



**Kenya Wildlife Services v Shihua Industry Alliance Company Limited & 4 others  
(Civil Appeal 23 of 2019) [2022] KEELC 3924 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3924 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL APPEAL 23 OF 2019  
LL NAIKUNI, J  
JULY 28, 2022**

**BETWEEN**

**KENYA WILDLIFE SERVICES ..... APPELLANT**

**AND**

**SHIHUA INDUSTRY ALLIANCE COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY CONSERVATOR ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION ..... 4<sup>TH</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**I. Preliminaries.**

1. What is before this Court for its determination are two Notice of Motion applications. The first one which is dated the May 26, 2022 was brought under a certificate of urgency by the Intended Advocate for the 1<sup>st</sup> Respondent. Whilst, the second one which is dated June 28, 2022 was filed by the 5<sup>th</sup> Respondent herein. This Court will deal with them simultaneously.
2. The urgency then was that, on August 14, 2019 this Honorable Court delivered a Judgment on appeal from a Ruling of a Sub ordinate Court in favour of the 1<sup>st</sup> Respondent against the Appellant. In that decision, the Honorable Court had ordered the release of the seized consignment goods to the 1<sup>st</sup> Respondent. Thereafter, on May 9, 2022, this Honorable Court made orders with very stringent timelines to the effect the Appellant facilitates the issuance of CITES permits and/certificate documents for the legal transshipment of the goods by the 1<sup>st</sup> Respondents herein to a Country of their designation in this case Hong Kong. It further ordered that there be verification of the contents of the 37 containers, the storage of the goods and the intended Cross - stuffing to fresh containers. It



directed that this exercise be conducted in the presence of the Court through either the Judge or the Deputy Registrar. The above verification exercise was scheduled to take place on the May 27, 2022.

3. However, 1<sup>st</sup> Respondent instructed, another set of Advocates and not the current ones, the Law firm of Messrs. Coulson Harney LLP to come on record to represent it in the matter. In accordance with the [Civil Procedure Rules, 2010](#), it is a requirement to seek for leave of the court to come on record for the 1<sup>st</sup> Respondent in place of Egunza and Associates after Judgment had been entered as it in these proceedings. Judgement was entered on August 14, 2019. She deponed that if the Application was not certified urgent and heard forthwith, the 1<sup>st</sup> Respondent would likely suffer substantial loss and damage once the Honorable Court becomes functus officio.

## **II. The Notice of Motion dated May 26, 2022 by the Intended 1<sup>st</sup> Respondent**

4. The Intended 1<sup>st</sup> Respondent filed this application dated May 26, 2022 under the Certificate of urgency. The application is premised on the provision of Order 9 Rule 9 and Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) Sections 1A, 1B, and 3A of the [Civil Procedure Act](#) and Article 159 (2) (d) of the [Constitution of Kenya 2010](#).
5. It sought for the following: -
  - a. Spent
  - b. There be a stay of all proceedings pending the hearing and determination of this application inter partes.
  - c. This Honourable court do issue leave for the firm of M/s Coulson Harney LLP Advocates to be placed on record in place of M/s Egunza & Associates on behalf of the 1<sup>st</sup> Respondent.
  - d. The Notice of Change of Advocates attached hereto to deemed as duly filed and served.
  - e. The costs of this application be in the cause.
6. Its grounds are on the face of the application and an 12<sup>th</sup> Paragraphed Supporting Affidavit with annexures sworn by Cecil Kuyo, dated May 26, 2022. She deponed that she is an advocate of the High Court of Kenya and a partner in the Law Firm of Messrs. Coulson Harney LLP. She stated that she had the authority of the 1<sup>st</sup> Respondent to swear the affidavit on its behalf. She annexed a copy of the Letter of Authority dated May 26, 2022 and marked as Exhibit CK -1. She deponed that the court's records showed that the Law Firm of Messrs. Egunza & Associates had been appearing in these proceedings on behalf of the 1<sup>st</sup> Respondent herein. However, she deponed having been informed by Mr Yao Bao, the sole director of the 1<sup>st</sup> Respondent since its incorporation, and verily believe that the 1<sup>st</sup> Respondent had never authorized M/s Egunza & Associates to appear in these proceedings on its behalf. Further, she deponed that she had been informed by Mr Yao Bao that the said engagement of M/s. Egunza & Associates might involving forged documents. However, it was this reason that the 1<sup>st</sup> Respondent had now appointed the Law Firm of Messrs Coulson Harney LLP to act for it in this matter. A copy of the Notice of Change of Advocates dated May 26, 2022 was contained in the exhibit annexed and marked as CK-2.
7. She deponed that on or about May 18, 2022, she placed a call together with her colleague Mr Alfred Deya to Mr George Egunza Advocate, the Proprietor of Messrs. Egunza & Associates, through his cell phone number 0722962895 and sought to know the status of this matter after being instructed by the 1<sup>st</sup> Respondent to take over its conduct. She indicated being aware that her colleague Mr Alfred Deya, on May 19, 2022, as a follow up to the above conversation, wrote an email to Mr Egunza Advocate through his email address [george\\_egunza@yahoo.com](mailto:george_egunza@yahoo.com) where we enquired whether he had



any objections to the Law Firm of Messrs. Coulson Harney LLP taking over the conduct of this matter on behalf of the 1<sup>st</sup> Respondent. She deponed that she was aware that Mr Egunza never responded to the above email. Therefore, it was necessary for this Honourable Court to grant the orders sought to enable the Law Firm of Messrs. Coulson Harney take over the conduct of this matter.

8. She deponed that given that Judgment had been entered in these proceedings, an order of the Honourable Court was necessary. This was under the procedural rules of this court of the change of Advocates from M/s Egunza & Associates to M/s Coulson Harney LLP Advocates. Thus, she held that it was necessary for their firm was granted an order of the Court before it could formally come on record as acting for the 1<sup>st</sup> Respondent. She deponed that due to the urgency of the matter borne out by the scheduled verification of the contents of all the 37 containers, and the intended Cross - Stuffing to fresh containers by another Shipping Agency for purposes of transshipment to the designated destination by the Honourable Court (through the Judge or the Deputy Registrar) on May 27, 2022. She averred that they could not procure in good time the affidavit of the 1<sup>st</sup> Respondent's Director, Mr Yao Bao, who was domiciled in China.

### **III. Further Affidavit in Support of Notice of Motion dated May 26, 2022**

9. There was a further affidavit by the Intended 1<sup>st</sup> Respondent sworn by Yao Bao. He held that he had the 1<sup>st</sup> Respondent's authority to make the Affirmation on its behalf in support of the Notice of Motion application filed on May 26, 2022. The 1<sup>st</sup> Respondent is a private company limited by shares which was incorporated in Hong Kong on January 3, 2014 as company number 2021452 in accordance with the laws of Hong Kong. He deponed that he had been the sole director and shareholder of the 1<sup>st</sup> Respondent since its incorporation to date, and the 1<sup>st</sup> Respondent had never appointed any other directors or had any other shareholders. On this he referred to the Affidavit of Chang Chun Shen Jensen both filed in this case. His information as shown on the 1<sup>st</sup> Respondent's corporate documents with the Companies Registry of Hong Kong ("HKCR"), the government department in Hong Kong was responsible for company related matters, corresponded to his passport number G52826587 and the address on his China Identity card (i.e. No 5 – 1, Xiapu, Xiali Village, Yuxi Town, Fuqing City, Fujian. He attached copies of the relevant documents of the 1<sup>st</sup> Respondent with the HKCR were contained in the exhibit annexed and marked as "YB-2. The 1<sup>st</sup> Respondent was set up for the purpose of purchasing the consignments of woods which were the subject matter of these proceedings.
10. He deponed that in or about February 2014, the 1<sup>st</sup> Respondent and its business partner, ZH Leung HK Trading Limited, also a company incorporated in Hong Kong, purchased woods in Madagascar. The plan was to ship the woods from Madagascar to Zanzibar, Tanzania, followed by transshipment from Zanzibar, Tanzania to Hong Kong. He attached copies of the relevant certificates, export permits and agreement marked as YB-4. In respect of the shipment of the woods from Zanzibar, Tanzania to Hong Kong, the shipper was Visiwani Enterprises Ltd, the shipping company was Pacific International Lines (PIE) Ltd ("PIL"), and the vessel carrying the Rose woods was MV Kota Hapas. PIL issued 4 bills of lading each dated May 19, 2014 (the B/Ls) to the Respondent and ZH Leung in respect of the woods. He attached copies of the B/Ls and marked them as YB - 5. He stated that he had the originals of the Bill of Lading in his possession.
11. He deponed that in around May 2014, he was informed that the woods had been detained in Kenya by the Kenya Wildlife Services ("KWS"). He on behalf of the 1<sup>st</sup> Respondent took steps to find out what had happened to the Rose woods and the reason behind their detention 'but to no avail. Since then and until early 2022, he had received no further updates regarding the said Rose woods.



12. He deponed that in or around February 2022, he noticed that there were numerous online articles that mentioned the release and return of the woods to the 1<sup>st</sup> Respondent pursuant to orders/directions made by the court. He attached and annexed an online article reporting this matter is contained in exhibit marked YB - 6. To ascertain the information in relation to the woods with a view of having them transhipped and exported to Hong Kong as originally planned, he, on behalf of the 1<sup>st</sup> Respondent engaged M/s Reed Smith Richards Butler LLP (RSRB), a firm of solicitors in Hong Kong for assistance. Based on the information in the Bill of Lading, RSRB contacted PIL for information regarding the matter and the woods. He attached copies of the exchanges between RSRB and PIL (with enclosures) marked as YB-7.
13. He deponed that based on the information provided by PIL to RSRB, the 1<sup>st</sup> Respondent had apparently been involved in court proceedings in Kenya concerning the woods (these proceedings), and it appeared that a person named as Salma Mbauro had been acting on behalf of the 1<sup>st</sup> Respondent in the proceedings. Pursuant to the court's ruling in July and October 2020, the rose woods were obtained to be released to the 1<sup>st</sup> Respondent, who would then nominate a shipping agency for the transshipment of the woods to a Country of their designation - Hong Kong. Further, on 24<sup>th</sup> November 2021, it appeared that the woods were transferred from the original 34 – 20 feet long containers to the 22 40feet long containers.
14. He deponed that as the sole director and shareholder of the 1<sup>st</sup> Respondent, was surprised to find out that M/s. Egunza Advocate and M/s Mbauro for the 1<sup>st</sup> Respondent had been acting in relation to the woods for the past 8 years without his knowledge. Particularly, neither he nor the 1<sup>st</sup> Respondent had ever authorized any person in Kenya (whether the said Salma Mbauro or any other person) to conduct legal proceedings in Kenya on the 1<sup>st</sup> Respondent's behalf.
15. This raised genuine concerns that someone had purported himself as the 1<sup>st</sup> Respondent's authorized person to act on its behalf in Kenya, and would procure the woods to be transhipped and exported to someone other than the 1<sup>st</sup> Respondent, without the 1<sup>st</sup> Respondent's knowledge or authority, thereby causing massive loss and damage to the 1<sup>st</sup> Respondent. It was for these reasons that he engaged the services of Messrs. M/s Coulson Harney LLP, a law firm in Kenya, to conduct further investigation on the matter. M/s Coulson Harney LLP conducted a court file search and provided him with the copies of the documents filed in these proceedings. He averred that he noticed that the court documents purportedly submitted by the 1<sup>st</sup> Respondent were made by a "Salma S. Mbauro" or "Salama S. Mbauro" or "Salima S. Mbauro" on the 1<sup>st</sup> Respondent's behalf and drawn and filed by an "Egunza & Associates" and a "Nabwana Nabwana & Co." He confirmed that as the sole director of the 1<sup>st</sup> Director of the 1<sup>st</sup> Respondent, had never authorized Mbauro to be the 1<sup>st</sup> Respondent's representative, nor had he ever approached either of the cited law firms to provide legal services to the 1<sup>st</sup> Respondent, let alone conducting legal proceedings on its behalf. Further, he averred that he had noticed that the court documents also contained purported board minutes of the 1<sup>st</sup> Respondent dated October 27, 2017 ("the Purported minutes"), which authorized a "Salama S. Mbauro" to be the 1<sup>st</sup> Respondent's representative in Kenya. He attached a copy of the purported minutes and marked it as YB-8. The purported minutes showed that a "Peter Liu" was the chairman of the 1<sup>st</sup> Respondent and a "Lesley Huang" was the Director/ Secretary of the 1<sup>st</sup> Respondent. As aforementioned, he stated that he was the 1<sup>st</sup> Respondent's sole director and shareholder since its incorporation and the said persons had never been director(s) or company secretary(ies) of the 1<sup>st</sup> Respondent. He invited the court to refer to the documents of the 1<sup>st</sup> Respondent as maintained in the public records of HKCR. He therefore verily believe that the purported minutes was a forged document, and Mbauro's conduct of these proceedings (including but not limited to the engagement of "Egunza & Associates" and "Nabwana



Nabwana & Co.” was unauthorized and involved criminal and fraudulent acts for which he would be making the appropriate criminal complaints in due course.

16. In addition, based on his understanding, Peter Liu was an individual resident in Taiwan who operated the business of transshipment of woods in Mombasa. The woods which the 1<sup>st</sup> Respondent and ZH Leung purchased were originally intended to be sold to Peter Liu/his associate(s), which if materialized would result in considerable commission fees payable to Peter Liu. However, the woods were ultimately purchased by the 1<sup>st</sup> Respondent and ZH Leung and he verily believed that Peter Liu, who got deprived of the commission fee, made a report to KWS to detain the woods. He also believed that Peter Liu, after finding out that the 1<sup>st</sup> Respondent had taken no action in respect of the woods for 3 years after the detention, orchestrated a scheme to deceive the 1<sup>st</sup> Respondent of the woods by falsely and wrongfully claiming himself as the “boss” of the 1<sup>st</sup> Respondent and pursuing legal actions to get his hands on the woods.
17. He concluded by averring that he was advised by his Advocate for the 1<sup>st</sup> Respondent which advice he verily believed to be true that:-
  - a. The 1<sup>st</sup> Respondent, as a corporate body could take decisions only through the agency of its organs, the board of Directors, and the Stakeholders as regulated by its Articles of Association and the provisions of the Hong Kong Companies Ordinance;
  - b. For any action or proceedings to be taken in the 1<sup>st</sup> Respondent’s name such action or proceedings must be authorized in accordance with the 1<sup>st</sup> Respondent’s name, such action or proceedings must be authorized in accordance with the 1<sup>st</sup> Respondent’s/Articles of Association;
  - c. There was no resolution of the 1<sup>st</sup> Respondent appointing the firm of M/s Egunza & Associates or Nabwana Nabwana & Company Advocates to represent it in these proceedings. The purported minutes filed in these proceedings are a forgery.
  - d. The appointment of M/s Egunza & Associates to represent the 1<sup>st</sup> Respondent in the proceedings ought to have been authorized by the 1<sup>st</sup> Respondent’s Board of Directors. He averred that he is the sole director and shareholder of the 1<sup>st</sup> Respondent; and
  - e. He had not delegated any power to Mbauro to appoint M/s Egunza & Company Advocates to act on behalf of the 1<sup>st</sup> Respondent.
18. By reason of the above, if M/s Coulson Harney LLP is not granted leave by the court to go on record as the 1<sup>st</sup> Respondent’s legal representative in these proceedings, there was a real risk that the woods would be fraudulently transshipped and exported to a third party without the authorization of the 1<sup>st</sup> Respondent, the true owner of the goods, and would result in irreparable loss and damage to the 1<sup>st</sup> Respondent. He therefore humbly invited the court the application herein.

#### **IV. Response to the Application dated May 26, 2022**

19. Through a Replying Affidavit dated June 9, 2022, Salama Mbauro, who stated that she was the holder of a Power of Attorney in respect of two sister companies ZH Leung HK Trading Limited and Shihua Industry Alliance Company Limited hence well conversant with the facts herein, duly authorized to make this affidavit on its behalf hence competent to depone to factual matters herewith and all matters pertinent to ZH Leung HK Trading Limited and Shihua Industry Alliance Company Limited.



20. She deponed that the application dated the May 26, 2022 was fatally and incurably defective having been brought in the Appellate Court yet the primary suit was decided on the February 22, 2019 being Chief Magistrates Miscellaneous Civil Application No 328 as consolidated with 329 of 2017 Shihua Industry Alliance and Another – Versus – The County Conservator and Conservator and Others (She annexed and marked SM-1 the copies of the said order).The application herewith had been filed in inordinate delay yet no explanation had been proffered therefore, the application is caught up by laches, hence the firm of Messrs. Coulson Harney LLP could not assert any rights by reason of the inordinate delay. All the material times, commencing from the sub-ordinate court in the Consolidated files; CM Misc. No 328/329 of 2017 there had been absolutely no objection as regards issue of representation from interception of the suits that had now culminated in the Appeal before the Honorable Presiding Court.
21. In tandem with the averment herein before what was mind boggling, puzzling and totally questionable was the fact that the firm of Coulson Harney LLP seemed comfortable to seize the proceedings at the Appellate stage yet the orders proper were granted vide proceedings before the Honorable Sub - ordinate Court, the judgment on Appeal already issued, the question then begets the interest of the firm of Coulson Harney was not in tandem with the interests of the 1<sup>st</sup> Respondent.
22. She deponed that before this Honorable court was the subject of the release of goods being thirty four containers that were illegally seized at the Port of Mombasa whilst on transshipment, the composition and/or otherwise of the 1<sup>st</sup> Respondent had never been on trial has not been the subject of these proceedings, more pertinently, he averred that he was advised by her advocate to be true the jurisdiction of the court strictly so was sitting on the appellate jurisdiction of the orders issued by the subordinate court and to ensure that the orders therewith were complied with to the latter.
23. She deponed further that the representation and the composition of the 1<sup>st</sup> Respondent in the proceedings herewith had not been thorny issued premised on the following grounds: -
  - i. That the composition, local representation and Counsel on record had undergone rigorous local scrutiny by the state agencies, no red flags had been raised to warrant and/or support the application which had been brought before the Honorable court.
  - ii. That the Law firm of Nabwana & Nabwana Advocates from which firm the firm of George Egunza & Associates Advocates took over from had been instructed by the two sister companies – Shihua Industry Alliance Company Limited and ZH Leung HK Trading Company Limited whose goods had been seized and detained at the port of Mombasa; according to the pleadings filed by the said firms of Advocates none to date were challenged what had been challenged was the proceedings that were on Appeal which Appeal had been proffered by the Kenya Wildlife Services the main Agency that seized the goods.
  - iii. That curiously the pleadings filed by the said firms of Advocates in the subordinate court had not been in issue up to and until judgment and the judgment before the Honourable Court of Appeal.
  - iv. That it was now ripe for conclusion that the instructions issued to the firm of Coulson Harney was devoid of history pertinent to the suit before the Honourable Court and that before the Subordinate Court which had been blindsided with little or absolutely no mention, the faceless individuals known as YAO BAO who purported to have issued instructions to the said firm had never sworn any affidavits made any entry on any document on Kenyan jurisdiction up until the filing of the application.



- v. That more practically there had been payments of several charges including but not limited to:-
    - a. Port charges
    - b. Custom warehouse rent charges
    - c. Shipping charges and demurrage
    - d. Handling and storage
    - e. Transfer of empty containers which had all been paid through the firm of George Egunza & Associates Advocates whilst representing the 1<sup>st</sup> Respondent, I did categorically state that in the event these charges would nor have been paid entities such as the Kenya Port Authority would have auctioned off the said 34 containers, this seemed to completely lost upon the firm of Coulson Harney in their endeavor to state that the firm of George Egunza was devoid of any instructions. (She annexed and marked it SM 2 were copies of the said payment demands and payments having been done.
24. She deponed that she had been advised by her advocates that it was proper that the application dated the May 26, 2022, was supported by an incompetent affidavit; as was appropriate an application to cross examine the said deponent, the fatality of the affidavit deems the application as unsupported by an affidavit since there were two choices either to have it expunged and/or at the hearing thereof seek to cross examine the deponent thereto.
25. She deponed that it was prudent to note that to entertain the said application it would be to re-litigate issues post judgment on the following pertinent grounds: -
- i. That there had been no complaint to the Police Authorities either in the Peoples Republic of China, the parent Embassy and/or the Local Police Authorities to warrant the references to issues of criminality for example to allege issues of forgery was to strike too low a blow without cogent evidence, on that alone the said affidavit was devoid of any merits.
  - ii. That there were two different signatures that had been executed for and on behalf of the individual YAO BAO which could be discerned by the Naked eye, there was the signature on the documents annexed thereto this now raised concerns as regards the documents annexed thereto this now raised concerns as regards the documents filed to even imagine that this individual had never appeared before the Honourable Court and/or any such local authority to substantiate his claims emboldens their position.
  - iii. That the letter of instructions to the firm of Coulson Harney LLP vide Authority to come on record in Mombasa ELC Civil Appeal No 23 of 2019 was dated the May 26, 2022 proceedings had been ongoing since the year 2017, which implies that the instructions were limited to the Appeal at execution stage yet the Orders being upheld emanated from the Subordinate court again in the said document the designation of Mr Yao Bao was not addressed and it was demised as being addressed "For and on behalf of Shihua Industry Alliance Company Limited; if indeed Mr Yao Bao was who he wanted the Honorable Court to believe he was why executed documents on a for and on behalf of yet purported to be the real owner; which questions the entire integrity of the documents produced.
  - iv. That even for a minute if the documents purported to have emanated from where it was purported to have there was no date of incorporation on the Memorandum and Articles of Association that the individual Yao Bao had produced and there was an intertwining with



another company Baihui International (HK) Limited that bore a date of the June 19, 2014 yet the goods were already in the territory Kenya and had already been detained, that was in April 2014 that the goods were detained and he did record a statement in his person at the time so begot the question was the quest by the said individual truly genuine to say the least.

- v. That since 2014 to date the individual Yao Bao does not disclose whether any payments in respect of the said transshipment had been made, the local clearing agent and whether at any material times surrendered to the local authorities for scrutiny.
  - vi. That she had been advised by her Advocates which advise she verily believed to be true that this affidavit did not meet the requisite threshold so as to form part of pleading herewith, the same was poignantly an attempt to re-litigate issues post judgment, had no verification, was devoid of genuineness hence the Honourable Court ought to disregard the said documents.
26. She deponed that it was imperative that he did categorically state that the present suit was an appeal emanating from a primary suit that was consolidated and trial proceeded, judgment rendered and decree issued, to put the matters into perspective it was imperative that a brief history herewith suffices:
- i. That she had been engaged both as a confidant and local representative of the two sister companies Shihua Industry Alliance Company Limited and ZH Leung HK Trading Limited for periods in excess of 15 years to which effect he had since gotten to know the Directors personally. She annexed and marked as SM -1 copies of documents that depict the said relation.
  - ii. That it was on this backdrop that on the date and time the said goods were seized by the Multi-agency team at the Port of Mombasa whilst on transshipment that she did present herself to the authorities and recorded statement with the authorities concerning the said shipment for and on behalf of the two sister companies Shihua Industry Alliance Company Limited and ZH Leung HK Trading Limited. She annexed and marked SM-2 copies of the said statements and consequent documentation depicting the said position.
  - iii. That further to the averment in paragraph (iii) the goods emanated from a shipper had emphatically documented that the instructing team comprised of the Tanzanian team and herself.
  - iv. That prior to the said seizure of the goods subject to the proceedings she was aware that the Director of both Shihua Industry Alliance Company Limited and ZH Leung HK Trading Limited.
27. She deponed that indeed on the January 23, 2014 the 2<sup>nd</sup> Respondent through its parent- Kenya Forest Service issued a permit to the 1<sup>st</sup> Respondent through herself for the passage of goods to the destination and the said authorization was premised on documents that she had presented for verification the said documents that would show that the verification exercise had been through and done through various stages that had been complete and depict that she had been in conduct all through. She annexed and marked as sm-5 the copies of the authorization from the Kenya Forest Services.
28. She deponed that despite the successful judgment the execution stage had been the most treacherous, having been met with stupefying opposition and contempt of the Orders of the Court by all and sundry leading to numerous applications being made before this court post judgment to enforce the release of the shipment back to the owners. She deponed that the present application to change advocates was part to the deliberating bottlenecks applied by the Respondents and unknown mysterious personalities aimed at condescending the integrity and powers of this court and the



preceding proceedings by ensuring that the original owners of the goods would never enjoy the fruits of the judgment and orders of this court shall never be complied with.

29. She deponed that the application was ill-timed, misconceived and lacks merit for the reasons stated above and for the further following reasons: -
- a. The content of the application and the supporting affidavit was sworn by initially an Advocate carelessly alleging that M/s Egunza & Associates Advocates conducted the entire proceedings without instructions from the 1<sup>st</sup> Respondent which was untrue as evidence adduced suggest otherwise. The further affidavit by one Yao Bao was a narration of contradictions of the affidavit sworn by Ms Cecil Kuyo in so far as they claimed not to be aware of these proceedings and how the alleged owner came to be aware of these proceedings and how the alleged owner came to be aware of these proceedings.
  - b. That to purport that Mr Egunza was never instructed in these proceedings was akin to denouncing the legality and legitimacy of the entire proceedings and judgment from the trial court to the appellate court yet at the same time wanting to hijack the process at the tail end with the end game to benefit from the judgment and from proceeding they have denounced. The proper procedure was to file a fresh suit to set aside the entire proceedings.
  - c. That this court had no jurisdiction at this stage to determine the authenticity of documents produced by intended Advocates for the 1<sup>st</sup> Respondent “vis a vis the documents that gave authority to myself and consequent instruction to Mr Egunza to institute these proceedings as it would amount to re-opening of the proceedings through the back door when the court was already functus officio. The court could only deal with executory application to executory application to enforce its orders while at the same time remaining alive to the doctrine that litigation must come to an end unless the parties go to appeal.
30. She deponed that the application mutated into a dispute of ownership of the 1<sup>st</sup> Respondent’s company and ownership of the goods which this court lacked jurisdiction to deal with issues of commercial nature and or criminal in nature and the applicant ought to had commenced their actions at the proper forums especially after denouncing the proceedings and producing a list of different directors from the ones who instructed M/s Egunza to act in the proceedings.
31. She deponed that it was not lost that the goods had been detained for owners for six (6) years at the Port of Mombasa. But it was perplexing for the intended advocate and Mr Yao Bao to claim that the said director was not aware of this proceedings thus not aware of the state and whereabouts of the Cargo for close to six years without any follow up was to take the intelligence of this Honourable Court for a ride and an abuse of the court process.
32. She deponed that as a matter of fact in the course of the proceedings the directors of Shihua Industry Alliance Company Limited and ZH Leung HK Trading Company Limited forfeited his position as their local agent by causing the parties to execute a Power of Attorney on the July 8, 2020. She attached and marked SM-5 a copy of the general power of attorney. That M/s Egunza is therefore properly on record and that all material times she had never engaged any individual by the name of Mr Yao Bao who remains a stranger to her and as far as she concerned a stranger to these proceedings and subject matter as well.
33. She deponed that acceding to the application by the intended Advocates’ would amount to a miscarriage of justice by allowing a stranger to hijack a process that was initiated by different legal owners of the goods with a proper agent and an advocate on record. That the application was also haunting and a careful reminder of how other unscrupulous entities had attempted to clamp and



hijack the proceedings including various suits and application filed in other courts claiming the same cargo but later unceremoniously withdrawn. She attached and marked as SM-6 a copy of pleadings filed by different entities in Kisumu and Mombasa. The court should therefore treat the application with the contempt it deserved as it lacked the legal and factual basis, misconceived, brought outside the jurisdiction of this court and only brought to impugn the integrity of the Court and the proceedings. She sworn the affidavit in opposition to the application dated May 26, 2022 and prayed for the same to be declined.

### **The Notice of Motion dated June 28, 2022 by the 5<sup>th</sup> Respondent**

34. The Application dated June 28, 2022 is premised under the provision of Sections 3, 13, 14, 16, 18 and 19 of the *Environment and Land Court Act*, 2011 and Order 42 Rule 6 of the Civil Procedure Rules. The 5<sup>th</sup> Respondent sought the following orders:
- i. The 1<sup>st</sup> Respondent be compelled to initiate the Customs Process of Cross stuffing prior to the cross stuffing of the 22 containers currently held at the Port of Mombasa;
  - ii. The court do make any other order that it may deem just and fit in the circumstances; and
  - iii. Costs of this Application be provided for.
35. It is grounded on a 23<sup>rd</sup> Paragraphed Supporting Affidavit sworn by Brian Mwachiro on June 28, 2022. He deponed that he was an officer appointed under and in accordance with the provision of Section 13 of the *Kenya Revenue Authority Act*, Chapter 469 Laws of Kenya. This Act was the one which administers the various revenue statutes such as the East Africa Community Customs Management Act and all the International conventions in relations to International Movement of Goods and Persons outside Kenya Territorial Borders, among others.
36. He deponed that he was currently serving as an officer within the Respondent's Port Enforcement Unit where the customs operations with regard to cross stuffing of consignment was undertaken. By virtue of his role and designation aforesaid he was therefore competent and duly authorized by the Applicant to make and swear this affidavit on its behalf. The 5<sup>th</sup> Respondent/ Applicant had the mandate to hold and control the movement of goods outside and into the country and the custodian of all goods under customs control either at the Ports, customs areas or places of loading or unloading at the Ports as envisioned under the *Est Africa Community Customs Management Act* 2004. He deponed that he was aware that the mandate of the 5<sup>th</sup> Respondent was not to clear entries but to clear goods/ Consignments, therefore until goods which had been cleared have exited the Customs area, they remained under customs control and could not be dealt with in any manner without the prior approval of the Commissioner of Customs.
37. He deponed that he was aware that the goods in questions had previously entered the customs area while in 34 twenty feet container carrying Rosewood in the year 2014:
- i. The Honourable Court granted orders on July 9, 2020 and October 14, 2020 which effectively indemnified the shipping line: PIL (Kenya) Limited and allowed the goods to be cross stuffed into Twenty-Two (22) Forty Feet Container from the Shipping Agents trading as Evergreen.
  - ii. The 1<sup>st</sup> Respondent on June 17, 2021 subsequently moved the 5<sup>th</sup> Respondent and requested for the permit and the authorization for the cross stuffing. This request provided the details of the shipping agency taking the custody of the goods.
  - iii. The 1<sup>st</sup> Respondent further through the clearing agent made the Request for cross stuffing clearing stating the reason for the cross stuffing. This was stated to be that they could not agree



with PIL (Kenya) Limited and had since been able to book container belonging to Evergreen Line and the ship MV Ever Diadem Voy 159E.

- iv. The request also clearly stated that the registration number of all the containers for which approval was being sought and the Registration Number for the new containers for which the goods were to be transferred.
  - v. The commissioner subsequently on September 9, 2021 approved the cross stuffing and informed all the relevant agencies including the Port Police, Kenya Ports Authority and the National Intelligence Service – Sea Ports. He annexed THE Court orders, request for cross stuffing and the approval of cross stuffing and marked them as KRA - 1.
38. He deponed to the court that on May 9, 2022 in the absence of the 5<sup>th</sup> Respondent issued an order and amongst the orders issued was Order (e) which provides that:

That an order be issued and is hereby granted tandem with other directions issued herein there be verification of the contents of all the said Thirty Seven (37) containers by the Honourable Court, cross stuffing to fresh containers area for the same due process including but not limited to supervision and release thereof in accordance with and in lawful compliance in the presence of the court (through the judge or the deputy registrar), for the purpose of transshipment to the designated Destination as duly ordered by the Honourable Court.

39. He deponed that he was aware that the order was incomprehensible as at the time of service only twenty two (22) containers were in the custody of the 5<sup>th</sup> Respondent. The 5<sup>th</sup> Respondent understood that the same related to the previous cross stuffing which had been undertaken further a court order. He deponed further neither the 1<sup>st</sup> Respondent nor clearing agent initiated the process of cross stuffing to enable them get the authorization for the same. He was aware as evidenced by the Parties being copied in the approval that cross stuffing involved several agencies and they have to be involved. The same was only authorized after the 5<sup>th</sup> Respondent had sought an opinion of the shipping line, who at the that time was deemed to be the owner of the goods and who prepared the documentation including the Bill of Lading that were used to make the customs entry for the goods. The goods having been cleared to exist the country but failed to exit remained under the customs control until they were loaded into a vessel and leave the port and it was erroneous to state that the goods 5<sup>th</sup> Respondent was “functus Officio” with regards to goods under its custody.
40. He averred that the Port was a customs area and all the goods therein were under customs control. This was until the same were cleared and removed from the port. It was the Customs department that authorized the loading of any cargo to be loaded into a ship leaving the Country. The consignment in question had been released into the customs system but remained under the customs control until they physically exited the customs area. The 5<sup>th</sup> Respondent did mandate under the East Africa Community was to clear goods to leave the country. Therefore, it was for that reason that after clearance was still issued the gate pass for goods and certificate of clearance to the vessel. The cross stuffing of consignments changed everything with regards to the goods these include the identity of the goods, the ownership, the shipper, it was akin changing chassis of a motor vehicle, the same being very critical it could only proceed after all the customs processes and verification had been undertaken.
41. He deponed that the 1<sup>st</sup> Respondent would be required to make entries and be issued with new documentation be processed by the new proposed shipping line before the goods could again exit the country. This would require an amended entry to be cleared a fresh. The 1<sup>st</sup> Respondent should



proceed and initiate the customs process for cross stuffing to be undertaken clearly providing the following:

- i. The reason for cross stuffing and the clear extent of the same;
  - ii. The identity of the goods and the containers which the goods had to be removed;
  - iii. The identity and the registration number of the container which the goods were to be transferred;
  - iv. The clearing agent to take over the goods and the shipping line taking custody of the consignments.
42. He deponed that due diligence undertaken by the 5<sup>th</sup> Respondent before cross stuffing are to ensure that goods did not fraudulently lose their identity and subsequently all the relevant persons including shipping lines gave the approval or the or the no objection to the same to avoid situations where the custodian of goods in customs areas, that is, the 5<sup>th</sup> Respondent was not sued for any loss of such goods. That requiring due customs process to be followed does not in any way prejudice the 1<sup>st</sup> Respondent. It was in the interest of justice and in public interest that the instant application be allowed as prayed. He deponed that he swore the affidavit in support of the Notice of Motion dated June 28, 2022 seeking and praying for the Honourable Court be pleased to allow the same.

#### **The Response to the application dated June 28, 2022**

43. Through a replying affidavit filed on July 4, 2022 Salama Mbauro who is the holder of a Power of Attorney in respect of two sister companies ZH Leung HK Trading Limited and Shihua Industry Alliance Company Limited and hence well conversant with the facts herein. She deponed that more particularly the 5<sup>th</sup> Respondents – the Kenya Revenue Authority was already functus officio having already released the goods to the 1<sup>st</sup> Respondent, the goods having been scanned, and delivered to the shipping line for the transshipment to the destination of the 1<sup>st</sup> Respondent, therefore to now purported to discredit the whole process is akin to invalidate the process that from the very on-start has been sanctioned by the Honorable court.
44. She deponed that she was aware that the processes that had been undergone hereto had been sanctioned by the Honorable Court with the due participation of the 5<sup>th</sup> Respondents officers of course there had been non-compliances forcing the Honorable Court to issue summons, warrants of arrest and orders that compelled the officers from the 5<sup>th</sup> Respondent to comply, this was absolutely not different from the scene that was created during the site visit by the Honorable court. She annexed and marked as SM-1 copies of summons, warrants and compliance order issued by the court.
45. She deponed that the 5<sup>th</sup> Respondent – the Kenya Revenue Authority through the chief manager, this was one of the individuals who had been summoned and pardoned by the Honourable court for flagrant disobedience of court orders did, on application by the 1<sup>st</sup> Respondent and in anticipation of the site visit, verification and consequent cross -stuffing upon purchase procure twenty – two (22) customs (Kenya Revenue Authority) seals which are specifically equivalent to the number of containers to be cross – stuffing and which were allowed into the port of Mombasa on authority of the same 5<sup>th</sup> Respondent officials. She annexed and marked SM – 2 are photographs of the said Kenya Revenue Authority seals.
46. She deponed that the 5<sup>th</sup> Respondent to provide the aforementioned Kenya Revenue Authority Seals there was payment to be done which was paid by the 1<sup>st</sup> Respondent essentially, the implication of these payments is that the 5<sup>th</sup> Respondent had been on the know both by receipt of payment and



- further by conduct by allowing the containers (22) which ought to have been cross-stuffed and which were allowed into the Port of Mombasa on authority of the same 5<sup>th</sup> Respondent Officials. She marked copies of the said payment as SM-3.
47. She deponed that the assertions that the cross-stuffing would change the mode of the goods essentially the ownership was an assertion that seeks to mislead the Honorable Court and this could be explained as hereunder:-
- i. That the Bills of lading that identify the Consignee, the Consignor, the shipper and agent had yet to be issued, the same was usually issued upon the commencement of the voyage for transshipment.
  - ii. That the 1<sup>st</sup> Respondent did apply for and was granted a zero manifest upon the initial cross-stuffing, the 5<sup>th</sup> Respondent did grant the requisite Entry Number 2014MSA4790140, 4790384, 4790472 and 4790390 to the 1<sup>st</sup> Respondent, these are the peculiar numbers that identity the said consignment. She annexed and marked SM4 are copies of entries and correspondences to that effect.
  - iii. That the deponent to the affidavit in support of the application one Brian Mwachiro had even corresponded in several of the documentation to the 1<sup>st</sup> Respondent – Shihua Industry Alliance Limited essentially implying that all material times prior to the said cross-stuffing scheduled for the June 24, 2022 the said individual had all the knowledge of the cross-stuffing as could be discerned from the documentation herein before mentioned and at no time was an objection raised.
  - iv. That there were on site remedies that could be invoked by the 5<sup>th</sup> Respondent which include amendments which are also catered for in a column that was to be inputted such rectification of errors and/or corrections to imply that the whole entry must be removed is to imply that the 1<sup>st</sup> Respondent had to re-commence procedure yet the Kenya Revenue Authority has since released the goods.
48. She deponed that the cord record bore witness that all the material times Counsels acting for and on behalf of the 5<sup>th</sup> Respondent have categorically stated on record that there were no further objections and/or embargos that were in their purview as regards the goods belonging to the 1<sup>st</sup> Respondent. The same 5<sup>th</sup> Respondents were aware and knew of having been served the order issued by the Honorable Court and had yet to have filed an application for review, appeal and/or brought to the attention of the Honorable Court any such anomalies that would prevent the judicious process scheduled for the June 24, 2022 to proceed to logical conclusion.
49. She reiterated the position as stated by her advocates on record which position she verily believe to be true that the goods in question subject matter to these proceedings belong to the Honorable Court were under the jurisdiction of the Honorable Court, it was therefore incumbent upon all the parties to comply simply put there can only be one centre of power, the Honorable Court which could not be subject to directions by another entity and in this case the purported Commissioner for customs, the Chief Manager and/or the export manager. The Honorable court did not make orders in a vacuum, the 5<sup>th</sup> Respondent had to comply with orders issued by the Honorable Court and could not purport to act in parallel to the court orders when it was convenient so to do.
50. She deponed that the change to the entire entries shall also confuse the rest of the other agencies that were involved in the clearance of the said Containers subject matter herein, the Kenya Port Authority, again she reiterated that the goods have already been released to the Kenya Ports Authority for transshipment. The new shipping agency had already called for the new containers which were subject



to the cross-stuffing that puts the 1<sup>st</sup> Respondent in a precarious position of losing the said containers, she annexed and marked the documentation as SM5. She reiterated again the 5<sup>th</sup> Respondent had the requisite mandate to charge for alteration which just like the payments for the seals could be charged to the 1<sup>st</sup> Respondent, but to demand for a whole change of entry that would be contrary to its laws, contrary to the court orders issues herewith. She concluded by stating that the affidavit was in opposition to the application filed herein.

## V. Analysis and determination.

51. I have carefully read and put into account all the filed pleadings, the cited authorities relied on and the relevant provisions of the Constitution of Kenya and the appropriate enabling laws with regard to the applications filed in this court. The parties did not canvass their argument by way of written submissions.
52. In order to arrive at an informed, fair, just and reasonable decision, I have framed the following salient four (4) issues for determination. These are:-
  - a. Whether the Notice of motion application dated May 26, 2022 is merited?
  - b. Whether the 1<sup>st</sup> Respondent should be granted leave to have to change the advocates from M/s Egunza & Associates to Coulson Harney LLP?
  - c. Whether the Notice of Motion application dated June 28, 2022 is merited?
  - d. Who will meet the Costs of these applications

### Issue No a). Whether the Notice of Motion application dated May 26, 2022 is merited?

53. Under this Sub – heading, it is imperative that the Court critically assesses the legal substratum that governs matters of legal representation and agents. This is founded under the provision of Order 9 of the *Civil Procedure Rules* entitled “Recognised Agents and Advocates”. Order 9 Rule 9 couched in mandatory terms provides inter alia:-

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

  - (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”
54. As a matter of fair hearing, the *Constitution of Kenya* under the provision of Article 50 (2) (h) provides for all persons to have adequate legal representation. The Law envisages two situations. When one is acting in person and the second one when the one is represented by an Advocate. A person is at liberty to change an Advocate ant anytime before Judgement has been delivered. However, the state of affairs changes after Judgement has been delivered. It is not an automatic thing to do. Simply put, that right becomes controlled by Court after when a party decides to act in person having previously engaged an Advocate, after judgment has been passed. Such change of Advocate or intention to act in person shall only be possible upon obtaining a Court order to that effect. This may be done by formally moving Court through an application or upon obtaining a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.



55. It is my view that this mischief intended to be curtailed is where persons abruptly, rudely and cunningly abandoned their Advocates after the litigation has been concluded and in most cases before settling their professional legal fees after them having rendered their unqualified services to their clients. All professional services – be it offered by the medical, transporters, garbage collectors, hospitality industry and so forth must be paid for. It can be extremely unfair to the Advocates.
56. In the instant case, it is not in dispute that Judgement, being an appeal emanating from the Sub – ordinate Court was already rendered by this Court on August 14, 2019. Thus, the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, 2010 is applicable here. The Intended Advocate for the 1<sup>st</sup> Respondent had applied to the court stating that the advocates on record were not the proper or rightful advocates contracted by the 1<sup>st</sup> Respondent. In other words, the advocates on record trading in the names and style of M/s Egunza & Associates were fraudulently misrepresenting themselves as the 1<sup>st</sup> Respondent’s advocates. Indeed, the 1<sup>st</sup> Respondent did not recognize them. Further to this averment they held that M/s. Salama Mbauro, the ostensible holder of the Power of Attorney in respect of two sister companies ZH Leung HK Trading Limited and Shihua Industry Alliance Company Limited was fictitious. On her part, she averred in her replying affidavit filed on July 4, 2022 that the said M/ s Egunza & Associates were given instructions to defend the suit and that she did not know anyone by the name of Yao Bao who purported to be the director of the Shihua Industry Alliance Company. She denied all allegations by the Applicant that the Mr Egunza was fraudulently acting in behalf of the 1<sup>st</sup> Respondent. By all means, this Honorable Court takes these issues to be extremely serious issues. They are not to be taken lightly whatsoever.
57. Clearly, the provisions of Order 9 Rule 9 of the *Civil Procedure Rules, 2010* make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. The reasoning behind the provision was well articulated in the case of “*S. K. Tarwadi – Versus - Veronica Muehlmann* [2019] eKLR where the judge observed as follows:
- “.....In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him.....”
58. In the case of “*Lalji Bhimji Shangani Builders & Contractors – Versus - City Council of Nairobi* [2012] eKLR the Court held as follows:-
- “A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”
59. To my mind therefore having regard to the proceedings so far taken in the matter and considering the Replying Affidavit of Salama Mbauro dated July 4, 2022 and her averments that she is the holder of the Power of Attorney for the 1<sup>st</sup> Respondent. This Court has taken cognizance that the said Power of Attorney has not been vigorously and adequately challenged apart from merely in jest and passing. For that reason, this Court is fully satisfied that being a sound and legal document it stands the test of the day unless otherwise stated.



60. Furthermore, this Court has taken judicial notice and from the surrounding facts and inferences of this case, that she has utilised the said Power of Attorney for many years – close to six (6) - from the time the consignments were intercepted in the Republic of Kenya by the Appellant - KWS and other security agencies in the course of their transshipment from Madagascar to Hong Kong. For instance, she has been making all the statutory payments such as the demurrages, Shipment agencies, and other permits for the Consignments. I have noted its not little financial burden to say the least. Additionally, she contracted the services of the advocates on record M/s Egunza & Associates and that she is not aware that Mr Yao Bao who is the alleged sole director of the 1<sup>st</sup> Respondent. What is apparent is that there was no attempt before to have the change of advocates and the amount of financial implication and burden bestowed on Salama Mbauro before judgment was entered in this matter. It must be remembered that the provisions of Order 9, Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the court and other parties.
61. Although the Applicant has a constitutional right to represent yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. It is clear from the above narration of Order 9, Rule 9 of the Civil Procedure Rules, a party needs to consent to the change of advocates in this case the Salama Mbauro who is the holder of the power of the Attorney for the 1<sup>st</sup> Respondent did not authorize any change of advocates. The Applicant brought an application in the correct prescribed legal manner and it is my humble observation that the holder of the Power of Attorney has proceeded with this matter from interception, the copy of the Power of Attorney attached herein in her Replying Affidavit has been taken into consideration and found to be legal.
62. Although Mr Yao Bao has been castigating all the documents presented to this Court by M/s Salama Mbauro including the Minutes and the Power of Attorney, this Court has not been shown any document of authority to their new Advocates emanating from him for them to take up this matter on his behalf. Indeed, he has sworn an affidavit but this Court finds it difficult is to recognized him just outrightly. The question that squarely bogs my mind is where has he been all these years from the time the goods were intercepted, the suits filed in Court and all the other developments surrounding the matter which have been receiving wide international media and social media coverage. In conclusion, this Court is not convinced that the application filed by the intended Advocate for the 1<sup>st</sup> Respondent satisfies the threshold founded under Order 9 Rule 9 of the Civil Procedure Rules, 2010 and therefore it must fail for being unmeritorious.

**Issue 2: Whether the 1<sup>st</sup> Respondent prayer on Order 42 Rule of the Civil Procedure Rules is merited?**

63. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”



(2)“No order for stay of execution shall be made under sub-rule (1) unless:-

- a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

64. The citing of this provision of the law was misplaced as it is wrongfully relied on in the given circumstances. I say so as this provision does not apply to the leave and prayers by the 1<sup>st</sup> Respondent in their Notice of Motion dated May 26, 2022. And the 5<sup>th</sup> Respondent quoted the same provisions in their Notice of Motion dated June 28, 2022. None of the parties has indicated that they plan to appeal the judgment having been entered in these proceedings on August 14, 2019 and the ruling delivered on May 9, 2022.

**Issue No 3 Whether the 1<sup>st</sup> Respondent should be compelled to initiate the customs process of Cross stuffing prior to the cross stuffing of the 22 containers currently held at the Port of Mombasa?**

65. I am inclined to touch on matters of cross stuffing as there was judgment entered in this suit and a ruling after the parties moved the court. It seems to me that a new cause of action would have arisen between the parties and this court would effectively be functus officio by virtue of the fact there was a judgment in 2019, ruling in 2022. The 1<sup>st</sup> and 5<sup>th</sup> Respondent have brought up the issue of fraud by advocates acting for them. The Supreme Court of Kenya expounding on the doctrine of functus officio in Election Petitions Nos 3, 4 & 5 *Raila Odinga & Others v IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

66. Having discharged its duty on this appeal this court is therefore functus officio, defined in *Black's Law Dictionary*, Ninth Edition as “[having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

67. Having keenly read the application and the submissions by the 1<sup>st</sup> and 5<sup>th</sup> Respondents herein I have no doubt that the said application raises extremely pertinent issues which are prevalent place for all consignments whether it is Cross – stuffing or not - kept at the Customs. Whether or not the 5<sup>th</sup> Respondent had been become functus officio or not it is immaterial at this stage. these are procedures and regulations that must be adhered with at all costs.

68. Being a Court of law, at no given moment should never at any one moment to be seen to compromise on laws, laid - down procedures and policies s long as they are not repugnant to the Law or the Constitution of Kenya. For this reason the application by the 5<sup>th</sup> Respondent succeeds and I hereby direct the 1<sup>st</sup> Respondent to fully comply with all administrative and internal policy and procedural



requirements by the 5<sup>th</sup> Respondents in as far as the facilitation of the Cross - stuffing of the consignment is concerned from the 22 Containers of the Evergreen shipping Agent to the new one.

69. Likewise, the apparent typographical error in the ruling of this Court delivered on May 9, 2022 as pointed out by the Respondents herein to be corrected forthwith to read 22 Containers and not 37 Containers as envisaged.

## **VI. Conclusion & determination**

70. Ultimately, from the foregoing analysis, I do proceed to make orders as pertaining the two applications as follows: -

1. That the Notice of Motion application dated May 26, 2022 by the 1<sup>st</sup> Respondent/Applicant be and is hereby dismissed for having not shown why the 1<sup>st</sup> Respondent wants a change of advocates and who authorized this change.
2. That the Notice of Motion application dated June 28, 2022 by the 5<sup>th</sup> Respondent be and is hereby dismissed for the reasons adduced herein. The prayers to compel the 1<sup>st</sup> Respondent to initiate cross - stuffing had been overtaken by events as that issue had already been addressed in this court.
3. That the 2<sup>nd</sup> Respondent further makes a Custom Process of the 22 Containers currently held at the Kenya Ports Authority of Mombasa.
4. That the court be and hereby amends the order it granted on May 9, 2022 to read 22 Containers and not 34 Containers.
5. That as previously ordered on the July 5, 2022, the process of cross-stuffing to proceed accordingly without any delay.
6. That the matter be mentioned on September 28, 2022 for progress and further directions.
7. That each party to bear their own Costs

It is so Ordered Accordingly.

**RULING IS DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**HON. JUSTICE Mr L.L NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT,**

**MOMBASA**

**In the presence of:-**

- a. **M/s. Yumna – the Court Assistant.**
- b. Mr Mungambi Advocates for the Appellant.
- c. Mr Egunza Advocates for the 1<sup>st</sup> Respondent
- d. Mrs Waswa Advocates for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents
- e. No appearance for the 4<sup>th</sup> Respondent
- f. Mr Pius Nyagah Advocates for the 5<sup>th</sup> Respondent
- g. Mr Deya Advocate for the Intended Advocates for the 1<sup>st</sup> Respondent

