



**Five Eleven Traders and Auctioneers (through its owners Crispus Waithaka)  
v Muses & 2 others (Environment and Land Miscellaneous Application  
E006 of 2022) [2022] KEELC 14428 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14428 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2022  
LL NAIKUNI, J  
OCTOBER 19, 2022**

**BETWEEN**

**FIVE ELEVEN TRADERS AND AUCTIONEERS ..... APPLICANT  
THROUGH ITS OWNERS CRISPUS WAITHAKA**

**AND**

**ALI KHAN ALI MUSES ..... 1<sup>ST</sup> RESPONDENT  
ESTATE SONRISA LIMITED ..... 2<sup>ND</sup> RESPONDENT  
THE OCPD/OCS DIANI POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**I. The Background And Introduction**

1. The 2<sup>nd</sup> 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 2<sup>nd</sup> 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 very onset, this court wishes to underscore the fact that this matter is overly convoluted and intricate. it is not a light matter at all. The case ought to be handled with extreme circumspect, prudence and care. It is one that has inevitably and naturally involved five judges of superior court being the late Justice Mukunya, J. Sila J, Matheka J, Naikuni J and Dena J and high possibility of yet another one - the presiding judge ELC, Mombasa – Hon Justice SM Kibunja I suppose and rightfully so, as he pens down a comprehensive legal opinion for the Court of Appeal and three judges of the Court of Appeal – W. Ouko, JA, W. Karanja, JA and S Ole Kantai, JA. As such, this court has decided to



proceed on by providing an indepth and critical analysis of the surrounding facts and legal rationale as much as possible before attaining the final determination. In so doing, the honorable court has been compelled by surrounding circumstances and inferences of the case before it to spread its dragnet widely and extensively by keenly considering other available and relevant legal materials in connection with, pertaining to and relation to this case. These includes the judgement and decree by this court delivered on October 13, 2014, the judgement by the Court of Appeal delivered on April 24, 2020, the ruling by this court November 9, 2021, the ruling of the ELC at Kwale on June 13, 2022 the direction by Hon Justice Munyao of July 20, 2022 and the report by the land registrar dated July 21, 2021 respectively. Fundamentally, this court wishes to state that its entry point on this matter is based on the averments of paragraph 12 of the direction by the Hon Justice Munyao to wit:-

“There was a pending application seeking various orders which I have already spelt out. There was an application for recusal of Naikuni J which was dismissed. Since this file is still alive, I will refer it back to Naikuni J, to deal with it to its logical conclusion but I reiterate that any future applications touching on execution of the decree must be filed in the substantive suit. If any party or person wishes to have any order arising from the subject judgement in ELC (Mombasa) No 30 of 2014, then the party or person must make his or her application within suit ELC (Mombasa) No 30 of 2014....”

3. The background of this miscellaneous application is convoluted and entangled with multiple suits. 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 judgment was delivered on April 24, 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 interfered with was where they found that the order for demolition was premature and that the judge had jumped the gun. They held 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.
4. After the Court of Appeal delivered its judgment on April 24, 2020, on May 18, 2021 the Land Registrar invited the parties to the suit land for determination of the boundary dispute. It is stated that the surveyor used a map that Sonrisa objected to. Aggrieved with the decision of the Land Registrar, Sonrisa filed a suit, Kwale ELC E001 of 2021 pursuant to section 86 of the [Land Registration Act](#). An objection was raised in that suit and Dena J on June 13, 2022 struck out the suit stating that as per the provision of section 34 of the [Civil Procedure Act](#), cap 21 Sonrisa should not have filed a fresh suit but instead it should have raised any issue concerning the disputed land in the main suit - ELC (Mombasa) No 30 of 2014.
5. Also, after the Land Registrar had delivered the report, on July 14, 2021, Mr SK Macharia filed an application in Mombasa ELC (Mombasa) No 30 of 2014 seeking orders to execute the decree of October 13, 2014. The application was made on grounds *inter alia* that the appeal had been heard



and dismissed. On November 9, 2021, a ruling dismissing the application was delivered by Matheka J. Her reasons were that there was a pending case in Kwale ELC E001 of 2021 that had to be determined first before proceeding with the matter. Thereafter, SK Macharia filed a miscellaneous application in the Chief Magistrate's Courts, that is CMCC (Mombasa) No 36 of 2022 seeking orders to execute the decree. This application was later withdrawn. Relentlessly, SK Macharia through his agents, Five Eleven Auctioneers filed this miscellaneous application seeking inter alia to execute the decree granted by Mukunya J of October 13, 2014. On February 17, 2022, Naikuni J being the ELC duty court granted the orders sought *ex - parte* and immediately SK Macharia through his agents Five Eleven Auctioneers straightaway proceeded and demolished the 2<sup>nd</sup> respondent/applicant - Sonrisa's property that was erected on the land alleging it to have encroached onto Mr SK Macharia's land. Being aggrieved by the said demolition, under certificate of urgency, Sonrisa filed this instant notice of motion application seeking the orders above stated.

### **The 2nd Respondent/Applicant's case**

6. The 2<sup>nd</sup> respondent herein sought for the following orders.
  - a. Spent;
  - b. Spent;
  - c. That in view of the urgency of the matter, the applicant through its owner Crispus Waithaka, Samuel Kamau Macharia and Ndegwa Marclus Njiru, Advocate and through their servants, agents or any other person whosoever be stopped and/or restrained from entering upon, interfering with and/or having any dealings of adverse nature with the parcel of land known Kwale/Galu Kinondo/48 or a disputed area which is subject of a court case in Kwale ELC No E001 of 2021 and more specifically the section of the land where the 2<sup>nd</sup> respondent's villas stood before demolition pending the hearing and final determination of this application;
  - d. That this honorable court be pleased to consolidate this miscellaneous cause with ELC No 30 of 2014 being the suit that the varied decree was issued;
  - e. That the Sub - County Police Commander Diani and the officer commanding police division (OCPD) Diani Police Station through their agents, officers and permitted assigns ensure strict compliance with orders 2 and 3 above pending the hearing and determination of this application;
  - f. That pending the hearing and determination of this application this honorable court be pleased to issue an order to the officer commanding station, Damaris Nzuve or any other officer in charge for orders of protection of the directors of the 2<sup>nd</sup> respondents, their employees, staffers, agents, and otherwise from being harassed, intimidated, victimized, and or threatened and to further compel the officer commanding station, Damaris Nzuve or any other officer in charge to grant the unrestricted access to the 2<sup>nd</sup> respondent to lodge a formal complaint as provided for in law;
  - g. That in the interest of the principle of natural justice the honorable court be pleased to order that this application and any orders given *ex parte* be served upon the applicant and/or its owners Crispus Waithaka, Samuel Kamau Macharia, Ndegwa Marclus Njiru Advocate and Damaris Nzuve;
  - h. That this honorable court be pleased to discharge the orders irregularly and fraudulently obtained and issued on February 17, 2022;



- 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 2<sup>nd</sup> 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 2<sup>nd</sup> respondent.
  - l. That the cost of this application be provided for.
7. The application is based on the grounds deposed in the supporting affidavit sworn by Iwona Strzelecka a Director of Sonrisa Limited. She deposed that on October 13, 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](#). From this case, the deponent avers that an order of injunction was issued restraining SK Macharia, his agents and the Land Registrar from dealing adversely with plot No 48.
  8. 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.
  9. Further to this, she deposed that on the night of January 23, 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 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. 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 February 8, 2022 in ELC (Kwale) E001 of 2021 and on February 16, 2022 SK Macharia through his advocates claimed that the court had no jurisdiction and sought leave to file a formal preliminary objection. She deposed that counsel was directed to file the preliminary objection within seven (7) days and subsequently the interim orders were extended.
  10. 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 January 24, 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 January 26, 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 February 14, 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.
  11. 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 October 13, 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. She deposed that the court order purported to execute a decree that was varied by the Court of Appeal.

12. Further to this, she deposed that this court put reliance on an application that was *res judicata* and granted *ex - parte* orders on February 17, 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 January 26, 2022 and November 9, 2021 in ELC (Mombasa) No 30 of 2014 which according to the deponent are still valid; that it purported to vary the orders dated September 28, 2021 in ELC (Kwale) E001 of 2021; and lastly, that it purported to vary the judgment and decree of the Court of Appeal.
13. She deposed that on 18<sup>th</sup>, 19<sup>th</sup>, and February 20, 2022, Five Eleven Auctioneers executed the irregular and illegal orders dated February 17, 2022 issued in this matter. She deposed that she explained to the OCS Damaris Nzuve 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.
14. 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. 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.

## II. Response by Five Eleven Auctioneers

15. On March 3, 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 he was competent and duly authorized to swear the affidavit, He was fully conversant with the facts of the case. He emphatically emphasized that contrary to what was being deponed under paragraph 2 of the 2<sup>nd</sup> respondents' certificate of urgency, the decree dated October 13, 2014 and order of ELC (Mombasa) No 30 of 2014 was never varied by the Court of Appeal in its judgement of April 20, 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.
16. 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 1<sup>st</sup> 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 1<sup>st</sup> defendant”.

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. The lower court heard his application and subsequently granted the prayers sought whereupon he realized he had made a error on jurisdiction and applied to withdraw the above application.

17. He averred that upon granting the said orders for demolition, the 2<sup>nd</sup> respondent moved the court via certificate of urgency in the application dated January 26, 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 February 15, 2022. Hence the orders dated 17<sup>th</sup> 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.
18. He deposed that in furtherance to this, the 2<sup>nd</sup> 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 2<sup>nd</sup> 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 July 2, 2021 was generated pursuant the 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.
19. He further deposed that the Land Registrar’s report dated July 2, 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 2<sup>nd</sup> respondent’s plot No 48 measuring 0.9ha had encroached onto Plot No 50 measuring 1.7ha. He further deposed that the demolition was in accordance with the decree of October 13, 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 2<sup>nd</sup> 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 2<sup>nd</sup> respondent had never preferred an appeal to the Supreme Court.
20. According to the dependent, the 2<sup>nd</sup> 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. 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.
21. 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. He also deposed that prayer numbers



6, 8, 9, and 10 of the application by the 2<sup>nd</sup> respondent herein were far-fetched and untenable as the 2<sup>nd</sup> 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 2<sup>nd</sup> respondent was on a fishing expedition amounting to an abuse of the court process. He added that the orders being sought by the 2<sup>nd</sup> 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 this proceedings without being granted an opportunity to answer to a substantive suit that had been procedurally commenced.

22. Lastly, it was deposed that the 2<sup>nd</sup> 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 2<sup>nd</sup> respondent herein with costs.

### **III. Response by the OCPD/OCS Diani Police Station**

23. On March 14, 2022 in response to the application, the 3<sup>rd</sup> respondent through the offices of the Attorney General filed their grounds of opposition. It was averred that 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 3<sup>rd</sup> respondent were matters under her mandate as an officer. 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

### **IV. Further Affidavit by the 2nd Respondent/Applicant - Estate of Sonrisa**

24. On March 8, 2022, with the leave of court the counsel for the 2<sup>nd</sup> respondent/applicant the law firm of Messrs Oluoch Kimori Advocates filed a further affidavit sworn by Iwona Strzelecka and dated March 6, 2021. She averred that the applicant continued advancing the misconceived and deceitful angle that the decree of October 13, 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. The deponent held that the applicant gained illegal access of the parcel No. 48 and illegally proceeded to execute a decree issued on 13<sup>th</sup> October, 2014 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. 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 2<sup>nd</sup> 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. 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".



25. 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 January 6, 2015 specifically made reference to Ali Khan of the plot No 50 and not Sonrisa owner of plot No 48.
26. 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.

## **V. Submissions of the Counsels**

27. On July 28, 2022 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 this directions accordingly. Indeed, on September 28, 2022 the parties were each accorded ample opportunity to highlight their written submissions orally.
28. 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 court learned a lot from this expose.

## **A. The Submissions by the 2nd Respondent**

29. On March 14, 2022, the learned counsel for the 2<sup>nd</sup> respondent, the law firm of Messrs Oluoch Kimori advocates filed their written submissions dated even date. Mr Tariq Khan, the learned counsel for the 2<sup>nd</sup> 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 February 17, 2022 granted the applicant leave to get police assistance when executing the decree issued in ELC (Mombasa) No 30 of 2014 on October 13, 2014 and dated January 6, 2015 to remove the 1<sup>st</sup> and 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> respondent.
30. According to the counsel, the order is for removal and vacant possession, therefore, the only orders that dealt with removal, eviction, demolition, and possession against the 2<sup>nd</sup> 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 submitted that the particular order was against the 1<sup>st</sup> defendant in that suit and not the 2<sup>nd</sup> defendant and as such was not and cannot be capable of being executed as against the 2<sup>nd</sup> 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 does not state with clarity that it applies to the 2<sup>nd</sup> respondent.
31. 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> defendant (1<sup>st</sup> 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 is 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.
32. 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 July 2, 2021 was prepared and served to the 2<sup>nd</sup> respondent on September 3, 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.
33. The learned counsel submitted that there is a pending appeal against the decision of the registrar in ELC (Kwale) E001 of 2021 and from that, there is existing orders in that court restraining Samuel Kamau Macharia from adversely dealing with the 2<sup>nd</sup> 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 2<sup>nd</sup> respondent of any property to Samuel Kamau Macharia as that would amount to denying the 2<sup>nd</sup> respondent the right to pursue its appeal and/or case stated as against the land registrar's decision.
34. The learned counsel asserted that the decree that the applicant purported to seek leave to execute against the 2<sup>nd</sup> 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.
35. The 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 section 34 speaks for itself.
36. In conclusion, the 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 Submission by the Applicants**

37. On March 8, 2022, the learned counsels for the applicants the law firm of Messrs Ndegwa & Ndegwa Associates filed their written submissions dated March 4, 2022. Mr. Ndegwa Njeru as a background expressed that the application filed by the 2<sup>nd</sup> respondent/applicant was best described by the Court of Appeal case of “*Muchanga Investment Limited (supra)*” too 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.....”
38. He informed court that this matter has protracted from the year 2014. He stated that the applicant on May 21, 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 2<sup>nd</sup> respondent at both the ELC No 30 by the futile attempt by the 2<sup>nd</sup> 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.
39. 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 2<sup>nd</sup> 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.
40. 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 2<sup>nd</sup> 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 v Lalji Mkanji* (1957) EA 314 and *Jeniffer Nyambura Kamau v Hampshire Nandi* (2013) eKLR.
41. Thirdly, the learned counsel wondered whether one could seek “*restitutio in integrum*” (restoration to the original position) as prayed by the 2<sup>nd</sup> respondent, the counsel submitted that according to the report by the land registrar, plot No 48 had encroached into plot No 50 therefore the 2<sup>nd</sup> 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.



42. 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.

### **III. The Issues for Determination.**

43. 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.

44. 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 there exists several and/or conflicting orders granted by the High Court, other courts and the Court of Appeal over the same subject matter.
- b. Whether the notice of motion application dated February 21, 2021 by the 2<sup>nd</sup> respondent and the orders sought thereof are tenable by this honorable court. If yes, are parties entitled to the relief sought?
- c. Whether a miscellaneous application is a stand alone suit in the strict sense of the law and whether this court still has jurisdiction to continue hearing and determining issues emanating from the said miscellaneous application.
- d. Who will bear the costs of the notice of motion application dated February 21, 2021.

### **IV. Analysis and Determination**

45. Having condensed the issues for determination herein, this honorable court now wishes to proceed on with an elaborate analysis of each one of them with the guidance of the following sub – headings as enumerated here. These are:-

Issue No. a). Whether there exists several and/or conflicting orders granted by the High Court, other courts and the Court of Appeal over the same subject matter.

46. On the very onset, undoubtedly, from the time this application was filed to date a lot of things have occurred some of which have had severe spiral and consequential effect to the filed application by the 2<sup>nd</sup> respondents herein. For instance, the orders by Justice Matheka, Justice Dena and the directions by the Hon Justice S. Munyao among the few. All said and done, this court will endeavor to discern on some of these happenings in the process of this ruling. Be that as it may, the honorable court wishes to refer to the intensive and elaborate argument advanced by the counsels on the existence of the decrees and orders by this court. The counsel for the Estate of Sonrisa, Mr Khan Advocate extensively submitted that there were orders in the files involved that conflict with the ruling of this court dated February 17, 2022. Indeed, he stressed that there were various decrees - "the original decree" by this court and other "varied decrees" including the one issued by the Court of Appeal. He felt that the bottom line why this court found itself on cross roads and in the current situation was essentially because the respondents in the doctrine of non disclosure, failed to inform court of the existence of the varied



decree as they only concentrated on the original decree hence misleading court to have issued the said orders of February 17, 2022. By varied decree, I understood the consent to be saying that there had been some or a number of changes or different types of elements incorporated onto the orders of the courts showing variation or slight changes thereof. He submitted that the original decree was presented at the Court of Appeal and upon hearing that court came up with what the learned counsel termed as “varied decree” dated April 24, 2020. Further, that Justice W. Ouko is the one who came up the said “varied decree”. According to him, the element of variation was in the statement by COA that:- “..... the order for demolition was, in the result, premature.....”

47. Indeed, the learned counsel indicated in the whole of this protracted, heavily loaded and exhausting journey the parties and the counsels for the applicants have been on record and thus Mr Khan counsel averred that they could not impute any ignorance whatsoever. Indeed, to place more emphasis on the point he submitted that “.....it was all act of material disclosure of the existence of the varied decree which was all done out of fraud and deceit making the orders of this court null and void and any consequent action wrongful.....”. To him although they had full knowledge of this facts but still proceeded to mislead this court by their over reliance on the original decree. In a rejoinder on this submissions, Mr Ndegwa advocate for the applicants not fully admitting held that whether the order was varied or not to him the matter was fully settled by the COA on April 24, 2020 and the only pending issue was the validation of the subject matter. He stated as result, they raised a preliminary objection onto the matter filed before ELC (Kwale) challenging the valuation report filed by the 2<sup>nd</sup> respondent and on June 13, 2022 the court delivered its ruling upholding the objection thereof.

48. Therefore, based on this very strong submissions by the learned counsels, the court feels it is imperative to extrapolate indepth on this trajectory on whether there exists any “varied decree/orders” derived from “the original decree” as has been vehemently alluded to by the learned counsel particularly Mr Khan for the 2<sup>nd</sup> respondent/applicant. In doing so, this court will venture into an assessment of all the legal avenues passed through by the parties herein and the specific orders and decrees the courts have consequently issued vis - a - vis their legal interpretation and imports in this proceedings. This will assist court in fully appreciating the main bone of contention.

49. Firstly, the original decree was issued from the judgement in the ELC No 30 of 2014 on October 13, 2014 before Justice Mr S Mukunya. Secondly, being aggrieved by this decision two civil appeals Were filed in the Court of Appeal on the April 24, 2020 the court ordered as follows:-

“ the demotion was premature”.

Thirdly, Sonrisa at in ELC (Kwale) No 001 of 2021, filed an application for injunction restraining the Coast Regional Land Registrar, Regional Surveyor and SK Macharia and his agents from adversely dealing with plot No 48 pending hearing and determination of the application. Interim injunction orders were issued pending inter-partes hearing. But upon hearing the suit, on June 13, 2022 dismissed it on ground that it was contravening the provision of section 34(1) of the Civil Procedure Act. Hence, all interim orders were subsequently suspended.

50. Fifthly, In ELC (Mombasa) 30 of 2014, SK Macharia through his counsel filed an application for execution of clause 5 of the decree that says; “that any party found to have encroached on the other parties land shall have sixty (60) days to demolish structures that might have been erected therein and move and vacate therefrom. If the party encroaching fails to move and vacate, the party whose land is encroached shall be at liberty after the said sixty (60) days to demolish such encroaching structures with the help of the court bailiff who will be assisted by the nearest police officer and administration police officer. But on November 9, 2021 this application was dismissed for lack of merit by Matheka J. The learned judge stated that firstly, the Court of Appeal faulted the judgment of Mukunya J. on clause 5



of the decree thus varying the said clause and Secondly, that there were in existence interim injunctive orders in ELC (Kwale) No E001 of 2021 restraining SK Macharia and his agent from adversely dealing with all that parcel of land known as plot No 48.

Sixthly, still on ELC (Mombasa) No 30 of 2014, Sonrisa through its advocates filed an application dated January 26, 2022 seeking orders for stay of execution of ex - parte orders issued in Mombasa CMCC 36 of 2022. Interim stay of execution orders was issued pending the hearing and determination of the application. In CMCC (Mombasa) 36 of 2022 was later withdrawn and on May 11, 2022, Sonrisa's application dated January 26, 2022 was withdrawn. Hence, all interim orders issued in the application stood suspended.

Seventhly, on February 16, 2022 in this miscellaneous application, Five Eleven Auctioneers filed an application seeking execution orders of the decree. On February 17, 2022 this court granted the execution orders as sought and stated that due process must be followed strictly.

51. From the foregoing, this court without wanting appear to be accusing anyone for splitting hairs here, has totally failed and is still unable to decipher any conflicting orders that the learned counsel has been referring to. Better still, the Court of Appeal in their judgment ordered the Land Registrar and the government to determine whether plot No 48 had encroached on to plot No 50. Pursuant to that, the Land Registrar in his report dated July 2, 2021 stated as follows:-

“Consequently, having relied on the survey report and relevant correspondences, it is likely that plot 48 was fixed and survey plan report drawn. In view of the above, it then appears that the said parcel has encroached on parcel 50.

Kindly, if any party is aggrieved by this finding, they are free to seek redress from the courts.”

Being aggrieved by this decision, the 2<sup>nd</sup> respondent/applicant instituted a suit at ELC (Kwale) No 001 of 2021 to challenge the decision. Eventually, this suit was struck out for not complying with the provision of section 34(1) of the *Civil Procedure Act*, cap 21 which provides as follows:-

“34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

From the foregoing, the 2<sup>nd</sup> respondent/applicant was to have filed any grievances to do with the execution, discharge or satisfaction of the decree in the ELC (Mombasa) No 30 of 2014. Under the provision of section 86 (1) of the *Land Registration Act*, No 3 of 2012 any party aggrieved by or with the decision or by the exercise of any power by the Land Registrar could apply for review of the Land Registrar's decision by way of a case stated for the court's opinion. The provision of section 86 is drawn as follows:-

“86(1) If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the registrar by this act, the registrar or any aggrieved person shall state a case for the opinion of the court, and thereupon the court shall give its opinion, which shall be binding upon the parties.”

52. After perusal of the court's record in ELC (Mombasa) No 30 of 2014 the court has not been invited to give its legal opinion on the validity, legality, and lawfulness of the land registrar's report. Therefore, as it stands and in accordance with the decision by the late Justice Mukunya of October 13, 2014 and the Court of Appeal of April 20, 2020, plot No 48 has encroached into plot No 50. This position is still to be altered by any legal entity. But I dare say no more.



53. Now back to the orders that this court was invited to consider. It is instructive to note that prayer No 3 was for Five Eleven Auctioneers and its owners and agents to be restrained from dealing adversely with plot No 48 or the disputed area which is the subject matter before the ELC (Kwale) No E001 of 2021. Clearly, this application was filed before the suit ELC (Kwale) E001 of 2021 was struck out. It follows therefore the same has been overtaken by events. Strangely, the court has observed that the 2<sup>nd</sup> respondent/applicants for unknown reasons never bothered to apply to amend the application accordingly to suit the situation in the given circumstances. Hence, this court rightly concluded that it is impossible and impractical to grant the order as prayed.

Issue No. b). Whether the notice of motion application dated February 21, 2021 by the 2<sup>nd</sup> respondent and the orders sought thereof are tenable by this honorable court. If yes, are parties entitled to the relief sought?

54. Before embarking on whether this court may be in a position to exhaustively and substantially deal with matters emanating from a substantive suit filed through a miscellaneous (read notice of motion) application, I feel it needful from the face value as a court with inherent powers bestowed on it under the provision of sections 1, 1A, 3, 3A of the *Civil Procedure Act*, cap 21, sections 3 and 13 of the Environment Act No 19 of 2011, sections 101 of the *Land Registration Act*, No 3 of 2012, section 150 of the *Land Act*, No 6 of 2012 and article 159 (1) & (2) of the *Constitution* of Kenya, though with abundant of limitations, to make certain decisions where possible onto some of the reliefs sought herein. Juxtapose, on any other matter that I will find rather complex to deal instantly, I will have the liberty to refer to the presiding judge of the ELC, Mombasa Hon Judge SM Kibunja to further deal perpendicularly and by tendering his legal opinion to the COA. While doing all this, I am adequately privy to the fact that courts of law are citadels of truths and justice and must not be made prone to rushed pronouncements.

55. Hence, I now proceed as follows. The prayer No 4 of the application, was a relief sought to consolidate this miscellaneous application with ELC (Mombasa) No 30 of 2014. Munyao J resultantly then issued directions on July 20, 2022. According to the contents of paragraph 12 of the directions states as follows:-

“If any party or person wishes to have any order arising from the subject judgment in ELC (Mombasa) No 30 of 2014, then such party or person must make his application within the suit Mombasa ELC No 30 of 2014.” (Emphasis is Mine)

From the foregoing, I will not grant this order as prayed. To me, prayer 5 stands as spent.

The prayer No 6 of the application was to order the Officer In charge of station (OCS) to issue protection to M/s Sonrisa, the 2<sup>nd</sup> respondent/applicant, its agents, and servants from being victimized and/or threatened and to further compel the OCS to grant unrestricted access to Sonrisa to lodge a formal complaint as provided for in law. Sonrisa and its counsel never brought any evidence to suggest that they were either being victimized and/or threatened or that they were restricted to lodge any formal complaint either in this court or in the police station in such an eventuality.

In the affidavit sworn by Ms Strzelecka she deposed that during the demolition she explained to the OCS that there were three varied court orders that were all valid. That they conflicted with the orders of this court of February 17, 2022 that was being executed. She deposed that for that very reason, she pleaded with the OCS to stop the demolition until there was a clarification from the court on this state of affairs. Unfortunately, she deposed, her pleas fell on deaf ears. She insisted that if the OCS had followed the laid down procedure, the illegal demolition would have been stopped. In response to



this, the OCS through the Attorney General argued that her actions were in compliance with her legal mandate as an officer. The provision of section 62 of the *National Police Service Act* provided for the non - liability of acts done by a police officer in obedience to a warrant. Section 62 is drawn as follows:’

“Where the defence to any suit instituted against a police officer is that the act complained of was done in obedience to a warrant purporting to be issued by a judge or magistrate, the court shall, upon production of the warrant containing the signature of the judge or magistrate, accept such warrant as prima facie evidence of the due making thereof, and upon the proof that the act complained of was done in obedience to such warrant enter judgement in favour of such police officer.”

56. This court concurs with the OCS. The acts of the OCS were in accordance to the order of the court. On the contrary, it would have been illegal and unjust for the OCS to delay the execution of a court order as Sonrisa seek clarification from court as to whether there are conflicting orders. From the foregoing, I find that prayer No 6 as prayed cannot be granted.

As for prayer No 7 stands as spent. The elephant in the room is under prayer No 8 of the application. It is for this court to discharge the orders issued on February 17, 2022 for allegedly being irregularly and fraudulently obtained. Its trite law that under the provision of section 107 of the *Evidence Act*, cap 80 which holds that he/she who alleges have to proof. All allegations emanating from acting in bad faith, breach of contract, negligence, fraud or irregularity have to be fortified with definite particulars due to their seriousness and severe consequences. No empirical evidence was placed before this court to support the said allegations. As a result, the unsubstantiated allegations remain as issues of hearsay and conjecture.

Nonetheless, as it has been indicated in this ruling, the fact that the miscellaneous application was exhausted and the court became “functus” the same court cannot purport to be hearing on such a substantive issue. It would tantamount to the court sitting on its on appeal. it is my view that this order as prayed cannot be granted as the 2<sup>nd</sup> respondent/applicant has the right to appeal if aggrieved with the decision of this court.

The prayer No 9 is for this court to direct the owners of Five Eleven Auctioneers and the OCS be investigated for criminal intent. It is impossible to issue this prayer as granted. This is a civil matter. The applicant is requesting the court to cross over to the criminal jurisdiction. If the applicant is of the view that the owners of Five Eleven Auctioneers have committed a crime, then she is at liberty to report the matter to the police station as a way of instituting criminal proceedings.

The prayers 10, 11 and 12 of the application is for this court to issue an order of sought the orders of ‘*restitutio integrum*’ (restoration to the original position) and an order restoring the status quo ante immediately prior to the grant of the said order issued on February 17, 2022 and recreate in facsimile the property as it stood and build them back brick by brick immediately prior to their demolition.

While I fully concur with the learned counsel for the applicant that this relief may not be fathomable and rather difficult to grant vide an application notwithstanding the provisions of order 3 rule 1 of the *Civil Procedure Rules, 2010*, I discern that it is one of the reliefs that I have referred to the ELC No 1 where the ELC No 30 of 2014 is being handled. But additionally, I discern that in land matters, the issuance of “status quo” order is now literally synonymous with the proceedings. As was held by the Court of Appeal in the case of “Mugah v Kunga [1988] KLR 748, status quo orders should always be issued for purposes of preserving the subject matter. This court’s practice directions *vide* gazette notice No 5178/2014 (Practice directions on proceedings in “the Environment and Land Courts, and on proceedings relating to the environment and the use and occupation of, and title to land and



proceedings in other courts) provide in direction No 28(k) that courts have the leeway and discretion to make an order for status quo to be maintained until determination of the case.

Okongo J in the case of "*Thugi River Estate Limited & another v Naitonal Bank of Kenya Limited & 3 others* [2015] eKLR explained when and how status quo orders should be issued. He held as follows:-

“.....order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs...

It is certainly worth pointing out that as such status quo orders are prompted by the court to assist in case management, the court must always keep an eye on the fundamentals. Firstly, when it is of no assistance there is no need to invoke it. There must be gain in its imposition. It would therefore be important for the court to know and precisely describe the state of affairs being kept in situ.

Secondly, the court must ensure no conflict or combat is generated by the order for maintenance of status quo. Its effect is everything for the court. It should create no prejudice to one party, nor hardship to one party. There should be equality in the prejudice, some sort of rigid yet false equality.”

57. From the above, an order of status quo ante freezes the state of affairs as is, it is not retrogressive. It cannot freeze the state of affairs as was before the fact. Although, and as it has been admitted by all the parties herein that demolition of the property has been done, this court on abundance of caution proceeds to issue an order of status quo ante of the property even after the demolition has occurred awaiting further directions by the ELC court number 1 as it will be directed herein below.

In prayer 11, Sonrisa is seeking orders for damages and/or for the property to be rebuilt. If so, I reiterate the umpteenth times that the 2<sup>nd</sup> respondent/applicant is at liberty to apply for damages in the substantive file of ELC (Mombasa) No 30 of 2014. From the facts adduced herein, it is claimed that the demolition was only done on property that was in the land said to have encroached into plot No 50. AS a known fact, the Court of Appeal in its judgment held that the order of demolition in the judgment of Mukunya J was premature. The Court of Appeal thereafter directed that the land registrar and the government surveyor should determine whether plot No 48 had encroached upon plot No 50. From the record, it is indicated that this land surveying was already undertaken and indeed a report by the Land Registrar dated July 2, 2021 prepared, shared with parties and filed in court. Indeed that was the main subject matter before the ELC (Kwale) No 001 of 2022. According to the contents of the report the Land Registrar indeed plot No 48 had encroached into plot No 50. This decision is still to be set aside. The learned counsel for Five Eleven Auctioneers, Mr Ndegwa eloquently argued that the Court of Appeal held that the order for demolition was premature for lack of a report by the Land Registrar therefore the availability of the report resuscitated the order for demolition.

58. The herculean query here, and its for the ELC No 1 by the presiding judge Hon SM Kibunja while doing his legal opinion to the Court of Appeal is this - did the order of demolition mature after the Land Registrar’s determination? This court’s hands are tied when it comes to the interpretation of the



judgment of the Court of Appeal. Parties can apply to the Court of Appeal for their clarification. I dare say no more.

Issue No c). Whether a miscellaneous application is a stand alone suit in the strict sense of the law and whether this court still has jurisdiction to continue hearing and determining issues emanating from the said miscellaneous application.

59. 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 July 20, 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”

59. While the provision of order 3 rule 1 of the [Civil Procedure Rules, 2010](#) further provides:-

“ Every suit shall be instituted by presenting a plaint 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 plaint, 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 un procedural, 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.

59. Ideally, once the relief has been obtained or achieved, the Miscellaneous application like any other application stands as having been spend 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 it’s 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 plaint, 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 property 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”

59. In this instant case, this miscellaneous application was filed by Five Eleven Auctioneers seeking to execute the decree of October 13, 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 spend.



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”.

59. 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.....”

59. 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.

Nonetheless, in accordance with the provision of section 99 of the [Civil Procedure Act](#) cap 21 which provides:-

“Amendment of judgements, decrees or orders:- clerical or arithmetical mistakes in judgement, decrees or orders, or errors arising from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any or the parties”.

Thus, it means the doctrine of “*functus officio*” does not prevent the court from correcting any clerical errors, nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality to all litigation process. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available. (See, the case of “*Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550)

Issue No d). Who will bear the costs of the notice of motion application dated February 21, 2021.

59. The [Black Law Dictionary](#) defines “cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of section 27 (1) of the [Civil Procedure Act](#), cap 21 holds that costs follow events. by events here it depicts the result of the legal action, process or proceeding in any litigation. It is trite law that the issue of costs is the discretion of courts. In the case of “[Reids Hewett](#)



Es Company v Joseph AIR 1918 cal 717 & Myres v Defries (1880) 5 Ex D 180, the House of the Lords noted:-

“The expression “costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

59. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The out come in the instant case is one of fair win – win on a balance scale of Justice by all parties. For that very fundamental reason, therefore, each party should bear their costs of this application.

#### **IV. Conclusion & Disposition**

59. 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. Thatthe notice of motion application dated February 21, 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 February 21, 2022 stand and have already been spend/overtaken by events.
  - b. Thatas 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. Thatan 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. Thatin the meantime, any of the parties to be at liberty to seek interpretation of the judgment dated April 24, 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 November 2, 2022 for further direction particularly with regard to:-
    - i. Prayers No 9, 10 and 11 of the notice of motion application dated February 21, 2022;
    - ii. Preparation of a final legal opinion to the court of appeal as per the orders granted by the said court on April 24, 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.

It is ordered accordingly.



**RULING DELIVERED VIA MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF OCTOBER 2022.**

**HON. JUSTICE (MR) L. L. NAIKUNI, JUDGE**

**ENVIRONMENT & LAND COURT AT,**

**MOMBASA**

**In the presence of:**

- a. Ms. Yumna Jillo Court Assistant
- b. Mr. Ndegwa Njiru Advocate for the Applicant.
- c. Mr. Tariq Khan Advocate for the 2nd Respondent/Applicant.

