



**Osundwa & Company Advocates v Vaghjiyani Entreprises Limited (Miscellaneous Application E140 of 2018) [2023] KEHC 24664 (KLR) (Commercial & Admiralty) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 24664 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
MISCELLANEOUS APPLICATION E140 OF 2018**

**MN MWANGI, J**

**MAY 26, 2023**

**BETWEEN**

**OSUNDWA & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**VAGHJIYANI ENTREPRISES LIMITED ..... CLIENT**

**RULING**

1. By a Notice of Motion dated 25<sup>th</sup> January, 2023 brought under the provisions of Sections 79G and 95, 63(e), 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* as amended in 2020, Cap 21 of the Laws of Kenya, the client (now applicant) seeks the following orders -
  - i. Spent;
  - ii. Spent;
  - iii. That the Honourable Court be pleased to grant orders of stay of execution pending the hearing and determination of the appeal lodged against the decree arising from the ruling of 24<sup>th</sup> November, 2022 in Milimani HC Comm. Misc. Appn. No. E140 of 2018 Osundwa & Company Advocates v Vaghjiyani Enterprises Limited and all consequential orders arising therefrom; and
  - iv. That the costs of this application be provided for.
2. The application has been brought on the grounds on the face of it and the supporting affidavit by Hiten Vaghjiyani, the Managing Director of the applicant company sworn on the 25<sup>th</sup> January, 2023. In opposition thereto, the respondent filed a replying affidavit sworn on 16<sup>th</sup> February, 2023 by Michael



Osundwa Sakwa, learned Counsel for the respondent. The respondent also filed grounds of opposition dated 6<sup>th</sup> February, 2023 raising the following issues–

- i. That the application has not met the threshold for grant of stay pending appeal;
  - ii. The respondent has not demonstrated any prejudice he will suffer if stay is not granted;
  - iii. The application is incompetent, misadvised and bad in law as the respondent has sought stay of execution on numerous occasions before this Honourable Court;
  - iv. The application is scandalous, frivolous, vexatious and an abuse of the Court process;
  - v. The application is incompetent and an abuse of the Court process;
  - vi. The application is fatally flawed and incurably defective;
  - vii. The application presents a ripe, plain and obvious case for dismissal; and
  - viii. The motion has been filed to intentionally hoodwink the Court and prevent the applicant from realizing the fruits of his judgment.
3. The application was canvassed by way of written submissions. The applicant’s submissions were filed by the law firm of Kinyanjui Kirimi & Company Advocates on 13<sup>th</sup> March, 2023, whereas the respondent’s submissions were filed on 22<sup>nd</sup> March, 2023 by the law firm of Osundwa & Company Advocates.
4. Mr. Kirimi, learned Counsel for the applicant relied on the case of *Halai and Another v Thornton & Turpin (1963) LTD* [1990] KLR where the Court of Appeal reiterated the conditions for granting an order for stay of execution. He submitted that this Court has discretionary jurisdiction to grant orders for stay of execution pending appeal pursuant to the provisions under Order 42 Rule 6 of the *Civil Procedure Rule*, 2010. He also relied on the definition in the *Black’s Law Dictionary* 9<sup>th</sup> Edition, page 521, on what constitutes sufficient cause and stated that the applicant has annexed warrants of attachment and proclamation notices and decree showing that the respondent has since commenced the process of execution which will create a state of affairs that will negate the very essential purpose of the applicant if he emerges as the successful party in the appeal. He stated that sufficient cause to warrant this Court to exercise its discretion in favour of the applicant has been established.
5. On the issue of substantial loss, it was submitted by Mr. Kirimi that the applicant stands to suffer irreparably since the respondent has commenced the execution process. He referred to the Court of Appeal decision in Nairobi Civil Appn. No. 238 of 2005 *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another* (UR) and submitted that the respondent has not demonstrated to this Court that he is able to refund to the applicant the decretal sum in the event the appeal herein is successful. He further submitted that the applicant has an arguable appeal since it is not only against the weight of evidence adduced but also against an erroneous and excessive award made by the Taxing Officer by failing to appreciate the law.
6. It was stated by Counsel for the applicant that the instant application was filed within reasonable time and the delay if any, has been sufficiently explained to the Court. He cited the case of *Gianfranco Manentibi & another v Africa Merchant Assurance Company LTD* [2019] eKLR and submitted that the applicant is ready to provide any security which the Court would direct as it would suffice to secure the due performance of the decree. Mr. Kirimi urged this Court to allow the application herein as prayed.



7. Mr. Shikanda, learned Counsel for the respondent relied on the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, where the issue of abuse of the Court process was discussed and submitted that the instant application is an abuse of the Court process for reasons that since the Taxing Officer delivered her ruling on the applicant's bill of costs on 17<sup>th</sup> July, 2019, the applicant has filed five applications seeking stay of execution of the said ruling, and the orders issued therein, but the said applications have since been dismissed for lack of merit.
8. He indicated that on 19<sup>th</sup> May, 2022, the applicant filed a Notice of Appeal and an application dated 2<sup>nd</sup> June, 2022 seeking leave to appeal against the ruling of 5<sup>th</sup> May, 2022 which dismissed its reference against the Taxing Mater's ruling dated 17<sup>th</sup> July, 2019. He stated that the said application was allowed on 24<sup>th</sup> November, 2022, but the Court also entered judgment in favour of the respondent for the sum of Kshs. 4,533,120.00. Mr. Shikanda submitted that the instant application was only filed after the respondent had obtained warrants of attachment dated 17<sup>th</sup> January, 2023. He stated that from the above information, it is clear that the applicant is trying to frustrate the execution process by filing multiple applications, appeals and references which is a clear statement of the abuse of the Court process.
9. He submitted that some, if not all the applications that have been filed by the applicant attract the rule of res judicata and that from the applicant's conduct, there has been clear intentional and purposeful use of the Court process to harass the respondent and interfere with the administration of justice. He indicated that if the instant application is allowed, this Court will be assisting the applicant in delaying the execution process.
10. Mr. Shikanda cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules and stated that the conditions therein cannot be severed, as they must be met simultaneously. On the issue of substantial loss, he stated that it is not enough for the applicant to make blanket allegations that it stands to suffer substantial loss without proof as is the case herein. He referred to the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR and submitted that execution is a lawful process and the mere fact that it has been put in motion or is likely to be put in motion by itself does not amount to substantial loss. The respondent's Counsel contended that this being a money decree, the applicant has failed to demonstrate what prejudice it will suffer that cannot be compensated by way of costs. He relied on the case of *Macharia & Company Advocates v East African Standard* [2002] KLR 63 and urged this Court to weigh the respondent's interest vis-à-vis that of the applicant and dismiss the instant application.
11. On whether there has been delay in filing the instant application, Mr. Shikanda stated that the ruling sought to be appealed from was delivered on 5<sup>th</sup> May, 2022, the Notice of Appeal was filed on 19<sup>th</sup> May, 2022, and the application seeking leave to appeal from the ruling of 5<sup>th</sup> May, 2022 was filed on 2<sup>nd</sup> June 2022. He stated that the instant application has been filed inordinately late since it was filed on 25<sup>th</sup> January, 2023, approximately ten months later, without any explanation as to why it was not filed on time. To this end, Mr. Shikanda relied on the case of *Thomas K'babati t/a K/Babati & Co. Advocates v Janendra Raichand Shah* [2021] eKLR. In submitting that the applicant is an indolent litigant whose conduct compromises its equity, Counsel for the respondent cited the case of *Winfred Nyawira Maina v Peterson Onyiego Gichana* [2015] eKLR.
12. He relied on the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR and stated that should this Court be inclined to grant the applicant the orders sought herein, it should be ordered to deposit the entire decretal sum together with costs and interest into a joint interest earning account in a reputable commercial bank within twenty-one days of the ruling since this is a money decree. He relied on the case of *Mwaura Kagura t/a Limit Enterprises v Kenya*



Bus Services Ltd & 4 others [2015] eKLR and submitted that the applicant's proposal to provide Kshs. 1,000,000/= as security for the due performance of the decree is punitive as it does not even begin to cover the interest accrued over the years.

### **Analysis and Determination.**

13. I have considered the application filed herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit filed by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are –
  - i. Whether this Court is *functus officio*;
  - ii. Whether the instant application is res judicata and an abuse of the Court process; and
  - iii. If the application for stay of execution pending appeal is merited.
14. In the affidavit filed by the applicant, it deposed that this Court delivered a ruling on 5<sup>th</sup> May, 2022 dismissing its reference dated 6<sup>th</sup> May, 2021 for lack of merit. That being dissatisfied with the said ruling, it filed an appeal against the said ruling and requested for typed proceedings. That it thereafter filed an application dated 2<sup>nd</sup> June, 2022 seeking leave to appeal against the said ruling and also filed a Notice of Appeal dated 19<sup>th</sup> May, 2022 validated. The applicant averred that on 24<sup>th</sup> November, 2022, the Court delivered a ruling allowing the application dated 2<sup>nd</sup> June, 2022 as prayed, and another ruling allowing the respondent's application dated 13<sup>th</sup> May, 2020 seeking entry of judgement of Kshs. 4,533,120.00 as taxed.
15. The applicant also averred that pursuant to the warrants of attachment and sale issued on 17<sup>th</sup> January, 2023 and served upon it on 24<sup>th</sup> January, 2023. The respondent has since commenced the process of execution of an erroneous sum of Kshs. 6,645,200.65 exclusive of the Auctioneer's fees. The applicant stated that the intended appeal raises cogent points of law and facts thus it is arguable with a high probability of success. That in addition, the applicant is ready and willing to deposit Kshs. 1,000,000/= in Court in due performance of its obligation and as a condition for stay of execution of the decree of 24<sup>th</sup> November, 2022 pending appeal, and to comply with any reasonable conditions that this Court shall set.
16. It was stated by the applicant that it will suffer irreparable prejudice, loss and damage in the event that the instant application is not allowed as its tools of trade will be attached at any time, by the Auctioneers. It further stated that typed proceedings in the Trial Court file are yet to be finalized so as to enable it to complete and file and serve its Record of Appeal.
17. The respondent in its replying affidavit deposed that this Court is functus officio having granted the applicant leave to appeal. It averred that the applicant has no intention of pursuing the appeal because since leave was granted to the applicant on 24<sup>th</sup> November, 2022, it has not taken any steps to proceed to the Court of Appeal, which is a clear indication that the applicant only wants to delay this matter in the superior Court.
18. It was stated by the respondent that in the event that the applicant intends to proceed to the superior Court, it should be ordered to deposit Kshs. 7,000,000/= in Court. It further stated that the allegation that the amount demanded is erroneous has no basis since the applicant has not provided an alternative figure that ought to be paid with cogent reasons.
19. The respondent contended that this Court's jurisdiction is limited to issuing an order for stay pending the filing of an appeal to the Court of Appeal. It averred that the said appeal to the Court of Appeal has not yet been lodged. The respondent contended that the Memorandum of Appeal does not raise



serious issues of law that would warrant issuance of the orders sought herein. It further averred that litigation must come to an end and any delay will prejudice the decree holder in enjoying the fruits of justice.

#### **Whether this Court is functus officio.**

20. The doctrine of functus officio gives effect to the principle of finality, therefore, a Court only becomes functus officio when it has performed all its duties in a particular case. That was the holding by the Court in *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550, where the Court held thus-

“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 becomes 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.”

21. The respondent’s case is that having granted the applicant leave to appeal against the ruling that was delivered on 5<sup>th</sup> May, 2022, this Court is functus officio. It is not disputed that this Court delivered a ruling dated 24<sup>th</sup> November, 2022 on the applicant’s application dated 2<sup>nd</sup> June, 2022. It is also not disputed that in the said application, the applicant sought for leave to appeal against the ruling dated 5<sup>th</sup> May, 2022 and for the Notice of Appeal dated 19<sup>th</sup> May, 2022 to be validated. It cannot be said that having granted the applicant leave to appeal to the Court of Appeal, this Court already directed its mind and exercised its discretion on the issue of stay pending appeal of the ruling delivered on 5<sup>th</sup> May, 2022. I therefore hold that this Court is not functus officio with respect to the instant application.

#### **Whether the instant application is res judicata and an abuse of the Court process.**

22. The respondent contended that the application herein is res judicata. The doctrine of res judicata is set out in the *Civil Procedure Act* at Section 7 as hereunder -

“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 can 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.”

23. In the case of *Abok James Odera v John Patrick Machira* Civil Application No. Nai. 49 of 2001, the Court held that to rely on the defence of *res judicata* there must be -

- i. a previous suit in which the matter was in issue;
- ii. the parties were the same or litigating under the same title;
- iii. a competent court heard the matter in issue; and
- iv. the issue had been raised once again in a fresh suit.

24. In view of the above, it is evident that the doctrine of res judicata brings about finality to litigation. In order for an application to be considered res judicata, the party wishing to rely on the said defence has to demonstrate that the matters in issue are similar to those which were previously in dispute between



the same parties and the same were determined on merits by a Court of competent jurisdiction. See *Henderson v Henderson* (1843-60) ALL ER 378. I have gone through the respondent's replying affidavit and there is no indication that this Court has dealt with an application for stay of execution pending an appeal against this Court's ruling delivered on 5<sup>th</sup> May, 2022, to the Court of Appeal. All that the respondent has done is submitted that some, if not all of the applications filed by the applicant are res judicata. The said issue was not pleaded and/or raised in the respondent's replying affidavit in opposition to the instant application.

25. Submissions are not pleadings, and if at all the respondent wanted to rely on the doctrine of res judicata in opposition to the application herein, it should have raised it in its grounds of opposition dated 6<sup>th</sup> February, 2023, and/or in its replying affidavit in opposition to the application herein. That notwithstanding, it this Court's finding that the respondent has failed to prove its allegation that this application is res judicata.
26. On the issue of whether the application herein is an abuse of the Court process, the respondent stated that since the Taxing Master delivered her ruling in favour of the respondent, the applicant has filed five applications seeking stay of execution of the said ruling and the orders issued therein, but the said applications have all been dismissed for lack of merit. It as such contended that the application herein is an abuse of the Court process.
27. It is not disputed that the applicant has filed several applications before this Court seeking stay of execution of the Taxing Master's ruling delivered on 17<sup>th</sup> July, 2019. It is however worth noting that the applicant has never filed an application for stay of execution of the Court's ruling delivered on 5<sup>th</sup> May, 2022, pending an appeal to the Court of Appeal. It is clear to this Court that the circumstances of this case changed when the respondent's application dated 13<sup>th</sup> May, 2020 seeking entry of judgement of Kshs. 4,533,120.00 as taxed, was allowed. There is now an order from this Court for payment of monies to the respondent by the applicant. The applicant being dissatisfied with that order was then granted leave to appeal against it to the Court of Appeal.
28. It is my finding that the applicant is within its right to apply for an order for stay of execution pending appeal and for the application to be heard and determined on its merits. The instant application is therefore not an abuse of the Court process.

#### **If the application for stay of execution pending appeal is merited**

29. Stay of execution pending appeal is provided for under the provisions of Order 42 Rule 6(1) & (2) of the *Civil Procedure Rules* 2010 which state as follows–
  - “ 1). No appeal or second appeal shall operate as a stay of a decree or order appealed from except 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.
  - 2). No order for stay of execution shall be made under sub-rule (1) unless-



- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
30. From the above provisions, an order for stay of execution can only issue against an order appealed from. In this instance, the applicant’s application seeking leave to appeal against the ruling dated 5<sup>th</sup> May, 2022 to the Court of Appeal was allowed, and the Notice of Appeal dated 19<sup>th</sup> May, 2022 was validated vide a ruling delivered by this Court on 24<sup>th</sup> November, 2022.
31. A Court’s power to grant an order for stay of execution is discretionary and the said discretion ought to be exercised judiciously. When dealing with an application for stay of execution, the Court has a duty to balance the competing interests of the parties taking into account the fact that an appellant herein has an undoubted right of appeal, whereas the respondent has a decree which it should not be obstructed from executing unless there is a valid reason.
32. The decree herein is a money decree. On 24<sup>th</sup> November, 2022, the Court allowed the respondent’s application dated 13<sup>th</sup> May, 2020 seeking entry of judgment in the sum of Kshs. 4,533,120.00, which in my considered opinion is a colossal amount of money. The applicant contended that in the event the instant application is not allowed, it will suffer irreparable prejudice, loss and damage as its tools of trade will be attached at any time by Auctioneers. It averred that the respondent has since commenced the process of execution of an erroneous sum of Kshs. 6,645,200.65 exclusive of the Auctioneer’s fees pursuant to the warrants of attachment and sale issued on 17<sup>th</sup> January, 2023 and served upon the applicant on 24<sup>th</sup> January, 2023. In the case of *Kenya Hotel Properties Limited v Willesden Investments Limited* [2007] eKLR, the Court of Appeal when dealing with an application for stay pending an appeal against a money decree held that -

“ Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.”
33. In the instant application, the applicant did not allege that the respondent’s financial status is unknown, such that if the decretal sum is paid to it, it will be unable to refund it to the applicant in the event the intended appeal is successful. Additionally, the applicant did not put forth its current financial position and show how the same will be affected in the event that stay is not granted and the decretal sum is paid out to the respondent. All it stated was that it will suffer irreparable prejudice, loss and damage as its tools of trade will be attached at any time by the Auctioneers.
34. It is also worth noting that the respondent did not demonstrate its financial capacity to this Court by providing financial statements to demonstrate its ability to refund the applicant its money in the event the intended appeal succeeds. It is however my finding that since the applicant did not allege that the respondent is incapable of refunding the decretal sum in the event the appeal is successful, the



respondent had no duty to prove and or demonstrate its financial position to this Court. In the case of *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410, Platt Ag JA (as he then was) held that-

“If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.” (emphasis added).

35. This Court finds that the applicant has not satisfied and/or demonstrated that it is likely to suffer substantial loss in the event the instant application is not allowed.
36. On the issue of whether the application herein has been made without unreasonable delay, Mr. Shikanda submitted that the ruling sought to be appealed from was delivered on 5<sup>th</sup> May, 2022, the Notice of Appeal was filed on 19<sup>th</sup> May, 2022, and the application seeking leave to appeal against the ruling of 5<sup>th</sup> May, 2022 was filed on 2<sup>nd</sup> June, 2022. He asserted that the instant application has been filed inordinately late since it was filed on 25<sup>th</sup> January, 2023, which is approximately ten (10) months later, without any explanation as to why it was not filed on time.
37. It is factual that the ruling sought to be appealed against was delivered on 5<sup>th</sup> May, 2022 and the applicant was granted leave to appeal against the said ruling on 24<sup>th</sup> November, 2022. As such, the time within which to file the instant application started running on 24<sup>th</sup> November, 2022. The application herein was filed on 25<sup>th</sup> January, 2023 which is approximately two (2) months from the date the applicant was granted leave to appeal. The applicant has offered no explanation for the said delay. This Court finds that there has been inordinate delay in filing the instant application. I agree with the finding by the Court in *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR where the Court held that-

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir*, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

38. On the issue of deposit of security, the applicant stated that it is ready and willing to deposit Kshs. 1,000,000/= in Court in due performance of its obligation, and as a condition for stay of execution of the decree of 24<sup>th</sup> November, 2022, pending the hearing and determination of the appeal, and that it is ready to comply with any reasonable conditions that this Court may impose. In the case of *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.”



39. Inasmuch as the applicant is willing to provide security for the due performance of the decree in issue, it has not satisfied the other two conditions for stay pending appeal, that is, that substantial loss may result to it unless the order is made and that the application has been made without unreasonable delay. Consequently, in light of the holding by the Court in the case of *Kenya Shell Ltd v Kibiru & another* (supra) reproduced in this ruling, I find that a lawful process of execution, without more, cannot be cited as evidence of substantial loss.
40. The upshot is that the application dated 25<sup>th</sup> January, 2023 is not merited and it is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF MAY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

