**Marisia & 2 others v Kalungokor (Environment & Land Case 139 of 2013) [2025] KEELC 564 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 564 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ENVIRONMENT & LAND CASE 139 OF 2013**

**FO NYAGAKA, J**

**FEBRUARY 13, 2025**

**BETWEEN**

**CHARLES MARISIA ........................................................................ 1ST PLAINTIFF**

**ABRAHAM M. LIMAKWANY (SUING AS THE ADMINISTRATORS OF THE ESTATE OF KOCHULEM AMOYWAL) .......................................... 2ND PLAINTIFF**

**DANIEL ROTICH NGORIAPUS (SUING AS THE ADMINISTRATORS OF THE ESTATE OF KABELI MOLER KORINYANG) ................................ 3RD PLAINTIFF**

**AND**

**PETRO KALUNGOKOR ..................................................................... DEFENDANT**

**RULING**

1. By a Notice of Motion dated 18th October 2022 the Plaintiff moved this Court for orders "that this honorable Court be pleased to issue an order directing the Deputy Registrar of this Court to execute mutation forms to implement the surveyor's report of 30th September 2021 in place of the defendants herein." It was brought under sections 1A, 1B, 3A and 3B of the *Civil Procedure Act*. It was based on two grounds being that the Registry Index Map had been amended; and the Mutation Forms had been drawn but the Defendant refused to sign them.

2. The application was supported by the affidavit sworn by Charles Merisia on 19th October 2021, a day after that of the application. He deposed that the orders of the Honorable Court had been implemented on the ground by the County Surveyor as seen from the Report dated 30th September 2021. The defendant was required to execute the mutation forms to give effect to the Surveyor's implementation. He, however, failed or declined to do so.

3. The application was opposed through an Affidavit sworn by the defendant on 8th August 2023 and filed on 18th August 2023. While on the heading he indicated that the reply was in relation to the

application dated 18th October 2021, in the body, specifically at paragraph *2* he deposed that it was in response to an application dated 28th October 2021.

4. This Court has carefully perused the Court record. No application dated 28th October 2021 has ever been filed by any of the parties. Be that as it may, the court is prepared to take it that the dating was an error, excusable under Article 159(2)(d) of *the Constitution* of Kenya, 2010. However, the Court notes, even as it excuses that error, possibly a typing one, that the reply to the application was made almost two years after the application was filed, but it would appear that it was not served. Thus, on 25th July 2023 the Court directed that it be served within seven (7) days. It was upon the service that the Defendant filed a Relying Affidavit he swore on 8th August 2023 and filed on 18th August 2023.

5. The Defendant deposed that the application was hopelessly misconceived, fatally defective bad in law, an abuse of the process of the court and a clear approbation and reprobation on the part of the plaintiffs/ Applicants. None of the parties were aggrieved by the judgment delivered by the Court on 27th February 2020. He annexed a copy of the judgment and marked it as PK-1.

6. Further, he deposed that it was an undisputed finding of the that Land Adjudication boundary between West Pokot/Chepkono/169 and 170 is 150 meters into parcel No. 170 also moving the boundaries between the land parcels 170 and 171 by 15 meters into parcel 170. After the judgment, the court directed the County Land Registrar West Pokot to visit the land parcels comprised in the land parcel numbers 169, 170 and 171 to establish and fix the boundaries established and maintained after the adjudication process was completed. The information about the completed land adjudication process was never provided anywhere in the instant proceedings, but it could be discerned from the various survey reports by the County Surveyor of West Pokot.

7. The County Surveyor's report dated 27th November 2018 indicated that after the completion of the Chepkono adjudication process there were two records, namely, the Adjudication Register and the Preliminary Index Diagrams (PIDs) that supported the registration and issuance of the title deeds. He annexed and marked PK-2 a copy of the report. The report went further to state that in implementing the judgment, the adjudication records and the survey report dated 20th June 2018 were used. He annexed and marked PK-3 a copy of the report dated the 20th June 2018.

8. He deposed further that the report dated 27th November 2020 stated that the boundaries 7, 1, 2, and 4 were in agreement with the Preliminary Index Diagrams (PIDs). Further, boundary 7 was the physical boundary of the land parcels comprised in the title of the numbers West Pokot/ Chepkono/170 and 171 and the boundary on the Registry Index Map (RIM). He added that in the report dated 20th June 2018 the Surveyor rightly stated that he pointed out boundaries 1, 2, 3 and 7 and all of them except boundary 3 had physical features.

9. He deposed further that it was the report dated 27th November 2020 that by its ruling dated 6th August 2021 this Court directed that it be implemented on the ground. He annexed and marked PK- 4 a copy of the ruling of the court. Further, the report established that boundary 7, which is the boundary between land parcels comprised in the title numbers West Pokot/Chepkono/170 and 171 was the correct boundary there and that was the current boundary on the ground, on the adjudication records and the registry index map (RIM).

10. On 6th December 2020 the Defendant instructed the firm of M/S Simiyu Wafula & Company Advocates to file an application dated the same date seeking the honorable court to issue an order for establishing and fixing the boundaries of the land parcels 169, 170 and 171 by a private survey or the Chief Surveyor of the Republic of Kenya in accordance with the judgment. He annexed as PK-5 a copy of the application.

11. He added that his major complaint in the application was that the surveyor did not perform his duty in accordance with the judgment of the court and neither did he fix the boundaries established and maintained after the adjudication process was completed as the court ordered. That true to his suspicion, and for the County Surveyor to perform something different from the judgment of the court, on 11th December 2020 the Plaintiff filed the application dated 8th December 2020 seeking prayers that the County Surveyors of West Pokot be ordered to curve out 5.90 hectares from its land, known as West Pokot/ Chepkono/170. He annexed a copy of the application and marked it to PK-6. He added that the grounds of the application were that the judgment of the Court had been partially implemented, and it was necessary to review the judgment for implementation to be completed.

12. The two applications dated 8th December 2020 and 6th December 2020 were heard and a joint ruling delivered on 6th August 2021 dismissing both and the Court granted leave to the County Surveyor and County Land Registrar to implement the report dated 27th November 2020 on the ground and therefore fix the boundaries in accordance therewith. He annexed and marked PK- 7(a) and (b) copies of the Ruling on the two applications and the order issued on the same date. He added that he preferred an appeal against the Ruling but the plaintiffs did not. He filed a Notice of Appeal dated 13th August 2021 and subsequently filed an application dated 1st September 2021 seeking orders of stay of execution of the ruling and the resultant orders delivered on 30th October 2020. He annexed and marked PK-8(a) and (b) copies of the Notice of Appeal and the application dated 1st September 2021.

13. The Applicants did not respond to the application dated 1st September 2021. On 29th September 2021 the County Surveyor in the company of over 20 police came to the suit parcel of land and fixed boundary 5 as the boundary between land parcels 169 and 170. Despite his protest and request that the exercise be halted temporarily, the Surveyor proceeded with the exercise. He added that his protest was that after judgment a survey report dated 27th November 2020 was filed on 18th December 2020. In it, the County Surveyor rightly captured his instructions that he was implementing an order of this Court by which he was to use the adjudication records together with the survey report dated 8th June 2018.

14. The survey report determined that boundary 5 was physical but not in agreement with the PID. Having failed to stop the activities of 29th September 2021 he (the Defendant/deponent) instructed his advocate on record to file the application dated 1st November 2021 pursuant to the provisions of Sections 34 of this *Civil Procedure Act*. In the application he sought three orders, one of which was that the County Surveyor of West Pokot furnishes the Court with the RIM signed by the Director of Survey, amended after 29th September, 2021; the County Surveyor and Land Adjudication Officer, West Pokot be summoned to attend Court for cross-examination; and if necessary the Deputy Registrar of the Court to visit the suit land to verify the implementation of the judgment. He annexed as PK-9 a copy of the application.

15. The plaintiffs opposed the application through a Replying Affidavit sworn on 15th November 2021. He annexed and marked as PK-10 the copy thereof. He added that he expected the plaintiffs to be happy to have the orders sought issued by the court so that they could happily demonstrate to the Court how they implemented the judgment. In the Replying Affidavit, 1st plaintiff informed the Court that the allegations that the County Surveyor acted contrary to the orders of the court were untrue and that the only outstanding issue was about the 5.09 (sic) hectares due to parcel number171, which was yet to be implemented.

16. The 1st plaintiff was not candid to disclose to the Court that the application to include the 5.09 hectares was dismissed by the ruling of the Court dated 6th August 2021 and the plaintiff never appealed against it. The court delivered its ruling on the application dated 1st November 2021 on the 31st of January 2022, dismissing the setting on the grounds that there was no question to be determined

by the court which could call for invoking Section 34 of the *Civil Procedure Act*. He annexed and marked as PK-11 a copy of the ruling. The deponent had no option but to await the outcome of the appeal against the ruling dated 6th August 2021.

17. On 29th June 2023 the Plaintiffs submitted to the court for execution copying of a Mutation Form No. 04681034 for signature by the Deputy Registrar. He annexed and marked as PK-12 a copy of Mutation Form. He added that the Mutation Form sought to increase the acreage of land parcel Nos. 171 by 14.4 hectares, No. 169 by 8.46 hectares and reduce his land by 0.42 hectares respectively. When the applicants were required to indicate the order requiring the Deputy Registrar to sign the Mutation Form they resorted to fix the instant application for hearing.

18. The Respondent contended that the instant application was a nullity as it sought to implement a Survey Report that was neither supplied to the court nor served him to date. The applicants had deliberately failed to disclose material information that could aid the just the determination of the dispute. A party seeking justice must place before the court all material evidence and facts which, considering the law, could enable the Court to arrive at a just decision.

19. The order of the court as given on 6th August 2021 was clear. It directed the County Surveyor to implement the report dated 27th November 2020 and not the one dated 30th September 2021. The applicants were deliberately attempting to vary the judgment, and the orders of the Court given on 6th August 2021 through unlawful and fraudulent means. The application was res judicata and an attempt to reopen and relitigate matters that had been tried and determined by the court. He added that a party was not permitted to litigate a matter piecemeal. Further, res judicata applies not only to points upon which the court was required by the parties to form and opinion on and pronounce a judgment but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligently ought to have brought forward at the time. He added that the applicants had failed to demonstrate why an undisclosed survey report was being implemented and not the one dated 27th November 2020.

20. He added that the principle of functus officio prevents a court from reopening the hearing of an application for review and setting aside the orders of 6th August 2021 in the manner attempted through the instant application. Further, the principle was bound up with the doctrine of res judicata. Thus, once judgment was delivered and further directions on it given on 6th August 2021 on how the judgment was to be implemented, the plaintiffs could only appeal against the same. Further, for the proper administration of justice there must be predictability and finality to a proceeding to ensure procedural fairness and the integrity of the judicial system. He stated that the Plaintiffs were going beyond the expectations of the two principles.

21. He deposed that nowhere had it been suggested by the judgment of the court or its ruling that any of the parties would lose land registered as their acreage. The dispute before the court was a boundary dispute which the Court directed that it be established and fixed on the basis of the boundaries established and maintained after the land adjudication process was completed. The application was a mission to corruptly and unjustly set more land than that which they acquired after the adjudication process. He prayed that the application be disallowed.

22. The Plaintiffs filed a Further Affidavit in response to the Replying Affidavit. This was upon seeking leave of the court on 2nd October 2023 to do so. The Court granted them fourteen (14) days to file it. The first Plaintiff swore the affidavit on 10th October 2023 and filed it on 11th October 2023, which was well within the period given to them to do so.

23. The deponent Charles Merisia, stated that the application was merited, and the County Surveyor fully and properly implemented the judgment of the court. The Surveyor's report dated 27th November

2020 was complied with and duly filed in court in accordance with the order. The Mutation Forms which they sought to be signed arose from the Surveyor's report. There was no other surveyor's report to be implemented and the orders they sought were in accordance with the judgment of the Court. In the absence of signing of the mutation forms, the judgment of the Court would be left hanging. He reproduced part of the judgment of the Court by giving the reliefs granted, as follows:

1. "That the County Land Registrar, West Pokot is hereby directed and ordered to visit land parcel numbers West Pokot/Chepkono/ 169, 170 and 171 and to establish and fix the boundaries on the basis of the boundaries established and maintained after the land adjudication process was completed.

2. The land registrar is hereby directed and ordered to effect a rectification of the registers of the said parcels of land (referred to in (1) above in case it is necessary) on the basis of the boundaries that will be ascertained.

3. Each party to bear their own costs of the suit."

24. The deponent added that the County Surveyor correctly implemented the judgment and stated in her orders follows:-

> "From the above table, parcel numbers 169 and 171, have bigger acreage on the ground compared to the registered acreages which was at adjudication record. This is an indication that the 1st Plaintiff and 2nd Plaintiff claim of land from the defendant has been realized by this survey. The ground acreages of parcel No. 170 and the registered acreage are almost equal. This is an indication that boundary No. 5 and 7 are correct boundaries between parcels 170 vs 169 and 170 vs 171 respectively."

25. He deposed that the complaints raised by the Respondent in his Replying Affidavit can be well determined in his appeal at the Court of Appeal.

26. The parties required the County Surveyor to be summoned to court to explain orally how he implemented the Report. The Court summoned the County Surveyor, West Pokot, one Raymond Rotich who attended and testified on 1st February 2024 regarding the implementation of the judgment. He stated on oath that they visited the site on 14th of June 2018 in the presence of the plaintiffs and the defendant. They did so pursuant to the order of the Court. This was the second visit after they gave a report of 20th June 2018. He added that on 27th February 2020, the District Land Registrar was served with an order directing him to visit the site and establish and fix the boundaries established and maintained after the land adjudication process. The land registrar gave the Surveyors the summons. The officers visited the site on 26th November 2020. They established the boundaries and prepared a report.

27. At this site, each party was asked to show their boundaries, if they existed, in order for the surveyor to pick them and compare with the Preliminary Index Diagrams (PIDs) and the adjudication register. They did so. The Surveyors prepared a report and computed the encourages in consultation with the Land Registrar, adopting different boundary lines in line with the PID and the Adjudication Register or the existing maintained boundaries from the Land Registrar's Report. The witness then gave the Court the map they prepared, which was attached to the Report.

28. Later they were given another order dated 6th August 2021 which required them to implement an earlier report. Therefore they fixed the boundaries according to it. On 29th September 2021, they visited the site to implement the report. After that they prepared their report dated 30th September 2021. He added that they had complied.

29. On cross-examination by the Plaintiffs' counsel he stated that one of the directions of the court was to establish who had encroached to which parcel of land. Regarding that, in relation to parcels 169, 170 and 171, they found out that some boundaries did not exist. They could, therefore, not say that the occupation was an encroachment. He gave the example of boundary number "six" (6) pointed out by the 2nd Plaintiff, but it did not exist: it had no physical existing features. It was not on the Map either. Nevertheless, they drew what the Plaintiff showed them.

30. He added that they drew the map supporting the report of 2018 and later in 2020, they drew another map. The Drawing of 2020 was done using the RIM, the Adjudication Records Register and the PID. There was no encroachment found. They calculated the acreage from the measurements they took on the ground and found out that the ground acreage for parcel No. 169 was 37.72 Hectares, although the registered one was 29.26 hectares. For parcel No. 170 the ground acreage was 20.58 Hectares, and the registered one 20.97 Hectares. For parcel No. 171 the ground acreage was 48.54 Hectares and the registered one 34.14 hectares. They had not made their final map drawing according to the findings. But they implemented the work as per the court order. What was remaining was only the registration of the new drawings.

31. On cross-examination by the Defendants' counsel, he stated that he and his colleague officers identified seven boundaries and named them one to seven (1-7).

    Boundary 1 was shown by the 1st plaintiff. It had an existing fence. It corresponded with the PID.

    Boundary 2 was shown by the defendant. It had an existing fence and corresponded with the PID.

    Boundary 3 was shown by the defendant. It had no fence. It did not correspond with the PID.

    Boundary 4 was not shown by anyone. It had an existing fence and corresponded with the PID.

    Boundary 5 had an existing fence. It did not correspond with the PID.

    Boundary 6 was shown by the 2nd Plaintiff. It had no existing fence. It did not correspond with the map (RIM).

    Boundary 7 was shown by the defendant. It had an existing fence which was curvilinear, meaning a curve-like shape, and it corresponded with the map.

32. The witness added that they received another order in 2020. He and the Land Registrar went to the ground to establish the boundaries established and maintained after the Adjudication was completed. To achieve that they used the PIDs, Adjudication Sketches and the Land Registrar's Report on the Boundaries Resolution Proceedings. The PIDs were at variance with what was on the ground. They also varied with the Report of 2018 in that boundary 3 was not on the map, and boundaries 6 and 5 were also not on the map. The boundaries on the PID were the ones they went to establish on the ground.

33. Relying on Section 20(i) of the *Land Registration Act* of 2012 which provides that every proprietor of the land shall maintain in good order fences, hedges, stones, pillars, beacons, walls and other features that demarcate the boundaries pursuant to the requirements of any written law, they proceeded to carry out the work. They also used sketches which normally show the neighbouring parcels of individual lands. These do not determine any boundary but only neighbouring parcels. Those were the documents they used.

34. From further cross-examination he stated that as per the Report of 2018 there is a road running between the edge of boundary 1 and 2 and on the other side of boundary 3, 4 and 5. During the implementation of the report in 2020, the road was still there. When he was referred to the annexture attached to the Report of 27th November 2020 he stated that from the report of 2018, the road runs and ends at the edge of the boundary number 7 and 5 on the other side but from the Report of 27 November 2020, it shows that the road ends at boundary 2 and 3.

35. From the Report of 27th November 2020, he and the Land Registrar adopted boundary No. 1 to be No. 3 while boundary No. 4 was adopted to be No. 2, and No. 7 to be No. 1. They both computed the acreages considering all the boundaries. The Land Registrar asked the County Surveyor to adopt boundaries 1, 2 and 3 as per the Report. The reasons for that were that some of the boundaries of the 2018 Report were not rhyming with the PID. Others were on the ground, fenced and maintained by the parties but not on the map. Thus, with the knowledge that the PID is not an authority on boundaries, the County Surveyor had to prepare the Report with the boundaries they had discussed with the Land Registrar for this Court to have an overview and implement them. So, they asked the Court to adopt the Report of 2020. He added that the renaming of the boundaries did not change the position of the boundaries. To demonstrate that he overlaid the maps of 2020 and 2018 to show that they were in the same position. He added that from the mutation presented, the Surveyor had proposed that the acreage for parcel No. 169 to be 37.72 hectares up from 29.26 hectares; for parcel No. 170 it be 20.55 hectares from 20.97 hectares and for parcel No. n71 it be 48.54 hectares from 34.414 hectares. These were the acreages that they had calculated. He stated that they were dealing with general boundary surveys, and for the Chepkono Adjudication Section, the PID was used to register the interests on the land, but they could not be used as an authority for boundaries. He explained that they were low on accuracy compared to the RIM which is georeferenced and has coordinates. For this case, the Surveyor relied majorly on the maintained boundaries by the interested parties and the Land Registrar's dispute resolution mechanism.

36. He could not determine how the Dispute Resolution Mechanism was used in that case. He could not explain how it works. He added that the Land Registrar was the one who would do. Further, they maintained boundary 1 as advised by the Land Registrar. He did not have the matrix used by the County Land Registrar. He urged the court to use the Report of 2020 to rectify the Register and the RIM. He added that in the Report he had not indicated whether the blue gums were the ones which were maintained at the Adjudication, and there was no evidence that they were the ones used to maintain the boundaries. In re-examination, he stated that the blue gums were mature trees which were planted in the 1970 or 1969.

37. Lastly, he added that general boundaries could have margins of error of even 10 or 50 acres. Any land that was free or excess land should not go to the state.

38. The Land Registrar, one Edwin Wafula, testified that his work is to oversee what the Surveyor does and adopt the surveyor's work. He could therefore not comment on the Report of the surveyor because the boundaries are finally established resulting from what was prepared by the earlier surveyor who used the natural features to prepare the titles issued. These features were blue gums planted for many years. He stated that that explained the variations of the acreages on the ground and the titles that were issued which were yet to be amended.

39. In cross-examination he stated that he himself did not visit the land. The Report was prepared by his predecessor, Mr. Ruto who with the Surveyor visited the land. On further cross-examination he stated that his office was served with the decree of the Court to visit the area and establish and fix the boundaries established and maintained after the land adjudication process was completed. This

was because there were facts the Court did not have, and the office was to establish them. After the adjudication is completed, a preliminary index diagram PID is prepared. The Report by the Surveyor did not refer to a PID. He did not have any communication from the office to the Adjudication Office calling for the documents that would aid the Office in carrying out the implementation of the Court Order. Besides the PID the other documents that would help in carrying out the exercise were the RIM. He added that after the Adjudication exercise is completed a PID is prepared and then the RIM follows. He refrained from commenting on what creates a Cadastral Map of survey.

40. Further, he added that the apportionment of the excess of the encourages was not the work of the Registrar but the Surveyor who was the technical expert or person as per the *Land Registration Act*. He could therefore not comment on the matrix that was used. He added that where there was accuracy, the acreage could be accurate, or more or less. Where there was less acreage, the Register could be reduced. Calculations would be done and the acreage reduced to rhyme with what is on the ground. If the acreage was accurate, it would be maintained. Where there was excess land on the ground the same would be rectified with an increment that would go to the RIM, the green card and the title deed(s). And if there were any mutations that would be rectified to reflect the correct acreage.

41. At the point of adjudication that would involve the adjudication officers. They would pick the correct information from the parties. Where land is already registered (and more found on the ground) one would require Solomonic wisdom to distribute it. For him he would go for an equal apportionment if he was the one doing it. The surveyor sent the report back to his office. It was the surveyor who had the mandate to rename the boundaries. He did not explain how or why he renamed them. The interpretation about establishing the boundaries would mean the boundaries as per the PID. It was possible that when the PID was done it had errors. He therefore would not comment on how the boundaries were done. It would be done only by the Surveyor who was an expert. He added that the boundaries which were to be established were general boundaries. In fixing them, at first, they relied on witness account and discernment. The PIDs would only form the basis for establishing the boundary if there were variations.

42. The Respondent filed his submissions dated 13/12/2023.

**Analysis and Determination**

43. This Court has considered the Application, the law, the submissions by the parties. Only three issues commend for determination. One is whether the Court is functus Officio on the application. Two is whether the application is res judicata. Three is whether the application is merited. Four is who to bear the costs of the application.

44. This Court will determine the issues in the sequence in which they appear.

**1. Functus officio**

45. The Respondent contended that the court was functus officio. By the term functus officio it means the fact that the Court has finished its business on an issue that is sought to be raised again in a matter it has handled. It could be functus officio in an interlocutory application or the whole suit. Either way, it means that the Court has closed its work and downed its tools.

46. The doctrine is not new in the Kenyan legal system. It has been considered many times over by courts of various levels. This Court cites two binding decisions on the same. Thus, in Telkom Kenya limited

v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR, the Court of Appeal held that -

> "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 general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions."

47. Additionally, the Supreme Court in Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, quoted and relied on an excerpt from the work of Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 which reads:

> "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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

48. From the above authorities by which I am bound it is clear that while functus officio prevents a court from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, it does not bar the Court from carrying out post-judgment procedures in the same matter. In the instant matter, the Court was only invited to consider a post-judgment step that ought to have been carried out if the parties herein were genuine in the implementation of the judgment of the Court. Thus, the court is not functus officio. If ever it was, then how is it to be satisfied that its decree has been implemented when one or more of the parties keep complaining that that has not been done? I dismiss that limb of argument.

49. The next issue raised by the Respondent was that the application was res judicata. The law on res judicata is provided for under Section 7 of the *Civil Procedure Act*. It is not only simple but its tenor is now settled. The Section provides:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

50. It is clear from the provision that the court that determined the previous matter(s) should have been of competent jurisdiction, the findings it made were on merits, and the issues were between the same parties litigating under the same title. Therefore, even if a party excludes or includes one or more parties in a subsequent suit it does not change the character and application of the law in that regard. It thus calls for courts to be vigilant to find whether a party is being as subtle as the serpent of Eden, as told in

the Holy Bible. Thus, in Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR the Court of Appeal stated as follows:

> " To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

51. Also, in Mwangi v Mokaya (Environment and Land Appeal 13 of 2023) [2023] KEELC 18642 (KLR) (6 July 2023) (Ruling) this Court held:

> " The elements of res judicata are therefore that the
>
> 1. issue being tried the second time was previously tried and determined
> 2. issue being tried was the same, directly or substantially in issue as in the former proceeding
> 3. court that tried it had competent jurisdiction
> 4. determination was on merits and not on a technicality hence conclusive on the issue
> 5. parties in the former proceeding were the same or litigated therein under the same title."

52. Additionally, in Uhuru Highway Development Ltd v Central Bank of Kenya (1999) eKLR the court listed the important ingredients of the res-judicata and follows:-
    1. The former judgment or order must be final.
    2. The judgment or order must be on merits.
    3. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
    4. There must be between the first and the second action identity of the parties, of subject matter and cause of action."

53. This turns the Court to the contention that the application herein is res judicata. The Respondent argues that the application is a re-litigation of matters that had been concluded by the court when it delivered its judgment and gave directions on 6th August 2021.

54. This Court has carefully analyzed the judgment and the directions given on 6th August 2020. First, it notes that the application herein is a follow-up of a post-judgement step the court wished to be taken by the relevant office in order to complete the implementation of its judgment. The application that gave rise to the ruling delivered on 6th August 2021 was the one dated 8th December 2020. By it the Plaintiff prayed for orders that the County Surveyor West Pokot be directed to curve out 5.9 hectares from land parcel No. West Pokot/ Chepkono/170. The issue was not the implementation of the Judgment as a whole. In my humble view, there is no similar application previously made regarding the issues raised in this application. Therefore, I do not find the instant application having met the conditions for it to be found rest judicata.

55. Turning to the third issue, the Court now considers whether the application is merited. The applicant sought the prayer that the Court makes an order directing the Deputy Registrar of the Court to execute the mutation forms prepared by the surveyor as per the Report of 30th September 2021, in place of the defendant. This court has stated above that this prayer is based on the understanding that this is a post-

judgment step, and the issue has not been litigated upon in the previous applications filed after the judgment was delivered. To make the point clearer, this Court will now turn to analyzing the decree and the subsequent steps that have been taken to implement it.

56. This court delivered judgment and it awarded the following reliefs:

(1) The County Land Registrar, West Pokot be and is hereby directed and orders to visit land parcels No. West Pokot/Chepkono/169, 170 and 171 and to establish and fix the boundaries on the basis of the boundaries established and maintained after the land adjudication process was completed.

(2) The Land Registrar is hereby directed and ordered to effect the rectification of the registers of the said parcels of land (referred to in (1) above in case it is necessary) on the basis of the boundaries that. Have been as attained.

(3) Each party to bear their own costs of the suit.

57. In my humble view the Land Registrar was obligated to consult, consider and refer to the land adjudication records and confirm on the ground whether the records, in terms of boundaries drawn thereon, corresponded with those on the ground, then take measurements therewith and adjust the registration records accordingly if there were any discrepancies. It is instructive to note that the parcels of land in issue herein were registered using general boundaries. Therefore, there was a possibility that the acreage on the ground of the parcels of land once confirmed, would either vary or remain the same depending on the exact measurements that would result from the establishment of the boundaries directed to be established. Additionally, the Land Registrar was mandated and ordered to rectify the registers of the parcels of land in issue if it became necessary and apparent from the exercise of the implementation of the judgment, through the assistance of the County Land Surveyor who is an expert in survey, upon finding that the acreages on the register and titles were different from that which would result in the circumstances. By necessary implication, and contrary to the arguments by the Respondent that the respective acreages of parcels No. 169, 170 and 171 were not to change, it means that at the time of implementation of the judgment, the acreages of the parcels would change either way - to be higher or smaller - depending on the location of the boundaries as per the records. This was, bearing in mind that the expert - the County Surveyor – and the Land Registrar were to use the records of the boundaries maintained after the adjudication process was completed.

58. Therefore, in determining the two applications dated 08/12/2020 and 06/12/2020 by the Plaintiff and the Defendant respectively, filed post-judgment, the learned judge stated as follows on 6/08/2021:

> " Parties in this case came before the court not knowing the exact acreage or proper location of their boundaries and the County Surveyor had to be relied on for his expertise in resolving the issue. Relying on the County Surveyor's report I am bound to observe that plot No. 170 appears to have the lease discrepancy.... It is for County Surveyor to determine where the proper boundary lies in accordance with the formal records. The application dated December 2020 therefore lacks merit."

59. The learned Judge added:

> " This Court is of the view that the County Surveyor was tasked with a full resolution of the dispute by implementing the decree in the suit and not just some part implementation thereof. Consequently, the application by the defendant to call in a private surveyor lacks merit. Similarly, his call for the Chief Surveyor to be directed to deal with the matter is misplaced as the Director of Surveys operates through the County Surveyors on the ground.

> I think the judgment of the court was very clear on what to be done and I need not repeat the same thing herein. The County Surveyor is the competent officer to trace the proper documentation or records regarding land adjudication and adjust the boundaries on the ground in accordance with those records, that is, if they require any adjustments or fix beacons in on the existing boundaries on the ground if they reflect what is on the official map. Both the applications…are dismissed with the costs."

60. It is clear to me that both parties were dissatisfied with the earlier steps of implementation of the judgment of the Court by the surveyor and returned to Court by way of the two applications which were dismissed on 6/08/2021. The court was emphatic on who and how to do the exercise of the implementation of the decree, and it was that the same was committed to the County Surveyor, and by implication the Land Registrar since the latter was to receive the records worked out by the former in order to adjust his records if there was need for that.

61. I have carefully examined the contention by the plaintiff and the detailed narration and factual assertion by the defendant. Particularly, I have given due consideration to the events that followed the delivery of the judgment and its implementation. The defendant gives a proper chronology of how the judgment was to be implemented. I agreed with him, both in his Replying Affidavit and the submissions that he made, that the County Surveyor was to use the adjudication records as were maintained after the conclusion of the adjudication process. These were the ones the County Surveyor was called upon by the Court to use to determine the proper boundaries and adjustments, if any, on the ground.

62. When the County Surveyor conducted the exercise this time round, he arrived at a Report dated 30th September 2021. It is pursuant to the said report that the mutation form impugned herein was drawn.

63. The question that remains then is whether, in arriving at the current state of affairs, in the form of a mutation ready for signature the County Surveyor correctly applied his expertise and the material before him from the adjudication office and compared it with the ground occupation and acted according to the judgment, to arrive at the mutation form that is challenged.

64. When the County Surveyor was summoned to court to explain how he arrived at the sketch and mutation form duly prepared and ready for action, he testified orally in detail as to the discrepancies he found on the ground in form of boundaries that he numbered one (1) to seven (7). Further, which of those corresponded with the boundaries shown on the PIDs and the RIM, and which one(s) did not. Particularly, the County Surveyor explained that he and his colleague officer identified seven boundaries. They named them one to seven (1-7). About them he explained that boundary 1 which was shown by the 1st plaintiff had an existing fence and corresponded with the PID; boundary 2 shown by the defendant had an existing fence and corresponded with the PID; boundary 3 shown by the defendant had no fence and DID NOT correspond with the PID; boundary 4 NOT SHOWN by ANYONE had an existing fence and corresponded with the PID; boundary 5 had an existing fence but did not correspond with the PID; boundary 6 shown by the 2nd Plaintiff had no existing fence and did not correspond with the map (RIM); and boundary 7 shown by the defendant had an existing fence which was curvilinear, meaning a curve-like shape, and it corresponded with the map.

65. From the maps and the existing information both from the rival parties and the PIDs, the County Surveyor arrived at the implementation matrix he did. This information was confirmed by the Land Registrar who too was called to testify as to the implementation.

66. I have carefully given deep thought and analysis of the actions and steps of both the County Surveyor and the Land Registrar on the decree implementation exercise they conducted. I am convinced that it was done beyond suspicion, in the presence and involvement of all the parties. It was done using

the proper records that the court had directed that they be used for the purposes of implementing the decree herein. I see no error that was made by the officer who was tasked with the exercise. Therefore, I find that the application dated 28/10/2021 is merited. It succeeds. The Deputy Registrar of this Court is directed to sign or execute the Mutation Forms to implement the surveyor's report dated 30th September 2021, which was arrived at in compliance with the directions of this Court. The Respondent shall bear the costs of the application

**RULING DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL (EMAIL) THIS 13TH DAY OF FEBRUARY, 2025.**

**HON. DR. IUR F. NYAGAKA**

**JUDGE**