pleased to enjoin the Applicant as an interested party to the Originating Summons.
  5. That the costs of the application be provided for.
  6. That any other Order which the Honorable Court may deem fit and fair.
3. The grounds are on the face of the Application and are set out in paragraphs a to k.
  4. The application is supported by the Affidavit of Samwel Kiplangat Mutai sworn on the 19<sup>th</sup> December 2025.
  5. The Application is opposed. There are grounds of opposition filed by the Plaintiff/Respondent dated 7<sup>th</sup> March 2026.
  6. The Notice of motion was canvassed by written submissions.

### **THE APPLICANT'S SUBMISSIONS**

7. They are dated 2<sup>nd</sup> April 2026. Counsel submitted that the Applicant has resided on the land since 1997. That he was not aware that the Plaintiff had filed the Originating Summons against the Defendant claiming adverse possession.
8. It is submitted that a judgment and/or decree can be varied by the Court through its inherent Power. Reliance is placed on **Order 10 rule 11 of the Civil Procedure Rules, Order 12 rule 7 of the Civil Procedure Rules and Articles 50(1) ,159 (2) (a) of the Constitution of Kenya, 2010.**

9. It is further submitted that the Plaintiff did not serve him with the pleadings knowing very well he was on the land. That he became aware of the judgment of the court through the neighbours.
10. It is also submitted that the caveat by the government of Kenya is still in place hence, the judgment did not take into account how the judgment will affect the Applicant.  
Reliance is placed on the cases of ***Onyango Vs Attorney General (1987) KECA 56 (KLR); Kenneth Kipkemboi Settlem & Another Vs National Social Security Fund, the Board of Trustees (2014) eKLR.***
11. It is submitted that the Applicant should not be denied an opportunity to present his evidence as regards his occupation.  
Further, that the court is not *fuctus officio* as it has power to hear any application after judgment to prevent an injustice.
12. It is submitted that the Applicant is in occupation of 3 ½ acres of the land which is the subject herein and that this fact has not been controverted.
13. It is also submitted that no prejudice will be suffered by the Plaintiff if the judgment is set aside. He prays that the application be allowed.

## **THE PLAINTIFF'S /RESPONDENT'S SUBMISSIONS**

14. They are dated 18<sup>th</sup> March 2026. They set out three issues for determination: -

- (a) Whether or not the Judgment of this honorable Court delivered on the 8<sup>th</sup> April 2025 ought to be set aside.
  - (b) Whether or not the Applicant has met the legal threshold for joinder as an interested party to these proceedings.
  - (c) Who should bear the costs?
15. It is submitted that though **Order 1 rule 10 (2) of the Civil Procedure Rules** allows for joinder of parties, the proceedings herein have been concluded. That the court is *functus officio*. Reliance is placed on the case of ***Telkom Kenya Limited Vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd (2014) eKLR***.
16. It is submitted that a prayer for joinder made after delivery of judgment is legally untenable as there are no subsisting proceedings into which a party may be joined. Reliance is placed on the cases of ***Trusted Society of Human Rights Alliance Vs Mumo Matemu & 5 Others (2014) eKLR; Francis Karoki Muruatetu & Another Vs Republic & 5 Others (2016) eKLR***; where the Supreme Court reiterated that an interested party must demonstrate that their interest will not be adequately represented by the existing parties and that their participation will assist the Court in determining the issues on controversy.

17. It is submitted that the Applicant's claim that he is occupying 3 ½ acres of the land has not been demonstrated. That the Deputy Registrar through a site visit on the 15<sup>th</sup> January 2025 established that the plaintiff was in exclusive possession of the land.
- Further that the delay in bringing this application has not been explained as the judgment was delivered on the 8<sup>th</sup> April 2025.
18. It is also submitted that there is a pending appeal in the Court of Appeal preferred by the Defendant.
19. It is submitted that the Applicant lacks the *locus standi* to seek review or setting aside of the judgment, Reliance is placed on the case of ***Otieno, Ragot & Company Advocates Vs National Bank of Kenya Limited (2020) eKLR.***
20. It is submitted that the Applicant's proper recourse, if any, lies on instituting a separate suit to ventilate his claim, Reliance is placed on the case of ***JMK Vs MWM & Another (2015) eKLR;***
- It is submitted that the application has not met the conditions set out in **Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules.**
21. Further that the Applicant's lack of participation in these proceedings cannot be a basis for setting aside a judgment to which he was not a party

Reliance is placed on the case of ***Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 Others (2014) eKLR*** .

22. The Plaintiff prays that the application be dismissed with costs.

## **ANALYSIS AND DETERMINATION**

23. I have considered the Notice of Motion, the Affidavit in support their response thereto, the written submissions and the Authorities cited. The issues for determination are:

**(i) Whether the applicant ought to be joined as an interested party to these proceedings?**

**(ii) Whether the judgment delivered on the 8<sup>th</sup> April 2025 ought to be reviewed and/or set aside.**

**(iii) Who should bear costs of the suit?**

24. **Order 1 rule 10 (2) of the Civil Procedure Rules** provides as follows: -

**(2)The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or**

**whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**

25. It is the Applicant's case that he is in occupation of 3½ acres of the subject land. It is also his contention that the Plaintiff failed to disclose to the Court who was actually in occupation.
26. It should be noticed that there are no subsisting proceedings pending before this court. Judgment was delivered on the 8<sup>th</sup> April 2025 and the Defendant has already preferred an appeal to the Court of Appeal.  
Even if the Applicant was to be joined in the proceedings, who will be litigate with?  
The judgment herein cannot be a subject of both appeal and review.
27. The Applicant's claim that he is in occupation of 3 1/2 acres of the land is neither here nor there. The Honorable Deputy Registrar visited the site on the 15<sup>th</sup> January 2025 and confirmed the Plaintiff was in occupation if indeed the Applicant was in occupation of most of the land then he would have noticed the Court on site and set the record straight. His claim that the Plaintiff failed to disclose his occupation is neither here nor there. The photographs he has annexed do not demonstrate that they are on the suit property.

28. I agree with the Plaintiff's/Respondent's submission that this court is *factus officio* having delivered judgment on the 8<sup>th</sup> April 2025. An appeal has been preferred against the said judgment.

The Applicant has the option of applying to be enjoined in the said Appeal as an interested party under the Court of Appeal rules.

29. In the case of ***Telkom Kenya Ltd Vs John Ochanda*** (supra) the Court held thus;

*“factus official is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon”.*

I am guided by the above authority in finding that there is nothing further for this court to do as the proceedings have concluded.

30. I also find that the conditions set out under order 45 rule 1 of the Civil Procedure Rules have not been met. I am not convinced that the only way the Applicant can ventilate his claim is by setting aside the judgment.

31. In conclusion I find no merit on this application and the same is dismissed with costs to the Plaintiff/Respondent.

**Ruling dated, signed and delivered virtually at Nakuru this 13<sup>th</sup> day of May 2026.**

**L. KOMINGOI**

**JUDGE**

**In the presence of :-**

Mr. Mutai for the Plaintiff

Mr. Wanjir for the Defendant

No appearance for the Proposed Interested Party

Court Assistant: Derick