



REPUBLIC OF KENYA



KENYA LAW
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**Thathini Development Co Ltd v Gachogu & 3 others (Civil Suit
149 of 2014) [2024] KEELC 4063 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 4063 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 149 OF 2014
LL NAIKUNI, J
APRIL 25, 2024**

BETWEEN

THATHINI DEVELOPMENT CO LTD PLAINTIFF

AND

DAVID W GACHOGU 1ST DEFENDANT

**ANN WAMBUI NJUGUNA (SUING AS THE LEGAL ADMINISTRATOR
OF THE ESTATE OF THE DECEASED - PETER OWEN
NJUGUNA) 2ND DEFENDANT**

SAFARICOM COMPANY LIMITED 3RD DEFENDANT

THE LAND REGISTRAR MOMBASA 4TH DEFENDANT

RULING

I. Introduction

1. In this Ruling, the Honourable Court was called upon to undertake the hearing and determination over the Notice of Motion application dated 30th January, 2024 instituted by David W. Gachogu, the 1st Defendant/Applicant herein. It was brought under a Certificate of Urgency and the dint of the provisions of Sections 1A, 1(B), 3, 3A, 63 of the [Civil Procedure Act](#), Cap. 21 and Order 40, 42 Rule (6) and Order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010.
2. Upon service, the Plaintiff/Respondent filed their replies accordingly. The Honourable Court shall be dealing with it later on accordingly in this Ruling.



II. The 1st Defendant/ Applicant's case

3. The 1st Defendant/Applicant sought for the following orders: -
 - a. Spent
 - b. This Honourable Court be pleased to stay execution and extend the Order for depositing security for a further thirty (30) days from the date of this application.
 - c. This Honourable Court be pleased to issue an Order for injunction restraining the 2nd Defendant by itself, its employees, and/or any other party acting on its behalf from releasing rental income in its possession until the hearing and determination of this application.
 - d. The Court be pleased to order the 2nd Defendant to give account of all rental money collected and release the same to the 1st Defendants advocates or any other party as would be directed by court for purposes of depositing in a joint account as security.
 - e. The Court in alternative to order the 2nd Defendant to release Kenya shillings five million five hundred thousand (Kshs 5,500,000/=) only for the purposes of being deposited as security as ordered by this Court
 - f. This Court to be pleased to grant any other Order which it deems fit in the circumstances..

4. The application by the 1st Respondent/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 15th Paragraphed Supporting Affidavit of DAVID WANYOIKE GACHOGU sworn and dated 30th January, 2024 with three (3) annexures marked as 'D - 1 to D - 3' annexed thereto. The 1st Defendant/Applicant averred that:
 - i. On 31st October 2023 this court allowed his application for stay on condition that he deposited security which was to come from the rent assumedly collected by him from the suit property when the suit was pending in court.
 - ii. He recalled that at the hearing of this suit, he had indicated to the Court that as soon as this suit was filed the 3rd Defendant stopped paying him yearly rent a fact which was confirmed by the same said Defendant.
 - iii. The amount ordered to be deposited as security was at a sum of Kenya Shillings Five Million Five Thousand (Kshs. 5, 500, 000.00/=) which amount the 2nd Defendant was holding and had confirmed in both the proceedings herein and to his advocate.
 - iv. He expected the 2nd Defendant to co - operate and have the said amount released so that he could comply with the Orders of this Court and give security but had not been done.
 - v. His advocate sent him to inquire from the 2nd Defendant as to the state of his account to enable him to know how much was in the said account but they kept on dilly dallying and he had to ask his advocate to write to them which he did through his letter of 27th November 2023. Annexed and marked as "D-1" was the said letter.



- vi. As it could be seen, the letter was written within the grace period to deposit the security given by the Court but the 2nd Defendant never responded and had never responded to date.
- vii. It was not only him who was following the rent money held by the 3rd Defendant, but the Plaintiff's Counsel wrote to his advocate as to the rent in its possession but the said 2nd Defendants advocate as to the rent in its possession but the said 2nd Defendant had apparently refused and or ignored to co - operate which had led to this delay. Annexed and marked as 'D – 2' letter dated 24th November, 2023 and their response dated 27th November, 2023.
- viii. He was shocked to be informed by his Advocate that the 3rd Defendant was now writing to the Plaintiff informing them that it would comply with the Judgement of this Court and release the withheld rent to them and yet the Orders of stay was very clear which Order the 3rd Defendant knew about and should had complied with.
- ix. The 2nd Defendant's actions were clearly directed at defeating the Orders of stay granted by this Court and the delay had been occasioned by the 2nd Defendant who was holding the money meant to be given out as security and despite our reminding them, they had refused to co - operate to have the rent amount released.
- x. He had reached a conclusion that the 2nd Defendant would not release this amount until this Court gave a specific Order against them to do so and his believe arises from their lack of interest to co - operate to the security amount released for that purpose.
- xi. His fear had been confirmed after his advocates on record received a letter threatening that the 2nd Defendant would release the rental amount to the Plaintiff in compliance with the Judgment of the Court. Annexed and marked as 'D – 3' annexed as the said letter.
- xii. He was in the Court to seek an order stopping the 2nd Defendant from leasing this money to the Plaintiff and be compelled to release the same to be deposited as security.
- xiii. As it could be seen, the delay has not been occasioned by him but by the 2nd Defendant and the same was excusable and plead with the court to understand him.

III. The Plaintiff/Respondent's response

5. The Plaintiff through a 13th Paragraphed Replying Affidavit sworn on 6th February, 2024 by WAINAINA MUNGAI, a director in the Plaintiff Company, opposed the application by deposing that:-
 - a. The application was an abuse of the due process of the courts.
 - b. The Court never deliver its Judgment on 15th February, 2023 and its ruling on stay of execution subsequently after that.
 - c. This Court having pronounced itself on the issue of stay of execution and having pronounced itself on the issue of security became "functus officio".
 - d. The issue of stay and security was "Res Judicata".
 - e. This Court could not sit as an appeal court in its own decision.
 - f. The stay conditions did expire last year and execution began in earnest.
 - g. The orders being sought was contrary to the Judgment and ruling issued by this Court.



- h. This file should be designated for archives and should not take any other and further judicial space in the cause list.
- i. The only remaining legal issue for this file was taxation which was ongoing.
- j. He prayed for the dismissal of the application with costs.

IV. Submissions

- 6. On 19th February, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 30th January, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that a ruling date was reserved on 24th April, 2024 by Court accordingly.

A. The Written Submissions by the Plaintiff/Respondent

- 7. The Plaintiff/Respondent through the Law firm of Messrs. Mwaniki Gitahi & Partners Advocates filed their written submissions dated 6th February, 2024. Mr. Mwaniki Advocate submitted that before the Honourable Court was an offending Notice of Motion application brought under Certificate of Urgency dated 30th January, 2024.
- 8. It was the Learned Counsel's submissions that the said application was an outright abuse of the due process of the courts and out to be dismissed with costs. According to the Counsel, on 15th February, 2023, the Honourable Court delivered a Judgment that was explicit directing the 2nd Defendant/Respondent to release the accrued rental income to the Plaintiff. The said Judgement had NEVER been challenged in a Superior court. It was the accrued rental income that the 1st Defendant was seeking through this offending application.
- 9. The Learned Counsel further submitted that in short, the 1st Defendant was now appealing against the judgment delivered by this Honourable Court to this Honourable Court through the application. All the issues raised in the application are "Res – Judicata".
- 10. In conclusion, the Learned Counsel submitted that having pronounced itself on 15th February, 2023 through the Judgment and subsequently on 31st October, 2023 on the application for stay, this Honourable Court became functus officio. In a nutshell, the Learned Counsel prayed that the offending application dated 30th January, 2024 be dismissed with costs.

V. Analysis & Determination.

- 11. I have carefully read and considered the pleadings herein by the 1st Defendant/Applicant and the Plaintiff/Respondent herein, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
- 12. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 30th January, 2024 is Res - Judicata and whether on the affirmative this Honourable Court is functus officio?
 - b. Who will bear the Costs of Notice of Motion application 30th January, 2024.



ISSUE No. a). Whether the Notice of Motion application dated 30th January, 2024 is Res - Judicata and whether on the affirmative this Honourable Court is functus officio

13. This Honourable Court on 15th February, 2023 rendered itself as follows:

- “96. Ultimately, after conducting such an intensive and elaborate analysis to the framed issues, the court is satisfied that the Plaintiff has on balance and preponderance of probability established its case against the 1st, 2nd, 3rd and 4th Defendants. Therefore, for avoidance of any doubts, I proceed to specifically order:-
- a. That Judgment be and is hereby entered in favour of the Plaintiff and against the 1st, 2nd, 3rd and 4th Defendants jointly and severally.
 - b. That the 1st Defendant directed to surrender the original Certificate of title to all that parcel of land known as Land reference No. Mombasa/MN/Thathini/112 within the next fifteen (15) days to the Land Registrar, Mombasa, the 4th Defendant for its cancellation and/or revocation and rectification of the entries of the Land Registries to be in the names of Thathini Development Company Limited pursuant to the provision of Section 143 (1) and (2) of the Registered Land Act Cap 300 (Repealed)
 - c. That the 1st Defendant directed to remit all the monies received in respect of the Lease entered between the Plaintiff and 3rd Defendant from the date of the execution of the Lease on 20th July, 2005 to date without fail.
 - d. That an order be and is hereby that the 3rd Defendant herein to henceforth release all the financial proceeds owed to the Company and emanating from the duly executed Lease Agreement between the Plaintiff's Company and the 3rd Defendant within the next thirty (30) days from the date of this Judgement.
 - e. That an order be and is hereby made for the 3rd Defendant to be allowed to continue operating its telecommunication mast erected thereof as per the terms and conditions stipulated in the duly executed lease dated 20th July, 2005 with the Plaintiff but subject to fresh renewal as per the desires of the parties herein.
 - f. That there be an order directing the Board of Directors of the Plaintiff's Company to convene an Annual General Meeting as per the Provisions of Section 275A of the Companies Act within the next three (3) months to deliberate on:-
 - i. The status of the company and court case.
 - ii. Elections of and/or appointment of the Board of Directors.
 - iii. Renewal and/or extension of the Lease for the Safaricom Company Limited, the 3rd Defendant herein.
 - iv. Annual returns to the Company registry.
 - v. Any other business.



- g. That costs of the suit be borne by the 1st Defendant.

It is so ordered accordingly.

14. The 1st Defendant further went ahead and filed an application on 8th March, 2023 brought under the provisions of Sections 1(A),1(B),3(A),63(e) and Orders 42 Rules 6 (1) (2) and 51 Rules 1 of the Civil Procedure Rules, 2010 and Section 3 of the [Civil Procedure Act](#), Cap. 21. It sought for the following orders:-
- a. Spent.
 - b. Spent.
 - c. That, subsequently, there be a stay of execution of the Judgment and decree of Honourable Justice L.L. Naikuni issued on 15th February 2023 Mombasa ELC 149 OF 2014 pending the hearing and determination of the Appeal.
 - d. That costs of this application be provided for.
15. The Application was premised on the grounds that the Honourable Justice L. L. Naikuni after hearing the case, delivered the Judgment in this suit on 15th February 2023 in favour of the Plaintiff's against the 1st, 2nd, 3rd and 4th Defendants jointly and severally with costs to be borne by the 1st Defendant. The 1st Defendant was aggrieved by the said Judgment and decree and was preferring an appeal at the Court of Appeal. The Appeal would be rendered nugatory if the order of this court was acted upon as the 1st Defendant was required to 'inter alia' surrender the original Certificate of Title of the suit parcel of land reference No. Mombasa/MN/Thathini/112 to the Land Registrar Mombasa for cancellation and/or revocation and rectification of the entries of the Lands Registry in favour of the Plaintiff. The 1st Defendant's Appeal had high chances of success and particularly on the issues of surrender of the Certificate of Title and remittance of the monies received in respect of the lease. The matter before the court was a land matter and the 1st Defendant prayed That he should be given an opportunity to canvass his appeal.
16. The Honourable Court granted the same in a ruling dated 31st October, 2023 making the following orders:-
- a. That the Notice of Motion application dated 8th March, 2023 be and is found to have merit hence allowed in its entirety pending the amendment of the Judgment dated 15th February, 2023.
 - b. That the Notice of Motion application dated 9th November, 2023 be and is hereby found to have merit hence is allowed in its entirety.
 - c. That this Honourable Court shall only review the Part of the Judgment That differentiates the 2nd and the 3rd Defendants instead of substituting the 3rd Defendant with the 2nd Defendant.
 - d. That subject to the fulfilment of the pre – condition under Order (e) herein below, there be an order of stay of the execution of the Judgment/decree delivered on 15th February, 2023 herein be and is hereby granted pending hearing and determination of the Applicant's intended Appeal subject to the review of the Judgment on the names of the parties.



- e. That an order be and is hereby made for the 1st Defendant to deposit as security a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000/=) being monies garnered and/or collected from the rental income ever since the execution of the Lease, terms and conditions stipulated thereof with respect to the suit property received from Safaricom Company Limited, the 2nd, Defendant herein in a fixed Escrow Joint interest earning bank account, in a reputable Commercial bank to be held in the names of Messrs. Mwaniki Gitahi & Company Advocates and Oddiaga & Company Advocates both being the Counsel for the parties Within the 60 (thirty) days from the date of delivery of this ruling. In default, the stay orders granted herein shall automatically lapse.
- f. That there shall be no orders as to costs.

17. It was callous that this Honourable Court has to be subjected to the hearing and determination of another application for stay of execution when it had already rendered itself as such on 31st October, 2023.

18. The provision of Order 42 Rule 6 (1) provides:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

19. I read that provision to dictate and mandate that the application for stay be made in the first instance to the court from whose decision the appeal was preferred and only after that court considers and determines such an application could the aggrieved party approach to appellate court to set aside the order made by the court appealed from. This the Honourable Court already did on 31st October, 2023 and granted stay on the same day.

20. The court retained its power 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. In this case, the Honourable Court was hand tied. In case of:- “Leisure Lodge Limited - Versus - Japhet Asige and another (2018) eKLR” the court said and held:

“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. In Mombasa Bricks & Tiles Limited & 5 Others – Versus - Arvind Shah & 7 Others [2018] eKLR, this court said of the doctrine of functus officio:-



“I understand the doctrine, like its sister, the res-judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.

As was held by the court of Appeal in Telkom Kenya Limited – Versus - John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.

I understand the decree-holder /applicant to be saying that the Judgment of the court that gave timelines for compliance remains unattended by the Judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the Judgment -debtor that they have a Judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the Judgment final rather than re - opening the dispute for determination on the merits. I decline to hold that the court has become functus officio. This is because I consider that there are several proceedings that can only be undertaken after Judgment and not before.

The following are just but examples:

- * Application for stay
- * Application to correct the decree
- * Application for accounts
- * Application for execution including garnishee applications
- * Applications for review
- * Application under section 34 of the Act

If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed”.

This court has not changed its views on the point and reiterates that here it has become functus officio as far as application for review is concerned. In any event a Court of Law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a Judgment. To do that would be an abdication of duty and a license for parties to do the unimaginable then shout from rooftops that the court is functus officio because there is a final Judgment”.



21. The provision of Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

22. Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it...

Explanation. - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit...

Explanation. - (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

23. This doctrine was expounded by the Court of Appeal of Kenya in the case of “IEBC – Versus - Maina Kiai & 5 Others [2017]eKLR” where it was held thus:-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- (i) The suit or issue was directly and substantially in issue in the former suit.
- (ii) That former suit was between the same parties or parties under whom they or any of them claim.
- (iii) Those parties were litigating under the same title.
- (iv) The issue was heard and finally determined in the former suit.
- (v) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

24. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit or application must have been competent and the former suit must have been heard and finally decided by the Court in the former suit or application. The principles of natural justice stipulate that each party ought to be heard before the court can pronounce itself on the matter being Res - Judicata.

25. In this matter I find the plea of res judicata by the Plaintiff/ Respondent is properly invoked and is therefore sustained as the application filed before me on 30th January, 2024 is similar to the one already determined on 31st October, 2023 dated 8th March, 2023. This Honourable Court has delivered itself on the merits and foundations of this Court on 15th February, 2023 on the judgment and 31st October, 2023 on the ruling for stay and review of the subsequent Judgment.



26. In the given circumstances, I cannot agree with the Respondent more that the applicant is merely engaging in filing numerous frivolous applications with the sole intent of evading the payment of the decretal sum. The Court will not allow itself to be used as a pawn in such games. As the legal adage goes, Litigation it is said must come to an end. In the case of “William Koross – Versus - Hezekiah Kiiptoo Komen & 4 Others [2015]eKLR” the Court held as follows:-

“The philosophy behind the principle of res judicata is that there has to be finality, litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation that does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.” [own emphasis]

27. On the doctrine of functus officio’, the Court of Appeal in the case of “Telcom Kenya Ltd – Versus – John Ochanda [2014] eKLR”, opined itself as follows:-

“Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon-

The general rule that final decision of a Court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”

28. Similarly in the case of:- “Raila Odinga – Versus – IEBC & Others Petition No. of 2013” the Supreme Court of Kenya cited with approval the following passage from “The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law” by Daniel Malan Pretorius:-

...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

29. In addition, the Supreme court also referred to the case of “Jersey Evening Post Limited – Versus – A. Thani [2002] JLR 542” at pg. 550 where the Court stated:-

“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.” [own emphasis]

30. This Honourable Court having delivered its Ruling of 31st October, 2023 it determined that the Applicant had stay and was to deposit as security a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000/=) being monies garnered and/or collected from the rental income ever since the execution of the Lease, terms and conditions stipulated thereof with respect to the suit property received from Safaricom Company Limited, the 2nd, Defendant herein in a fixed Escrow Joint



interest earning bank account, in a reputable Commercial bank to be held in the names of Messrs. Mwaniki Gitahi & Company Advocates and Oddiaga & Company Advocates both being the Counsel for the parties Within the 60 (thirty) days from the date of delivery of this ruling. In default, the stay orders granted herein shall automatically lapse.

31. Sixty days have since lapsed and they lapsed in 31st December, 2023. After that order the Honourable Court became functus officio in the matter. To hold otherwise would amount to giving a stay of execution in this present application. For that very reason, I am persuaded that the application has no merit whatsoever and this it must fail outrightly.

ISSUE No. b). Who will bear the Costs of Notice of Motion application 30th January, 2024.

32. It is well established that costs is at the discretion of the Court. Costs is the award that is granted to the party upon the conclusion of any legal action or legal proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“ the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

33. The provision of Section 27 of the Civil Procedure Act, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

34. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.
35. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.
36. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each



case. In the case of:- “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

37. In this case, as this Honourable Court opines that the Plaintiff/ Respondent shall have the costs being that the 1st Defendant/ Applicant has not proved his case as per the application dated 30th January, 2024.

VI. Conclusion & Disposition

38. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience.

39. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

a. That the Notice of Motion application dated 30th January, 2024 be and is hereby found to lack merit and is hereby dismissed in its entirety with costs.

**b. That the Plaintiff and the 2nd Defendant shall have the costs of the Notice of Motion Application dated 30th January, 2024.

It is so Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS25THDAY OFAPRIL.....2024.

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HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Plaintiff/Respondent.
- c. No appearance for the 1st Defendant.
- d. No appearance for the 2nd Defendant/Applicant.
- e. Mr. Kongere Advocate for the 3rd Defendant,
- f. No appearance for the 4th Defendant.

RULING: ELC CASE NO. 149 OF 2014 Page 8 of 8 **HON. LL NAIKUINI (JUDGE)**

