



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO.226 OF 2010**

**CHESTERTON PROPERTIES LTD.....PLAINTIFF**

**-VERSUS-**

**SAMSON MUTURIA & OTHERS.....DEFENDANTS**

**RULING**

1. Before this court for determination is the Notice of Motion application dated 16<sup>th</sup> April 2012. The said application was initially opposed on grounds of jurisdiction of this court to entertain the same and vide a ruling delivered on 31<sup>st</sup> July 2012 by F, Tuiyott J, the preliminary objection on the jurisdiction was overruled. Directions on hearing of the application were given and the application was canvassed by viva voce evidence, where the 47 defendants were represented by Irine Wekesa as PW1, Justus Muchiro Kiboi as PW2, John Paul Obonyo as PW3 and Father Gabriel Polan as PW4. The court bailiff equally testified but the plaintiff did not testify.

2. At the outset, it is important to lay some factual background of the matter. The plaintiff filed a plaint dated 5<sup>th</sup> July 2010. The plaintiff amended the plaint and a further amended plaint was filed on 28/6/2011. Vide a consent filed on 28/6/2011, a total of 91 defendants agreed to voluntarily vacate and handover vacant possession leaving a total of 47 defendants subject of this ruling.

3. On 28<sup>th</sup> July 2011, the plaintiff filed a notice of withdrawal of suit against the 47 remaining defendants. For the 47 defendants, the firm of Jengo & Associates on 5<sup>th</sup> August 2011 filed a document known as notice of objection to the consent dated 27<sup>th</sup> June 2010. On 28<sup>th</sup> August 2011 the firm of Jengo and Associates filed a request for judgment on costs arising from the Notice of Withdrawal dated 28<sup>th</sup> July 2011.

4. As earlier alluded to in respect to the jurisdiction of the court, the court in the ruling delivered on 31<sup>st</sup> July 2012 found that it had jurisdiction under Section 34 of the Civil Procedure Act. Although the application seeks determination of execution proceedings and whether the same were legal or not, and evidence was taken on the same, for all intents and purposes, save for the issues under Section 34, upon filing of the notice of withdrawal of the suit against the 47 defendants the suit actually died and the consent recorded on 19<sup>th</sup> March 2012, 8 months after the withdrawal of the suit was therefore a nullity.

5. It follows equally that whereas the court would have jurisdiction to entertain an application for execution under Section 34, the instant application having been based on the consent recorded on 19<sup>th</sup> March 2012, eight months after withdrawal of the suit against the 47 defendants is equally a nullity the 47 defendants were no longer parties to the suit. That upon withdrawal of the suit against the 47 defendants, there was nothing remaining that was capable of falling under Section 34 for purposes of execution and the court finds that the application dated 19<sup>th</sup> April 2012 having been filed 8 months after the withdrawal of the suit against the 47 defendants, as the defendants were no longer parties to the suit.

6. The upshot is that the application dated 16<sup>th</sup> April 2012 has no bearing and is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21<sup>ST</sup> DAY OF JULY 2021**

**C.K. YANO**

**JUDGE**

**In the presence of:**

**Wangechi holding brief for Munyithya for plaintiff**

**No appearance for defendants**

**Court Assistant – Yumna**

**C. K. YANO**

**JUDGE**