



REPUBLIC OF KENYA



**Tsucho Capital (K) Ltd & 3 others v Kinyanjui (Civil Appeal  
14 of 2021) [2023] KEHC 22657 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22657 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 14 OF 2021  
SM GITHINJI, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**TSUCHO CAPITAL (K) LTD ..... 1<sup>ST</sup> APPELLANT  
FRANCIS NJOGU NJIHIA ..... 2<sup>ND</sup> APPELLANT  
JUSTIN MWANIKI NJAGI ..... 3<sup>RD</sup> APPELLANT  
AFRICAN SPIRITS LIMITED ..... 4<sup>TH</sup> APPELLANT**

**AND**

**JANET GATHONI KINYANJUI ..... RESPONDENT**

*(Being an Appeal against the Judgment and decree of the Honourable D. S. Sitati,  
Resident Magistrate delivered on 18.01.2021 in CMCC No. 120 of 2018- Kilifi)*

**RULING**

**CORAM:** Hon. Justice S. M. Githinji

Okello Kinyanjui & Company Advocates for the Appellants

Jengo Associates Advocates for the Respondent

1. Before this court for determination is the Respondent's Notice of Motion dated May 5, 2023 brought under section 1A, 1B, 3A and 63 of the Civil Procedure Act, Cap 21. The Respondent seeks the following orders; -
  - a. Spent.
  - b. That Sidian Bank be and is hereby compelled to release the amount of Kshs 2, 306,133.50 together with the accrued interest that was deposited at its Sidian Bank, Moi Avenue, Mombasa Branch wide fixed deposit account number 01002150034087 in the joint names of Jengo



Associates and Okello Kinyanjui and Company Advocates as security by the appellants herein pending the hearing and determination of the appeal to the firm of Jengo Associates forthwith vide their client account being Guaranty Trust Bank K Ltd, Jengo Associates – Client Account Number 2150029545, Mombasa Branch.

- c. Costs.
2. The application is supported by the affidavit of the Respondent’s counsel Macmillan E Jengo sworn on May 5, 2023 wherein he deposed that since this appeal was dismissed on April 13, 2023, there was no reason to hold the decretal sum Kshs 2,306,133.50 deposited in the advocates’ joint interest earning account.
  3. The Appellants opposed the application. They filed grounds of opposition dated July 17, 2023 stating that; -
    1. The application is supported by a false affidavit.
    2. The application is otherwise an abuse of the process of this honourable court.
    3. The application notice seeks orders that this honourable court is incapable of granting.
  4. Parties agreed to canvass the application by way of written submissions, but at the time of writing this ruling, I did not find submissions by either party.
  5. The application herein is premised on section 1A, 1B, 3A and 63 of the Civil Procedure Act that provide: -

“ 1A. Objective of Act

    - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
    - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
    - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

    1. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
      - a. the just determination of the proceedings;
      - b. the efficient disposal of the business of the Court;
      - c. the efficient use of the available judicial and administrative resources;



- d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- e. the use of suitable technology.

3A. Saving of inherent powers of court.

6. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

63. Supplemental proceedings

7. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—
- a. issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;
  - b. direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;
  - c. grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
  - d. appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
  - e. make such other interlocutory orders as may appear to the court to be just and convenient.

8. Looking at the present application, I find that section 63 above has no relation with the orders sought herein. Section 1A, 1B establish the objectives of the *Civil Procedure Act* and duty of the court in furthering the objectives under 1A; Section 3A confer the court with inherent powers to avoid an injustice or stop an abuse of the court process.

9. A perusal of the court record reveals that the parties herein recorded a consent dated March 25, 2021. One of the terms of that consent was that the Appellants do deposit the decretal amount in the joint names of the parties' advocates within a stipulated period of 30 days. On July 15, 2021 when the appeal was slated for mention, Mr. Okello, counsel for the Appellants indicated that he had complied with all the issues concerning the consent order. It is evident therefore that the decretal amount was deposited in a joint interest earning account.

10. Ordinarily, the purpose of a security deposit is to ensure due performance of a decree or order as may ultimately be binding on an applicant in an application for stay of execution. Stay pending appeal was granted vide the aforementioned consent order. The appeal was dismissed as evidenced by the judgment of this court dated April 12, 2023. I also note that the Appellants filed a notice of appeal dated April 14<sup>th</sup> April 2023. However, there is no order for stay against this court's judgment. In the circumstances, I see no basis for holding the security deposited in a joint interest earning account.

10. The application dated May 5, 2023 is therefore merited and hereby allowed as prayed.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 27TH DAY OF SEPTEMBER, 2023.**

.....  
**S.M.GITHINJI**



## **JUDGE**

### **In the Presence of; -**

1. Mr Mwangi holding brief for Mr Njengo for the Applicant
2. Mr Okello for the Respondent

