



**China Qingjian International Group (K) Limited v Yandong & 3 others (Civil Suit E026 of 2022) [2023] KEHC 18386 (KLR) (Commercial & Admiralty) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18386 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
CIVIL SUIT E026 OF 2022**

**A MABEYA, J**

**MAY 31, 2023**

**BETWEEN**

**CHINA QINGJIAN INTERNATIONAL GROUP (K) LIMITED ..... PLAINTIFF**

**AND**

**XU YANDONG ..... 1<sup>ST</sup> DEFENDANT**

**ENZYNE CREATIONS LTD ..... 2<sup>ND</sup> DEFENDANT**

**JOHDON LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**ISAACA ADVOCATES ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before Court for determination are three applications, two by the plaintiff and one by the 4<sup>th</sup> defendant. The plaintiff's applications are similar and will be determined together. They are dated 27/9/2022 and 16/9/2022, respectively (herein after the applications).
2. The 1<sup>st</sup> application was brought under section 1A, 1B and 3A of the *Civil Procedure Act*, Order 2 Rule 15(1) (d) and Order 42 Rule 6 of the *Civil Procedure Rules*. The 2<sup>nd</sup> application was brought under section 1A (1), 1B, 3A and 63 (e) of the *Civil Procedure Code* and Order 42 Rule 6 (2) & 7 of the *Civil Procedure Rules*.
3. The 1<sup>st</sup> application sought orders that pending the determination of Civil Appeal No E336 of 2022, there be a stay of the taxation of the amended party and party bill of costs dated 16/9/2022 by the 1<sup>st</sup> defendant, amended party and party bill of costs dated 16/9/2022 by the 2<sup>nd</sup> defendant, party ad party bill of costs dated 9/9/2022 by the 3<sup>rd</sup> defendant, amended party and party bill of costs dated 16/9/2022 by the 4<sup>th</sup> defendant and amended party and party bill of costs dated 5/9/2022 by the 4<sup>th</sup> defendant. The application also sought orders that the said bills of costs be struck out.



4. The 2<sup>nd</sup> application sought orders for stay of execution of the ruling dated 12/8/2022 and any consequential decree pending determination of the appeal filed by the plaintiff. It also sought orders staying 7 proceedings involving the plaintiff as outlined in prayer 3 of the application.
5. The grounds for the applications were set out in their body and in the two supporting affidavits sworn by Qui Gaolei in support of the applications.
6. It was contended that this Court delivered a ruling on 12/8/2022 dismissing the suit having found that it was sub-judice. That the plaintiff filed a notice of appeal on 16/8/2022 and application dated 16/9/2022 before the Court of Appeal seeking orders for stay of execution of the said ruling. That the plaintiff had also written to the Deputy Registrar requesting for certified typed proceedings to enable the plaintiff lodge the record of appeal.
7. That the plaintiff had a strong appeal with a high chance of success based on the memorandum of appeal and would be prejudiced if the appeal was successful having settled the various bills of costs which had colossal amounts. That the intended appeal would be rendered nugatory if the orders sought were not issued.
8. It was also contended that the subject bill of costs were filed prematurely before the appeal was determined and whilst the counterclaim suit was still pending determination and ought to have been struck out. That the plaintiff had filed a defence to the 4<sup>th</sup> defendant's counterclaim on 31/3/2022 and the issues were yet to be determined upon.
9. It was thus contested that the application had been brought expeditiously and no prejudice would be suffered by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants if the orders sought were granted.
10. The applications were opposed. The 3<sup>rd</sup> defendant opposed the applications vide grounds of opposition dated 7/11/2022 whereas the 1<sup>st</sup> and 4<sup>th</sup> defendants opposed the same vide grounds of objection dated 1/11/2022.
11. It was contended that the order issued on 12/8/2022 striking out the plaintiff's suit was a negative order and was thus incapable of execution save for costs and could not thus be stayed. That the application failed to meet the threshold under Order 42 Rule 6 of the Civil Procedure Rules and this court was functus officio and lacked jurisdiction to stay a suit pending before a different court.
12. It was further contended that no appeal had been filed and no draft memorandum had been filed thus the plaintiff lacked an arguable appeal to warrant the orders sought. That the application was an abuse of judicial time and ought to be dismissed.
13. The applications were canvassed by way of written submissions. The 1<sup>st</sup> and 4<sup>th</sup> defendants' submissions were dated 24/11/2022, the 3<sup>rd</sup> defendant's were dated 21/11/2022 whereas those of the plaintiff were dated 16/10/2022. This Court has considered those submissions alongside the rival pleadings and evidence before it.
14. The sole issue for determination is whether the applicant has met the necessary conditions for granting the orders for stay pending appeal. Order 42 Rule 6 (2) sets out the conditions for stay. These are that an applicant must show that he will suffer substantial loss unless the stay sought is granted and that security should be provided. Further, such an application must be made without delay.
15. The subject ruling was delivered on 12/8/2022. The applications are dated 16/9/2022 and 27/9/2022. They were filed within a reasonable time and it is the finding of this Court that there was no inordinate delay in bringing the application for stay.



16. On substantial loss, it was held in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, as follows: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Appellant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Appellant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

17. The plaintiff's case was that after the ruling was delivered, the defendants proceeded to serve it with their respective party and party bills of costs whereas the plaintiff had filed and served a notice of appeal and application to stay execution of the ruling. That the substantive appeal had been filed and had a probability of success as this Court erred in the findings contained in the subject ruling.
18. The plaintiff contended that should it pay the costs as raised by the defendants, the appeal would be rendered nugatory.
19. This Court notes that the ruling of 12/8/2022 upheld the preliminary objections before court based on inter alia that the suit was sub-judice. The effect of the ruling was that the plaintiff's suit was struck out with costs to the defendants. There was no order directing the parties to do or refrain from doing anything. This Court is not convinced that there is any order which is capable of execution.
20. This was the finding in *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR wherein the court held that: -

“With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated 30<sup>th</sup> July 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus: -

“what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

21. Similarly, in *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus: -

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can



be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."

22. This Court is in agreement with the above authorities. Having only issued negative orders dismissing the suit, there is nothing to be stayed pending appeal. There is no substantial loss to be suffered by the plaintiff.
23. Consequently, the prayer for stay of execution must fail by the wayside and the same is hereby dismissed.
24. As regards the prayer to stay proceedings relating to taxation of the bills of costs, this Court notes that a decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from of Order 42 rule 6 (1) of the [\*Civil Procedure Rules\*](#).
25. *In Re Global Tours & Travel Ltd* HCWC No.43 of 2000 Ringera, J (as he then was) held that:

“ ... As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”
26. It is not in contention that the subject ruling of 12/8/2022 dismissed the plaintiff’s suit with costs to the defendants. Naturally, the defendants filed and served their respective party and party bill of costs and initiated the taxation process. The plaintiff was thus apprehensive that should it pay the assessed costs, a successful appeal may be rendered nugatory.
27. However, this Court opines differently. Should the plaintiff’s appeal be successful, its suit would be reinstated irrespective of whether or not it had paid the defendants costs. The effect of the appeal is not dependent on payment of costs as the substantive issue is whether or not the plaintiff’s suit was sub-judice, and if the Court of Appeal finds differently, then the ruling will be set aside and suit reinstated.
28. In any case, upon assessment of costs, the amounts paid to the defendants would be definite and capable of being refunded in the event of a successful appeal. There is no real harm or prejudice in continuation of the taxation proceedings to ascertain the costs payable to the defendants.
29. Consequently, the prayer for stay of proceedings must fail.
30. The upshot of the above is that the applications dated 16/9/2022 and 27/9/2022 are found to be unmerited and are dismissed with costs to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.
31. The third application for consideration was dated 19/8/2022. It was brought by the 4<sup>th</sup> defendant as against the plaintiff. The same was brought under Order 2 Rule 15 (1) (b), (c) and (d), Order 36 Rule 1 and Order 51 Rule 1 of the [\*Civil Procedure Rules\*](#).



32. It sought that the plaintiff's defence to the counterclaim dated 31/3/2022 be struck out and judgment be entered for the 4<sup>th</sup> defendant in terms of prayers 2 and 3 of the counterclaim, or in the alternative, that the defence be struck out and the matter do proceed to formal proof.
33. The grounds for the application were set out on the face of it and in the supporting affidavit of Marsden Osioma on 19/8/2022. It was contended that the defence was a sham and mere denial and its existence on record was an abuse of court process and deliberate delay of the fair trial of the counterclaim.
34. That the 4<sup>th</sup> defendant and plaintiff had entered into an agreement for provision of legal services for a one-year period at a total cost of Kshs. 60 million. That the plaintiff paid Kshs, 1 million and the balance of Kshs. 59 million was payable after the term. That upon expiry, the plaintiff declined to pay the balance despite benefiting from the 4<sup>th</sup> defendant's legal services.
35. Despite carefully checking the court e-filing system, this Court could not trace any response to the application by the plaintiff. No such response was referred to by the plaintiff in its submissions.
36. Striking out of pleadings is governed by Order 2 Rule 15(1) (a) (b) (c) and (d) of the Civil Procedure Rules (CPR) which states: -

“ 15.

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- (a) it discloses no reasonable cause of action or defence in law; or
  - (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or
  - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

37. In the present case, it is not disputed that the 4<sup>th</sup> defendant and the plaintiff entered into a retainer agreement for provision of legal services. This Court has seen that agreement which is dated 1/4/2020. The services were to run for a period of one year commencing on 1/4/2020 to 30/4/2021 at a remuneration of Kshs. 60 million. The plaintiff was to pay a deposit of Kshs. 1 million which it did.
38. Vide the letter dated 28/9/2021, the 4<sup>th</sup> defendant demanded for payment of the balance and the same remains outstanding till date.
39. This Court is alive to the fact that in Clause 5 of the agreement, there is an arbitral clause to the effect that: -

“For any possible disputes and or controversies that might arise in the interpretation of this agreement, the parties will appoint by mutual consent the competence of a mediator or arbitrator. In agreement and consideration of the above terms the Company and the Law firm here unto duly executed this agreement.”



40. There is no evidence that there is any dispute on the agreement. Under section 6 of the *Arbitration Act*, an application for stay has to be made before entering appearance. By delivering the defence to counterclaim by the plaintiff, this Court assumed jurisdiction.
41. Secondly, this Court finds under section 6(1) (b) of the *Arbitration Act*, that there is not in fact any dispute between the parties on the agreement the subject of the counter-claim to warrant referring the matter to arbitration. Once the amount agreed under the agreement was demanded after expiry of the agreed period and after the amount fell due, the same was neither responded to nor disputed.
42. Accordingly, I find that the application by the 4<sup>th</sup> defendant dated 19/8/2022 to be meritorious and allow the same as prayed.
- 43 It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

