



**Shah v Kiriimi & another (Civil Suit 177 of 2017)  
[2023] KEELC 16659 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16659 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 177 OF 2017  
LL NAIKUNI, J  
MARCH 8, 2023**

**BETWEEN**

**RATILAL GHELA SHAH ..... PLAINTIFF**

**AND**

**DARIUS MWITI KIRIMI ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR KWALE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. The Honorable Court was moved by David Mwiti Kiriimi, the 1<sup>st</sup> Defendant/Applicant through filing of a Notice of Motion application dated April 20, 2022. It was brought under the dint of Sections 1A, 1B, 3A, 12, 13, 15 and 18 of the Civil Procedure Act, Cap 21.

**II. The 1<sup>st</sup> Defendant/Applicant's case**

2. The 1<sup>st</sup> Defendant/Applicant herein sought for the following orders:-

- a) Spent.
- b) That pending the hearing of this application, there be stay of proceedings herein be issued.
- c) That this honorable court be pleased to direct that this matter be transferred to Kwale ELC for further hearing and determination.
- d) That the costs of this application be borne by the Respondents.



3. The application is based on the grounds, testimonial facts and the averments made out in the nine (9) Paragraphed Supporting Affidavit of Martin Osodo, an Advocate of the High Court of Kenya and the Counsel for the 1<sup>st</sup> Defendant/Applicant herein. The Deponent held that the 1<sup>st</sup> Defendant gave them instruction to take over the matter from the Law firm of Messrs Marende Necheza & Company Advocates. From the perusal of the Court file, they have found out that the suit land known as Land Reference Numbers Kwale/Diani Complex/25, was situated in Diani within Kwale County. Likewise, the 1<sup>st</sup> Defendant resided on the suit property
4. He deposed that he was aware by the time of instituting this suit in the year 2017 there was no Environment and Land Court vision at Kwale. However, from the year 2021, there has been established an Environment & Land Court at Kwale with a Judge presiding over it.
5. He opined that taking that the suit land and the 1<sup>st</sup> Defendant were both at Kwale, it was just fair that the notice of motion application filed on April 22, 2022 and the suit herein be transferred to be heard and determined by the court sitting in Kwale County since it has the geographical jurisdiction over the suit property.

### **III. The Plaintiff/Respondent's Responses**

6. The Plaintiff/Respondent opposed the application with Grounds on Opposition dated July 1, 2022. The plaintiff argued that the application was incompetent, frivolous and a gross abuse of the court process and further Could not be heard by the court which has since become *functus officio*.

### **IV. Submissions**

7. On May 30, 2022 while all parties were present in Court, they were directed to dispose off the application by way of written Submissions. Pursuant to that they all complied. Thereafter, the Honorable Court reserved a date to deliver its ruling on notice accordingly.

#### **A. The Written Submissions by the 1<sup>st</sup> Defendant/Applicants**

8. On July 20, 2022, the Learned Counsel for the 1<sup>st</sup> Defendant/Applicant, the Law firm of Messrs. Alinaitwe Osodo Advocates LLP filed their written submissions in support of the application on April 20, 2022. Mr Martin Osodo Counsel submitted that the provision of Sections 12, 13, 15 and 18 of the [Civil Procedure Act](#), Cap 21 dictated that the suit herein be heard and determined by the Environment and Land Court situated at Kwale within the County of Kwale. The Counsel contended that at the time the suit was being instituted, in this Court sitting at Mombasa, there was no Court in Kwale, that would have heard the matter. However, since an Environment and Land Court had been established in Kwale, the Counsel urged this Court to order for the transfer of the matter herein to be heard and determined at the Environment & Land Court at Kwale.
9. His main contention was that 1<sup>st</sup> Defendant was a resident of Diani Kwale and so was the suit land. He felt he was not being well represented during the hearing and determination of the suit by his previous advocates on record. The previous Advocates on record for the 1<sup>st</sup> Defendant were the law firm of Messrs Marende Necheza & Company advocates. He further argued that he was not forum shopping nor to indicate that he had no faith in this Court but only did this application for convenience sake of his case. The Deponent stated that the previous Advocates had filed an application dated April 12, 2022 and filed on April 21, 2022 seeking to set aside the Judgement and review the orders delivered by this Court issued on November 25, 2021. He deposed that he had filed a Notice of Change of Advocates dated April 25, 2022 which he served the previous Advocates together with a letter to this effect.



10. The Counsel urged Court to transfer this suit to ELC Kwale for the said application to be heard and determined in the court near his residence and where the subject matter is located.

### **B. The Written Submission by the Plaintiff/Respondent**

11. On July 15, 2022, the Learned Counsel for the Plaintiff/Respondent herein, the law firm of Messrs K'Bahati & Company Advocates filed their Written submissions dated July 7, 2022 in opposition of the application, Mr K'Bahati Advocate submitted that as a very fundamental point, that the court has rendered Judgement in this matter on November 25, 2021. Thus, the prayer sought herein to transfer the suit for further hearing and determination is untenable and is an abuse of the court process. The Counsel submitted that the 1<sup>st</sup> defendant has not sought for stay of proceedings pending the transfer of the matter to Environment & Land Court at Kwale, hence the application herein beats logic, was incompetent and unsustainable. The Counsel argued that a Court file could not be transferred whimsically and without any purpose since the suit had been determined and Judgment rendered on November 25, 2021. The Counsel urged court to dismiss the suit for lacking merit and substance with costs to the plaintiff/respondent.

### **V. Analysis & Determination**

12. I have considered the application filed herein by the 1<sup>st</sup> Defendant, the Replies and the Submissions made and the relevant provisions of the statutes. There are only two issues to be considered by this Honorable Court herein.
  - a. Whether the Court based on the Doctrine of “functus officio” this Honorable Court may grant the reliefs sought of transfer of a case to another Court after Judgement has already been delivered/pronounced on November 25, 2021
  - b. Who will bear the Costs of the application?

#### **Issue No a). Whether the Court based on the Doctrine of “Functus officio” this Honorable Court may grant the reliefs sought of transfer of a case to another Court after Judgement has already been delivered/pronounced on November 25, 2021.**

13. Fundamentally, the main issues for consideration is whether the Court has the legal mandate to cause a transfer of a suit to another Court after Judgement has been delivered. Under the provisions Sections 12, 13, 15 and 18 of the Civil Procedure Act, Cap 21 is what the 1<sup>st</sup> Defendant/Applicant has relied upon to seek transfer. Clearly, these provisions of the law contemplates cases which are pending for trial. From records, the trial of this case has been concluded. My understanding is that, the issues in dispute as between the parties have been resolved and a Judgment delivered issued on November 25, 2021. There is nothing more to adjudicate upon leave alone transferring to another Court. The Honorable Court is *functus officio* and is prevented from re-opening the case, which it has already rendered a final decision on. This doctrine of *functus officio* does not prevent the court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein.
13. The case of “ICEA Lion General Insurance Co. Limited v Julius Nyaga Chomba [2020] eKLR, relied on the case of “Jersey Evening Post Limited v Al Thani [2002] JLR 542 at 550 where it was held that:

“A Court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only



fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

14. The court does not become *functus officio* merely because it delivered a judgement, it retains its powers to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file that are not merit based. In case of *Leisure Lodges Limited v Japhet S Asige & another* [2018] eKLR the court held that,

“On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act.”

15. Ideally, what is before this Court is an application that requires this Court to re-open the decided dispute, consider the location of the suit property and the residential area of the 1<sup>st</sup> Defendant to confirm that indeed the suit property is within the geographical jurisdiction of the Environment & Land Court at Kwale. Jurisdiction is everything and for court to consider the issue as presented by the applicant, would be considering the application on merit based, which is prohibited by the doctrine of *functus officio*. In all fairness, it is so unfortunate as the 1<sup>st</sup> Defendant ought to have known these obvious facts and prevailing circumstances to spare himself of breath and resources. For these reasons, the application can not be successful as it dies on arrival.

#### **Issue No b). Who will bear the Costs of the Application?**

16. The issue of Costs is at the discretion of the Court. The provision of Section 27 (1) of the *Civil Procedure Act*, holds that Costs follow the events. The event here means the results of this case whereby the application by the 1<sup>st</sup> Defendant has failed. Thus, the 1<sup>st</sup> Defendant should meet the Costs of the said application.

#### **VI. Conclusion & Determination**

In the long analysis, the Honorable Court views that this application has no merit and has to fail. In view of the foregoing, I grant orders:-

- a) That the Notice of Motion application dated April 20, 2022 be and is hereby dismissed.
- b) That this Court has no jurisdiction to hear and determine the application based on “the doctrine of being *functus officio*” a Judgement having been pronounced on November 25, 2021.
- c) That the Costs of the application to be borne by the 1<sup>st</sup> Defendant.

It is so Ordered Accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 8<sup>TH</sup> DAY OF MARCH 2023.**

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

**ENVIRONMENT & LAND COURT AT,**



**MOMBASA**

**In the presence of:**

- a. M/s. Yumna, the Court Assistant.**
- b. M/s. Gathoni Advocate holding brief for Mr. K’Bahati for the Plaintiff/Respondent**
- c. Mr. Osodo Advocate for the 1<sup>st</sup> Defendant/Applicant.**
- d. Mr. Makuto Advocate for the 2<sup>nd</sup> Defendant/Respondent.**

