



REPUBLIC OF KENYA



Quiver Development Kenya Limited v Tapataiya & 3 others (Environment and Land Case 583 of 2017) [2025] KEELC 6573 (KLR) (2 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE 583 OF 2017
LC KOMINGOI, J
OCTOBER 2, 2025**

BETWEEN

QUIVER DEVELOPMENT KENYA LIMITED PLAINTIFF

AND

PETER LENGULU TAPATAIYA 1ST DEFENDANT

DEVKIN ASSOCIATES LIMITED 2ND DEFENDANT

CHIEF LAND REGISTRAR NAIROBI 3RD DEFENDANT

HON ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. This Ruling is in respect to the Notice of Motion application dated 29th April 2025 which is brought pursuant to Section 3, 13 (1), (2), (7), 16, 19 (1), (2) of the *Environment and Land Court Act*; Order 9 Rule 9 and 10, Order 10 Rule 11, Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules; and all other enabling provisions of the law.
2. It seeks orders that;
 - i. Spent
 - ii. That the firm of Kirui Kamwibua & Co. Advocates be granted leave to come on record on behalf of the 2nd Defendant/Applicant.
 - iii. There be a temporary Stay of execution of the orders issued on 24th April 2025 pending the hearing and determination of this application inter-parties.
 - iv. That the orders issued on 24th April 2024 and all other consequential orders therein be set aside and the 2nd Defendant/Applicant be allowed to defend the application dated 4th November 2024 on merit.



- v. The costs of this application be in the cause.
3. The grounds are on the face of the application and are set out in paragraphs a to h. It is supported by the sworn Affidavit of Peter Kinyua Muchendu.
 4. He averred that as one of the 2nd Defendant's Directors, he was well versed with the matter and competent to swear the Affidavit. He claims that despite the 2nd Defendant having counsel on record and having filed a witness statement, he was never called to testify. He claims that he was not able to actively follow up on the suit due to his ailing health from the year 2014 and due to this, he transferred all his shares to his Co-Director in May 2018. He was therefore not actively involved with the management of the 2nd Defendant, although he believed that their Advocate on record was acting in their best interests. It was only until 1st February 2025 (sic) that he learnt that a Decree dated 30th May 2024 had been issued against the 2nd Defendant. Due to the gravity of the orders granted in the Application dated 4th November 2024, it was only fair that execution of the orders issued on 24th April 2025 be stayed and the Applicant be accorded an opportunity to be heard.
 5. The Plaintiff, through its Replying Affidavit sworn by its Director Eshban Githiaka, contested this application stating that it was entitled to the fruits of its Judgement. He contended that the claim that the 2nd Defendant was never called to testify was moot because once the judgement was delivered, then the Court became functus officio. He further averred that the 2nd Defendant's counsel was present when the judgement was delivered and therefore the 2nd Defendant cannot claim not to have been aware of the decision. He further added application dated 4th November 2024 as well as orders for execution was duly served through substituted service pointing out that it was until 28th January 2025 when counsel for the 2nd Defendant filed an application to cease acting. The allegation that he transferred his shares to his co-Director was also questioned on grounds that there was no evidence to support it.
 6. It was his contention therefore that there was no sufficient reason advanced by the 2nd Defendant to warrant issuance of the orders sought in their application and the same should be dismissed with costs.
 7. The Applicant in his Further Affidavit dated 18th July 2025, stated that the application was not seeking to set aside the orders ensuing from the hearing of the main suit but only the orders issued on 24th April 2025 in respect to the application dated 4th November 2024. He also indicated that there was evidence that he resigned as a director of the 2nd Defendant due to his ill health and the documents dispatched to the Company's Registry. He was however, not aware whether they had been actioned or not. He therefore averred that the Application should be allowed as prayed.
 8. The application was canvassed by way of written submissions.

Submissions of the 2nd Defendant/Applicant.

9. Counsel submitted that this Court had discretion to set aside the ex parte orders citing the cases of *Shah v Mbogo and Another* [1967] EA 116 and *Wachira Karani v Bildad Wachira* [2016] eKLR. It was its submissions that the Applicant's health was frail making it difficult for him to participate in the proceedings. It was also submitted that substituted service was unlikely to reach the Applicant due to his health condition and he had a right to be heard on merit citing *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. While still making reference to the *James Kanyiita* case, counsel submitted that the doctrine of functus officio was not absolute where judgement was obtained in breach of procedural safeguards and should not prevent a court from preventing clerical errors as held in *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] KECA 600 (KLR).



10. As such, the orders issued on 24th April 2025 should be set aside.

Submissions of the Plaintiff/Respondent.

11. Counsel submitted that while illness could warrant setting aside of orders as held by Mativo J. (as he then was) in *Wachira Karani v Bildad Wachira* [2016] eKLR, the 2nd defendant being a company with more than one Director and any other available substitute meant that the matter could still be duly handled even in the deponent's absence. Counsel added that the lack to act as well as tender evidence of resignation from the company meant that the application was an afterthought and did not warrant the setting aside of the orders.
12. On whether the 2nd Defendant was properly served, counsel submitted that Order 5 Rule 17 of the Civil Procedure Rules provided that where the court is satisfied that the defendant cannot be served personally, it may order service by way of advertisement in a newspaper which was done in this case. Therefore, the 2nd defendant was duly served and incapacity of one of its Directors could not invalidate service.
13. Counsel went on to submit that there was inordinate delay in filing of the Application from the time the judgement was delivered without sufficient reason. This application would therefore prejudice the Plaintiff and should be dismissed with costs.

Analysis and determination

14. I have considered the Notice of Motion, the affidavit in support, the response thereto, the rival submissions and the authorities cited. I find that the issues for determination are:
 - i. Whether the 2nd Defendant is entitled to the reliefs sought in the Application dated 29th April 2025
 - ii. Who should bear costs of the Application?
15. The Applicant has approached Court seeking stay of execution of the Orders issued on 24th April 2025 and an opportunity to defend the application dated 4th November 2024.
16. It is his claim that he was unaware of the said Application and he stood to suffer irreparable loss and damage since his property was at risk of being attached and sold.
17. The Plaintiff contested this application on grounds that the Applicant should not feign ignorance because he was duly represented by an Advocate during the proceedings.
18. In the Application dated 4th November 2024, the Plaintiff sought that;
 - i. The Honourable Court be pleased to order that Peter Kinyua Muchendu and Purshottam Bhimji Devani being the Directors /Shareholders of the 2nd Defendant/Judgement Debtor, do attend Court on a Date to be allocated by the Court for purposes of their examination on oath as to:
 - i. Whether any or what Debts are owing to the 2nd
 - ii. Whether the 2nd Defendant/Judgement Debtor has any and what Property or means of satisfying the Decree issued on the 30th May 2024.

And to produce the 2nd Defendant/Judgement Debtors' Books of Accounts and other Documentary Evidence.



- ii. Upon personal attendance and examination of the Directors/Shareholders of the 2nd Defendant/ Judgement debtor herein namely Peter Kinyua Muchendu and Purshottam Bhimji Devani herein, the Honourable Court be pleased to pierce the Corporate Veil of the 2nd Defendant/ Judgement debtor and the said directors of the 2nd Defendant/ Judgement Debtor be and are hereby jointly and severally held personally liable to pay the Applicant the decretal sum of Kshs. 68,250,000/= plus interest at 16 p.a from the 23rd November 2014 until payment of the in full terms of the Decree of the Court issued on the 30.5.2024.
 - iii. That warrants of attachment and sale of assets of the Directors and Shareholders of the 2nd Defendant/Judgement debtor, Devkin Associates Limited, namely, Peter Kinyua Muchendu and Purshottam Bhimji Devani do issue in execution of the decree herein.
 - iv. That in the alternative to (3) above, A Notice to Show Cause be and is hereby issued upon the said Directors (Peter Kinyua Muchendu and Purshottam Bhimji Devani) compelling the said directors and shareholders of the 2nd Defendant/ Judgement debtor to Show Cause why they should not be committed to civil jail for a period of not less than Six (6) months for failure to pay or satisfy the decretal sum in this suit.
 - v. That the Honourable Court be pleased to Grant Leave to the Applicant/ Decree Holder to serve this application and all attendant process upon the 2nd Defendant/Judgement Debtor and its directors by way of substituted service through the Registered Post Via their Postal Address P.O Box Number 85231 Mombasa as appearing in the Company Records and the Investigations report.
 - vi. The costs of this application be borne by the 2nd Defendant/Judgement Debtor.
 - vii. Any other order appropriate to court be issued.
19. In that application, the Plaintiff claimed that despite serving the 2nd Defendant with the decree, the 2nd Defendant had refused/failed to satisfy the decree. It was claimed that the 2nd Defendant did not have attachable assets and its Directors were using the corporate veil to refuse to make the payment. It was therefore important that the Directors be compelled to produce the books of accounts to ascertain its ability to satisfy the decree and that the corporate veil be lifted.
20. On the 29th January 2025, this Court allowed the Application dated 28th January 2025 by counsel for the 2nd Defendant to cease acting. On the same day, the Court allowed the Plaintiff to serve the 2nd Defendant through substituted service as sought in the Application dated 4th November 2024.
21. When this matter came up on the 24th April 2025 and there being evidence of substituted service, this Court allowed prayer number 3, 4, and 6 of the Application as sought and marked the matter as finalised.
22. I have considered the reasons advanced by the Applicant and I find that they are plausible. The fact that he has been unwell has not been rebutted by any other evidence.
23. I find that he deserves a chance to be heard on the Notice of Motion dated 4th November 2024.
24. I therefore find merit in this application and the same is allowed in the following terms;
- a. That the orders issued on 24th April 2024 and all other consequential orders are hereby set aside and the 2nd Defendant/Applicant be allowed to defend the Notice of Motion dated 4th November 2024 on merit on condition, that the 2nd Defendant/Applicant do pay to the



Plaintiff/Decree Holder throw away costs of Kshs.10,000/= within twenty one (21) days from the date of this Ruling.

- b. That costs of this Application be borne by the 2nd Defendant/Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF OCTOBER 2025.

L. KOMINGOI

JUDGE.

In the Presence of:

Mr. E. Akumu for Ms. Mwaniki for the Plaintiff/Respondent.

Mr. Sankale for the 1st Defendant.

Mr. Kirui for the 2nd Defendant/Applicant.

Court Assistant – Peter.

