



REPUBLIC OF KENYA



**KENYA LAW**  
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**Machogu v Kirui (Civil Appeal E040 of 2021)  
[2025] KEHC 2240 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2240 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E040 OF 2021  
JK NG'ARNG'AR, J  
FEBRUARY 27, 2025**

**BETWEEN**

**JAMES BOSIRE MACHOGU ..... APPLICANT**

**AND**

**BRIAN KIPKEMBOI KIRUI ..... RESPONDENT**

**RULING**

1. The Applicant, James Bosire Machogu filed a Notice of Motion Application dated 24th June 2023 where he sought the following orders:-
  - i. Spent.
  - ii. Spent.
  - iii. Spent.
  - iv. That pending the hearing and determination of this Application inter-partes, a stay of execution of the warrants of attachment and sale dated 20th June 2023 demanding the payment of Kshs 601,596/= and all consequential orders and proceedings thereto.
  - v. That status quo be maintained pending the determination of the amounts owed to the Respondent and any payment of the remaining balances owed to the Respondent.
  - vi. That the auctioneers in the Warrants dated 20th June 2023 do tax their costs.
  - vii. That this Honourable Court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.
2. The Application was brought under Order 51 Rule 1, Order 22 Rule 22(2) of the Civil Procedure Rules 2010, sections 94, 27, 1A (1), (2), (3), 3A of the Civil Procedure Rules and Article 159 of *the*



Constitution of Kenya, 2010. It was based on the grounds on the face of the Application and further by the annexed Supporting Affidavit of Lawrence Njuguna sworn on 24th June 2023.

### **The Applicant's Case.**

3. The Applicant stated that Judgment in the trial court in Sotik Civil Suit Number 98 Of 2019 was delivered by Hon. E. Muleka to the tune of Kshs 974,200/= in favour of Respondent (then Plaintiff). The Applicant further stated that he was granted a stay of execution by this court on condition that he pays the Respondent an initial Kshs 217,000/= and thereafter provide a Bank Guarantee of Kshs 700,000/=.
4. It was the Applicant's case that he appealed the Judgement by the trial court and this court reduced the damages payable to the Respondent from Kshs 974,200/= to Kshs 460,830/=. That the Applicant had paid the Respondent Kshs 217,000/= and a further Kshs 151,152/= and remained with a balance of Kshs 92,318/=. It was the Applicant's further case that the Respondent had commenced execution demanding Kshs 601,596/=.
5. In his written submissions dated 17th July 2023, the Applicant stated that this court had original jurisdiction to determine his Application and was thus not functus officio. He relied on *Slok Construction Limited vs Erick Odhiambo Odongo (2022) eKLR* and *Ena Investments Limited vs Benard Ochau Mose & 2 others (2022) eKLR*.
6. It was the Applicant's submission that he was willing to settle any balance he owed the Respondent. That the balance was Kshs 92,318/= and not Kshs 601,596/= as demanded by the Respondent.

### **The Response.**

7. The Respondent filed his Grounds of Opposition dated 6th July 2023 and stated that the orders sought by the Applicant could not be granted as this court was functus officio and lacked the jurisdiction to hear and determine the Application.
8. In his submissions dated 11th July 2023, the Respondent submitted that the prayer for stay amounted to reopening the suit in which a final decision had been rendered. That the proper court to hear and determine the Application was the court which issued the Decree i.e. Sotik Law Courts and not this court. He relied on *Isaiah Owino Lawi vs South Nyanza Sugar Company Limited (2021) eKLR* and *Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 others (2013) eKLR*.
9. It was the Respondent's further submission that the Application was an abuse of the court process. That in light of the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the Applicant would not suffer any substantial loss if the orders he sought were not granted. That after this court delivered its Judgement on 28th April 2023, he waited for three months for the Applicant to settle his balance without success. It was the Respondent's further submission that he suffered prejudice as he had not enjoyed the fruits of his Judgement.
10. I have gone through and considered the Notice of Motion Application dated 24th June 2023, the Respondent's Grounds of Opposition dated 6th July 2023, the Applicant's written submissions dated 17th July 2023 and the Respondent's written submissions dated 11th July 2023. The following issues arise for my determination:-
  - i. Whether this court has jurisdiction to determine the present Application
  - ii. Whether the present Application is merited.



**i. Whether this court has jurisdiction to determine the present Application.**

11. Jurisdiction is defined in the Black's Law Dictionary, 10<sup>th</sup> Edition as:-

**A court's power to decide a case or issue a decree.**

12. In the case of Kenya Commercial Bank Limited & another v Samuel Kamau Macharia & 2 others [2008] KECA 334 (KLR), the Supreme Court of Kenya held:-

“A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

13. I note that this is a sister file to Bomet High Court Civil Appeal Number E039 of 2021 – James Bosire Machogu vs John Kipkurui Chepkwony. The Applicant in the aforementioned case was similar to the present Application and he sought the same prayers. As noted in the sister Ruling, the singular dispute in the present Application revolved around the amount of money that the Applicant ought to pay the Respondent. This disputed amount was anchored on a Decree in Sotik Civil Suit Number 98 of 2019.

14. Section 34 of the *Civil Procedure Act* provides:-

- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.....

15. In South Nyanza Sugar Company Limited V Alfred Sagwa Mdeizi T/A Pave Auctioneers [2010] KEHC 929 (KLR) Makhandia J. (as he then was) stated:-

“Section 34 of the *Civil Procedure Act* strictly bars the filing of separate proceedings to determine issues that emanate or arise from execution of decrees in a suit. Without obvious regard to these mandatory provisions of the law, the learned magistrate held that the appellant, if he sought to recover any monies from any of the parties to the application had to bring or initiate independent proceedings. In the face of the clear provisions of Section 34 of the *Civil Procedure Act*, this conclusion was clearly erroneous.”

16. It is clear to me that section 34 of the *Civil Procedure Act* provided that issues emanating from execution of decrees should be brought up and addressed in the court that issued the decree and in this particular case, Sotik Magistrate's Court. It is trite law that a court must have jurisdiction to hear and determine a suit or an Application from the very beginning. Without it, the court has no option other than to down its tools.

17. Flowing from the above, it is my finding that this court has no jurisdiction to the extent of determining the computation of payment. As already stated, this was an issue that emanated from execution of a Decree and the best forum for the resolution of this issue was the trial court as envisaged by section 34 of the *Civil Procedure Act*.



18. In the end, it is my finding that this court has no jurisdiction to determine the Notice of Motion Application dated 24th June 2023 and as a consequence must down its tools.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**HON. JULIUS K. NG'ARNG'AR**

**JUDGE**

Ruling delivered in the presence of Mr. Njunguna for the Appellant Ms. Gogi for the Respondent and Siele and Susan (Court Assistants).

