



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO.36 OF 2013**

**CIVICON LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**KIVUWATT LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

The orders sought in the Notice of Motion Application dated 20<sup>th</sup> November, 2014 are as follows:-

1. **That this application be and is hereby certified urgent and heard exparte on priority basis in view of its urgent nature and service of the same be dismissed with in the first instance.**
2. **That pending the hearing and determination of this application interpartes the ruling delivered herein on 25<sup>th</sup> July, 2013 by the Learned Judge Honourable Mr. Justice Martin Muya and all subsequent and consequential orders staying all proceedings in this suit be and are hereby set aside in the interim.**
3. **That pending the hearing and determination of this application interpartes the Defendant/Respondent whether by itself, its employees, servants and or agents' or otherwise howsoever be and is hereby restrained by an order of this suit from interfering with or dealing in any manner whatsoever with the equipment known as "the Separator" which is part of the subject matter of this suit and in the custody of the applicant in its transit shed within its premises in Mombasa.**
4. **That the ruling and the orders issued on 25<sup>th</sup> July, 2013 staying all proceedings in this suit and on the issue of jurisdiction of this honourable court in entertaining this dispute be and is hereby reviewed, set aside or vacated.**
5. **That this court do issue any such further and appropriate orders in the circumstances of this matter as it deems fit.**
6. **That the costs of this application be provided for.**

The applicant concedes in its submissions that prayers No.1, 2 and 3 are spent and these pending for determination are prayers 4, 5 and 6.

**The Applicants case**

The contention by the applicant is that it's aggrieved by this court's ruling dated 25<sup>th</sup> July, 2013 in which it held that it had no jurisdiction to entertain an application for an injunction which had been filed earlier

and indeed the entire dispute.

The applicant further contends that since that ruling and consequential orders were granted, the circumstances surrounding the dispute between the applicant and the respondent has substantially and fundamentally changed because of the following grounds and in particular the fact that the respondent filed a separate but similar suit against a third party who is not a party in these proceedings so as to gain an unfair advantage over the applicant by having the subject matter of the suit leave the jurisdiction by way of a consent which has now been disputed by the parties in that suit.

The suit in question was instituted by way of a plaint dated 10<sup>th</sup> October, 2013 **Mombasa High Court Civil Suit No.117 of 2013 – Kivuwatt Limited & Another Vs. The Commissioner, Kenya Revenue Authority, Customs Services Department.**

It is further contended that the applicant is not a party to that suit wherein it's pleaded in paragraph 6 of the plaint that at all material times to that suit the equipment known as "the Separator" the subject matter of the suit, has been under the custody of Kenya Revenue Authority.

In paragraphs 7 and 8 of the plaint its pleaded that the equipment as a matter of law should have exited Kenya by 6<sup>th</sup> October, 2013 but the equipment had been in custody of the Applicant in its privately owned Transit Shed in Mombasa for the last two years.

That though in paragraphs 11, 12 and 13 of the plaint its pleaded that there is another suit between the Applicant and the Respondent being Mombasa HCC No.36 of 2013 Civicon Ltd Vs. Kivuwatt. It was not disclosed that all further proceedings in that suit had been stayed for want of jurisdiction pending arbitration and that one of the claims was the release of the said equipment.

That there was non-disclosure in the said plaint that the Applicant was the licensed owner and operator of the said Transit Shed and that the equipment was stored in the Transit Shed at the request of the Respondent itself and in accordance with existing contracts between the Applicant and the Respondent.

Further that the Applicant did file an application dated 18<sup>th</sup> September, 2013 seeking to be enjoined in the suit as 2<sup>nd</sup> Defendant. This application was dismissed and the subsequently the suit was compromised by way of a consent letter dated 18<sup>th</sup> November, 2013 filed in Court on 19.12.2013.

It is further the Applicants contention that the Respondent is anxious of having the equipment released through the court process yet the court had made a ruling to the effect that it lacked jurisdiction to entertain the dispute particularly as regards the equipment.

### **The Respondents Case.**

The Respondent does not dispute the fact that this court on 25.7.13 delivered a ruling and issued the following orders:-

- a. **The injunction granted to the Plaintiff in this suit dated 16<sup>th</sup> April, 2013 is hereby sets aside.**
- b. **An order for stay of proceedings in this suit is granted pending the arbitration proceedings.**
- c. **Costs to the Defendant**
- d. **The application by the Plaintiff dated 15<sup>th</sup> April, 2013 is dismissed with costs.**

It is also not in dispute that the ruling was premised on sound principles of law applicable to the dispute and the same had not been appealed against in the Court of Appeal.

Further, subsequent to that ruling the Defendant deposited the separator with the Kenya Revenue Authority and undertook and completed clearance process for the release of the equipment.

The Respondent does not deny having instituted proceedings in High Court Civil Suit No.117 of 2013

against the Kenya Revenue Authority's Customs Services for the release of the Separator.

Thereafter a consent was entered between the Plaintiff and the Defendant in that subsequent suit but before it could be made.

an order of the court, the Plaintiff herein, sought to be enjoined as a 2<sup>nd</sup> Defendant in High Court Civil Suit No.117 of 2013. This application was dismissed by Kasango J. On 18.12.2013.

Subsequently, the Plaintiff filed a Constitutional Petition No.4 of 2014 seeking various declarations of violation of its Constitutional rights by virtue of the consent entered between the Defendant and the Kenya Revenue Authority in respect in the release of "the separator". This petition was later dismissed by Justice Edward Muriithi who refused to interfere with the consent letter dated 18.11.2013.

As a result of that decision the parties caused the consent letter dated 18.11.2013 to be adopted as an order of the court on 22.7.2014.

Subsequently orders were made to the O.C.S Makupa Police Station to ensure compliance with the release orders.

By an application dated 8.8.2014 the Plaintiff sought stay orders in the Court of Appeal vide Civil Application No.37 of 2014. The application for stay was dismissed on 27.11.2014. That during the pending of the ruling of the Court of Appeal in Civil Application No.37 of 2014 and the ruling by the High Court in Civil Case No.117 of 2014 the Applicant moved this court and obtained an injunction order on 21.11.2014.

It is the contention by the Defendant that this is an abuse of the Court process, in that it was made during the pendency of the High Court Civil Case No.117 of 2013 and the Court of Appeal Civil Application No.37 of 2014.

That the orders of stay were in conflict with the order of the Court of Appeal to the effect that ***"an order of stay relating to the separator may run counter to the provisions of the East African Community Customs Management Act."***

Further that the stay orders contradicted a funding already made by the High Court in Civil Suit No.117 of 2013 to the effect that Civicon did not have possession of the Separator and therefore it fails the test of asserting a lien over it.

### **The law**

The review orders sought are premised on the provisions of Order 45 rules 1 and 2 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. Order 45 Rule 1 provides:-

***"Any person considering himself aggrieved;***

- a. ***By a decree or order from which an Appeal is allowed, but from which no appeal has been preferred; or***
- b. ***By a decree or order from which no appeal is hereby allowed, and who form the discovery of new and important matter or evidence which after the exercise of the diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or an account of some mistake or error ....on the face of the record, or for any other sufficient reasons, deserves to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay."***

Section 80 of the Civil Procedure Act is basically in all fours with orders 45 rules 1 and 2 and provides:-

***“Any person who considers himself aggrieved –***

- a. ***By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred or***
- b. ***By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thereof as it thinks fit.”***

Mr. Ongoya Counsel for the Defendant submits that in an application for review like the one before the court, the formal order or decree of the court sought to be reviewed must be extracted and annexed to the application. He places reliance on the case of **Belgo Holdings Limited Vs. Robert Kotch Otachi & Ano. NRB High Court Civil Suit No.454 of 2014** which the court cited with approval the case of **Bernard Githii on behalf of Mutathini Farmers Co. Vs. Kiholo Farmers Co. Ltd HCCC No.32 of 1994** where it was held:-

***“There is no decree drawn up and attached to the application. It is not as clear as it ought to be what aggrieves the applicant. There has to be a decree or order in discovery of new and important matter or evidence which after the exercise of the diligence was not within the knowledge of the Applicant and could not be produced by him at the time the decree was passed or order made before an application may be made for a review of a judgment.”***

It is further submitted that failure to annex the decree or order is fatal to the application.

Counsel relies on the case of **Gulam Hussein Jivanji Vs. Jivanji & Another 1929 – 30 KLR 44.**

Where it was held:-

***“But in my opinion however, aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein unless the person is aggrieved at the formal decree or formal order based upon the judgment as a whole that person cannot appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable.”***

I respectively agree with counsel’s submissions that a formal order or decree of the judgment sought to be reviewed ought to be extracted and annexed to the application.

In the present application, there has been no compliance with that legal requirement. Both provisions of Order 45 Rules 1 and 2 and Section 80 of the Civil Procedure Act refers to any person who considers himself aggrieved by a decree or order.

The Applicant has not brought itself within these provisions and therefore the application for review cannot be granted in its present form. Is the application an abuse of court process? It is not in dispute as submitted by counsel for the Defendant that on the 25<sup>th</sup> day of July, 2013 this court delivered a ruling in which it held that it had no jurisdiction and stayed the proceedings pending arbitration proceedings.

Counsel for the Defendant concedes in his submissions that the ruling was premised on sound principles of law applicable to the dispute as presented before the court and it’s no wonder that the same was not appealed before the Court of Appeal.

It is further not denied that the Defendant thereafter constituted proceedings in HCCC No.117 of 2013 for the release of the Separator and later consent orders were entered but stalled after the Plaintiff filed an application to be enjoined as a 2<sup>nd</sup> Defendant which application was rejected and an appeal was filed in the Court of Appeal.

In its judgment dated 3<sup>rd</sup> July, 2015 at page 16 the judges of the Court of Appeal observed:-

**“the court found that it lacked jurisdiction to determine the dispute because it was the subject of arbitration proceedings.....**

**How then can the same court again in a suit giving rise to this appeal, assume jurisdiction and order for the forceful repatriation of the Separator to Rwanda and or determine the question of lien and even possession whether physical or legal? There is no doubt at all that the Appellant had established claim over the “Separator” which was in its possession pursuant to the contract with 1<sup>st</sup> Respondent or even pursuant to customs requirements under EMCA. The 1<sup>st</sup> Respondents decision to file suit and subsequently enter a consent with 3<sup>rd</sup> Respondent when assessed in light of this background may be said to have been an attempt to steal a match on the Appellant.”**

I totally associate myself with the observations of the Judges of the Court of Appeal on this matter

The application cannot be said to be an abuse of Court process. That abuse may lie elsewhere. However having not brought itself within the provisions of Order 45 Rule 1 and 2 and Section 80 of the Civil Procedure Act as argued Supra the application for review cannot stand and its hereby dismissed.

Costs follow the event but owing to the observations by the Court of Appeal and mine as regards the quest for release of the Separator whereas there are in existence orders that the court had no jurisdiction, its ordered that each party bear its own costs in the application.

Ruling delivered, dated and signed this 13<sup>th</sup> day of August, 2015 in the presence of Miss Nyamai Holding brief for Elisha Ongaya and Nick Bikati for the Defendant/Respondent

Mr. Nyachoti for the Applicant (Absent)

M. MUYA - JUDGE

13.8.2015

Each party to be furnished with copies of the ruling.

**M. MUYA**

**JUDGE**

**13.8.2015**