



**Koceyo & Company Advocates v Nairobi City Water & Sewerage Company Limited (Environment and Land Miscellaneous Application E231 of 2021) [2023] KEELC 21107 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21107 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E231 OF 2021**  
**JO MBOYA, J**  
**OCTOBER 26, 2023**

**BETWEEN**

**KOCEYO & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .. RESPONDENT**

**RULING**

**Background And Introduction**

1. The Applicant has filed the Application dated the 24<sup>th</sup> July 2023; and in respect of which same has sought for the following Reliefs;
  - i. ....Spent.
  - ii. This Honorable court be pleased to grant an order of stay of execution of the ruling delivered on the 13<sup>th</sup> July 2023 in Misc. Application No. E231 of 2021; Koceyo & Co Advocates v Nairobi City Water and Sewer Company, pending hearing and determination of this Application.
  - iii. This Honorable court be pleased to grant an order of stay of execution of the ruling delivered on the 13<sup>th</sup> July 2023; in Misc. Application No. E231 of 2021; Koceyo & Co Advocates v Nairobi City Water and Sewer Company, pending hearing and determination of the intended appeal.
  - iv. This Honorable court be pleased to set aside the ruling delivered on the 13<sup>th</sup> July 2023.
  - v. Costs of this Application be provided for



2. The subject Application is anchored and premised on numerous grounds which have been enumerated in the body thereof. For good measure, the Application is anchored on a total of 34 grounds, some of which are omnibus.
3. Furthermore, the Application is supported by the affidavit of Titus Koceyo, himself an advocate of the High Court of Kenya; and which has been sworn on the 24<sup>th</sup> July 2023.
4. On the other hand, upon being served with the instant Application, the Respondent herein filed a Replying affidavit sworn by Dickson Khisa and which is sworn on the 25<sup>th</sup> September 2023, wherein, the Respondent has contended, inter-alia, that the Honourable court is divested of Jurisdiction to entertain and/or adjudicate upon the subject Application.
5. First forward, the Application beforehand came up for hearing on the 25<sup>th</sup> September 2023; and whereupon the advocates for the respective Parties agreed to canvass and ventilate same by way of written submissions.
6. Arising from the foregoing, the Honourable court thereafter proceeded to and circumscribed the timelines for the filing and exchange of written submissions. Instructively, the Applicant proceeded to and filed written submissions dated the 26<sup>th</sup> September 2023; whereas the Respondent filed submissions dated the 2<sup>nd</sup> October 2023.

## **Parties' Submissions:**

### **a.Applicant's Submissions:**

7. The Applicant herein has adopted the grounds contained at the foot of the Application and furthermore, reiterated the contents of the Supporting affidavit. Further and in addition, Learned counsel for the Applicant has thereafter raised, highlighted and canvassed three (3) issues for due consideration by the Honourable court.
8. Firstly, Learned counsel for the Applicant has submitted that the current Application has been filed and mounted pursuant to the correct provisions of the law and hence the application is legally tenable.
9. Additionally, Learned counsel for the Applicant has submitted that the prayer for stay of execution is informed by the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*; and thus the current Application does no suffer from any defect and/or any deficiency, whatsoever.
10. Secondly, Learned counsel for the Applicant has submitted that the Applicant has established and demonstrated that same is bound to suffer Substantial loss, unless the orders of stay sought are granted.
11. Furthermore, Learned counsel for the Applicant has contended that unless the orders of stay are granted, the Respondent herein shall be at liberty to take out and commence execution proceedings, with a view to recovering the some of Kes.186, 893.40/= only, which had been paid to the Applicant as security pending the hearing and determination of the Reference.
12. In view of the foregoing, Learned counsel for the Applicant has contended that the grant of an order of stay of Execution pending the hearing of the Intended Appeal, would suffice to avert the imminent execution, which is likely to arise and/or accrue.
13. Lastly, Learned counsel for the Applicant has submitted that the Applicant herein has filed and/or mounted an appeal which raises arguable issues. Consequently and in this regard, it has thus been contended that the appeal on behalf of the Applicant is therefore arguable.



14. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on, inter-alia, the holding in the case of *R.W.W v E.K.W* (2019)eKLR, *Visram Ravji Halai v Thornton & Turpin* Civil Application No. 15 of 1990 (1990)KLR, *Mrao Ltd v First American Bank & 2 Others* (2003)eKLR, *Wacira Karani v Bildad Wacira* (2016)eKLR, *P.M.M v J.N.W* (2020)eKLR and *James Wangalwa & Another v Agnes Naliaka Chesetu* (2012)eKLR .
15. Premised on the foregoing submission, Learned counsel for the Applicant has therefore impressed upon the court to find and hold that the Application beforehand is meritorious and thus same ought to be granted.

**b.The Respondent’s Submissions:**

16. The Respondent herein filed written submission dated 2<sup>nd</sup> October 2023; and same has raised, highlighted and canvassed two (2) pertinent issues for consideration by the Honourable Court.
17. First and foremost, Learned counsel for the Respondent has submitted that what was before this court was a Reference filed by and on behalf of the Respondent and which reference was ultimately heard and determined by the court.
18. Additionally, Learned counsel for the Respondent has submitted that having heard and determined the Reference, this court is divested of the requisite Jurisdiction to re-visit the same matter and to set aside its ruling, either in the manner sought or at all.
19. Further and in any event, Learned counsel for the Respondent has submitted that this court is *functus officio* as pertains to the question beforehand and hence same is not seized of the requisite Jurisdiction to grant the reliefs sought.
20. In support of the contention that the court is *functus officio*, Learned counsel for the Respondent has cited and relied on, inter-alia, the case of *Jersey Evening Post Ltd v Al Thani* (2002)JLR 542 and *ICEA Lion General Insurance Co Ltd v Julius Nyaga Chomba* (2020)eKLR.
21. Secondly, Learned counsel for the Respondent has submitted that the Applicant herein has similarly neither established nor demonstrated the basis to warrant the grant of the orders of stay of execution pending (sic) appeal or at all.
22. In particular, Learned counsel has submitted that the fact that execution is likely to be commenced and/or carried out does not ipso facto, denote that the Applicant herein will suffer Substantial loss, either as alleged or at all.
23. Furthermore, Learned counsel has contended that execution by itself is a lawful court process and thus the commencement or intended commencement of execution cannot be contended to be a basis for stay of execution.
24. Be that as it may, it has also been submitted that an order of stay of execution pending appeal can only arise and/or be granted where it is shown that Substantial loss is likely to arise and/or occur. However, in respect of the instant matter, Learned counsel for the Respondent has submitted that no evidence of Substantial loss has been placed before the court or at all.
25. To buttress the foregoing submissions, Learned counsel for the Respondent has cited and relied on inter-alia the holding in the case of *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* (2022)eKLR; *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012)eKLR; and *R.W.W v E.K.W* (2019)eKLR, respectively, wherein the court defined what constitutes substantial loss.



26. Arising from the foregoing submissions, Learned counsel for the Respondent has thus implored the Honourable court to find and hold that the instant Application is devoid of merits and thus ought to be dismissed.

#### **Issues For Determination:**

27. Having reviewed the Application beforehand, as well as the Response thereto; and upon taking into consideration the written submissions filed by the advocates for the Parties, the following issues do emerge and are thus deserving of determination;
- i. Whether the Honorable court is seized and possessed of the requisite Jurisdiction to adjudicate upon the subject Application.
  - ii. Whether the Applicant has satisfied the requisite ingredients to warrant the grant of an order of stay of Execution pending Appeal.

#### **Analysis And Determination**

##### **Issue Number 1. Whether The Honorable Court Is Seized And Possessed Of The Requisite Jurisdiction To Adjudicate Upon The Subject Application.**

28. It is common ground that the Applicant herein filed and/or lodged an advocate client bill of costs dated the 10<sup>th</sup> December 2021; and which bill of costs was thereafter taxed by the Honorable taxing master.
29. Subsequently, the Applicant procured and obtained a Certificate of taxation in the sum of Kes.186, 893.40/- only.
30. Nevertheless, following the issuance of the certificate of taxation, (details in terms of the preceding paragraph), the Respondent herein felt aggrieved and thereafter filed a Reference seeking to challenge the entirety of the Certificate of taxation.
31. Suffice it to point out that the Reference by and on behalf of the Respondent was heard and disposed of vide Ruling rendered on the 13<sup>th</sup> July 2023; whereupon this court found that there was an error in principle culminating into the Certificate of taxation being set aside and/or rescinded.
32. It is also instructive to note that other than setting aside the certificate of taxation, the court ordered and directed that the Applicants/ advocates' client bill of costs be remitted to a taxing master (other than Hon Diana Orago) for purposes of re-taxation.
33. Furthermore, it is also apparent that the Bill of costs is currently pending taxation before the Honorable taxing master. However, despite the pendency of the bill of costs for taxation, the Applicant herein has reverted to this court and is now seeking to invite the court to, inter-alia, set aside the Ruling delivered on the 13<sup>th</sup> July 2023.
34. To my mind, the Ruling under reference was arrived at after hearing both the Applicant and the Respondent. Consequently, the Ruling under reference was one based on merits and not otherwise.
35. Taking into account the foregoing position, the question that does arise is whether this court that considered the matter and rendered the ruling on merits, can re-engage with the subject matter with a view to setting aside, varying and/ quashing the impugned ruling.
36. Nevertheless and in my humble view, once a court, this court not excepted, has adjudicated upon a matter on merits, a party who is aggrieved and or dissatisfied can only impeach the decision of the designated court by way of an appeal, where appropriate.



37. Other than the foregoing, it suffices to point out that such a Party, who is aggrieved with and/or dissatisfied by the decision, cannot revert back to the same court and ask the court to set aside his/her ruling. Surely, such an invitation would be tantamount to having the court sit on appeal on its own decision, which is a legal anathema and contrary the dictates of the Rule of Law.
38. Arising from the foregoing exposition, it is my considered view that this court is devoid and bereft of Jurisdiction to (sic) set aside its own ruling which was delivered on the 13<sup>th</sup> July 2023, after due consideration of the merits of the Reference.
39. Furthermore, it is worthy to underscore that without Jurisdiction, a court of law is called upon to down his/her tools at the onset and in any event, as soon as the court discovers that same is not seized of Jurisdiction.
40. To underscore the significance of Jurisdiction, it is appropriate to take cognizance of and to reiterate the holding of the Court of Appeal in the *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, where the Court of Appeal stated thus;
- “ 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.”
41. In short, it is my position that the aspect of the Application inviting this court to set aside the impugned Ruling, is clearly misconceived and premised on misapprehension of the basic principles of the law, which inter-alia, bars the Court from sitting on Appeal in respect of own decision.
42. Other than the question of want of Jurisdiction to re-engage with the Ruling rendered on the 13<sup>th</sup> July 2023, there is also the aspect/ perspective that pertains to the Doctrine of *functus officio*.
43. For good measure, the doctrine of *functus officio* prohibits a court of law from entertaining a matter which same has effectively determined and/or pronounced itself on. Instructively, the doctrine of *functus officio* underpins the principle finality; and thus precludes a court from re-engaging with a matter that same has determined.
44. In respect of the instant matter, there is no gainsaying that this Honourable court rendered a merit-based Ruling, after hearing both Parties. Consequently and in this regard, this court is therefore bound by the doctrine of *functus officio*.
45. As concerns the import, tenor and scope of the doctrine of *functus officio*, I can do no better than to adopt and reiterate the holding of the Court of Appeal in the case of *Telkom Kenya Limited v John*



*Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, where the court held thus;

“The Supreme Court in *Raila Odinga v IEBC* cited with approval an excerpt from an article by *Daniel Malan Pretorius entitled, “The Origins of the *functus officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832* in which the learned author stated;

...“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.

46. Premised on the foregoing, my answer to issue number one (1) is twofold: Firstly, this court is devoid of Jurisdiction to re-visit the ruling rendered on the 13<sup>th</sup> July 2023; and purport to set same aside, either as sought or at all.
47. Secondly, this court is barred and precluded by the doctrine of *functus officio* from undertaking any merit-based engagement with the dispute beforehand, with a view to impeaching the ruling under reference.

**Issue Number 2. Whether The Applicant Has Satisfied The Requisite Ingredient To Warrant The Grant Of An Order Of Stay Of Execution Pending Appeal.**

48. Before venturing forward to discuss the issue herein, it is appropriate and imperative to underscore that the commencement of and/or levying execution by itself, does not amount to substantial loss. Instructively, execution proceedings are provided for under the law and hence where appropriate, it behooves the court to facilitate same. See the provisions of Order 22 of the *Civil Procedure Rules*, 2010.
49. Nevertheless, where an Applicant contends that the levying of execution shall occasion substantial loss, which is a fundamental ingredient as far as grant of an order of stay of execution is concerned, then it behooves the Applicant to place before the honorable court cogent, plausible and credible evidence to demonstrate that substantial loss is likely to accrue.
50. Furthermore, it is not lost on this court that substantial loss is not just any other loss. However, it must be a loss, which may not be compensable in monetary terms or better still; one that may render the appeal, if any, academic, unless the loss itself is averted.
51. For good measure, there is no gainsaying that an order of stay of execution shall only issue and/or be granted where it is demonstrated that substantial loss will occur. In this regard, it suffices to adopt and reiterate the dictum of the Court Appeal in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, where the court stated and held as hereunder;

“It is usually a good rule to see if order XLI rule 4 of the *Civil Procedure Rules* can be substantiated. 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”

52. Taking into account the foregoing position, the question that I must deal with is whether the Applicant herein has placed before the court any scintilla or iota of evidence to demonstrate that substantial loss will accrue and/or arise, unless the orders of stay of Execution are granted.
53. Before venturing to answer the question alluded to in the preceding paragraph, it suffices to point out that the dispute beforehand touches on and concerns the sum of Kes.186, 893.40/- only, which was ordered to be paid to the Applicant herein as security for costs pending the hearing and determination of the reference that had hitherto been filed by the Respondent.
54. Additionally, it is worthy to highlight that the Reference which had hitherto been filed, by the Respondent herein, was ultimately heard and determined. For good measure, the reference was allowed.,
55. Insofar as the sum of Kes.186, 893.40/- only was ordered to be held as security pending the hearing of the Reference, what comes to mind at this juncture is whether the Applicant has any legal basis/foundation to retain the said security.
56. Put differently, what loss will the Applicant herein suffer if the said security, which was to be held pending the determination of Reference, is released back to the Respondent/Client.
57. In my humble, albeit considered view, it behooved the Applicant to demonstrate the nature of the loss, difficulty and/or injustice, if any, to be suffered if the monies were released back. Instructively, the burden of proof laid upon the Applicant herein. See the Provisions of Sections 107, 108 and 109 of the *Evidence Act*, chapter 80, Laws of Kenya.
58. However, I must confess that after examining the grounds contained at the foot of the Application, as well as the contents of the supporting affidavit; there is no iota of justification alluded to or otherwise.
59. Additionally, it is also important to underscore that the Respondent herein is a statutory body and an affiliate of the Nairobi City County Government; and thus same is deemed to be in funds, capable of meeting any debts or decree, that may ultimately be awarded.
60. Notwithstanding the foregoing, it is not lost on this court that no averment has been made that the Respondent may not be able to pay and/or settle any decree, that may ultimately arise upon taxation of the advocate client bill of costs.
61. Suffice it to point out that it was the obligation of the Applicant to place before the Honourable Court sufficient material to vindicate that substantial loss will ensure. However, having failed to do so, it is not within the purview of this court to proceed on the basis of speculation or at all.
62. In a nutshell, it is my finding and holding that the Applicant herein has failed to demonstrate that same shall suffer any Substantial loss, unless the orders of stay of Execution sought, are granted.
63. Consequently and given that Substantial Loss is the cornerstone to granting an Order of Stay of Execution by dint of the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010; I would have similarly declined to grant the reliefs sought.



**Final Disposition:**

64. Before advertizing to and proclaiming the final orders, it is also appropriate to underscore that though the Applicant alludes to an Intended Appeal, however, there is no evidence of a Notice of Appeal having been lodged in accordance with the provisions of Rule 75 of the *Court of Appeal Rules* 2010.
65. Nevertheless, having found and held that this court is bereft of Jurisdiction and coupled with the failure by the Applicant to demonstrate the existence of substantial loss; it is my finding that the Application beforehand is not meritorious.
66. Consequently and in the premises, the Application dated the 24<sup>th</sup> July 2023; be and is hereby Dismissed with costs.
67. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF OCTOBER 2023.**

**OGUTTU MBOYA**

**JUDGE.**

In the Presence of;

Benson - Court Assistant.

Mr Dickson . Khisa for the Respondent/Client.

Ms. Clare Nyakundi h/b for Mr. Koceyo for the Advocate/ Applicant.

