



REPUBLIC OF KENYA



Synergy Industrial Credit Ltd v Oxyplus International Ltd & 2 others (Civil Case E077 of 2021) [2022] KEHC 16692 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E077 OF 2021
A MABEYA, J
DECEMBER 21, 2022**

BETWEEN

SYNERGY INDUSTRIAL CREDIT LTD PLAINTIFF

AND

OXYPLUS INTERNATIONAL LTD 1ST DEFENDANT

AMIT KUMAR AGGARWAL 2ND DEFENDANT

PANNAA DILIP CHAUHAN 3RD DEFENDANT

RULING

1. This is a ruling on three applications by the defendant dated November 1, 2022, November 11, 2022 and December 8, 2022, respectively.

1st Application Dated November 1, 2022.

2. The application was brought under article 2(1), 10,20(1),27 28,41,47,48,50(2)(a)(b)(c), 157(2)(d), 232,236 of the *Constitution* of Kenya 2010, section 1,2 and 3 of the *Civil Procedure rules* 2010. It sought a raft of orders all of which are spent save the one seeking leave to file a proposal for settlement of the remaining decretal amount.
3. The application was anchored on the grounds on the face of it and in the affidavit sworn by Amit Kumar Aggarwal. The defendants' case was that, in the ruling dated August 26, 2022, the court required the defendants to comply with the orders of the registrar dated October 1, 2021.
4. In compliance thereof, the 2nd defendant made payments of Kshs 5,000,000/- on September 22, 2022 and thereafter Kshs 500,000/- on October 19, 2022 and October 27, 2022, respectively. That the defendants were unable to raise the remaining sums due to lack of liquidity thus the need for a review



and stay of the order of October 1, 2021. That the plaintiff had on October 27, 2022 threatened to auction the defendants' properties which would adversely affect the company's ability to stay in business. The defendants indicated that they were willing to settle the decretal sum on favourable terms.

5. The plaintiff opposed the application vide a replying affidavit of November 9, 2022 sworn by Jacob M Meeme. He stated that, the issues and prayers sought in the application were res-judicata by virtue of the ruling of August 26,2022. That the defendants had not preferred any appeal against the rulings of August 30, 2021 and August 26, 2022. That the defendants had filed a similar application dated September 24, 2021 seeking the same prayers and raising the same issues as of the present application.
6. It was contended that the defendants had attempted to settle part of the decretal amount however that was not reason enough to stay execution of the said orders. That the plaintiff had written to the defendants giving a proposal on modes of payment as a show of good faith however, the defendants failed to respond. That since the plaintiff had a regular judgment, it would be prejudiced by the orders sought.

2nd Application Dated November 11, 2022

7. The application was brought under article 2(1), 10,20(1),27 28,41,47,48,50(2)(a)(b)(c), 157(2)(d), 232,236 of the Constitution of Kenya 2010, section 1,2 and 3 of the Civil Procedure rules 2010. It sought that the *status quo* be maintained pending the hearing of the application dated November 1, 2022. That application is therefor spent as the *status quo* has been maintained to-date.

3rd Application Dated December 8, 2022

8. The application was premised under articles 2(1), 10, 20(1), 27 28, 41, 47, 48, 50(2)(a) (b) (c), 157(2) (d), 232, 236 of the Constitution of Kenya 2010 and sections 1, 2 and 3 of the Civil Procedure Rules 2010. The defendants sought that the plaintiff shows cause its directors should not be arrested; the release and return of the assets seized, collected and taken from the defendant's premises. That the OCS Eldoret do supervise compliance thereof.
9. The defendants claim was that on December 8, 2022 the plaintiff's agent, the auctioneer, appeared at the defendant's premises attached, possessed and towed away vehicles belonging to the defendants without issuing a proclamation. According to the defendants, the warrant of attachment dated November 28, 2022 was not served upon the defendants and neither did it appear on the e- filing portal. That the plaintiff's actions were aimed at defeating the court process.
10. This application was not responded to. The application was canvassed by written submissions. The court directed that submissions be filed within 48 hours but this was not complied with thereby causing the delay in the delivery of this ruling.
11. The plaintiff submitted that the defendants had sought an order of stay of execution which was refashioned as one of *status quo*. That they had previously filed an application for stay of execution dated September 24, 2021 which was dismissed on August 26, 2022. That in the premises, the applications were an abuse of the court process as they offended sections 6 and 7 of the Civil Procedure Act.
12. The defendants submitted that they had made cash payments totaling Kshs 6,644,960/- leaving an outstanding balance of Kshs 3,500,000/- That they had sought the court's indulgence in coming up with a payment plan as the plaintiff had failed to make reasonable accommodations on how the sum could be settled. That the defendants were willing to make payments of Kshs 291,666/- per month in order for them to handle other pending bills.



13. I have considered the three applications, the responses, the preliminary objection and the submissions by the parties. The defendants premised their case on the fact that they had made considerable payments towards settling the decretal amount. That however, they were unable to raise the remaining amount and sought to have the order of August 26, 2022 stayed or reviewed with an aim of seeking alternative payment plans. It was the defendant's contention that the plaintiff had threatened to auction the defendant's property and the same would affect their business.
14. The plaintiff termed the applications an abuse of the court process and that they were *res judicata*.
15. On *res judicata*, section 7 of the [Civil Procedure Act](#) provides: -
- “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.”
16. In, [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), [2017] eKLR), the Court of Appeal held that: -
- “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;
- a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) 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.
- The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”
17. I have looked at the applications before me and the orders sought therein and compared them with the application dated September 24, 2021. The applications are about liquidating the decretal amount by instalments. The reliefs being sought are the same and the parties are the same. The earlier application was determined on merit and a ruling delivered on August 26, 2022.
18. All that the defendants have done in the application of November 1, 2022 is to couch the prayers to appear that they want a different payment plan for the amount due. This is a matter the court



pronounced itself on as aforesaid in the ruling of August 26, 2022. No amount of semantics can change the matter.

19. In this regard, I find that the issues raised herein had already been determined by the court and the application dated November 1, 2022 is therefore *res judicata* and cannot therefore lie. The same lacks merit and is hereby struck out with costs.
20. As regards the application dated December 8, 2022, the defendants sought the return of the attached assets and a show cause for the arrest of the plaintiffs' directors. The defendants complained that the warrant of attachment dated November 28, 2022 was not served and did not appear on the e-filing portal.
21. Section 44(1) of the *Civil Procedure Act* provides that in execution proceedings, only property of the judgment debtor is liable to attachment. The said section stipulates that: -

“All property belonging to a judgment debtor including property over which or over the profits of which he has disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree...”
22. I have looked at the record. On November 28, 2022, the deputy registrar issued the warrants of attachment. It was alleged that the defendants' goods were seized without any proclamation. This allegation was not denied. However, the defendants did not annex the schedule of the items that were seized by the auctioneer. Be that as it may, no attachment should be allowed before proclamation. Proclamation of the goods gives a judgment-debtor an opportunity to settle the decretal amount. Attaching goods before proclamation therefore denies the judgment-debtor that opportunity.
23. Taking into consideration that the irregularity alleged was not denied, the prayer for return of the goods, though unspecified is allowed. However, the plaintiff can re-attach after due proclamation in accordance with the law.
24. As regards the prayer for show cause, I see no ground at all for the same and the same is therefore declined.
25. Accordingly, the applications are determined as follows: -
 - a. The application dated November 1, 2022 is struck out with costs.
 - b. The application dated November 11, 2022 was spent. Since it was responded to, the costs thereof are awarded to the plaintiff.
 - c. On the application dated December 1, 2022, the prayer for the return of the goods is hereby allowed. However, the prayer for notice to show cause for the plaintiff is declined. Each party to bear own costs.
26. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2022.

A. MABEYA, FCI Arb

JUDGE

