Mutai (Suing as a legal representative of Kiplangat Arap Korir) v Korir (Sued as a personal representative of the Estate of Joseph Kiplangat Kirui) & 3 others (Environment & Land Case 76 of 2007) [2024] KEELC 3776 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3776 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 76 OF 2007

MC OUNDO, J

APRIL 25, 2024

BETWEEN

NEHEMIAH KIPKOECH MUTAI (SUING AS A LEGAL REPRESENTATIVE OF KIPLANGAT ARAP KORIR) ..... PLAINTIFF

AND

RICHARD KIPYEGON KORIR (SUED AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH KIPLANGAT KIRUI) ..... 1ST DEFENDANT

SARAH CHEPNGENO CHEPKWONY ..... 2ND DEFENDANT

STANLEY KIPKOECH ..... 3RD DEFENDANT

KIPYEGON KOECH ..... 4TH DEFENDANT

RULING

1. Vide a consent order of 16th July, 2018, the suit against the 2nd and 3rd Defendant had been withdrawn. The Plaintiff Applicant has now filed an application by way of Notice of Motion dated 25th July, 2022, brought pursuant to the provisions of Order 12 rule 7 of the Civil Procedure Rules, Section 11 of the *Civil Procedure Act* and Article 40, 159 and 165 of *the Constitution* of Kenya, where he seeks that the consent entered on or about the 16th July, 2018 be set aside and thereafter, the court to reinstate the instant suit to proceed on merit.

2. The Applicant has also sought for an order revoking the Grant of Letters of Administration of the estate of the deceased Plaintiff dated 1st December, 2021 which had been issued by the Principle Magistrate's Court Hon. R.M Oanda to Joseph Cheruiyot Boit, Chirchir Shadrack and Joseah Ole Naiguran, pending the hearing and determination of the instant suit. He further sought for costs of the suit.

3. The Application was supported by the grounds on its face and the Supporting Affidavit of equal date sworn by Nehemiah Kipkoech Mutai, who had deponed that he was the legal representative of the estate of the deceased Plaintiff who had instituted the instant suit. That at all material times, he had been the one instructing the former Advocates on record on behalf of the deceased's estate.

4. That the deceased Plaintiff had instructed the firm of M/s Orina & Co Advocates where upon the Plaintiff's demise, the Applicant had continued consulting and instructing the said legal Counsel on behalf of the deceased estate. That pursuant to the failure of the legal Counsel to update them on the status of the instant suit, he had consulted with the court's registry whereupon he had been shocked to learn that the suit against the 2nd and 3rd Defendants had been withdrawn without his instruction despite his intention to have the suit determined on merits and not otherwise.

5. That upon instructing the current Advocates on record to apply for the proceedings, he had confirmed that indeed their former Counsel on record had abused his powers since without instructions, he had informed the court that the case against the 2nd and the 3rd Defendants had been withdrawn. That subsequently, the consent purportedly entered on the 16th July, 2018 as had been replicated in the proceedings had been a lie since the same had been entered without instructions.

6. That pursuant to the withdrawal of the instant suit against the 2nd and the 3rd Defendants, the Administrators of the deceased Plaintiff's estate had been sued by the creditors who had been demanding for titles and/or compensation from the estate. That resultantly, there had been two grants of letters of administration issued to four different parties over the same subject matter by two different courts hence the need to consolidate the administration of the deceased Plaintiff's estate under one person to avoid duplication of duties.

7. That he was apprehensive that should the Principle Magistrate's Court at Kilgoris proceed to determine the succession cause and give orders for the division of the deceased Plaintiff's estate before the instant matter is fully determined, there was a high likelihood that the actual beneficiaries including the creditors of the said estate would not fully benefit. That unless the orders sought were granted, the beneficiaries of the estate stood to suffer irreparably as the Defendants were likely to dispose, sell, alienate, or deal with the suit property in a prejudicial manner.

8. The Application was opposed by the 2nd Defendant/Respondent's Replying Affidavit dated 27th October, 2022 who deponed that she and her co-administrator and brother Philip Kipkorir Chepkwony, vide a title deed issued on the 19th October 2018, were the current registered owners of property LR No. Transmara/Kimintet D/1426 through transmission and as the administrators of the estate of their late father. That the issuance of the said title had been preceded by the withdrawal of the instant suit against her and 3rd Defendants on 16th July, 2018.

9. That her father's estate had been unjustifiably joined to the instant suit as a 2nd Defendant whereby the matter had come up for hearing severally culminating in the consent order withdrawing the suit against the 2nd Defendant which consent had been recorded in the open court in the presence of the Counsel previously on record for the Plaintiff/Applicant. That the said consent had conclusively delivered judgement and final orders of the court in respect of the Applicant's purported claim against herself or the estate of her late father hence the instant application was an abuse of the court's process.

10. In retort, the Applicant vide his Supplementary Affidavit dated 9th March, 2023, narrated the genesis of how the suit land came to be registered in the name of the 2nd Defendant's father in law to the effect that the Gazette Notice No. 15176 of 20th October, 2012 which had been placed for public Notice to subdivide the original land parcel number Transmara/Kiminted 'D'/441 which had belonged to the late Kiplangat Arap Korir on the basis of the Minister's decision on Land Appeal case No. 59 of

2004, had been issued during the pendency of the instant suit by a court of competent jurisdiction. The Minister's decision had therefore been overturned by the court's decision in favour of the Plaintiff vide a judgement delivered 28th July 2010.

11. That on 21st December 2012 in execution of the said Gazette Notice, the original mother title Transmara/Kiminted 'D'/441 had been subdivided into two and the 2nd Defendant's late father-in-Law one Chepkwony Chumo had been registered as the proprietor of parcel L.R No. Transmara/Kiminted D/1426 on the said date. That thereafter, the 2nd Defendant transferred the interest in the suit land from her father-in-law's name to her name with the said transfer entry being noted on 19th October, 2018.

12. That the aforementioned sub-division had been done unprocedurally, fraudulently and in contempt of a matter pending before a competent court hence the Plaintiff was maintaining his suit against the 2nd Defendant in the original suit with regards to the proprietary rights in the original title number Transmara/Kiminted 'D' 441.

13. Directions were issued for disposal of the application through written submissions wherein on the 26th April, 2023 when the matter came up for mention to confirm filing of submissions, there had been filed in court the second Application dated 10th March, 2023 and despite the court indicating that it had no jurisdiction to deal with the same, the Applicant had on 21st June, 2023 asserted that the court had the inherent power to rule on the same. The court thus directed that the Applications dated 25th July, 2022 and 10th March, 2023 be heard simultaneously.

14. In the Application dated 10th March, 2023 brought pursuant to the provisions of Order 51 Rule 1, 3 and 4 of the Civil Procedure Rules, Sections 1A, 1B, 3A of the *Civil Procedure Act*, the Plaintiff/Applicant herein sought that the court pronounce that the 2nd Defendant committed the offence of perjury contrary to Section 108 (1) of the Penal Code and thereafter order that criminal investigation be commenced against her and also issue warrants of arrest for the 2nd Defendant to be arraigned in court.

15. He also sought that the Gazette Notice No. 15176 appearing on Gazette Notice dated 26th October, 2012 and Vol. CXIV-NO. 104 of the Kenya Gazette be declared illegal and of no legal effect and that the resultant sub-titles being title numbers Transmara/Kiminted 'D' 1426 and Transmara/Kiminted "D" 1427 be cancelled and the Original mother-title number Transmara/Kiminted be reinstated in the name of the Plaintiff to hold in trust for the beneficiaries of the estate of the deceased. He further sought that the costs of the Application be borne by the 2nd Defendant.

16. The Application was supported by the grounds on its face and the Supporting Affidavit of equal date sworn by Nehemiah Kipkoech Mutai who deponed that in response to his Application dated 25th July, 2022, the 2nd Defendant had given false information while on oath via her sworn Affidavit dated 22nd October, 2022 by deponing that the issuance of the titles had been done after the suit against her had been withdrawn. That however, the title deed had been issued in the name of her deceased father in law, one Chepkwony Chumo on 21st December, 2012 and 5th February, 2013 despite the said 2nd Defendant having confirmed in her statement dated 12th January, 2016 that her father in law had died on 4th April, 2004.

17. That the above revelations had unmasked crimes and illegalities that had been committed by the 2nd Defendant as an administrator and a person of interest in the instant suit in collusion with the land official during the pendency of the suit before a competent court of law.

18. He reiterated the contents of his supporting Affidavit and Supplementary Affidavit to the effect that the purported sub-division of the original parcel without any direction from court or any order of the

court awarding the 2nd Defendant the number of acres hived from the original mother title during the pendency of the suit had been fraudulent. That subsequently, the 2nd Defendant's Affidavit dated 22nd October, 2022 constituted a fabric of lies calculated to conceal a crime already committed hence he (Applicant) was challenging the said Affidavit.

19. In response, the 2nd Defendant vide her Replying Affidavit dated 26th November, 2023 reiterated the contents of her Replying Affidavit dated 22nd October, 2022 and deponed that the said Affidavit had been apt and factual thus the present application and prayers thereto had been an afterthought, diversionary and unattainable and should not attract the court's discretion but should be dismissed with costs.

20. That the title number L.R No. Trasmara/Kiminted/1426 had not been borne of any substantive or procedural error. She deponed that the Land Registrar had never been a party to the instant suit from inception and that the prayers and allegations of perjury directed at her had been untrue.

21. Directions were given that the Applications dated 25th July, 2022 and 10th March, 2023 be canvassed by way of written submissions to which the parties complied and filed their respective written submissions to which I shall herein summarize as follows:

Plaintiff/Applicant's Submissions.

22. The Applicant vide his submissions dated 20th December, 2022 in support of his Application dated 25th July, 2023 hinged his reliance on the decided case of Catherine Kigasia Kivai v Ernest Ogesi Kivai & 5 Others CV Suit No. 20 of 2018 eKLR (sic) to submit that it was not only the Plaintiff/Applicant who bore the burden of convincing the court on why the case should be reinstated but it was also upon the Defendant/Respondent to satisfy the court on the prejudice and the injustice that would be occasioned by such a reinstatement.

23. He also relied on the decision in the case of Shah v Mbogo (1976) EA 116 (Harris J) to submit that reinstatement was at the discretion of the court, which discretion ought to be exercised in a just manner hence it would be a miscarriage of justice to condemn a party unheard on merits and that to purport that a party who had been battling for justice since the year 2007, a period close to 20 years, had entered into a consent would defeat the logic. That they were determined to prosecute the instant matter to its logical conclusion since the Defendant/Respondents reasons against the reinstatement of the suit was inconsequential. That further, Article 159 of *the Constitution* empowered the court to adjudicate on matters and determine them in a just manner.

24. With regard to the question of delay, it was the Applicant's submission that upon learning that the suit had been withdrawn, he had engaged the court staff for copies of the typed proceedings on the matter with a view of establishing the circumstances of the withdrawal of the suit to properly instruct his current lawyers on record but the said court staff had delayed in typing and certifying the proceedings hence there had not been a delay in filing the instant application, that however if there had been a delay, then the same was inordinate.

25. He reiterated the contents of his Supporting Affidavit and Supplementary Affidavit to submit that the suit by the Plaintiff against the 2nd and the 3rd Defendants had been withdrawn without an actual copy of the consent agreement being signed by the parties themselves or through their lawyers being formally filed in court as had been the tradition of the courts of law with regards to the consent agreement of parties to a suit. That therefore, the subsequent withdrawal of the suit by the Plaintiff against the 2nd Defendant could not be treated as a judgement of the court. That it was trite law that a consent was a contract that must be executed by all the relevant parties. Reliance was placed on the decided cases

of Flora Wasike v Destimo Wamboko (1982-1988) 1 KLR 625, Hirani v Kassam (1952) 19 EACA 131, Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd (1982) KLR P. 485 and Paul Kiplangat Keter v John Koech [2021] eKLR.

26. He thus maintained that in the present case there had not been any consent entered between the parties at all hence the purported consent had been a nullity and thus the instant suit ought to be reinstated and be determined on merit.

27. Regarding the Application dated 10th March, 2023, the Applicant vide his Submissions dated 25th July, 2023 summarized the factual background of the matter before framing four issues for determination to wit:

    i. Whether the Applicant merits the interim orders.

    ii. Whether the Gazette Notice should be declared illegal and the resultant sub titles cancelled.

    iii. Whether the 2nd Defendant committed perjury.

    iv. Who should bear the cost.

28. On the first issue for determination as to whether the Applicant merits the interim orders, reliance was placed on the decided cases of Florence A. Odhiambo v Wananchi Telcom Limited & another [2017] eKLR and Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR to submit that the Applicant had sufficiently demonstrated a prima facie case with a probability of success. He reiterated the contents of his Supporting Affidavit to submit that he stood to suffer irredeemably unless the court granted the orders in the interim. That the 2nd Defendant having falsified the withdrawal of the Applicant's suit and subsequently illegally caused the sub-division and registration of titles in the name of the deceased person then later to herself, there was an imminent danger that the 2nd Defendant would proceed to deal with the properties in a manner that was detrimental to the Applicant by further transferring the properties to another party.

29. He thus submitted that unless the court granted the interim order restraining the registrar from howsoever dealing with the properties in dispute, the Applicant was at an imminent danger of further suffering prejudice. That therefore, the balance of convenience leaned in the Applicant's favour hence he deserved the restraining orders in the interim.

30. On the second issue for determination, the Applicant reiterated the contents of his Supporting Affidavit and thereafter hinged his reliance on the provisions of Section 80 of the *Land Registration Act* as well as the decided cases of Republic v Kisumu District Land Officer & another [2010] eKLR and Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (interested parties) [2018] eKLR to submit that the mother title number Transmara/Kiminted 'D'/441 had been sub-divided illegally and in utter disregard to the due procedure hence the court ought to declare the Gazette Notice Number 15176 appearing on Gazette Notice dated 26th October, 2012 and Vol. CXIV-NO. 104 of the Kenya Gazette resulting in the illegal subdivision of the suit illegal and grant an order of cancellation of the resultant titles.

31. Regarding the issue on whether the 2nd Defendant committed Perjury, the Applicant placed reliance on the definition of perjury under the provisions of Section 80 of the Penal code as well as the decided case of David Omwenga Maobe v Republic [2015] eKLR and the elements of perjury as listed in the decided case of James Mulinge v Freight Wings Ltd & 3 others [2016] eKLR to reiterate the contents of his Supporting Affidavit thereby submitting that the 2nd Defendant had lied under oath in her Replying Affidavit dated 27th October, 2022 in response to the Applicant's application dated 25th July, 2022. That subsequently, the court should pronounce that she had committed the offence of perjury contrary

to Section 108 of the Penal Code and grant the orders for the investigation, arrest and charging of the 2nd Defendant. Further reliance was placed on the decision in the case of Lucy Wanjiru Njunge & 2 others v Job Mwangi Macharia & 9 others [2005] eKLR.

32. As to who should bear the costs, reliance was placed on the Supreme Court's decision in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others [2014] eKLR to submit that since it had been the 2nd Defendant's illegal actions and schemes that had necessitated the filing of the instant Application, she should personally bear the costs of the Application. He thus urged the court to allow the Application dated 10th March 2023 with costs.

2nd Defendant/Respondent's Submissions.

33. The 2nd Defendant/Respondent did not file any submissions with regards to the Applicant's Application dated 25th July, 2022 despite the court having on 21st June 2023 ordered that they file their submission by the close of business that day. However, in response to and opposition of the Applicant's application dated 10th March, 2023, the 2nd Defendant/Respondent vide her written submissions dated 26th November, 2023 reiterated the content of her Replying Affidavit to submit that the court had become functus officio as from 24th July 2018 hence incapable of being invoked with regard to the settled matter relating to land parcel L.R No. Transmara/Kimintet D/1426.

34. She placed reliance on the decided cases of Charles Kiptarbei Birech v Paul Waweru Mbugua & another [2021] eKLR and John Waruinge Kamau v Phoenix Aviation Limited [2015] eKLR to reiterate that the consent settlement had been recorded and adopted in open court in the presence of the Plaintiff's previous Counsel on record hence the allegation that the Plaintiff/Applicant had found out that his suit against the 2nd and the 3rd Defendants had been withdrawn without his knowledge or express instruction had been untrue.

35. Her submission was that the averments in the affidavit dated 27th October, 2022 reinforced the substance of the withdrawal notice by consent and had not intended to perjure or mislead the court. She thus submitted that the instant Application was an abuse of the court's process. Reliance was placed in the decided case of Muchanga Investment Limited v Safaris Unlimited (Africa) Ltd & 2 Others, Civil Appeal No. 25 of 2002 [2009] KLR 229. She further relied on the decision in the case of Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 to urge the court to prevent abuse of the court process manifested in the instant application.

36. Regarding the alleged perjury, she submitted that no perjury or averments had been made of a nature or magnitude or effect that had negated the proceedings culminating in the consent order withdrawing the case against her on 24th July, 2018. That her Replying Affidavit dated 27th October, 2022 had been apt and factual and that the Plaintiff/Applicant had not demonstrated in totality on the alleged perjury.

37. Her submission was that the consent judgement pertinent to land parcel L.R No. Transmara/Kiminted D/1426 had been fully implemented and no appeal or an application for review had arisen therefrom hence the court had become functus officio with regards to the consent judgement or orders issued in the year 2018. Reliance was placed in the decided cases of Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR and Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR.

38. Her further reliance was hinged on the provisions of Section 99 of the *Civil Procedure Act* to submit that the instant application and the prayers thereto did not fall within the exception of functus officio

since the orders sought were far reaching and calculated to reviving a concluded matter and had not in any way aligned to the exceptions under the said Section 99 of the *Civil Procedure Act*. That instead, the Applicant in the instant application had intended to overstretch the jurisdiction of the court under Article 165 of *the Constitution* with regards to appeals and reviews. She thus submitted that the instant application lacked merit and should be dismissed with costs.

Determination.

39. I have considered two applications herein filed by the Plaintiff/Applicant wherein in the first application dated 25th July, 2022, the Plaintiff/Applicant seeks for the setting aside of a consent order of 16th July, 2018 so that the instant suit could be reinstated for hearing on merit. The Applicant further seeks for an order revoking the Grant of Letters of Administration to the estate of the deceased Plaintiff dated 1st December, 2021 which had been issued by the Principle Magistrate's Court Hon. R.M Oanda to Joseph Cheruiyot Boit, Chirchir Shadrack and Joseah Ole Naiguran, pending the hearing and determination of the instant suit. Finely, he seeks for costs of the suit.

40. In the Second Application dated the 10th March, 2023, the Plaintiff/Applicant had sought that the court finds that the 2nd Defendant had committed perjury in her Replying Affidavit dated 27th October, 2022 in response to the his application dated 25th July, 2022. The Applicant also sought that the Gazette Notice No. 15176, Vol. CXIV-NO. 104 dated 26th October, 2012, be declared illegal and that the resultant sub-titles being title No. Transmara/Kimintet 'D' 1426 and Transmara/Kimintet "D" 1427 be cancelled and the Original mother-title No. Transmara/Kimintet'D'/441 be reinstated in his name to hold in trust of the beneficiaries of the estate of the deceased.

41. I have considered the 2nd Defendant/Respondent's response to the said Applications to wit that by a consent recorded on the 16th July, 2018, the suit against her and 3rd Defendant was withdrawn wherein subsequently she and her co-administrator and brother Philip Kipkorir Chepkwony, had been issued with a title deed on the 19th October 2018, and are currently the registered owners of property LR No. Transmara/Kimintet D/1426.

42. I find the issues raised here for determination as follows;

    i. Whether the court can revoke the Grant of Letters of Administration of the estate of the deceased Plaintiff dated 1st December, 2021

    ii. Whether the consent order of 16th July 2018 should be set aside

    iii. Whether this court is funtus officio.

43. On the first issue for determination, the background of facts leading to seeking of orders to revoke the grant of letters of administration to the estate of the deceased Plaintiff emanate from the implementation of the impugned grant as well as the withdrawal of the suit against the second and third respondents. The notorious case of The Owners of the Motor Vessel "Lilian S" –vs- Caltex (Kenya) Ltd [1989] KLR 1, held as follows:-

    > " ...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

44. Section 13 of the *Environment and Land Court Act* gives the court power to hear and determine disputes relating to land use and other instruments granting any enforceable interests in land. The

issues in the protest herein are deeply rooted in the grant in Succession Cause which only a probate court possesses the jurisdiction to hear and determine. This court cannot therefore revoke the Grant of Letters of Administration of the estate of the deceased Plaintiff dated 1st December, 2021.

45. On the second issue for determination, the law on variation of a consent judgment is now settled to the effect that the variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, and an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.

46. Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625, held as follows:

> ''It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

47. In Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR, the Court of Appeal at paragraph 29 held that:

> " The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court."

48. Further in Hirani v. Kassam (1952), 19EACA 131, the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:

> " Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement."

49. The Court of Appeal in the case of Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd (1982) KLR P. 485 held that:

> " A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.
>
> In the same case the Court further held that:
>
> > " An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding".

50. I find in present case, that no such circumstances have been shown to exist suggesting that there had been fraud or collusion in the consent entered into by the parties herein. Indeed all material facts were known to the parties, who on the 16th July 2018 after the matter had proceeded for hearing with the evidence of the Applicant having been taken, the parties Counsel had recorded a consent in the following terms;

> ''By consent of the Plaintiff, 2nd and 3rd Defendants, the suit against the 2nd and 3rd Defendants is hereby withdrawn with no order as to costs''.

51. The compromise had been in terms as clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. Indeed there has been no evidence placed before this Court that the Plaintiff's Counsel had no authority to enter into the consent to withdraw the suit against the 2nd and 3rd Defendants, and therefore I find that Counsel had authority to act for the Plaintiff/Applicant and had full mandate to compromise the suit as he did. I find that the Applicant has failed to demonstrate to the court that this is a deserving case for the court to exercise its inherent jurisdiction and therefore this limb of the Application is devoid of merit.

52. On the last issue for determination as to whether this court is functus officio, this term has been defined in Black's Law Dictionary, Ninth Edition as follows;

> " 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."

53. The Supreme Court of Kenya had also relied on the holding in the case of Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550 to the effect that:

> " 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."

54. It is not disputed that pursuant to a consent order herein entered on the 16th July, 2018, the suit against the 2nd and 3rd Defendants had been withdrawn wherein subsequently the 2nd Defendant and her co-administrator and brother Philip Kipkorir Chepkwony, had been issued with a title deed on the 19th October 2018, as proprietors of LR No. Transmara/Kimintet D/1426 thereby perfecting the consent order. I thus find that the court is now functus officio. Both the applications dated 25th July, 2022 and 10th March 2023 are herein dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 25TH DAY OF APRIL 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

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