



**Five Eleven Traders and Auctioneers through it's owners Crispus Waithaka
v Muses & 2 others (Environment and Land Miscellaneous Application
E006 of 2022) [2023] KEELC 19316 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2022
LL NAIKUNI, J
JULY 18, 2023**

BETWEEN

**FIVE ELEVEN TRADERS AND AUCTIONEERS THROUGH ITS OWNERS
CRISPUS WAIHAKA APPLICANT**

AND

ALI KHAN ALI MUSES 1ST RESPONDENT

ESTATE SONRISA LIMITED 2ND RESPONDENT

OCPD/OCS DIANI POLICE STATION 3RD RESPONDENT

RULING

I. Introduction

1. The 2nd Respondent/Applicant herein, the Estate of Sonrisa Limited, moved this Court through a Notice of Motion application dated February 21, 2022 and filed in under Certificate of Urgency on February 22, 2022 for its determination. The 2nd Respondent brought the said application under the provision of Article 162 (2) (b) of the *Constitution of Kenya, 2010*, Sections 3 (2), (3), 13 & 19 of the *Environment and Land Court Act*, No. 19 of 2011, Section 34 of the *Civil Procedure Act*, Cap. 21, Orders 22, 40 and 51 (1) of the *Civil Procedure Rules, 2010* all of the Laws of Kenya.
2. From the records, it is instructive to note that on October 19, 2022 this Honorable Court pronounced itself on prayers 1 to 8 of the Application dated February 21, 2022. While taking that direction, this Court was coming from a view point of the limitations of this being a Miscellaneous Applications and the already existence of the main & substantive suit – ELC No. 30 of 2014 which is within the domain of ELC No. 1, Mombasa. Besides, on 20th July, 2022 the ELC No. 1 through Justice Sila Munyao provided express and graphic directions on how these matters would be handled all facts remaining constant and going forward. I guess I was well guided though. Resultantly, this Court in its wisdom



felt it needful to have that the remaining two prayers numbers 9 to 11 best placed being determined by ELC No. 1 where it ruled as follows:

“Consequently, having caused an indepth and robust analysis of all the framed issues herein, on a preponderance of probability, this Honorable proceeds to provide the following directions.

- a. That the Notice of Motion Application dated 21st February, 2022 be and is hereby allowed as with the passage of time, with an exception to Prayers Nos. 9, 10 & 11 which are deferred to be heard and determined by ELC No. 1, Mombasa, all the other Prayers being numbers 1, 2, 3, 4, 5, 6, 7, 8 and 12 respectively of the application dated 21st February 2022 stand and have already been spend/overtaken by events.
 - b. That as directed by this Court (Justice Munyao J) in its direction of 20th July, 2022 all or any future application touching on the execution of the decree dated 13th October 2014 and the subject property of the suit must be filed in the substantive file, Mombasa ELC No. 30 of 2014.
 - c. That an order be made that with an exception of ELC (Mombasa) No. 3, which has become “Functus Officio”, any other ELC Courts at Mombasa are at liberty to here and determine all the matters pertaining to the execution of the ELC (Mombasa) No. 30 of 2014.
 - d. That in the meantime, any of the Parties to be at liberty to seek interpretation of the Judgment dated 24th April 2020 from the Court of Appeal.
 - e. That in order to keep close track of any pending matter herein, this matter to be mentioned in the physical presence of all parties before the ELC Mombasa No. 1 – Justice SM Kibunja (Presiding Judge) on 2nd November, 2022 for further direction particularly with regard to:-
 - i. Prayers No. 9, 10 and 11 of the Notice of Motion Application dated 21st, February, 2022;
 - ii. Preparation of a final Legal Opinion to the Court of Appeal as per the Orders granted by the said Court on 24th April, 2014;and/
or
 - iii. any other direction it may deem fit and suitable to grant in the given circumstance whatsoever thereof.
 - f. That I will reiterate, parties have a right to appeal the decision of this court if aggrieved.
 - g. That each party to bear their costs.”
3. However, upon considering the aforestated direction by this Court, on 2nd November, 2022, the ELC No. 1, Justice SM. Kibunja, made direction returning the matter to be dealt with by this Court. It s based on this background that this Court will have no choice but to conclude this matter having commenced it altogether. Now, that is the substratum – pith and substance of the matter before me. Of course with the danger of sounding repetitive and indeed monotonous, there will be need to recap on the genesis of the matter once more. On a number of occasions without count, this Honorable



Court has reminded the parties that this miscellaneous application is convoluted and entangled with multiple suits. From a brief background, the party that first brought this dispute to court was Samuel Kamau Macharia. He sued Ali Khan Muses, the Estate of Sonrisa Limited and the Land Registrar in Mombasa ELC 30 of 2014 for encroachment. SK Macharia is the registered proprietor of land Parcel Galu/Kinondo/50 (hereinafter referred to as “Plot No. 50”) and Sonrisa is the registered owner of land parcel Galu/Kinondo/48 (hereinafter referred to as “Plot No. 48”). The issue for determination was inter alia whether plot 48 had encroached into Plot No. 50. Mukunya J. who had the conduct of this matter held that Plot No. 50 was 1.7ha and Plot 48 was 0.9ha and not 1.9ha as had been indicated in the Registry Index Map. He ordered that the beacons between the two plots be fixed by a surveyor taking into account the area in the respective titles. He further ordered that any party found to have encroached on the other party’s land shall have 60 days to demolish all structures and vacate forthwith. Aggrieved with the decision of the court, both Ali Khan and Sonrisa appealed separately to the Court of Appeal. The appeals were later consolidated, and the COA delivered its Judgment on 24th April 2020. On the issue of encroachment, the Court of Appeal agreed with Mukunya J. that plot 48 was 0.9ha instead of 1.9ha and the beacons were to be fixed by the surveyor. The only part that the Court of Appeal in their own interpretation interfered with the Superior Court’s decision was where they found that the order for demolition was premature and held that the Judge had jumped the gun. They directed that the Land Registrar had to first conduct its proceedings to determine the extent of the parties’ respective parcels and cause to be defined by the survey, the precise position of the boundaries. In the pendency of this process, the demolition took place nevertheless and that is the main reason that this application was instituted by the 2nd Respondent/Applicant seeking certain reliefs hereof.

II. The 2nd Respondent/Applicant’s case

4. The 2nd Respondent herein sought for the following orders.
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent.
 - e. Spent.
 - f. Spent.
 - g. Spent.
 - h. Spent.
 - i. That this Honorable Court direct that Crispus Waithaka, Samuel Kamau Macharia, Ndegwa Marclus Njiru Advocate and Damaris Nzuve be investigated for criminal intent;
 - j. That this Honorable Court be pleased to issue an order restoring the status quo ante immediately prior to the grant of the said order issued on February 17, 2022 to wit the Applicant through its owner Crispus Waithaka, Samuel Kamau Macharia, Ndegwa Marclus Njiru and the current Officer Commanding Station (OCS) Damaris Nzuve recreate in facsimile the villas as they stood and build them back brick by brick immediately prior to their demolition.
 - k. That in the alternative, this Honorable Court be pleased to issue an order for security to the 2nd Respondent as shall be adequately and sufficient for the due performance of order 11 above



and to compensate for the loss and damage of other immovable properties as shall be proved by the 2nd Respondent.

- I. Spent.
5. The application was based on the grounds, testimonial facts and the deposition made out under the Supporting Affidavit sworn by IWONA STRZELECKA a Director of Sonrisa Limited together with the annexures annexed thereof. She deposed that:-
- a. On 13th October 2014 a decree was issued in ELC (Mombasa) No. 30 of 2014, and on appeal, the Court of Appeal varied the said decree. She deposed that the land registrar executing the court of appeal judgment did a report that was later challenged in ELC (Kwale) No. E001 of 2021 pursuant to the provision of Section 86 of the [Land Registration Act](#), No. 3 of 2012.
 - b. From this case, an order of injunction was issued restraining SK Macharia, his agents and the Land Registrar from dealing adversely with Plot No. 48.
 - c. The deponent contends that in an attempt to commence illegal demolition of Sonrisa's property contrary to the orders granted by the Court of Appeal, SK Macharia filed an application that was later dismissed in ELC (Mombasa) No. 30 of 2014 seeking ex - parte orders to execute the decree.
 - d. Further to this, she deposed that on the night of 23rd January 2022 the agents of SK Macharia in disobedience to the Court orders in Kwale ELC E001 of 2021 illegally gained unlawful and unauthorized access to Plot No. 48 and illegally demolished the perimeter wall surrounding the land. She added that these actions were reported to Diani Police Station under OB 7/23/1/2022.
 - e. According to the deponent, this action by SK Macharia's agents caused significant damage to Sonrisa's business. Consequently, an application for contempt of court was filed on 8th February 2022 in ELC (Kwale) No. E001 of 2021 and on 16th February 2022 SK Macharia through his Advocates claimed that the Court had no jurisdiction and sought leave to file a formal Preliminary Objection.
 - f. She deposed that the Counsel was directed to file the Preliminary Objection within seven (7) days and subsequently the interim orders were extended.
 - g. According to the deponent, the Applicant herein through its owner Crispus Waithaka and his agents disregarded the court's orders and obtained ex - parte orders dated 24th January 2022 of eviction from the Magistrates Courts in Mombasa CMCC Misc. Civil Application No. 36 of 2022.
 - h. She deposed that Sonrisa being apprehensive of the ex parte orders, filed an application on 26th January 2022 in Mombasa ELC No. 30 of 2014 to challenge the irregular order. She further deposed that the court issued stay orders of the Magistrate's orders and on 14th February 2022 when the matter came up for "inter - parte" hearing, SK Macharia filed an application challenging the jurisdiction of the court. According to the deponent, the Counsel for SK Macharia neither filed submissions to canvass his application challenging the jurisdiction nor did he file any Preliminary Objection within seven (7) days as directed in ELC (Kwale) No. E001 of 2021.
 - i. She deposed that SK Macharia through Five Eleven Auctioneers instituted this Miscellaneous application and illegally and unprocedural obtained "ex - parte" orders purporting to execute



the decree of 13th October 2014. The deponent averred that the conduct of the proceedings in the Miscellaneous application herein raised grave and serious concerns as the court neither called to verify the contents of ELC (Mombasa) No. 30 of 2014 nor did it question why a miscellaneous application was filed when the substantive file was active.

- j. She deposed that the Court order purported to execute a decree that was varied by the Court of Appeal.
- k. Further to this, she deposed that this Court put reliance on an application that was Res Judicata and granted ex - parte orders on 17th February 2022 that did not comply with the mandatory provisions of the Auctioneer's Act and Rules and the Civil Procedure Rules, 2010; that was in conflict with the orders issued on 26th January 2022 and 9th November 2021 in ELC (Mombasa) No. 30 of 2014 which according to the deponent are still valid; that it purported to vary the orders dated 28th September 2021 in ELC (Kwale) No. E001 of 2021; and lastly, that it purported to vary the Judgment and Decree of the Court of Appeal.
- l. She deposed that on 18th, 19th, and 20th February 2022, Five Eleven Auctioneers executed the irregular and illegal orders dated 17th February 2022 issued in this matter. She deposed that she explained to the OCS Damaris Nzuve that there were three (3) Court orders that were valid and conflicted with the orders she was executing, however, the deponent's pleas fell on deaf ears and she proceeded with the execution without seeking clarification from the court. She deposed that if the OCS had followed the laid - down procedure, the illegal demolition would have been stopped.
- m. She added that notwithstanding the foregoing, the purported orders issued if allowed were to remove the occupiers and give vacant possession to SK Macharia. She deposed that the orders were not for demolition. She deposed that Crispus Waithaka, Samuel Kamau Macharia, Ndegwa Marclus Njiru and the current OCS Damaris Nzuve knew that there was a boundary dispute between Plot No. 48 and Plot No. 50 hence, there was no way they could be able to determine where Plot No. 50 began and ended.
- n. She deposed that the application was a rouse to circumvent the existing court orders in place. Further to this, the deponent contended that the applicant through its owners and in collusion with the OCS and unknown goons destroyed and stole movable properties belonging to Sonrisa and its guest worth approximately a sum of Kenya Shillings Fourty Thousand (Kshs. 40,000/=).
- o. She deposed that having executed the irregular and illegal orders of this court, SK Macharia and Five Eleven Auctioneers had also taken over Sonrisa's entire property. Lastly, she deposed that if the orders sought were not granted, Sonrisa would suffer irreparable loss and damage.

III. Response by Five Eleven Auctioneers

- 6. On 3rd March, 2022, the Five Eleven Auctioneers while opposing the application filed its 29 Paragraphed Replying Affidavit dated and sworn by Crispus Waithaka on even date and the four (4) annexures marked as "CW – 1 to 4" annexed thereto. He indicated that:
 - a. He was competent and duly authorized to swear the affidavit, He was fully conversant with the facts of the case.
 - b. He emphatically emphasized that contrary to what was being deposed under Paragraph 2 of the 2nd Respondents' Certificate of Urgency, the Decree dated 13th October, 2014 and Order of



ELC (Mombasa) No. 30 of 2014 was never varied by the Court of Appeal in its Judgement of 20th April, 2020, but the said order was only deemed to be pre-mature by the Court of Appeal since the report by the Land Registrar report had not yet been availed.

- c. He deposed that the afore mentioned Decree was brought to his attention by the Instructing Advocate and he was made aware of the Order No. 9 which provided “inter alia”:-

“ That the 1st Defendant shall remove all his structure and remove all debris thereof within that period. In default the Plaintiff shall after that period move to with the help of the Court Bailiff and with the assistance of the Police and Administration of the nearest police station and demolish all structures therein. The cost of such demolition shall be borne by the 1st Defendant”.

- d. He stated that pursuant to that he moved the lower court through Miscellaneous Application No. 36 of 2022 for his appointment as the Court Bailiff and for the police assistance.
- e. The lower court heard his application and subsequently granted the prayers sought whereupon he realized he had made an error on Jurisdiction and applied to withdraw the above application.
- f. He averred that upon granting the said orders for demolition, the 2nd Respondent moved the Court via Certificate of Urgency in the application dated 26th January, 2022 seeking Stay of the Orders issued by the Lower Court in Miscellaneous Application No. 36 of 2022. Court granted the orders.
- g. However, he deposed that the “ex – parte” stay of execution of the orders granted in the CMCC No. 36 of 2022 by Naikuni J were no longer alive as the application was withdrawn on 15th February 2022.
- h. Hence the orders dated 17th February. Hence, the orders issued by this Court were procedural and lawful granted without any element of fraud and/or irregularity. He deposed that the allegation of fraud as pleaded had not been particularized with specific clarity and certainty as required by law.
- i. He urged Court not to grant prayer No. 8 of the application as in so doing it would depict and be confirming that not only the Applicant herein but also this Court was part of the alleged fraud, an act that would grievously injure and puncture the Court’s reputation.
- j. He deposed that in furtherance to this, the 2nd Respondent was in want of duty of material non – disclosure as they had failed to bring to the attention of the Court that the Court of Appeal in CA No. 14 Consolidated with No. 32 of 2016 was found to be of no merit in the 2nd Respondent’s Appeal and the only issue in the SK Macharia’s appeal was the absence of a Land Registrar’s report and hence it would be pre – mature to order demolition of the offending and encroaching buildings.
- k. On furtherance to this assertion, he stated that noting that the report by the Land Registrar dated 2nd July, 2021 was generated pursuant the Court of Appeal’s order, the same vide inference, incorporation and association formed part of the Court of Appeal’s orders and as such any aggrieved party could move the Court of Appeal for its setting aside.
- l. He further deposed that the Land Registrar’s report dated 2nd July 2021, annexed herein and Marked as “CW – 4” of the annexature was generated pursuant to the Court of Appeal’s order and hence, if aggrieved the court of appeal is the only one who could set it aside. He opined that from the Land Registrar’s report, it confirmed the High Court and Court of Appeal



Judgement that the 2nd Respondent's Plot No. 48 measuring 0.9HA had encroached onto Plot No. 50 measuring 1.7HA.

- m. He further deposed that the demolition was in accordance with the decree of 13th October 2014, the Court of Appeal judgment as buttressed by the surveyor's report. He stressed that the decree had neither been stayed nor set aside. He averred that contrary to the 2nd Respondent belief and assumption that there existed a disputed area, the boundary dispute between the two plots was known and had already been determined by the highest Appellate Court. The 2nd Respondent had never preferred an appeal to the Supreme Court.
- n. According to the deponent, the 2nd Respondent herein through its numerous applications was attempting to re-open an already concluded litigation and resuscitate the ELC (Mombasa) No. 30 of 2014 with respect to the size of the two plots of land which would act as an abuse of the due process of Court.
- o. Further to this, he deposed that this matter could not be consolidated with ELC (Mombasa) No. 30 of 2014 because the same had been concluded and an appeal ensued therefrom.
- p. He deposed that the application was fatally defective as it had sought the orders of 'restitutio integrum' vide an application notwithstanding the provisions of Order 3 Rule 1 of the Civil Procedure Rules, 2010. Furthermore, the orders sought were not available to trespassers.
- q. He also deposed that prayer numbers 6, 8, 9, and 10 of the application by the 2nd Respondent herein were far-fetched and untenable as the 2nd Respondent herein had not appropriately moved this court for a grant of the prerogative orders of Mandamus under the provision of Order 53 of the Civil Procedure Rules, 2010 and as such, the 2nd Respondent was on a fishing expedition amounting to an abuse of the court process.
- r. He added that the orders being sought by the 2nd Respondent herein offend the provision of Section 7 of the *Civil Procedure Act*, Cap. 21. He held that the application offended the provision so of Article 25, 27, 48 and 50 of the *Constitution of Kenya, 2010* on fair hearing as it condemned Ndegwa Njiru Advocate, Crispus Waithaka and Dr. S.K Macharia unheard as they had been adversely mentioned in these proceedings without being granted an opportunity to answer to a substantive suit that had been procedurally commenced.
- s. Lastly, it was deposed that the 2nd Respondent herein had denied SK Macharia, the owner of Plot No. 50 from the right to enjoy quiet possession and ownership of their property as guaranteed by the provision of Article 40 of the *Constitution of Kenya, 2010*. In view of all the foregoing, the Deponent urged Court to dismiss the application by the 2nd Respondent herein with Costs.

IV. Response by the OCPD/OCS Diani Police Station

- 7. On 14th March, 2022 in response to the application, the 3rd Respondent through the offices of the Attorney General filed their Grounds of Opposition. It was averred that:
 - i. The application was misconceived, frivolous, vexatious, and an abuse of the process of the court. The grounds affirmed that the issues being raised in the prayers being sought against the 3rd Respondent were matters under her mandate as an officer.
 - ii. Furthermore, it held there was no proof that the applicant herein had been stopped or denied access to the police station or from reporting any matter. If anything, Police stations were open to any person within the Republic of Kenya who wished to lodge any report or complaint



V. Further Affidavit by the 2nd Respondent Applicant - Estate of Sonrisa

8. On 8th March, 2022, with the leave of Court the Counsel for the 2nd Respondent/Applicant the Law firm of Messrs. Oluoch Kimori Advocates filed a further affidavit sworn by Iwona Strzelecka and dated 6th March, 2021. She averred that:
- a. The Applicant continued advancing the misconceived and deceitful angle that the Decree of 13th October, 2014 in the ELC (Mombasa) No. 30 of 2014 was never varied while the actual legal position she opined was that the Decree did not grant nor admit that SK Macharia was the legal owner of Plot No. 50 and further to this, the orders issued by this court were for eviction and taking of vacant possession of Plot No. 50 and not for demolition.
 - b. The Deponent held that the Applicant gained illegal access of the Parcel No. 48 and illegally proceeded to execute a decree issued on 13th October, 201 in the ELC No. 2014. She deposed that the Applicant kept on alleging that the COA never varied the Decree of this Court and deemed it premature since the Registrar's Report was not availed. She replicated some parts of the Judgement by the COA to support her argument.
 - c. She held that the report by the Land Registrar was delivered to the parties and in compliance with the directions in the Judgement of the COA, the 2nd Respondent/Applicant invoked the provision of Sections 79 (3A), 80, 86 and 91 (9) of the Land Registration Act and stated the case of determination by the Court and indeed this was done through filing of ELC (Kwale) No. 001 of 2021. She deposed that there could be no execution of the Plot. No. 48 as the same would be a complete disregard of these provisions of the law.
 - d. Should there have been any legal demolition the same ought to have been on Plot No. 50 and by a Court Bailiff. In the absence of clarity of the boundary, a matter that was still to be determined, and which area had been clearly defined by the Courts as the "disputed area".
 - e. The Deponent reiterated that ELC (Kwale) No. E001 of 2021 challenged the land registrar's report. She also deposed that the Order No. 9 of the decree dated 6th January 2015 specifically made reference to Ali Khan of the Plot No. 50 and not Sonrisa owner of Plot No. 48.
 - f. On the issue of fraud and irregularities, she deposed that this was an issue for the court to determine. Lastly, she deposed and vehemently refuted that Sonrisa was a trespasser.

VI. Submissions of the Counsels

9. Sometimes in February, 2023 while in the presence of all the parties herein, this Honorable Court directed that the Notice of Motion application be canvassed by way of written Submission. Pursuant to that all parties fully complied with these directions accordingly. This Honourable Court will still make reference to these submissions as they were made in respect of the entire application hence also in regard to Prayers 9, 10 and 11.
10. This Honorable Court, from the very onset wishes to wholeheartedly applaud Mr. Khan Advocate, M/s. Wambi Advocate and Mr. Ndegwa Advocate for executing their tasks so professionally and with extensive resilience, humility, diligence, dignity, decorum and dedication. Indeed, this Honourable Court learned a lot from this expose and the patience exhibited by the Learned Counsels.



A. The Written Submissions by the 2nd Respondent

11. On 14th March, 2022, the Learned Counsel for the 2nd Respondent, the Law firm of Messrs. Oluoch Kimori Advocates filed their written Submissions dated even date. Mr. Tariq Khan, the Learned Counsel for the 2nd Respondent submitted the decree that this Honourable Court aided and/or will continue to aid to purportedly execute a decree that had been varied by the Court of Appeal and not capable of being executed. The Learned Counsel argued that this Court by its order dated 17th February 2022 granted the Applicant leave to get police assistance when executing the decree issued in ELC (Mombasa) No. 30 of 2014 on 13th October 2014 and dated 6th January 2015 to remove the 1st and 2nd Respondents from Plot no. 50. She begged this court to answer this question, “which particular order of the 2014 decree was being sought to be executed as against the 2nd Respondent?” The Counsel submitted that the application that led this court to grant the aforesaid order did not specify which order of the year 2014 decree was being sought to be executed more so as against the 2nd Respondent.
12. According to the Learned Counsel, the order was for removal and vacant possession, therefore, the only orders that dealt with removal, eviction, demolition, and possession against the 2nd Respondent would be Order No. 5 of that decree. She added that the Applicant in his Replying Affidavit deposed that he was instructed to seek leave to execute order No. 9 of that decree. The Learned Counsel argued that the particular order was against the 1st Defendant in that suit and not the 2nd Defendant and as such was not and cannot be capable of being executed as against the 2nd Defendant. The Learned Counsel submitted that the only order that dealt with eviction, demolition and vacant possession was order no. 5 of the decree, which still never stated with clarity that it applies to the 2nd Respondent.
13. The Learned Counsel also urged the court to deal with the question on whether the aforementioned order was capable of being executed as against the 2nd Respondent at the time that the application moved this court. The Learned Counsel argued that this should be answered in the negative. She added that the abovementioned order was one of the grounds upon which the 2nd Defendant’s appeal was based on and the Court of Appeal pronounced itself on pages 13 and 14 of the COA’s Judgment. She further submitted that the Court of Appeal agreed with the submissions of the 2nd Defendant (1st Appellant in the appeal) and referred to the case of “[Lawrence Kairu Nyambura v Symon Kabugi Kinyuri](#) (2015) where according to counsel it was held that it was only after the determination of a dispute by the Land Registrar that parties can move to court to challenge that decision, therefore, the court was not justified to order demolition after determination by the Land Registrar. The Counsel contended that the Court of Appeal noted in the judgment that the order of demolition was in the result premature, hence order 5 of the Decree was not incorporated in the Court of Appeal’s final decree.
14. The Learned Counsel averred that the decree of the Court of Appeal under order 3 only directed the Land Registrar to determine the boundary dispute but it did not in any way go further to incorporate order 5 of the decree. Further to this, the Counsel submitted that in the execution of the Court of Appeal’s decree, the Land Registrar conducted proceedings to determine the boundaries and encroachment and consequent to this, a report dated 2nd July 2021 was prepared and served to the 2nd Respondent on 3rd September 2021. The Counsel submitted that from the foregoing, the 2014 decree to the extent upheld by the Court of Appeal had been fully complied with and execution finalized by the time the Applicant herein approached the court. She reiterated that an eviction or demolition order could not be granted by this court as that was not part of the Court of Appeals judgment. She submitted that the [Land Registration Act](#) has provisions on how the decision of the Land Registrar can be challenged.



15. The Learned Counsel averred that there was a pending appeal against the decision of the registrar in ELC (Kwale) E001 of 2021 and from that, there was existing orders in that court restraining Samuel Kamau Macharia from adversely dealing with the 2nd Respondent's property. The Learned Counsel submitted that this court cannot be called upon to legalize illegality by ordering a premature demolition, eviction, and handing over of vacant possession by the 2nd respondent of any property to Samuel Kamau Macharia as that would amount to denying the 2nd respondent the right to pursue its appeal and/or case stated as against the Land Registrar's decision.
16. The Learned Counsel asserted that the decree that the Applicant purported to seek leave to execute against the 2nd Respondent does not exist and therefore, this court should discharge its orders, declaring them illegal and/or unprocedural obtained and instead grant an order of status quo ante. The Learned Counsel opined that the applicant through his Counsel maliciously and procedurally misled the court in issuing illegal ex - parte orders in the following ways; by failing to disclose to the court that he had filed a similar application and similar orders granted in the CMCC (Mombasa) No. 36 of 2022; by alleging that he had complied with Order 22 Rule 18 of the Civil Procedure Rules, 2010; and by erroneously alleging that the judgment of this court was dismissed by the Court of Appeal.
17. The Learned Counsel further relied on the provisions of Section 34 of the *Civil Procedure Act*, Cap. 21 and the case of "*Yobensa & Another v Geoffrey Magera Omwoyo* ELC Case No. 13 of 2011 (unreported). Counsel submitted that the question on whether the Defendant, in that case, was entitled to the remains of the deceased on the portion of the land which after re-survey was found to belong to the Plaintiffs for determination under Section 34. She added that the Judge, in that case, found that it was not necessary for the Plaintiff to file a fresh suit and did not agree that the Court was "*functus officio*" as the decree issued by the court was in the process of being executed. The Counsel submitted that similar to the aforementioned case, this court did not have jurisdiction in a miscellaneous application to grant orders to aid in the execution of a decree from ELC (Mombasa) No. 30 of 2014. The Counsel further referred me to the case of "*James Wainaina and 6 others v Karanja Mbugua and Co. Advocates* (2012) eKLR and submitted that in that case, the judge struck out the suit filed on the basis that if the Plaintiff wished to contest the execution process in that suit then the only avenue was to challenge the process in the same suit not by filing a fresh suit and stressed that the provision of Section 34 speaks for itself.
18. In conclusion, the Learned Counsel stated that the Court of Appeal had noted that the order of demotion was in the result premature. Thus, it was for this reasoning that the Court of Appeal did not incorporate order 5 of the ELC No. 30 of 2014 decree in the final decree. Therefore, the Counsel urged the Court set aside the orders of this Court and discharge the same and instead order for status quo to be maintained and damages to be paid by the Applicant for misleading this Court.

B. The Written Submission by the Applicants

19. On 8th March, 2022, the Learned Counsels for the Applicants the Law firm of Messrs. Ndegwa & Ndegwa Associates filed their written submissions dated 4th March, 2022. Mr. Ndegwa Njeru as a background expressed that the application filed by the 2nd Respondent/Applicant was best described by the Court of Appeal case of Muchanga Investment Limited (Supra) to the effect that the principle that a party should have his day in Court should not be taken literally. He should have his day only when there was something to hear. Parties should not squander judicial time. Hearing time should be allocated by the Court on a need basis and not as a matter of routine.....”
20. He informed Court that this matter had protracted from the year 2014. He stated that the Applicant on 21st May, 1981 he acquired the suit property and was issued with a Certificate of title deed over the



property. He then proceeded to charge it with Daima bank. It was at the time of discharging it that the fraudulent transfer and encroachment was realized. He argued that this application stemmed from an attempt by the 2nd Respondent at both the ELC No. 30 by the futile attempt by the 2nd Respondent both in ELC No. 30 of 2014 and CA no. 32 Consolidated with 14 of 2016 where a decision was arrived at by the COA.

21. The Learned Counsel on matters of law submitted mainly on four (4) issues. Firstly, was on whether the court order is valid. The Counsel submitted that the court order obtained from this court was not a stand-alone order as the same was backed by the High Court decree, the court of appeal judgment and the Land's Registrar's report. He contention was that the court of appeal held that the order for demolition was premature for lack of a registrar's report therefore the availability of the report resuscitated the order for demolition. He added that since ELC (Mombasa) No. 30 of 2014 and Civil Appeal No. 14 and 32 of 2016, the court is "*functus officio*" and the Land Registrar's report indicated that Plot No. 48 had encroached into Plot No. 50 undeterred. The Counsel further argued that this application is one of the numerous means of forum shopping employed by the 2nd Respondent in an attempt to litigate until the result favors them. The Counsel alleged that the application was Res Judicata and further submitted that the court in ELC (Mombasa) 30 of 2014 and Civil Appeal 14 and 32 of 2016 rendered this matter functus upon obtaining the Land Registrar's report.
22. Secondly, the Learned Counsel on matters of law averred that whether the elements of fraud as pleaded have been proved. The Learned Counsel submitted that the 2nd Respondent pleaded fraud and illegality without proving. He submitted that it is trite law that allegations of fraud must be proved. To buttress on this point, the Counsel relied on several cases such as "[Benson Wandera Okuku v Israel Were Wakho](#) (2020) eKLR, "[RG Patel – versus – Lalji Mkanji](#) (1957) EA 314 and "[Jeniffer Nyambura Kamau v Hampbery Nandi](#) (2013) eKLR.
23. Thirdly, the Learned Counsel wondered whether one could seek "restitutio in integrum" (restoration to the original position) as prayed by the 2nd Respondent, the Counsel submitted that according to the report by the Land Registrar, Plot No. 48 had encroached into Plot No. 50 therefore the 2nd Respondent is a trespasser who could not claim for damages. The Counsel submitted that the principle of "restitutio in integrum" requires that lawfulness in a contract had to be maintained. He cited the case of "Bid Insurance Brokers Limited v British United Provident Fund (2016) eKLR and submitted that in that case, the court held that the remedy of restitution only applies where the Defendant had been unjustly enriched and would only apply where the contract had been set aside. He submitted the issue of restitution would never arise or founded in an illegality as it was in this case.
24. Lastly, the Learned Counsel raised the issue as to whether the court had been moved correctly. The Counsel argued that the prayers sought cannot be issued in a fatal application. He submitted that a Notice of Motion application could not institute a suit and the suit herein is a miscellaneous application with the purpose of obtaining supplementary orders. The Counsel cited the case of "Proto Energy Limited v Hashi Energy Limited (2019) eKLR and submitted that the substantive Prayers no. 9, 10, and 11 which could not be issued in a defective suit. He urged that the application to be dismissed.

VII. The Issues for Determination.

25. As indicated above, I have keenly considered the pleadings filed by all the parties, the elaborate and robust written and oral submissions by the Learned Counsels, the relevant provisions of the [Constitution of Kenya, 2010](#), the law and the cited authorities. I have also perused all the files that have been mentioned in this application.



26. In order for this Court to arrive at an informed, reasonable, just and fair decision, I have framed the subject matter under the application into the following four (4) salient issues for consideration. These are:-
- a. Whether this Honourable Court has the Jurisdiction and/or legal mandate power to direct that Crispus Waithaka, Samuel Kamau Macharia and Ndegwa Marclus Njiru, Advocate and Damaris Nzuve can and should be investigated for criminal intent.
 - b. Whether this Honourable Court can give an order restoring the status quo ante immediately prior to the to the grant of the said order issued on 17th February, 2022 to wit the Applicant through its owner Crispus Waithaka, Samuel Kamau Macharia, Ndegwa Marclus Njiru and the current Officer Commanding Station, Damaris Nzuve recreate in facsimile the villas as they stood and build them back brick by brick immediately prior to their demolition?
 - c. Whether in the alternative, this Honourable Court be pleased to issue an order for security to the 2nd Respondent as shall be adequate and sufficient for the due performance of order 11 above and to compensate for the loss and damages of other immovable properties as shall be proved by the 2nd Respondent.
 - d. Whether there is a possibility for the two disputants – Mr. Samwuel Kamau Macharia and the Estate of Sonrisa through, M/s. Iwona Strzelecka exploring and embracing an Alternative Judicial System (AJS) under the provision of Article 159 (2) (c) of the [*Constitution of Kenya, 2010*](#).
 - e. Who will bear the costs of the Application.

VIII. Analysis and Determination

27. I will deal with each of these issues separately one by one as follows.

Issue No. a). Whether this Honourable Court has the Jurisdiction and/or legal mandate power to direct that Crispus Waithaka, Samuel Kamau Macharia and Ndegwa Marclus Njiru, Advocate and Damaris Nzuve can and should be investigated for criminal intent.

28. Under this Sub – heading, the Court will deal on the matter of Jurisdiction of the Court. Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by the [*Constitution of Kenya*](#) under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the [*ELC Act*](#), the jurisdiction of the Court is defined as

“.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”:

29. Under Sections 4 and 13 (1) of the Environment Land court Act this court has the legal mandate to hear any matter related to environment and land including the one filed by the Applicant hereof. In the case of the ELC (Malindi) in the “*Kharisa Kyangyo v Law Society of Kenya* (2014) eKLR”.



30. The broad jurisdiction of the Environment and Land Court is donated by Article 162 of the Constitution which establishes the three tiers of Kenya’s Superior Courts. It provides thus:

- “ 1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)
- 2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
 - a) employment and labour relations; and
 - b) The environment and the use and occupation of, and title to, land.
- 3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)
- 4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

31. In the discharge of the mandatory obligation placed on it by the Constitution, Parliament enacted the Environment and Land Court Act and set out in details, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:

“ 13 Jurisdiction of the Court

- 1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- 2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
 - a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
 - b) relating to compulsory acquisition of land;
 - c) relating to land administration and management;
 - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
 - e) any other dispute relating to environment and land.
- 3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom



relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.

- 4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court
- 5) Deleted by Act No. 12 of 2012
- 6) Deleted by Act No. 12 of 2012
- 7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-
 - a) interim or permanent preservation orders including injunctions;
 - b) prerogative orders;
 - c) award of damages;
 - d) compensation;
 - e) specific performance;
 - f) restitution; or
 - g) declaration; or
 - h) costs.

32. It is to be noted that under the provision of Article 165(5), the Constitution expressly bars the High Court against exercising jurisdiction in respect of matters reserved for the Supreme Court or falling within the jurisdiction of the third-tier superior courts established under Article 162(2) of the Constitution. Article 165(5) of the Constitution provides thus:

“The High Court shall not have jurisdiction in respect of matters:

- a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution, or
- b) falling within the jurisdiction of the courts contemplated in Article 162(2)”

33. A plain reading of the above constitutional and statutory framework on the jurisdiction of the Environment and Land Court reveals that the Environment and Land Court which is the court contemplated under Article 162(2)(b) of the Constitution, has a broad constitutional jurisdiction to hear and determine disputes relating to the environment and the use, occupation, and title to land. the Constitution donated powers to Parliament to legislate a legal framework elaborating on that broad constitutional framework. In so doing, Parliament at Section 13(7) of the Environment and Land Court Act empowered the Court to make any order or grant any relief as the Court deems fit and just, including interim and permanent preservation orders. Parliament did not limit the jurisdiction to grant interim or permanent preservation orders to civil processes only. It simply gave the Court jurisdiction to issue preservation orders. It is therefore my view that, if Parliament wanted



this particular jurisdiction to be restricted only to civil processes, it would have done so. In its wisdom, it did not restrict the court's jurisdiction to grant preservation orders to civil processes alone.

34. In this instant suit, the Applicant pursues inter alia the Honourable Court has the power to direct that Crispus Waithaka, Samuel Kamau Macharia and Ndegwa Marclus Njiru, Advocate and Damaris Nzuve can and should be investigated for criminal intent.
35. It is not lost to the Court that, in its day to day adjudication of disputes relating to environment and the use and title to land, the Court is oftentimes confronted with disputes relating to rival allegations of criminal intent and contempt of court orders which surmounts to a criminal offence and defiance of court orders. The court is often invited to determine which of the rival titles is fraudulent and which is bona fide. It is expected that whenever the court is invited, in appropriate cases, it will be at liberty to exercise its jurisdiction under Section 13(7) of the *Environment and Land Court Act* and issue conservatory orders relating to both civil and criminal processes relating to any impugned title facing allegations of criminal intent and . The same applies to cases in which the court is invited to exercise judicial review jurisdiction in criminal proceedings relating to criminal offences under the *Environmental Management and Coordination Act* (the EMCA) and other relevant statutes.
36. The Applicant deponed that Crispus Waithaka and his agents disregarded the court's orders and obtained ex - parte orders dated 24th January 2022 of eviction from the Magistrates Courts in Mombasa CMCC Misc. Civil Application No. 36 of 2022. She deposed that Sonrisa being apprehensive of the ex parte orders, filed an application on 26th January 2022 in Mombasa ELC 30 of 2014 to challenge the irregular order. She further deposed that the court issued stay orders of the Magistrate's orders and on 14th February 2022 when the matter came up for "inter – parte" hearing, SK Macharia filed an application challenging the jurisdiction of the court. According to the deponent, the counsel for SK Macharia neither filed submissions to canvass his application challenging the jurisdiction nor did he file any Preliminary Objection within seven (7) days as directed in ELC (Kwale) E001 of 2021.
37. She deposed that SK Macharia through Five Eleven Auctioneers instituted this Miscellaneous application and illegally and unprocedural obtained "ex – parte" orders purporting to execute the decree of 13th October 2014. The Respondents in turn have argued that it held there was no proof that the applicant herein had been stopped or denied access to the police station or from reporting any matter. If anything, Police stations were open to any person within the Republic of Kenya who wished to lodge any report or complaint.
38. I am therefore satisfied beyond doubt that under Section 13 of the *Environment and Land Court Act*, this court has jurisdiction to issue orders relating to both civil and criminal processes. However, that jurisdiction is limited to matters relating to environment and the use and occupation, and title to land.

Issue No. b). Whether this Honourable Court can give an order restoring the status quo ante immediately prior to the to the grant of the said order issued on 17th February, 2022 to wit the Applicant through its owner Crispus Waithaka, Samuel Kamau Macharia, Ndegwa Marclus Njiru and the current Officer Commanding Station, Damaris Nzuve recreate in facsimile the villas as they stood and build them back brick by brick immediately prior to their demolition?

39. The second issue for determination is whether the Applicant has made out a case for grant the orders for the Status Quo to be maintained on the suit land. The jurisprudential principle upon which our



courts exercise jurisdiction to grant conservatory orders was outlined by the Supreme Court of Kenya in the Case of “*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* eKLR” as follows:

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”

40. Be that as it may criminal intent arises where a party decipher to commit an offence that threatens the well being and tranquility of the nation. Instructively, what is before this court is not a petition by a citizen of this Country alleging apprehended fear of imminent violation of a right under the Bill of Rights. More importantly, the Applicants have failed to place before this Honourable Court any material to suggest that she is threatened with imminent violation of her constitutional rights through any criminal or civil process relating to the suit property herein. If that were to happen, that citizen will be at liberty to initiate an action within the framework of the Bill of Rights and ventilate his grievances before the appropriate forum.
41. I therefore, although I hold that Prayer 9 fails on this regard, but taking the sensitivity and the protracted existing land boundary dispute between the parties herein, it is imperative that I proceed to grant the relief of Status Quo to be maintained in order to preserve the suit property pending further directions. I am
42. On the prayer for the reconstruction of a demolished building is one which is mandatory in nature and can only be granted where the court can enforce it. In the case of “*Canadian Pacific Railway v Rand* (1949) 2KB 239 at 249 and *Locabail International Finance Ltd v Afro-Export* (1988) All ER 901, both cited with approval in the Moses Njoroge case the court held that the principle governing mandatory injunction is as follows:
- “A Mandatory Injunction can be granted on an Interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff mandatory Injunction will be granted on an interlocutory application.”
43. The Applicant contended that on 18th, 19th, and 20th February 2022, Five Eleven Auctioneers executed the irregular and illegal orders dated 17th February 2022 issued in this matter. She deposed that she explained to the OCS Damaris Nzube that there were three court orders that were valid and conflicted with the orders she was executing, however, the deponent’s pleas fell on deaf ears and she proceeded with the execution without seeking clarification from the court. She deposed that if the OCS had followed the laid down procedure, the illegal demolition would have been stopped. She added that notwithstanding the foregoing, the purported orders issued if allowed were to remove the occupiers and give vacant possession to SK Macharia. She deposed that the orders were not for demolition. She deposed that Crispus Waithaka, Samuel Kamau Macharia, Ndegwa Marclus Njiru and the current OCS Damaris Nzube knew that there was a boundary dispute between Plot No. 48 and Plot No. 50 hence, there was no way they could be able to determine where Plot No. 50 began and ended. She



deposed that the application was a rouse to circumvent the existing court orders in place. Further to this, the deponent contended that the applicant through its owners and in collusion with the OCS and unknown goons destroyed and stole movable properties belonging to Sonrisa and its guest worth approximately Kenya Shillings Fourty Thousand (Kshs. 40,000/=). She deposed that having executed the irregular and illegal orders of this court, SK Macharia and Five Eleven Auctioneers had also taken over Sonrisa's entire property. Lastly, she deposed that if the orders sought were not granted, Sonrisa would suffer irreparable loss and damage.

44. The Respondent contended that he emphatically emphasized that contrary to what was being deposed under Paragraph 2 of the 2nd Respondents' Certificate of Urgency, the Decree dated 13th October, 2014 and Order of ELC (Mombasa) No. 30 of 2014 was never varied by the Court of Appeal in its Judgement of 20th April, 2020, but the said order was only deemed to be pre-mature by the Court of Appeal since the report by the Land Registrar report had not yet been availed. He deposed that the afore mentioned Decree was brought to his attention by the Instructing Advocate and he was made aware of the Order No. 9 which provided "*inter alia*":-

"That the 1st Defendant shall remove all his structure and remove all debris thereof within that period. In default the Plaintiff shall after that period move to with the help of the Court Bailiff and with the assistance of the Police and Administration of the nearest police station and demolish all structures therein. The cost of such demolition shall be borne by the 1st Defendant".

45. The Respondent averred that upon granting the said orders for demolition, the 2nd Respondent moved the Court via Certificate of Urgency in the application dated 26th January, 2022 seeking Stay of the Orders issued by the Lower Court in Miscellaneous Application No. 36 of 2022. Court granted the orders. However, he deposed that the "ex – parte" stay of execution of the orders granted in the CMCC No. 36 of 2022 by Naikuni J were no longer alive as the application was withdrawn on 15th February 2022. Hence the orders dated 17th February. Hence, the orders issued by this Court were procedural and lawful granted without any element of fraud and/or irregularity. He deposed that the allegation of fraud as pleaded had not been particularized with specific clarity and certainty as required by law. He urged Court not to grant prayer No. 8 of the application as in so doing it would depict and be confirming that not only the Applicant herein but also this Court was part of the alleged fraud, an act that would grievously injure and puncture the Court's reputation.
46. He deposed that in furtherance to this, the 2nd Respondent was in want of duty of material non – disclosure as they had failed to bring to the attention of the Court that the Court of Appeal in CA No. 14 Consolidated with No. 32 of 2016 was found to be of no merit in the 2nd Respondent's Appeal and the only issue in the SK Macharia's appeal was the absence of a Land Registrar's report and hence it would be pre – mature to order demolition of the offending and encroaching buildings. On furtherance to this assertion, he stated that noting that the report by the Land Registrar dated 2nd July, 2021 was generated pursuant the Court of Appeal's order, the same vide inference, incorporation and association formed part of the Court of Appeal's orders and as such any aggrieved party could move the Court of Appeal for its setting aside.
47. He further deposed that the demolition was in accordance with the decree of 13th October 2014, the Court of Appeal judgment as buttressed by the surveyor's report. He stressed that the decree had neither been stayed nor set aside. He averred that contrary to the 2nd Respondent belief and assumption that there existed a disputed area, the boundary dispute between the two plots was known and had already been determined by the highest Appellate Court. The 2nd Respondent had never preferred an appeal to the Supreme Court.



48. In the Case of “*Esther Wanjiku Mwangi & 3 others v Wambui Ngarachu* (2017) eKLR, J. G. Kemei quoted the Case of “*Nandan Pictures Limited v Art Pictures & others* Air 1956, Cal 428 which discussed the scope of mandatory injunction thus:-

“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the Plaintiff’s suit and the prayer made in it for an injunction to restrain the doing of a certain act, the Defendant does that act and thereby alters the factual basis upon which the Plaintiff claimed his relief. An injunction issues in such a case in Order that the Defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the Defendant to undo what he has done with notice of the Plaintiff’s suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

In *Shepherd Homes Limited Versus Sandahm Homes Limited v Sandahm* [1971] 1 CH. 34, Megarry, J. stated:

“it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the Court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in Order to enforce a contractual obligation”

49. The holding in the “Nandan Pictures and Shepherds Homes Case (supra)” was quoted with approval by the Court of Appeal in the Case of “*Lucy Wangui Gachara v Munidi Okemba Lore* (2015) eKLR” where the Court of Appeal stated that such orders should only be granted in the clearest of cases as it amounts to determination of issues in dispute in summary. In this case, the Respondent was granted the demolishing orders were in accordance with a decree of 13th October 2014, the Court of Appeal judgment as buttressed by the surveyor’s report. He stressed that the decree had neither been stayed nor set aside. He averred that contrary to the 2nd Respondent belief and assumption that there existed a disputed area, the boundary dispute between the two plots was known and had already been determined by the highest Appellate Court. The 2nd Respondent had never preferred an appeal to the Supreme Court. A court’s jurisdiction flowed from either the *Constitution* or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the *Constitution* or other written law.
50. It is important for the parties to note that the relief of interlocutory mandatory injunction are granted generally to preserve/restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. Mandatory injunctions are not to be on



the negative and cannot be granted against the decisions of Superior courts. For this reason prayer no. 10 fails.

51. I take note that it is clear the Order of demolition came from a Competent jurisdiction superior to this court. This Honourable Court cannot overturn a final decision of the Court of Appeal

Issue No. c). Whether in the alternative, this Honourable Court be pleased to issue an order for security to the 2nd Respondent as shall be adequate and sufficient for the due performance of order 10 above and to compensate for the loss and damages of other immovable properties as shall be proved by the 2nd Respondent.

52. Under this Sub heading, this Court feels it imperative to extrapolate briefly on two legal terminologies that seem to be extensively featuring from these proceedings. These are a). Miscellaneous application and b). State of being “Functus Officio”.

In furtherance to the directions of this court dated 20th July 2022, it must be noted that a Miscellaneous Application file is not a suit in the strict sense of the law. Section 2 of the *Civil Procedure Act*. Cap 21 defines “Suits” to mean:- “All civil proceedings commenced in any manner prescribed under Section 2 means prescribed rules”

The provision of Section 19 of the *Civil procedure Act*, Cap 21 provides:-

“Every suit shall be instituted in such manner as may be prescribed by the Rules”

53. While the provision of Order 3 Rule 1 of the *Civil Procedure Rules, 2010* further provides:-

“Every suit shall be instituted by presenting a Complaint to Court or in such other manner as may be prescribed”

Administratively, it is purely an application (as opposed to a full fledged suit – proceedings commenced by way of either a Complaint, Petition, Originating Summons or Motions, Application for Judicial Review) filed in court and most circumstances where there the main file is missing or misplaced from its safe place of custody or registry for seeking specific relief. It is usually indirectly or directly related to a substantive case. There has to be a main suit related to the said application. Otherwise should anyone commence a suit ostensibly through a Miscellaneous application, this is unprocedural, fatally defective and being in contravention of the laid - down rules and statutes it is incapable of surviving the life of a proper suit. It must die a natural death.

54. Ideally, once the relief has been obtained or achieved, the Miscellaneous application like any other application stands as having been spent or exhausted its usefulness. The life span and/or timeframe of a Miscellaneous application extremely short and well defined. Indeed, as it faces or fizzles out, the only thing that remains for ever as long as the suit is concerned is its product – the order. To wrapped it, I am compelled to rely on the decision cited by the Learned Counsel for the Applicant, “Proto Energy Limited (supra) where the Court held, inter alia:-

“As a general rule a suit can only be instituted by way of a Complaint, Petition or an Originating Summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a Notice of Motion renders the entire suit defective”



55. In this instant case, this miscellaneous application was filed by Five Eleven Auctioneers seeking to execute the decree of 13th October 2014. Pursuant to that, Orders to this effect were issued. In the strict legal sense, the Miscellaneous application like a used gun bullet or cartridge was fully spent.

Subsequently, flowing from the above legal reasoning, this court, therefore, became “functus officio”. My understanding is that a court is “functus officio” when it has performed all its duties in a particular case. The Black Law Dictionary defines the term - “functus Officio” to mean:-

“Having performed his or her office. Without any further authority or legal competence because the duties and functions of the original commission have been fully accomplished”.

56. In the instant case, upon this Court granting the orders on February 17, 2021 and other subsequent directions and also based on the self-explanatory averments made under Paragraphs 11 and 12 of the directions by Hon. Justice Munyao, to wit:-

“...I do not hesitate to categorically state that the filing of Miscellaneous Application when there exist substantive suit ought not to be encouraged. If there is a substantive suit, then applications which seek orders purporting to emanating from that suit need to be filed in the substantive suit and not in Miscellaneous applications.....I will say no more but I will direct that any application must be filed within the substantive suit which is the ELC (Mombasa) No. 30 of 2014. That is where the Decree was made and if any party wishes to execute the Decree or seek any orders out of the Judgement therein then he/she must apply within that file and no where else.....”

57. Thus, in all fairness, surrounding facts and inference remaining constant and in the fullness of time going forward, unless otherwise stated, this Honorable Court finds itself in a situation devoid and bereft of any further legal mandate to continue dealing with this matter whatsoever. And especially prayer 11 in a matter already decided by the Court of Appeal. It goes without saying that Prayer 11 also collapses by virtue of the fact that, I reiterate, the Honorable Court is functus officio at this point. Nonetheless, on humanitarian grounds and for the sake of providing the safety of the 2nd Respondent and her property under the Bill of Rights, I proceed to order that there be security to that effect.

Issue No. d). Whether there is a possibility for the two disputants – Mr. Samwuel Kamau Macharia and the Estate of Sonrisa through, M/s. Iwona Strzelecka exploring and embracing an Alternative Judicial System (AJS) under the provision of Article 159 (2) (c) of the [Constitution of Kenya, 2010](#).

58. In the recent times, the Judiciary in its transformation strategic Plans has fully embraced and endorsed the doctrine or policy on Alternative Judicial System (now referred to as “The AJS”) . It is anchored under the provision of Article 159 (2) (c) of the [Constitution of Kenya, 2010](#) and Section 20 (1) and (2) of the Environment & Land Court Act, No. 19 of 2011. Among many other purposes of AJS is that it is intended to expeditiously and speedily clear the ever long backlog of cases through just, amicable and proportionate resolution of disputes. These cases have been pending in Court for many years. It is perceived to be cost effective, time saving and user friendly. The results are instant and leaves all parties happy taking that its based on Win – Win basis. In the long run all parties remain friends and sustain cordial relationship in future.

59. With this background, this Court strongly feels that the instant case is one where it should be referred to AJS process. For instance, among many proposals to resolve the matter would be on any of the parties making an offer to purchase the whole portion or part of the disputed area at the market price. For



this reason therefore, the Deputy Registrar of ELC is hereby directed to ensure that this mechanism is organized to be undertaken appropriately at Kwale region. Thereafter, a report should be prepared and filed accordingly in Court. The Court is extremely optimistic through this “modus operandi” this rather protracted dispute will be resolved once and for all.

Issue No. e). Who will bear the costs of the Application.

60. The issue of costs had already been dealt with in the ruling dated October 19, 2022. The Court wishes not to belabor the point. It is just fair that each party bear their own costs.

IX. Conclusion & Disposition:

61. Consequently, having caused an indepth and robust analysis of all the framed issues herein, on a preponderance of probability, these Honorable proceeds to provide the following directions.

- a. That the Notice of Motion Application dated February 21, 2022 are hereby partially allowed to the extent:-
 - i. This Honorable Court issues an order restoring the status quo ante immediately prior to the grant of the said order issued on February 17, 2022 pending the outcome of the ELC No. 30 of 2014.
 - ii. In the this Honorable Court issues an order for security to the 2nd Respondent.
- b. That as directed by this Court (Justice Munyao J) in its direction of July 20, 2022 all or any future application touching on the execution of the decree dated October 13, 2014 and the subject property of the suit must be filed in the substantive file, Mombasa ELC No. 30 of 2014.
- c. That an order be made that with an exception of ELC (Mombasa) No. 3, which has become “*functus officio*”, any other ELC Courts at Mombasa are at liberty to hear and determine all the matters pertaining to the execution of the ELC (Mombasa) No. 30 of 2014 as the Court of Appeal has already rendered itself on the matter.
- d. That the two Disputant parties herein - Mr. Samwuel Kamau Macharia and the Estate of Sonrisa through, M/s. Iwona Strzelecka are advised and encourage to embrace, explore and extrapolate onto the now well designed Alternative Judicial System (AJS) as provided for under the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 as rapid means to settle this protracted land and/or boundary dispute once and for all.
- e. That the Deputy Registrar, ELC be and is hereby directed to organise for the Disputant parties herein to appear before an appointed AJS session within Kwale within the next thirty (30) days from the date of the delivery of this Ruling and the AJS Report to be filed in Court thereafter.
- f. That each party to bear their own Costs.
- g. That parties have a right to appeal the decision of this court if aggrieved.

It is ordered accordingly.

RULING DELIVERED VIA MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF JULY 2023.

.....
HON. JUSTICE (MR.) L. L. NAIKUNI, JUDGE
ENVIRONMENT AND LAND COURT AT,



MOMBASA

Ruling Delivery in the Presence of:

- a. Ms. Yumna Jillo, the Court Assistant.
- b. Mr. Mwangi Ndegwa Advocate for the Applicant.
- c. M/s. Aswan Advocate holding brief for Mr. Khan Advocate for the 2nd Respondent/Applicant.
- d. M/s. Waswa Advocate for the 3rd Respondent.

