



**Stackelberg & another v Obst (Civil Suit 133 of 2007)
[2024] KEHC 9088 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 133 OF 2007
JK NG'ARNG'AR, J
JULY 23, 2024**

BETWEEN

JOACHIM VON STACKELBERG 1ST PLAINTIFF

YOLANDA FIRTH 2ND PLAINTIFF

AND

SYLKE OBST DEFENDANT

RULING

1. The 2nd Plaintiff/Applicant filed the Notice of Motion application dated 12th April 2024 pursuant to Article 159 (d) and 162 (2) (b) of the *Constitution*, Section 13 of the *Environment and Land Act* 2011, Section 1A, 1B, 3A, 18(1)(b) of the *Civil Procedure Act*, and all other enabling provisions of the law. The application was filed under Certificate of Urgency dated 23rd April 2024.
2. The Applicant prayed for leave for the firm of Mungai Kamau Advocates to come on record and take over the conduct of the matter for the 2nd Plaintiff/Applicant in place of the firm of Kadima & Co. Advocates. That the matter herein be transferred to the Environment and Land Court in Kwale for hearing and determination of the pending application since this court does not have jurisdiction to hear and enforce decrees emanating from land disputes. That pending the hearing and determination of the application herein there be an order for stay of proceedings and execution of the decree dated 6th November 2014, and that costs of the application be in the cause.
3. The application was premised on grounds on its face and the supporting affidavit of George Mungai sworn on 15th April 2024, that the firm of Kadima & Co. Advocates which previously represented the Applicant signed a consent to have the firm of Mungai Kamau Advocates take over representation of the Applicant herein. That the subject matter of the case, Kwale/galu Kinondo 1174,1175,1176 and 1177, is situated in Diani within Kwale County and the court with territorial jurisdiction is the Kwale Environment and Land Court. That the said court is also seized with jurisdiction to hear and



determine any application regarding enforcement of decrees that relate to land matters. That judgment in the land dispute herein was delivered on 6th November 2014 and a decree dated 28th September 2020 issued, which is being enforced by the Respondent herein. That because of lack of jurisdiction, the proceedings, judgment and decree issued thereon were illegal, null and void ab initio and incapable of being enforced against the Applicant. That no prejudice will be occasioned to the Respondent if the application is allowed.

4. The Respondent opposed the application through Grounds of Opposition dated 2nd May 2024 that the prayer seeking to transfer the matter to Kwale Environment and Land Court for hearing and determination has no merit. This is because there is no pending matter to be transferred as the final judgment has already been delivered, that the court is functus officio having finally determined the rights and liabilities of the parties herein in the judgment of 6.11.2014 and the decree of 28.9.2020. That there has been partial extraction of the decree to the effect that the Defendant/Decree holder has been registered as the proprietor of the suit property and issued with a title deed. That the remainder of the decree relates to awarding the Defendant/Decree holder interests and costs of the suit, and that there is a Notice to Show cause dated 31.5.2023 for the judgement debtor to show why he should not be committed to civil jail. That the remaining part of the decree does not involve any question of title, use and/or occupation of land.
5. The Applicant further opposed the Application on grounds that the High Court has jurisdiction to hear and determine this matter and to deliver judgment because the matter was instituted in 2007 long before the Environment and Land Court was established and came into operation in 2012, pursuant to Section 30 of the *Environment and Land Court Act*, Direction 3 of the Practice Directions issued by the Chief Justice on 25.7.2014 vide Gazette Notice No 5178, and the Court of Appeal in *Peter Solacher v Romantic Hotels and another*, Mombasa Civil Appeals No 167 of 2019. The Defendant also stated that the prayer seeking stay of proceedings and execution of the decree dated 6.11.2014 had no merit because there are no pending proceedings to be stayed, there are no pending or intended appeals, the Applicant has not demonstrated any substantial loss it will suffer, and the application for stay has been brought after an inordinate delay of 8 years.
6. The Respondent also opposed the application vide a Replying Affidavit sworn on 2nd May 2024 and filed on the same day where she fully adopted and relied upon the Defendant's Grounds of Opposition dated 2.5.2024 and filed on 3.5.2024, and reiterated the contents therein. The Respondent prayed that the Plaintiff/Judgment Debtor's Notice of Motion application dated 12th April 2024 be dismissed with costs.
7. The application was canvassed by way of written submissions. The Applicant filed submissions dated 2nd May 2024 and filed on 27th May 2024, and argued that the Environment and Land Court had jurisdiction to hear and determine the dispute pursuant to Article 162 (2) of the *Constitution* and Section 30 of the Environment and Land Act. That the commencement date of the Act was 30th August 2011 and the first witness was heard on 22nd May 2012. Therefore, the matter herein ought to have been transferred to the Environment and Land Court on the issue of jurisdiction as was held in *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* (2012) eKLR and *National Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others*.
8. The Respondent in his submissions dated 2nd May 2024 and filed on 27th May 2024 contended that the court had jurisdiction to execute the decree because it is the very court that issued in accordance with Order 22 Rule 6 of the *Civil Procedure Rules*. The Respondent supported the position with the decision in *John Gilbert Ouma v Kenya Ferry Services Ltd* (2023) eKLR which held that a court that has delivered judgment cannot revisit the question of whether it had jurisdiction to entertain the suit. On



the issue of transferring the matter to Kwale Environment and Land Court, the Respondent cited the authority in *Rebecca Chumo v Christina Cheptoo Chumo* (2021) eKLR that a party seeking to transfer a matter from one court to another has the burden of providing sufficient reasons as to why the transfer is merited.

9. The Respondent also submitted that the jurisdiction to grant stay of proceedings or execution crystallizes upon lodging of a notice of appeal as was affirmed in the case of *Multichoice (Kenya) Ltd Wananchi Group (Kenya) Limited & 2 others* (2022) eKLR and granting of stay of proceedings would amount to this court making an order in vain contrary to the holding in *Diana Ketbi Kilonzo v Republic* (2016) eKLR. That the three conditions for grant of stay of execution under Order 42 Rule 6(2) were also not met. The Respondent urged the court to dismiss the application with costs and allow the Defendant to execute the remainder of the decree.
10. This court has considered the Applicant's Notice of Motion application dated 12th April 2024, the Respondent's Grounds of Opposition and Replying Affidavit, and Submissions of both parties. The issues for determination therefore are whether the prayer for leave for the firm of Mungai Kamau Advocates to come on record and take over the conduct of the matter for the 2nd Plaintiff/Applicant is merited, whether the matter herein can be transferred to Kwale Environment and Land Court for hearing and determination, whether an order for stay of proceedings and execution of the decree dated 6th November 2014 can be granted, and costs of the application.
11. On whether leave can be granted for the firm of Mungai Kamau Advocates to come on record, Order 9 Rule 9 of the *Civil Procedure Rules* provide: -

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.
12. This position was further expounded in the case of *Koske v Langat* (Environment and Land Appeal E005 of 2021) [2023] KEELC 21958 (KLR) (30 November 2023) (Ruling) as follows: -

“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 after judgment had been passed, must notify the Court and other parties.”
13. The Applicant indeed has the right to be represented by an advocate of her choice but it ought to be in compliance with the procedures set out as above. The Applicant has stated that the firm of Kadima & Co. Advocates which previously represented the Applicant signed a consent to have the firm of Mungai Kamau Advocates take over representation of the Applicant herein. The issue of change of advocates has also not been disputed by the Respondent.



14. On whether Kwale Environment and Land Court has jurisdiction, the court in *Shah v Kirimi & another* (Civil Suit 177 of 2017) [2023] KEELC 16659 (KLR) (8 March 2023) (Ruling) was apt in its determination that: -

“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 1st 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 1st Defendant ought to have known these obvious facts and prevailing circumstances to spare himself of breath and resources. For these reasons, the application cannot be successful as it dies on arrival.”

15. Judgment was delivered on 6th November 2014 and the decree issue on 28th September 2020. The Respondent has stated that the decree was extracted and partially executed to the effect that the Defendant/Decree Holder has been registered as the proprietor of the suit property and issued with a title deed. That what is outstanding is the award of interests and costs of the suit. This court therefore finds that proceedings were fully concluded with the perfection of judgment or orders and it cannot alter its decision as it is *functus officio*. The redress available to the Applicant is to challenge the decision in a higher court.
16. On whether there can be stay of proceedings and execution of the decree dated 6th November 2014, the Applicant has not demonstrated that substantial loss may result unless the order is made, that the application has been mad without unreasonable delay and that such security as the court orders for the due performance of the decree has been given before the applicant, pursuant to Order 42 Rule 6 of the *Civil Procedure Rules*.
17. In the upshot, the only prayer to be granted by this court is to allow the firm of Mungai Kamau Advocates to come on record and take over the conduct of the matter for the 2nd Plaintiff/Applicant in place of the firm of Kadima & Co. Advocates. Otherwise all the other prayers are not granted. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF JULY 2024

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Mungai Advocate for the Plaintiff

Karina Advocate for the Defendant

Court Assistant – Samuel Shitemi

