



**Kenol Kobil Plc v Canarian Holdings Limited (Environment & Land
Case 111 of 2019) [2025] KEELC 335 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 335 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 111 OF 2019
SM KIBUNJA, J
JANUARY 29, 2025**

BETWEEN

KENOL KOBIL PLC PLAINTIFF

AND

CANARIAN HOLDINGS LIMITED DEFENDANT

RULING

1. The plaintiff filed the notice of motion dated 15th August 2024 seeking for the following orders:
 1. “Spent.
 2. That this Honourable Court be pleased to extend the stay of execution order issued on 19th June 2024, pending the hearing and determination of the application herein.
 3. That this Honourable Court be pleased to vary the order issued on 19th June 2024 with an order that the Plaintiff (Defendant in the Counterclaim) provides as security to the Defendant (Plaintiff in the Counterclaim) a Bank Guarantee of equal value to the Decretal amounts.
 4. That in the alternative to prayer 3 above, this Court be pleased to grant an extension of time of 30 days to the Plaintiff (Defendant in the Counterclaim) to deposit the Decretal amounts in a joint interest earning account to be held in the joint names of counsel for the parties.
 5. That this Honourable Court be pleased to make any other or further orders that it may deem just and fit to in the interest of justice
 6. That costs of this application be provided for.”

The application is premised on the eleven (11) grounds on its face marked (a) to (k), and supported by the affidavit of Roselyne Shitakha, senior legal counsel at Rubis Energy Kenya PLC, sworn on 15th August 2024 in which she inter alia deposed that the Court delivered judgment on 25th October



2023 in favour of the respondent for a cumulative sum of Kshs. 51,761,757.89, USD 1,137,850.78 and USD 17,509.00, including an order for monthly payment of mesne profit costs and interests, which continues to accrue; that the plaintiff filed an application for stay pending execution of the Judgment which was allowed by this court on 19th June 2024 on the condition that the whole decretal amount was deposited in a joint interest earning account of both parties counsel within 60 days from the date of the ruling; that the court further ruled that the accrued monthly mesne profits as at the date of ruling be deposited in the abovementioned account and further accruing mesne profits also be deposited in the same account before the last day of the month; that the orders were to lapse on 18th August 2024 and that the plaintiff proposes that the stay of execution order dated 19th June 2024 be varied to allow the plaintiff to provide a bank guarantee of equal value from Stanbic Bank Kenya PLC in lieu of depositing the amounts aforesaid in the order; that the plaintiff has sufficient facilities with the said bank to give the bank confidence in issuing the guarantee; that the plaintiff has a large asset base in Kenya that secures the defendant's right to enjoy her fruits of judgment in the event the appeal is not successful and thus invoked the court's discretion in dispensing justice and balance the rights of both parties during the appeal; that the plaintiff is apprehensive that if the application is not granted the defendant will proceed to execute as the same had already taxed their bill of costs and a ruling delivered on 7th August 2024; that the plaintiff had filed its Record of Appeal in Civil Appeal E069 of 2024 within the prescribed timelines of law and is awaiting directions from the Court of Appeal on hearing and determination; that the defendant would not be prejudiced if the application to allow a bank guarantee; was granted that if the court should refuse to grant the prayer for the plaintiff to provide a bank guarantee, then the court should consider extending time for to comply with the deposit order as it had already executed the joint account opening forms.

2. The application is opposed by the defendant through the four grounds of opposition dated 11th September 2024 and replying affidavit of Alex Trachtenberg, director of the defendant, sworn on 11th September 2024 reiterating the grounds and are summarised as follows:
 - i. That this court does not have jurisdiction as it has become functus officio having fully determined the suit and the application for stay of execution of judgment and decree herein.
 - ii. That the application is bad in law as it requests the court to sit on appeal of the ruling dated 19th June 2024.
 - iii. That this court cannot revisit the issues raised in the plaintiff's application for stay of execution dated 23rd November 2024 so as to reach a different conclusion.
 - iv. That the application is now moot as the decretal amount of Kshs. 51,761,757.89 and USD 1,155,359.78 has already been deposited on 4th September 2024.
 - v. That the defendant proceeded to file its party and party bill of costs for taxation and forwarded the notice of taxation dated 5th July 2024 to the plaintiff's counsel; that vide a letter dated 16th July 2024 the defendant reminded the plaintiff of the conditions of stay issued by this court, and proposed Absa Bank Kenya PLC as the institution to domicile the joint account which was responded by a counter offer from the plaintiff vide a letter dated 8th August 2024 to enter into a consent to vary the ruling dated 19th June 2024 and be allowed to furnish a bank guarantee.
 - vi. That the defendant was not convinced that a bank guarantee would sufficiently cover the decretal amount in view of the continuing accrued monthly mesne profits and thus rejected the counter offer vide a letter dated 9th August 2024.



- vii. That the instant application was filed at the eleventh hour after no deliberate efforts were made to comply with the stay conditions and further that it is mala fides as it is intended to prejudice the defendant's right to enjoy the fruits of her judgement.
 - viii. The application has been overtaken by events as the plaintiff deposited Kshs. 51,761,757.89 and USD 1,155,359.79 albeit out of time but left out the monthly mesne profits of July and August.
3. The plaintiff responded by filing a further affidavit of Roselyne Shitakha sworn on 26th September 2024 deposing among others that the plaintiff had abandoned prayer 2 and were only pursuing prayer 3; that the plaintiff is not requesting this court to sit on appeal, but to vary the conditions of the ruling dated 19th June 2024; that the respondent had through the letter dated 30th August 2024 agreed to extension of time to deposit the decretal sum and the plaintiff has now fully complied with the order; that the amount deposited seriously impacts the applicant's cash flow, and that a bank guarantee is payable upon demand by the issuing bank should the plaintiff's appeal be dismissed; that the application is brought in good faith as can be seen by the act of depositing the decretal amount; that the act of the plaintiff depositing the decretal amount shows that it will be able to pay even if the appeal is dismissed; that the plaintiff will expediently provide the bank guarantees once the prayer 3 is allowed as it has already confirmed from its bank and that it would be in the interest of justice to allow the application.
 4. The defendant filed a further affidavit sworn by Alex Trachtenberg on 8th October 2024 deposing inter alia that the plaintiff should continue depositing the monthly mesne profits of July, August, and September 2024 in compliance with the order of 19th June 2024.
 5. The learned Counsel for the plaintiff and the defendant filed their submissions dated 27th September 2024 and 8th October 2024 respectively, which the court has considered.
 6. The following are the issues for determinations by the court:
 - i. Whether the plaintiff has met the threshold for variation of the conditions set in the orders issued on 19th June 2024.
 - ii. Who bears the costs of the application?
 7. After considering the grounds on the application, grounds of opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited the court has come to the following determinations:
 - a. The application by the plaintiff has invoked sections 1A, 1B and 3A of the *Civil Procedure Act* and section 3 of the Environment and Land Court Act. From the further affidavit by the plaintiff and their submissions, it is mainly seeking for prayer 3, which is for varying of conditions set in the ruling of this court dated 19th June 2024. The defendant has in all its responses opined that the court is functus officio and is being asked to sit on appeal on its ruling. The defendant has inter alia cited the decision in the case of *Moyale Liner Bus Services versus Gachu Ibrahim* [2021] eKLR, where the court refused to alter its order for deposit of decretal sum in a joint interest earning account as the court was functus officio. The plaintiff has insisted that this court can vary the terms of conditions and cited among others the decision in the case of *George W. Omondi versus Guilders International Bank Limited* [2015] eKLR where the court held that it has the power to vary or amend the terms and conditions upon which it had given a relief, which power ought to be invoked sparingly and for good reasons.



- b. The learned counsel for both sides have presented the court with well-reasoned submissions and I take this early opportunity to thank each one of them. The court has after considering the issue of the court’s power to alter or vary its own ruling or orders concluded that it is essentially the jurisdiction of review under section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The instant application comprises of all the tenets of a review but intentionally phrased in a way not to be subject to the limits under the rules for review. Though the provisions relating to review orders were not cited on the body of the notice of motion, as required by Order 51 Rule 10 of the Civil Procedure Rules, the court will proceed to treat the application as one for review. In the case of Cape Suppliers Limited versus Sinohydro Corporation Limited [2023] KEHC 2666 (KLR) cited by the plaintiff, the court used its discretion and the ground of sufficient cause to vary its orders. The ground of sufficient cause is analogous to the other two grounds to wit discovery of new evidence and error apparent on the face of the record as was held in the case of Nasibwa Wakenya Moses versus University of Nairobi & Another [2019] (eKLR). This position was reiterated in the case of Yusuf –versus- Nokrach, (1971) EA 104, where the court held that “any other sufficient reason” as set out in Order 44 Rule 1 of the former Civil Procedure Rules, means sufficient reason analogous to those in the rule. In the case of Wangechi Kimita & Another versus Mutahi Wakabiru *CA No 80 of 1985* (unreported) it was held that;

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 for the *Civil Procedure Act*. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason.”

Thus, considering that the plaintiff has already deposited the decretal amount as admitted by both parties, and what is remaining is the mesne profits, the court does not view the need for the plaintiff to withdraw the already deposited decretal amount. For this reason, the court does not view any mala fides on the part of the plaintiff in filing the instant application as claimed by the defendant. In any case, it is apparent the defendant appear okay with the plaintiff depositing the decretal sum long after the time given had lapsed and does not appear averse to the court taking it as an act of partial compliance with the order of 19th June 2024. What the defendant has emphasized on is the depositing of the monthly mesne profits, which the plaintiff has not done.

- c. Notwithstanding the finding above, this court has a duty to balance the interests of the plaintiff and the defendants, as the pending appeal is heard and determined either way. Obviously, it is not possible for the court to give with precision the duration the parties’ pending appeal will take to be determined, or to determine the figure or sum that would be sufficient to cover the mesne profits that will accrue during that period.

However, I am of the considered view that a bank guarantee would be a sufficient security or assurance for covering the mesne profits that are yet to be remitted, and will continue to accrue as the pending appeal is heard and determined. The mesne profits are unlikely to be as substantial as the decretal sums already deposited in the joint interest earning account. Guided by the decision in the Supreme Court of Kenya case of Westmont Holdings SDN BHD versus Central Bank of Kenya & 2 others [Petition No. 16 (E023) of 2021], I am of the view that so as



to disengage the parties herein from squabbling over the remaining compliance element of the order of 19th June 2024, and to prompt them to instead put their efforts to the pending appeal, it would be just and fair, and definitely not unreasonable or excessive to partially allowing prayer 3 of the application with an order that the plaintiff do provide a bank guarantee for the payment of an amount adequate to cover two (2) years mesne profits at the rate decreed in the judgement within fourteen (14) days from today.

- d. It is trite that costs generally follow the event unless where there is a good reason to depart from that edict under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya. Though the plaintiff has partially succeeded in its application which was essentially seeking the court's discretion, it will bear the defendant's costs.
8. In view of the foregoing determinations, the court finds and orders as follows:
- a. That prayer 3 of the notice of motion dated the 15th August 2024 is granted limited to the plaintiff being allowed to provide a bank guarantee as security for the payment of a sum of money adequate to cover two (2) years' mesne profits, at the rate decreed in the judgement delivered on 25th October 2023 within fourteen (14) days from today, pending the hearing and determination of the appeal.
 - b. The defendant is awarded the costs in the application.
 - c. That needless to say, should the plaintiff fail to comply with this order, the defendant be at liberty to claim the release of the security deposited and execute for any balance and accrued mesne profits as decreed in the judgement.
 - d. For avoidance of doubts, this court is now functus officio.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF JANUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff : M/s Mima For Onyango

Defendant : Mr Okoth And Ochieng.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

