



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CIVIL APPEAL NO. 123 OF 2019**

**TRANSMARA SUGAR COMPANY.....APPELLANT**

**-VERSUS-**

**CHARLES O. MBAKA.....RESPONDENT**

**RULING**

The twin applications for determination before this court are Notice of Motion Applications dated 4/12/2020 as well as 6/1/2021 (**the applications**). Both applications were filed by the appellant and the court directed they be canvassed by way of written submissions.

The appellant through the firm of **Wachira, Wekhomba Aim & Associates Advocates** filed a notice of motion application under a certificate of urgency dated 4/12/2020 on 8/12/2020 seeking the following orders:-

**1. Spent.**

**2. That there be stay of execution of the aforesaid judgement/decree and certificate of costs pending the hearing and determination of the appeal MIGORI HCCA No. 123 of 2019 being the lead file in consolidated appeals MIGORI HCCA No. 119,120,121,122,124,125 and 126 all of 2019.**

**3. That this Honourable Court be pleased to make a determination and/or give its interpretation of the purport of the meaning of:**

**The decretal award as on the 15/10/2019 when stay of execution was granted.**

**Stay of execution of the decree and the judgment of the lower court pending hearing and determination of the appeal.**

**4. That in the alternative to the payers above, this Honourable Court does call for the proceedings of the Senior Resident Magistrate's Court under the powers granted to it by Article 165 (6) and (7) of the Constitution of Kenya 2010 and give appropriate directions that it may consider necessary for the dispensation of justice given the circumstances of the suit.**

The application is anchored on the grounds set out on its face and a supporting affidavit sworn by **Rajesh Bhargava** the **Chief Operations Officer** of the appellant.

The grounds are restated in the supporting affidavit in which **Mr. Rajesh Bhargava** briefly deponed as follows:

**i. That the appellant company was sued in Rongo SPMCC Case No. 165, 166, 167, 168, 169, 171, 175 and 205 all of 2017.**

**ii. On 27/8/2019 judgment was delivered against the appellant and it was ordered to pay cumulatively the sum of Five Million Two Hundred and Ninety Thousand Nine Hundred and Twenty (Kshs. 5,290,920/=) plus costs and interests from the date of filing suit.**

**iii. That the appellant being dissatisfied with the whole judgement and decree of the learned Magistrate, preferred the present appeals and the Honorable Judge directed that MIGORI HCCA No. 123 of 2019 be the lead file.**

**iv. That simultaneously with the applications, the appellant sought stay of execution of the judgement, decree and all subsequent proceedings emanating from the judgements. The appeals having been consolidated; this court only dealt with**

the lead file.

v. That the respondent did not oppose the application and on 15/10/2019 Mrima J, allowed the application as prayed to the effect that a stay of execution of the judgements, decrees and all consequential orders emanating from RONGO SPMCC Case No. 165,166,167,168,169,171,175 and 205 all of 2017 pending the hearing and determination of the appeal.

vi. That the stay was conditional which required the appellant to provide a bank guarantee from a reputable bank for the amount equivalent to the whole decretal amount within 30 days of 15/10/2019.

vii. As of 15/10/2019, the respondent had not applied for or perfected the decree as the appellant had not been served with any decree when the stay was granted.

viii. That the appellant secured a bank guarantee amounting to Kshs. 5,290,920 from I & M Bank LTD and served the original upon the firm of Kerario Marwa & Co. Advocates for the respondent who duly acknowledged the same on 13/11/2019.

ix. That on 17/7/2020, the appellant was served with warrants of execution and proclamation notices dated evenly which proclamation notices attached a decree dated 11/11/2019. The proclamation notice was partial execution of the decree dated 11/11/2019 and only in so far as the party-to-party costs that had been assessed.

x. The appellant filed an application in the lower court challenging the execution of the part decree and also lifting of the proclamation notices which application was dismissed.

xi. That the purport of the ruling undid the whole appeal process as the ruling allowed the execution of the whole decree notwithstanding that the appellant fully complied with the stay orders of this Honourable Court issued on 15/10/2020.

xii. That the Magistrate gave window to the respondent to execute the entire decree against the appellant despite the fact that the Magistrate was made aware that the appeal had already been admitted and was in its advanced stages of hearing and it was reserved for judgment on 4/3/2021.

xiii. That the appellant has been advised by his advocates that this court is clothed with powers under the provisions of Articles 165 (6) and (7) to call for the proceedings of the Lower Court make an examination of the same and give directions that it considers that will be fair administration of justice given the circumstances of the case.

xiv. That this court be pleased to grant an injunction against execution of the partial decree and partial warrants of attachment granted by the Honourable Magistrate's Court.

xv. That the appellant believes the certificate of costs was wrongly extracted as the bill was taxed *ex-parte* and the warrants illegally extracted as the respondent did not pay full court fees at the time of filing suit and neither did he pay further court fees. This court is invited to examine the specific aspect from the lower court files under its supervisory jurisdiction.

xvi. That interpreting this court's order and examining the proprietary of the execution process if this court is satisfied with the procedure, the appellant is ready and willing to provide further bank guarantee for the taxed costs amounts as security pending the hearing and determination of this appeal.

xvii. That the appellant will suffer irreparable loss and the substratum of this appeal will be defeated if the respondent is allowed to execute on a matter pending appeal.

xviii. The present application has been made without delay and in the interest of justice. The respondent will not suffer any prejudice should the orders herein be granted.

The application was opposed. The respondent, **Charles O. Mbaka**, through the firm of **Kerario Marwa & Co. Advocates** filed his grounds of opposition and a replying affidavit dated 15/12/2020 evenly. On the grounds of opposition, the respondent submitted that the application dated 4/12/2020 is *res judicata* as a similar application was heard and determined by Mrima J on 15/10/2019; that another stay of execution cannot in law be granted unless by an appellate court; that the consequences of non-compliance with the court orders of 15/10/2019 were clearly spelt out by the Honourable Court in the 2<sup>nd</sup> limb of the order; that non-compliance with the said orders is not being denied but justified by the appellant through this application and the one dismissed in the lower court.

In his replying affidavit, the respondent deponed:-

i. That the application by the appellant is *res judicata* as it was already heard and determined by Mrima J on 15/10/2019.

ii. That the 2<sup>nd</sup> limb of the order allowed the respondent to proceed with execution if the orders were not complied with.

iii. That the full decretal amount in the appeals was Kshs. 7,101,680 but the appellant only guaranteed Kshs. 5,290,920 thereby violating the court order of 15/10/2019.

iv. That the appellant has refused to comply with the court orders of 15/10/2019 even after being advised by the advocates of

the respondent.

v. That the appellant cannot purport not to understand what the full decretal amount is yet in its supplementary record of appeal it filed decrees amounting to Kshs. 7,101,680/=.

vi. That there is no issue or fact requiring directions or consideration from this court on the issue of the execution as indeed it was ordered by this court on 15/10/2019.

On 17/12/2020 this court directed that the hearing of the application be fixed for 16/3/2021 and status quo be maintained.

Before the application was heard and determined, the appellant filed another application dated 6/1/2021 on 13/1/2021. The appellant sought the following orders:-

1. Spent.

2. That this Honourable Court be pleased to order the unconditional release of the applicant's motor vehicle registration number KCK 097X and the spare parts loaded onto it pending the hearing and determination of this application.

3. Spent.

4. That there be stay of execution of the aforesaid judgement/decree and certificate of costs pending the hearing and determination of the appeal MIGORI HCCA No. 123 of 2019 being the lead file in consolidated appeals MIGORI HCCA 119, 120, 121,122,124,125 and 126 all of 2019.

5. That the Honourable court punishes as it deems fit Kerario Marwa practicing as Kerario Marwa and Co. Advocates under Section 55 and 56 of the Advocates Act for outright contempt of court.

6. That in exercise of its administrative function, this Honourable Court immediately calls for the lower court files to determine:

The proprietary of the proceedings.

Confirm whether any further court fees was paid in the files.

Stop any further forum shopping and avoid duplicity.

Determine why the files have never been brought to Migori yet as a matter of procedure once an appeal is lodged, the lower court files are taken to the appellate court.

The application is anchored on the grounds set out on its face and a supporting affidavit sworn by **Wekhomba Mackton Victor**, Counsel for the appellant.

The grounds are restated in the supporting affidavit in which Mr. Wekhomba Mackton Victor, Learned Counsel for the appellant briefly deponed as follows:-

i. That on 17/12/2020, the court ordered that status quo be maintained pending the hearing and determination of the appellant's application dated 4/12/2020 on 16/3/2021 which orders applied to the lower court files.

ii. That the application dated 4/12/2020 was filed in MIGORI HCCA No. 123 of 2019 being the lead file in the consolidated appeals MIGORI HCCA No. 165, 166, 167, 168, 169 171, 175 and 205 all of 2019.

iii. That in sheer disobedience of court orders, with an intent to force the respondent to pay part of the decretal amounts in RONGO RMCC NO. 166 and 167 of 2017, the respondent's advocate misdirected and lied to the Magistrate court to extend warrants of sale and proclamation notices.

iv. That the advocate sought to extract the warrants even when they had not paid further court fees which is a prerequisite in any matter where at the time of filing the amount of damages was not determinable.

v. That on 4/1/2021 while the applicant's truck KCK 097X was on duty to collect factory machines in Kisumu, the respondent's advocates Ikimwanya Auctioneers yard attached the truck and took it to the auctioneer's yard while loaded with crucial factory equipment.

vi. That in total disregard of the court orders, the respondent's advocates through Ikimwanya Auctioneers issued a notification of sale for the illegally attached truck which led to stalling of the factory's machines.

vii. That the illegal holding of the applicant's motor vehicle and spare parts not only caused losses to the company but shortage of sugar in the country as the factory machines had stalled.

viii. That despite several phone calls and pleas from the appellant's advocates for the release of the motor vehicle, the respondent's advocates have refused to release the motor vehicle.

ix. The appellant is apprehensive that should the stay of execution sought herein not be granted, the appeal which has already been heard and is pending judgement will be rendered nugatory.

The application was opposed through a replying affidavit sworn by the respondent dated 18/1/2021 filed evenly. The respondent deponed:-

a) That the application is bad in law and a waste of the court's time.

b) That the appellant is deliberately misleading the court by insinuating that his advocate has disobeyed and or disregarded a court order when it is the appellant who seems to selectively obey orders given by this court.

c) That the conditional stay of 15/10/2019 required the full decretal amount as awarded be guaranteed which amounted to Kshs. 7,101,680/=. The appellant instead gave a bank guarantee of Kshs. 5,290,920/= instead of Kshs. 7,101,680/=.

d) That his advocate wrote to the appellant's advocate to bring to their attention the fact that they were in disobedience of the order dated 15/10/2019 and risked execution of the balance of Kshs. 1,810,760/=.

e) That since there was no bank guarantee for the balance in disobedience of the order dated 15/10/2019, the advocate proceeded to execute for the balance of Kshs. 1,810,760/= in which there is no stay of execution for that amount.

f) That at the time of the hearing of the application dated 4/12/2020 execution was on going and though the advocate was entitled to execution for the full decretal sum for non-compliance, the advocate only executed for Kshs. 1,810,750/=.

g) That the prevailing status quo at the time of hearing the application dated 4/12/2020 was that execution was on going based on the breach of orders of this court by failing to deposit a bond guarantee of the full decretal sum.

The appellant filed submissions in support of its applications dated 4/12/2020 and 6/1/2021.

The appellant raised six (6) issues for determination. The appellant addressed the first and the second issues jointly: **Whether the appellant complied with the order of 15/10/2019 and if so, whether the subsequent execution proceedings by the respondent are null and void.**

The appellant submitted that the respondent's interpretation of what the full decretal sum was as per the court order is erroneous; that the taxation of the bill of costs was still pending when the stay orders were issued and the decree had not yet been perfected; that the order specifically stayed the execution of the judgement, decree and all consequential proceedings therefore, it was clear that any form of execution had been stayed; that taxation is not an independent process but part of the execution process as it emanates from a judgement and contemplated decree from a judgement and is therefore part and parcel thereof and not independent. To support this assertion, the appellant relied on the cases of **Jibril Brothers Enterprises Ltd & Another vs Abdulaziz Nasser Athman (2020) eKLR** and **Rubo Kimngetich Arap Cheruiyot vs Peter Kiprop Rotich (2006) eKLR**.

The appellant further submitted that the decretal sum as per the court order was the damages awarded in the judgement excluding the costs and interest; that the amount in the bank guarantee delivered to the respondent's advocates was for all the seven (7) sister files thus the appellant complied with the orders of 15/10/2019 hence the taxation and the ensuing warrants of attachment and sale were irregular, null and void.

The third issue is whether the application dated 4/12/2020 is *res judicata*. The appellant submitted that for a plea of *re judicata* to prevail, it must involve the same issues between the same parties and the issues must have been heard and determined on merits. It is not denied that the issues are between the same parties but what is disputed is that the issues in the two applications are directly similar.

The appellant directed the court to ground 7 of the application that the respondent illegally moved to partially execute the decrees issued on the party and party bill of costs since there was no stay with regards to that part of the decree and the orders sought in the application specifically order 3 (a) and (b) in regards to the interpretation of the decretal sum as per the order and interpretation of stay of execution of the decree and judgment of lower court pending the hearing and determination of the appeal; that it therefore follows that the issues in the instant application are different from the issues dealt with in the former application. The appellant relied on the case of **Saifudeen Abdulla Bhai & Hussein Abdulla Bhai vs Zainabu Mwinyi (2014) eKLR**.

The fourth issue is whether there can be execution of partial decree on a party bill of costs only. The appellant submitted that there is no procedure for the execution of partial decrees only on party bill of costs; that the only known procedure for execution of a partial decree is that which is set out under Section 94 of the Civil Procedure Act; that since there is no procedure in regard to execution of partial decree only on party bill of costs, the same was done following unknown procedures and is null and void. Further, fees must be paid for execution to proceed and the respondent herein never paid further fees as can be seen from the decree herein making it illegal. Thus, the decree as extracted was illegal as there was no decree available for extraction once there were stay orders in place.

On whether the stay of execution can be granted, the appellant submitted on the conditions of stay as provided for under Order 42 Rule 6 (2) (a) and (b) of the Civil Procedure Rules 2010; that this court has been properly moved to grant stay of execution arising from the taxation as was held in the case of **Kilonzo & Co. Advocates vs John Njenga Mututho (2012) eKLR**.

On the sixth issue for determination, the appellant submitted that the respondent's advocate should be punished for contempt of court orders.

That on 17/12/2020 the court ordered that status quo be maintained which order was made in the presence of counsel of both parties; that in disregard to the orders, the respondent's advocate went ahead to extend the warrants of attachment in the lower court misdirecting the Magistrate and attached the appellant's motor vehicle spare parts leading to the operations of the factory coming to a standstill; that Section 5 (1) of the Judicature Act gives this court the power to punish for contempt of court; that this court should exercise its jurisdiction and punish the respondent's advocates for contempt by committing him to civil jail for six (6) months.

The appellant concluded that stay orders be granted, the proclamation notices and the warrants of attachment be lifted and the respondent be ordered to settle any fees emanating from the said proclamation notices and costs of the application as was held in the case of **Rubo Kimnetich Arap Cheruiyot vs Peter Kiprop Rotich (supra)**.

The respondent filed a response to the appellant's submissions dated 5/4/2021, in which it was submitted that the stay was a conditional order which applied to the decretal sum of Kshs. 7,101,680/=; that the court's order included costs and interest of the suit; that if it was the intention of the Honourable Judge to include costs and interest in his wording of the conditional stay, then the Honourable Judge would have specified so in the orders; that the reasons for disobeying the order for conditional stay was because of the varied interpretations of the court order dated 15/10/2019; that the wordings of the orders only referred to stay of execution of the decree and judgment of the lower court and there is no wording of '**all consequential orders**' thus the party and party costs did not form part of the order for conditional stay.

Further to the foregoing, the respondent submitted that the appellant was served with the bill of costs for all the files and the assessment notice was served with the same; that the appellant at the same time had instructed the firm of Kuyioni, Seriani & Co. Associates Advocates therefore the current advocates on record cannot purport to have been unaware of a perfected decree or any taxation proceeding.

On whether the application dated 4/12/2020 is **res judicata**, the respondent submitted that the issues being raised in this application were determined by this court on 25/9/2019; that prayers 2 and 3 seek stay of execution of the lower court's decree and judgement, and the same prayers were sought in the application dated 25/9/2019; that the appellant having by its own actions or omissions vacated the conditional stay and allowed the respondent to execute; that they were in contempt and the appellants are now rushing to the same court hiding under another stay application. The fact that the issue of stay of decree and judgement of the lower court had been dealt with and an order made makes the current application res judicate.

On whether there can be execution of partial decree a party's bill of costs, the respondent submitted that there was no partial decree on party bill of costs; that due process was followed in the assessment of the same at the lower court and the certificate of costs have not been challenged by the appellant; that the execution of the party and party costs was not stayed and was not forming part of the bank guarantee deposited in court. The guarantee was issued on 12/11/2019 and the certificate of costs issued are dated 11/11/2019; that the appellant was made aware of the taxed costs and interest on 26/11/2019 before the expiry of the 30 days; that the appellant was therefore well within 30 days period to pay the whole decretal sum as per the decrees and certificate of costs dated 11/11/2019. The proper procedure was followed in the execution of costs as it followed the vacation of the order for conditional stay.

On whether stay of execution can be granted by this court or an appellate court, it was urged that the court order was specific that in default, the order of stay stood vacated, discharged and execution to follow; that the appellant does not explain the reason for disobeying the court orders and is seeking the help of this court to redeem itself for having disobeyed the orders of this court; the court issued direct consequences for disobedience of the court orders and the appellant cannot now come to the same court seeking stay of execution orders; that since the court pronounced itself through the orders of 15/10/2019, it cannot again issue contradictory orders.

On whether the respondent's advocate should be punished for contempt, the respondent submitted that there was no contempt. On 17/12/2020, the court issued an order of status quo and the question that this court should ask itself was what the prevailing status quo then was. The respondent further submitted that the status quo then, was that execution was ongoing as there was no stay and the same was at an advanced stages; that there was no express order stopping the respondent from executing the party and party costs and the consent recorded by advocates therefore the respondent cannot be faulted for carrying out instructions from his client. It is unprofessional for counsel to move court to commit a colleague to civil jail for carrying out instructions and performing his duties as an officer of court.

The respondent submitted that this application is a waste of court's time and resources, the proclamation attachment currently stayed are as a result of a legal process as ordered by this court on 15/10/2019.

I have considered the twin applications dated the replies thereto, respective exhibits and rival submissions.

It is this court's opinion that the issues for determination arising therefrom the two applications are:-

- 1) **Whether the applicant's application dated 4/12/2020 is res judicata.**
- 2) **What was the decretal sum as at 15/10/2019 when stay order was granted?**
- 3) **Whether it was proper for the respondent to commence execution proceedings against the appellant.**

It is not in dispute the appellant filed an application dated 25/11/2019 and thereafter on 15/10/2019, orders for stay of execution of the lower court's judgement and decree dated 27/8/2019 in **RONGO SPMCC 171 of 2017** were granted by consent pending the hearing and determination of this appeal.

The application was first heard by Mrima J. Learned Counsel for the parties filed a consent on 15/10/2019 in the following terms.

**"By Consent:-**

The Notice of Motion Application dated 25/9/2019 be allowed in terms of prayer 3, that is, that there be a stay of execution of the decree pending hearing and determination of appeal on condition that the appellant provide a BANK BOND for the full decretal sum from a reputable Bank as GUARANTEE for the performance of the decree within 30 days of the date hereof.

**In default, the order of stay to stand vacated and discharged and execution to follow.”**

Thereafter, further proceedings on the pending appeal proceeded and it was ordered that this would be the lead file and the same orders would apply to **HCCA Appeals No. 119, 120, 121,122,124,125 and 126 all of 2019**. A judgement date was then reserved for 4/3/2021.

During the pendency of the stay orders, the respondent commenced execution proceedings of the party and party costs and extracted decrees for all the files in **RONGO SPMCC Nos. 165, 166, 167,168,169,171,175 and 205 all of 2017** and took out warrants of execution together with proclamation notices dated 11/11/2019.

Being apprehensive that the execution would commence, the appellant filed an application before the lower court dated 22/7/2020 seeking stay of execution of the partial decree on party and party costs pending the hearing and determination of the appeal, which application was dismissed. On that basis, the appellant filed another application before this court dated 4/12/2020 seeking stay of execution of the decree and certificate of costs in the lower court files pending the hearing and determination of the appeals filed in this court. Upon reading the application, I directed that status quo be maintained and the application be fixed for interparties hearing on 16/3/2021. It is the application dated 4/12/2020 that the respondent contends is *res judicata*.

Turning to the first issue of determination whether or not the applicant’s application dated 4/12/2020 is *res judicata*, I am duly guided by Section 7 of the Civil Procedure Act wherein the principle is codified: -

**“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.” (emphasis added)**

Thus, for a suit to be *res judicata*, the following elements have to be fulfilled:-

- a) **The former suit was between the same parties.**
- b) **The parties were litigating under the same title.**
- c) **The issues in the former suit had been subsequently raised.**
- d) **The issues in the former suit has been heard and finally decided by such court.**

The court of appeal explained the above doctrine in the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal held that:

**“Thus, 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.” (emphasis mine).**

In **Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR** the court held:

**“To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.” (emphasis mine).**

Similarly, In **E.T.V vs Attorney General & Another (2012) eKLR** it was held:-

**“The courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.” (emphasis mine).**

My understanding is that the doctrine of *res judicata* is meant to lock out parties from the judicial system from re-litigating on the same issues which were previously settled either by the trial or appellate court.

Emphasis is placed on **issues which were finally determined** so that even if the same parties appeared before any court and issues were framed differently over the same subject matter, the court can read through the plaintiff/appellant and note the outcome would not be any different.

The application dated 25/9/2019 sought stay of execution of the decree and judgement in the lower court suits while the application dated 4/12/2020 sought stay of the commenced execution proceedings from the extracted court decrees and certificates of costs dated 11/11/2019 in the lower court files. The questions in issue and the orders being sought are different even if the parties are litigating under the same title. The latter application, now for consideration, seeks a stay of execution for the already extracted decrees and certificate of costs dated 11/11/2019 whilst in the former application of 25/9/2019, the stay of execution being sought was for the judgement and decree in which execution had not commenced.

Although the parties are the same or litigating under as the same parties, the issues are different. I find that the application dated 4/12/2020 is not *res judicata*.

The main issue in dispute is the interpretation of the stay orders issued by this court on 15/10/2019. The appellant contends that the execution was illegal and in contravention to the said orders issued by the court while the respondents contends that the execution was permissible as the appellant had not fulfilled the conditions in the stay orders. Further, the respondents admits disobedience of the court orders was due to the varied interpretation of the court orders dated 25/10/2019. It is the respondent's further contention that the amount to be guaranteed by the appellant was Kshs. 7,101,680 as opposed to Kshs. 5,290,920.

At the time the application dated 25/9/2019 was filed, the execution process had not been commenced. The award order was specific, it was staying **'execution of the decree'** it meant the decree of the court which meant the award costs and interests from the time of filing of the suit that is per the trial court's judgement. It did not include any party and party costs for which the respondent went ahead to execute. From the court record, the decrees extracted for all the sister files in this appeal are dated 11/11/2019. This could only mean that at the time parties entered a consent on 25/10/2019, it was not specified the decretal amount the appellant needed to deposit to comply with the consent.

The resultant judgement of the lower court suits was in favour of the respondent. The judgement and decree thereof was an executable order which would have changed the position of the appellant if stay orders were not granted pending the hearing and determination of their appeal. One of the conditions outlined in **Order 42 Rule 6 of the Civil Procedure Rules** for stay of execution to issue is that there is a likelihood that substantial loss may result to the applicant. In this instance, the loss that would have occurred to the appellant was the execution of the judgement sum awarded to the respondent. If at all the court would not have issued the stay orders, the court would have engaged in a mere academic exercise when rendering its final judgement as the whole appeal process would have been rendered a nugatory.

In the case of **Republic v Kenya Urban Roads Authority & 3 others Ex-parte Cytonn Investments Management Limited [2018] eKLR**. The court defined a stay order as follows: -

"A Stay Order is defined as **a court order halting or suspending a judicial proceeding either fully or temporarily**. Such orders are issued in order to **suspend or stop a legal action until a certain condition is fulfilled or a particular event occurs**. The court can lift the suspension later on and re-commence the legal proceeding. In general, however, there are two types of Stay Orders: a Stay of Execution and a Stay of Proceedings. **A Stay of Execution is a Stay Order issued by court suspending or delaying the enforcement of a judgment against a person.**" (emphasis supplied).

The Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Other (2014) eKLR** held thus:-

***"...The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light."***

The next issue is whether the respondent was allowed to partially execute the decrees issued on the party and party bill of costs. Partial execution of decrees can only be done under Section 94 of the Civil Procedure Act which provides that the party seeking to execute must seek leave of the court none was sought.

In **Rubo Kimnetich Arap Cheruiyot vs Peter Kiprop Rotich (supra)** the court held:-

**"The second question is whether the Defendant was entitled in law to execute for the recovery of the taxed costs on the basis of the certificate of costs or at all, at the time the execution took place. At the time of the execution, it is common ground that there was a temporary order of this court staying execution of the decree pending the hearing and determination of the application dated 29<sup>th</sup> June 2004. From the finding of the court hereinabove, the costs were awarded in the judgment and expressed in the Decree. The costs were payable to the Defendant by the Plaintiff. Since there was and could be no stay of "further proceedings" in so far as ascertainment of costs was concerned through taxation, the Defendant was perfectly entitled to have his bill of costs taxed. However, he could not have the said costs or any other order in the decree enforced by way of execution...The order of this court had stayed any form of execution of the decree. This included recovery of costs which could only be expressed in the decree. I see no logic in the argument that the stay of execution was confined or limited to the eviction order. Both costs and eviction could only be executed through the Decree."** (emphasis mine).

I am fortified by the above judicial pronouncements. There is no justifiable reason why the respondent proceeded with the execution of the partial decree thereof even if the execution process was commenced due to the varied interpretation of the court orders issued on 15/10/2019,

which order Counsel of the respondent surprisingly personally consented to.

Even if the extracted decree indicates that there is a short fall of Kshs. 1,810,760 of the bank guarantee issued by the appellant, there is still no basis for execution of a part decree. There being a pending appeal, which was already reserved for judgement, it would only make judicial sense for the decree holder to await the outcome of the appeal which will either be in or against his favour in order to proceed with the execution.

When alluding to the orders issued by this court on 15/10/2019, the learned Magistrate made a proper observation on page 5 of his ruling dated 1/12/2020 which this court agrees with that: -

**“The assessment of party and party bill of costs in my view was not stayed but rather the executions”**

Surprisingly, towards the tail end of his ruling, the learned Magistrate allowed the execution of the part decree.

I find that the actions of the respondent’s Counsel is in wanton disregard of the stay orders issued on 15/10/2019.

The only known procedure for partial execution of decrees as submitted by Counsel for the appellant is provided for under Section 94 of the Civil Procedure Act but it is in relation to execution of part decrees issued with leave of the High Court only. It follows that the said execution was irregular and unlawful.

Counsel for the appellant has made sensational claims that the respondent did not pay further court fees as required before extraction of the decree. Counsel for the respondent chose not to respond to these allegations. This court took the liberty to call for and examine the lower court files. In **Civil Case No. 168 of 2017 Samwel Ouma Onyango vs Transmara Sugar Co. Ltd, Civil Case No. 165 of 2017 Samwel Okemwa vs Transmara Sugar Co. Ltd and Civil Case No. 171 of 2017 Charles O. Mbaka vs Transmara Sugar Co. Ltd**, the further court fees were assessed at **Kshs. 21,390, Kshs. 68,500 and Kshs. 18,086 respectively**. In the rest of the files in this series, there is no form on record indicating the further court fees assessed. There is no iota of evidence by way of court receipts as they were used then, to show that the further court fees were paid.

One wonders how Counsel for the respondent and/or his authorized representatives managed to extract the decrees in the absence of payment of the further court fees. The decrees as extracted were null and void. Therefore, it goes without saying that they must be set aside.

This court notes with concern that what happened in this matter borders on some misconduct on the respondents’ counsel which should not be countenanced and therefore the respondents will be condemned to pay the costs of the two applications. In the even such conduct is repeated in future, Counsel will be personally liable to pay the costs of any unlawful execution which may ensue, contrary to court orders.

I grant orders are as follows:-

- 1. The application dated 4/12/2020 be and is hereby allowed in terms of prayers no. 2 as prayed.**
- 2. For avoidance of doubt, the decretal award as of 15/10/2019 when stay was granted was Kshs. 5, 290.920/=.**
- 3. The application dated 6/1/2021 be and is hereby allowed in terms of prayers no. 2 and 4 as prayed.**
- 4. That no further execution proceedings of any kind shall commence and proceed pending the hearing and determination of this appeal.**
- 5. The lower court decrees dated 11/11/2019 issued in RONGO SPMCC Case No. 165, 166, 167,168,169,171, 175 and 205 all of 2017 be and are hereby set aside.**
- 6. The respondent is hereby directed to comply with prayer no. 2 of the appellant’s application dated 6/1/2021 within seven (7) days hereof.**
- 7. The ruling of the Honourable Magistrate dated 1/12/2020 be and is hereby set aside.**
- 8. Costs of the applications dated 4/12/2020 and 6/1/2021 are awarded to the appellant.**
- 9. Both counsel granted leave to file further submissions and there be highlighting of submissions on the appeal on 2/3/2022.**

DATED, DELIVERED AND SIGNED AT MIGORI THIS 25TH DAY OF NOVEMBER, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr. Aim for the Applicant

Mr. Mwita Kerario for the Respondent

Evelyne Nyauke Court Assistant