REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCL APPEAL NO. E032 OF 2024

LUCAS OTIENO OTIENDE.....1ST APPELLANT

DAKAN ODHIAMBO OKUMA.....2ND APPELLANT

PAUL OTIENO OKEYO.....3RD APPELLANT

JARED OTIENO AYOO.....4TH APPELLANT

MILDRED GUMBO.....5th APPELLANT

JENIFFER ODHIAMBO GUMBO..... 6TH APPELLANT

VERSUS

MICHAEL ODHIAMBO DACHE.....1ST RESPONDENT

KISUMU DISTRICT LAND REGISTRAR.....2ND RESPONDENT

KISUMU DISRICT LAND SURVEYOR..... 3RD RESPONDENT

THE COMMISSIONER OF LANDS.....4TH RESPONDENT

THE ATTORNEY GENERAL..... 5TH RESPONDENT

J U D G E M E N T

Introduction

1. A brief background to the appeal herein as can be gathered from the record of appeal filed herein is that the 1st Respondent filed a suit namely; Kisumu CM ELC NO.266 of 2018 (the suit) against the 2nd, 3rd, 4th and 5th Respondents vide the plaint dated 5th February, 2013 first filed in the Environment and Land

Court as Kisumu ELC CASE NO.21 OF 2014 but later transferred to the Chief Magistrate's Court at Kisumu. The subject matter of the suit was a road of access, of which the 1st Respondent complained that the same had been unlawfully created across his land parcel No. KISUMU/KOGONY/5551 by the 2nd, 3rd, 4th, and 5th Respondents without any justifiable cause and/or consent.

2. He therefore sought for orders of permanent injunction restraining the 2nd, 3rd, 4th and 5th Respondents from trespassing on his land and from opening up the access road illegally created on the parcel of land, an order directing the 2nd, 3rd, 4th and 5th Respondents to amend Registry Map sheet No.5 of Kogony Registration section by deleting or removing the access road illegally created over his land parcel No. KISUMU/KOGONY/5551, general damages for trespass, mesne profits, costs of the suit, and interest on the general damages and costs from the date of filing the suit till payment in full.
3. The record shows that in response to the claim in the plaint, a Statement of Defence dated 8th July, 2014, was filed on behalf of the 2nd, 3rd, 4th, and 5th Respondents by the Attorney General denying the claim. It was asserted on behalf of the 2nd, 3rd, 4th, and 5th Respondents that they carried out their duty in

accordance with the law and that at all times, the registered proprietor of the land gave instructions for the sub-division, and that the sub-division was carried out by private surveyors and not a government surveyor.

4. The 2nd, 3rd, 4th, and 5th Defendants denied causing any act of trespass and averred that all their actions carried out in respect of land parcel No. KISUMU/KOGONY/5551 were above board and in furtherance of their duty. The 2nd, 3rd, 4th, and 5th Respondents urged the court to dismiss the suit.
5. The record shows that the suit was heard before the trial court, which vide the judgement 31st May, 2023, found that 1st Respondent had demonstrated that he was entitled to the orders sought save for the prayers for general damages for trespass and mesne profit. The court entered judgment in favour of the 1st Respondent and against the 2nd, 3rd, 4th, and 5th Respondents for an order of permanent injunction, an order directing the 2nd, 3rd, 4th, and 5th Respondents to amend the Registry Map sheet No.5 of Kogony registration area by deleting and/or removing the access road illegally created over land parcel No. KISUMU/KOGONY/5551 and awarded costs of the suit to the 1st Respondent and interest thereon from the date of the judgment to the date of payment in full.

6. The Appellants were not parties in the suit. However, according to their averments in the Supporting Affidavit sworn by LUCAS OTIENO OTIENDE on 27th May, 2024, the Appellants, who claim to be owners of land neighbouring the suit land and beneficiaries to the impugned public access road, were not notified and/or involved in the suit. That they were not granted an opportunity to be heard in the case and to put in a sufficient defence. So, they brought an application vide the Notice of Motion dated 27th day of May, 2024 seeking orders, inter alia, that they be joined in suit, an order setting aside the judgement dated 31st May, 2023 and all consequential orders arising therefrom, an order setting aside the proceedings so that the matter be set down for hearing de novo and an order that costs of the application be in the cause.
7. The application, which was brought under a certificate of urgency, was supported by the Supporting Affidavit of Lucas Otieno Otiende and the annexures thereto. The record shows that the 2nd, 3rd, 4th, and 5th Respondents did not oppose the application. It shows further that although Counsel for the 1st Respondent sought more time to file a response to the application, the same was not granted, so no response was filed by the 1st Respondent to the application.

8. The record shows that the trial court delivered its ruling on 12th June, 2024, wherein it found that, given the judgment by the court on 31st May, 2023, the court was functus officio and unable to issue the orders sought and proceeded to strike out the application with no orders as to costs.

The appeal

9. Aggrieved by the ruling dated 12th June, 2024, the Appellants preferred the present appeal vide the Memorandum of Appeal dated 11th June, 2024, which was later amended and substituted with the amended Memorandum of Appeal dated 3rd day of July, 2025 on the grounds that;

    i. The learned Magistrate of the trial court erred in law and fact in finding that it was functus officio when;

        (a) The application sought orders for stay of execution and subsequently the setting aside of the judgment delivered by the court on 31st May, 2025, a decision which was rendered without their participation.

        (b) The Appellants were not parties to the original suit, yet the impugned decision

ordered the closure of a public road on which they rely for access to their homes.

As such, they were condemned unheard, contrary to the rules of natural justice.

(c) The doctrine of functus officio did not bar the court from considering the application dated 5th June, 2024.

(d) Being users of the access road, it was certain that the outcome had serious ramifications on their ability to access their homes but the 1st Respondent intentionally failed to include them as Defendants or notify them of the proceedings.

ii. The learned Magistrate of the trial court erred in law and in fact in striking out the application dated 5th June, 2024, despite having the discretion to set aside the judgment in the interest of doing justice to all parties, including the Appellants herein.

iii. The learned Magistrate of the trial court erred in law in misapplying the doctrine of functus officio in the circumstances.

iv. The learned Magistrate of the trial court erred in law and in fact in failing to consider the application and the evidence on record, thereby arriving at an erroneous determination.

10. The Appellants therefore seek orders that;

(i) The appeal be allowed, the ruling and order issued on 11th June, 2024, by the learned Magistrate be set aside;

(ii) The judgment and resultant decree of the Magistrates' court delivered on 31st May, 2023, be set aside.

(iii) The 1st and 2nd Appellants be joined in Kisumu ELC NO. 266 of 2018, Michael Oginga Dache -vs- Kisumu District Land Registrar and 3 Others as Defendant, and the matter be set down for hearing de novo.

Submissions

11. Pursuant to directions given by the court on 18th November, 2025, the appeal was heard by way of written submission.

Submission by the Appellant

12. Written submissions dated 17th December, 2025, were filed by G & A Advocates LLP on behalf of the Appellant. Counsel framed 3 issues for determination in the appeal, namely;

a) Whether the trial court misapplied the doctrine of functus officio in striking out the Appellants ' application dated 5th June, 2024, as being functus officio

b) Whether the trial court erred in failing to exercise its discretion judiciously by striking out the application dated 5th June, 2024.

c) Whether the trial court's decision of striking out the Appellant’s application infringed on the Appellant’s right to be heard.

13. Counsel submitted that the doctrine of functus officio exists to prevent a court from re-litigating matters already determined between parties. Relying on the case of *Odinga -vs- IEBC & 3 Other (Petition 5, 4, & 3 2013 Consolidated (2013) KESC 8 (KLR)* which cited with approval an excerpt from the article by Daniel Malan Pretorius in “The Origin of the functus officio doctrine with specific reference to its application in administrative law (2005) 122 SALJ 832”, Counsel submitted that the doctrine of functus officio does not bar a court from entertaining a case it has already decided but prevents it from

revisiting the matter on a merit based re-engagement once the final judgement has been entered. That the court retains residual jurisdiction to entertain post-judgment applications such as the one filed in these proceedings.

14. Counsel submitted that the Appellants contend that the 1st relief sought in the application dated 5th June, 2024, was an order of stay of execution and setting aside of the judgment delivered on May, 31st, 2023. That the court retained the jurisdiction to consider the application, and by striking out the application on the grounds that it had become functus officio, the trial court erred in its application of the doctrine.

15. On whether the trial court erred in failing to exercise its discretion judiciously by striking out the application dated 5th June, 2024, Counsel submitted that the principles upon which a court may grant an order of stay of execution and setting aside of judgement are that the Applicants ought to demonstrate that they stand to suffer substantial loss unless the order sought is made and that the applicants have given such security as the court orders for the due performance of such decree. That as for setting aside, the court has unfettered discretion to set aside a judgment on such terms as it deems fit and just under Order 10 Rule 11 of the Civil Procedure Rules.

16. That the Applicants had demonstrated before the trial court that they were condemned unheard contrary to the provisions of Article 50 of the Constitution and the rules of natural justice, that unless an order of stay of execution was granted the access road would be closed effectively denying them access to their respective homes and properties thus rendering them homeless and destitute and that they were willing to provide any security and/or comply with any conditions that the court would impose as conditions for grant of the order.

17. Counsel submitted that the appropriate remedy, which presented a lower risk of injustice, was to grant a stay, set aside the judgment and order a fresh trial. That in striking out the application, the court improperly exercised its discretion. Counsel relied on the cases of *John Florence Maritine Services Limited & Another -vs- Cabinet Secretary, Transport and Infrastructure & 3 Others [2021]eKLR*, *Deyries Muriithi & 4 Others -vs- Law Society of Kenya & Another; SC Application No.12 of 2015; (2016)eKLR* and *Patel -vs- E.A. Cargo Handing Services Ltd* cited with authority in *Constantine Kaneke Charouye -vs- H. Young Company (E.A) Limited [2020] KEELRC 1354 (KLR)* on when an Appellate court can interfere with the exercise of jurisdiction by the trial court.

18. On whether the trial court's decision to strike out the application infringed on the Appellants' right to be heard, Counsel submitted that the Appellants, despite being the principal users of the road of access, did not participate in the proceedings leading to the judgment sought to be set aside, as they had no notice of the proceedings. That under article 25, the right to a fair hearing is a legal absolute right that cannot be limited, inhibited, or denied. That the trial court elevated procedural finality above substantive justice, thereby abdicating its constitutional duty under articles 48 and 50 of the Constitution.

19. Counsel relied *inter alia* on the case of *Patel & Another -vs- Kimundia & 4 Others (202),* where it was held that the right to be heard is sacrosanct as it is the avenue through which a party accesses justice. That in the present case, the Appellants were completely unaware of the existence or pendency of the suit in the Magistrate's court until judgment was delivered and execution commenced. That it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.

Counsel concluded that the appeal presents a clear case of Appellate intervention and urged the court to allow the appeal in the interest of justice as prayed.

Submissions by the 1st Respondent

20. Written submissions dated 9th April, 2026, were filed by Winnie Anuro, Advocate of Owiti, Otieno & Ragot Advocates. Counsel submitted that the trial court currently found that it was functus officio, the judgment of the court having been conclusively determined and substantially executed, the Appellants' application dated 5th June, 2024, was a clear abuse of court process and that the learned trial magistrate properly struck it out. Relying inter alia on the case of *Manginya Salim Murgani -vs- Kenya Revenue Authority [2014]eKLR* and the case of *Telkom Kenya Limited -vs- John Ochanda (suit on his own behalf and on behalf of 996 former employees of Telkom Limited [2014]eKLR,* Counsel submitted that the law of functus officio states that decision-makers, judges, administrative officials, or arbitrators cannot, as a general rule, re-open their decisions to correct a mistake. That there is no opportunity for them to do better next time in the same case because there will be no next time.

21. Counsel submitted that the doctrine of functus officio prevents a court from re-visiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein. That litigation must come to an end, yet the Appellant, through the impugned application, sought to engage endless litigation with a view to denying the 1st Respondent from enjoying the fruit of the judgment.
22. Counsel submitted further that it was not true that the Appellants were condemned unheard. That the Appellants were not parties in the suit and therefore have no locus standi in the matter. Counsel relied on the case of *Law Society of Kenya -vs- Commission of Lands & Others, Nakuru High Court Civil Case No.464 of 2000* to support the submissions.
23. Counsel submitted that the trial court exercised its discretion correctly in declining to grant the orders of stay of execution and setting aside of the judgment as the court had rendered itself on the matter a decision which was final and conclusive, and further, the judgment of the court was already implemented, and that such a decision cannot be revoked or varied by the court.
24. That as the road had been closed vide a decree of the trial court, the best recourse to the Appellants would have been to

follow the procedure laid down at sections 1, 10, and 11 of the Roads and Public Access Roads Act, Cap 399 Laws of Kenya, to construct an access road on the 1st Respondent's land and not to engage in endless litigations.

25. The 1st Respondent urged the court to find that the appeal lacks merit and to dismiss it with costs to the 1st Respondent.

26. No submissions were filed by the 2nd, 3rd, 4th, and 5th Respondents.

Analysis and determination

27. This is a first appeal, and as such, the court has a duty to re-analyze and re-examine the evidence adduced and be able to reach its own independent conclusion in the matter. In the case of *Selle and another vs Associated Motor Boat Company Ltd and others 1968 E.A 123* it was held that:

"An appeal to this court from a trial by the High Court is by way of a retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not

necessarily bound to follow the trial court's findings of fact if it appears either that he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

28. The central issue for determination in this appeal is whether or not the trial court erred by finding that it had become functus officio by reason of the judgment already delivered by the court.

29. As held by the Supreme Court of Kenya in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR,* relied on by the appellant herein where the Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *"The Origins of the Functus Officio Doctrine, with Special 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 reviewed or varied by the decision maker."

30. The doctrine bars a court from revisiting its decision on the merits thereof. In the case of *Telkom Kenya Ltd –Vs- John Ochanda (2014) eKLR,* also relied on by the appellant, the court stated: -

> "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. The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

31. The court pointed out the various exceptions to the principle of functus officio, including applications for stay (of execution), application to correct the decree (under the slip rule), application for accounts, application for execution including

garnishee proceedings, application for review, and applications under section 34 of the Civil Procedure Act.

32. Further, Section 99 of the Civil Procedure Act provides exceptions to the doctrine of *functus officio* in the following terms-

> "Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

33. In the present case, as the application before the court was an application for setting aside the judgment, the doctrine of functus officio was not applicable. The court did err in declining to consider the merits of the application on the ground that it had become *functus officio*. The application did not invite the trial court to revisit the merits of the judgment but was anchored on the grounds that parties who were directly affected by the claim in the suit and the ensuing judgment were never notified of the existence of the suit and therefore had no chance to be heard before the judgment was delivered.

34. What was before the trial court for consideration was whether grounds for setting aside the judgment had been demonstrated. I respectfully find that the trial court misapplied the doctrine of functus officio, failed to exercise its discretion judiciously, and thus failed to determine the application before it on the merits.

35. There is reason for this court to interfere with the findings and decision of the trial court. The principles upon which this court, as an appellate court, can interfere with the exercise of discretion of the trial judge are well established. This court must, to interfere, be satisfied that the trial court has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the court was clearly wrong in the exercise of his discretion and that as a result there has been misjustice- see *Mbogo & Another v Shah [1968] EA 93; Ephantus Mwangi & Another v Wambugu [1983/4] 2 KCA 100.*

36. Under section 78 of the Civil Procedure Act, the court may determine a case finally, remand a case, frame issues, and refer them to trial, or take additional evidence or require evidence to be taken, or order a new trial. The circumstances of the case before the trial court are that the trial court did not

hear the application at all, after holding that it had become functus officio. In my view, this is a proper case for this court to refer the matter to the trial court to exercise its discretion and hear and determine the application on merit.

37. For the foregoing reason, I find that the appeal has merit and allow it as follows;

    i. **The ruling of the trial court dated 11th June 2024 is set aside.**

    ii. **The matter is returned to the trial court for hearing and determination of the application dated 27th May 2024 on merit.**

    iii. **Costs are awarded to the Appellants.**

Orders accordingly.

Judgment dated and signed at Kisumu and delivered virtually this 7th day of May 2026.

E. ASATI,

JUDGE.

In the presence of:

Atika - Court Assistant.

No appearance for the Appellant.

No appearance for the Respondent.