



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 8 OF 2010**

**TANZANIA NATIONAL ROADS AGENCY ..... PLAINTIFF**

**V E R S U S**

**KUNDAN SINGH CONSTRUCTION LTD ..... 1<sup>ST</sup> DEFENDANT**

**KENYA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Court by the Ruling delivered on 29<sup>th</sup> July 2010, by Justice F. Azangalala (as he then was) stayed the suit between the parties in case in **Milimani HCCC No. 164 of 2009**. The Court by that Ruling, essentially found that when the Plaintiff filed this suit it contravened Section 6 of the Civil Procedure Act Cap 21. Section 6 forbids the Court proceeding with another suit which-

**“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”**

It was on the basis of that Section that the Court by the above mentioned Ruling stayed the **Milimani HCCC No. 164 of 2009**.

2. The Plaintiff filed an appeal being in the Court of Appeal **Mombasa Civil Appeal No. 49 of 2011**. By that appeal Plaintiff sought amongst others determinations that the stay granted hereof on 29<sup>th</sup> July 2010 was in error. The Court of Appeal by its judgment of 14<sup>th</sup> October 2013 dismissed the appeal. On that dismissal Plaintiff filed before this Court under Certificate of Urgency a Notice of Motion dated 2<sup>nd</sup> November 2013. The Plaintiff sought by that application that the Court would certify as urgent the Plaintiff’s application dated 22<sup>nd</sup> March 2010 and would proceed to fix the same for hearing. That application dated 22<sup>nd</sup> March 2010 was for prayers on behalf of Plaintiff for Defendants to be restrained from discharging the securities created over properties and other assets registered in the 1<sup>st</sup> Defendant’s name.
3. The Plaintiff *exparte* obtained an order on 4<sup>th</sup> November 2013 whereby this Court certified the application dated 22<sup>nd</sup> March 2010 as urgent and proceeded to fix for hearing *interpartes* of that

application dated 22<sup>nd</sup> March 2010.

4. It is those orders that provoked the 2<sup>nd</sup> Defendant's Notice of Motion dated 11<sup>th</sup> February 2014, which is under consideration. By that application 2<sup>nd</sup> Defendant seeks to set aside exparte orders made by this Court at the behest of the Plaintiff on 4<sup>th</sup> and mistakenly stated as 8<sup>th</sup> November, 2013.
5. It is important to note that the proceedings of this case do not show that any order was issued to any party on 8<sup>th</sup> November 2013. The order as stated before issued on 4<sup>th</sup> November 2013 on Plaintiff's application was the one that certified Notice of Motion dated 22<sup>nd</sup> March 2010 as urgent and fixed that application for hearing inter partes.
6. The Defendant by the Notice of Motion under consideration also prayed for such further and appropriate orders that the Court deems fit.
7. The 2<sup>nd</sup> Defendant's application which is under consideration is based on the grounds that-
  1. **That the Plaintiff irregularly and/or uprocedurally obtained the order of 4<sup>th</sup> November 2013 setting down Plaintiff's application dated 22<sup>nd</sup> March 2010 for hearing when there is an order staying this suit pending the determination of Milimani HCCC NO. 164 of 2009.**
  2. **That by the order of Justice Azangalala of 2<sup>nd</sup> February 2011 to this suit and all subsequent proceedings were stayed pending the hearing and determination of Milimani HCCC No. 164 of 2009.**
8. The 2<sup>nd</sup> Defendant in its affidavit in support of that application, which affidavit was sworn by Mr. Philip Nyachoti, its learned Counsel, referred to the judgment of **Mbsa Court of Appeal Civil Appeal No. 49 of 2011**. 2<sup>nd</sup> Defendant in referring to that judgment deponed that the stay granted by Justice Azangalala continued to subsist since the appeal against Justice Azangalala's said decision was dismissed.
9. The main issue for determination is whether the stay of this case by Justice Azangalala subsisted after the Court of Appeal's judgment.
10. The Plaintiff filed the appeal in **Mombasa Civil Appeal No. 49 of 2011** to challenge the order of stay of this case by Justice Azangalala. The Court of Appeal by its Judgment dated 14<sup>th</sup> October 2013 dismissed the appeal. In my humble view that dismissal of the Plaintiff's appeal challenging the stay order means that stay remained in place.
11. As correctly argued by the Plaintiff the Court of Appeal by that Judgment in the appeal challenging the stay of Justice Azangalala of this suit did make various statements and it would be best if I reproduced those statements as follows-

**“We have anxiously pondered over the record of appeal, the rival submissions of the parties to this appeal as well as the law and having done so, we are satisfied that the appeal can be effectively disposed of on the narrow ground of the same having been overtaken by events. In other words, we need not consider the merits of the appeal at all.**

**Both parties have agreed that despite the order staying proceedings in the Mombasa case issued by Azangalala, J., the subject of this appeal, the Milimani case has run its course exhaustively.**

**According to the appellant, the Milimani case had progressed to the point where**

enforcement of the decree was anticipated. However, according to the 1<sup>st</sup> Respondent, an application for the dismissal of the said suit had been made, canvassed and ruling thereon was expected sometimes in October, 2013. Thus which-ever way one looks at it, progress has been made in the Milimani case towards its conclusion so that even if this Court was to allow or dismiss the appeal, such an outcome will have no impact or effect at all on the Milimani case. If anything there is a high risk of such eventuality turning into a legal absurdity. For instance, if we were to allow the appeal, effectively, we will be saying that the two cases should proceed to hearing simultaneously but separately. However, as we already know, the Milimani case has been heard and is pending either enforcement of the decree or a ruling on an application for its dismissal presumably for want of prosecution. So that at the end of the day, we would have issued an order in vain and court orders are never issued in vain.

On the other hand, if we were to dismiss the appeal, we would effectively have given a seal of approval of the learned Judge's order staying the proceedings in the Mombasa case pending the hearing and final determination of the Milimani case. Again such an order will be in vain as the Milimani case has been heard and is pending conclusion either way. In the premises there is hardly anything left in the proceedings to stay. We will be doing what one may say closing the stable when the horse has already bolted.

To avoid such an absurdity and since this appeal has to be determined either way, by either dismissing it or allowing it, and since the appeal for all intents and purposes has been overtaken by events, the best result that commends to us in this appeal is to have it dismissed. As the advocates involved have in a way or another actively participated in getting the two cases murky, each party shall bear its costs of this appeal. It is so ordered."

The Court of Appeal, as far as I can tell at the time of delivering the above judgment did not have the benefit of the Ruling delivered on 19<sup>th</sup> July 2013 by Lady Justice J. Kamau in Milimani HCCC NO. 164 of 2009. The said Judge was considering prayer for striking out the Milimani case. Lady Justice J. Kamau had this to say in her Ruling-

17. The Court has carefully considered the pleadings and the submissions filed by the parties and notes that there outstanding issues between the parties in HCCC No. 8 of 2010 Mombasa and CA Misc. Cause No. 248 of 2010. This Court does not know the fate of those matters and in particular the outcome of the 1<sup>st</sup> Defendant's application filed at Mombasa on 28<sup>th</sup> May 2010 which had sought to strike out of the plaint. The danger of different courts handling related matters is the danger of different decisions emanating therefrom thus creating conflicting decisions.
21. At this juncture, this court is only be interested in establishing whether the 1<sup>st</sup> Defendant has been able to prove that the plaint should be struck out for being otherwise an abuse of the court process. In its grounds on support of its application, the 1<sup>st</sup> Defendant conceded that the Arbitral Award dealt with most issues except the Performance Guarantee NO. GOKE86046077250C. While the court is aware of its obligations to dispose of matters expeditiously as mandated by Sections 1A and 1B of the Civil Procedure Act, it is also alive to the Plaintiff's rights for a fair hearing under Article 50 of the Constitution of Kenya, that of being given an opportunity to ventilate its case even if it is only one issue that is pending for determination by the Court.
22. The question as to whether that issue justifies the existence of the injunctive order currently in place is another matter altogether. The court notes that Apondi J had in his ruling directed the issues which were not canvassed by the Arbitral Tribunal in Stockholm, Sweden do proceed for hearing. This Court holds the same view provided that those issues were not subject to arbitral proceedings. However, the 1<sup>st</sup> Defendant is at liberty to move the court

**appropriately to canvass its argument that the injunctive orders should be discharged on the ground that the suit had been filed to secure interim measures pending reference of the matter to arbitration and that the same are now spent. This should be set out clearly to enable the court make a just determination of the same.**

**23. The Court finds that the grounds primarily set out in the 1<sup>st</sup> Defendant's application would not amount to sufficient grounds to abuse of the court process by the Plaintiff. In view of the fact that there appears to be outstanding issues between the Plaintiff and the 1<sup>st</sup> Defendant, this court finds itself reluctant to strike out the Plaint. Similarly, in the event the 1<sup>st</sup> Defendant holds the view that there are no issues pending for determination by the court and that the Final Award ought to be recognized and enforced, then it ought to move the court appropriately.**

**24. In the circumstances, this court finds that the 1<sup>st</sup> Defendant's Notice of Motion dated 22<sup>nd</sup> June 2012 and filed on 28<sup>th</sup> June 2012 as drawn is not merited and the same is hereby dismissed with costs to the Plaintiff."**

12. The Milimani case by virtue of that Ruling is still pending determination. Its pending cannot in my view be termed as procedural technicalities as submitted by the Plaintiff's learned Counsel Mr. Joseph Munyithya.

13. I concede to the Plaintiff's submissions that I cannot interpret the Court's judgment. I can only consider the Court of Appeal decision as pronounced by the Court of Appeal. The Court of Appeal faced with appeal against the order of Justice Azangalala, which order stayed this suit pending determination of the Milimani case, dismissed the appeal. In other words the Court of Appeal did not set aside the stay granted by Justice Azangalala in these proceedings.

14. On the other hand by the Ruling of 19<sup>th</sup> July 2013 of Justice J. Kamau, in the Milimani case, the said Judge stated that **"there appears to be outstanding issues between the Plaintiff (KUNDAN SINGH CONSTRUCTION LTD) and the 1<sup>st</sup> Defendant (THE CHIEF EXECUTIVE TANZANIA NATIONAL ROADS AGENCY)."** Lady Justice J. Kamau having made that finding declined to strike out the Milimani case.

15. In response to the issues identified herein above I do find that the Court of Appeal did not discharge the stay of these proceedings issued by Justice Azangalala on 2<sup>nd</sup> February 2011, and because the Milimani case has not been concluded the stay does remain in place.

16. Before ending this Ruling I need to comment on Mr. Munyithya's submissions that the correct party who ought to have moved this Court in the present application ought to have been the 1<sup>st</sup> Defendant, who is the Plaintiff in the Milimani case, and not the 2<sup>nd</sup> Defendant, because the 2<sup>nd</sup> Defendant is a Defendant in the Milimani case. In my view there is no basis for that argument. A party in a cause can move the Court whether or not they stand to benefit directly from the orders sought, so long as the orders sought relate to the matter they are parties to. I do therefore reject that submission.

17. In the end I grant the following orders-

**a) The exparte orders issued on 4<sup>th</sup> November 2013 relating to the Notice of Motion dated 2<sup>nd</sup> November 2013 are hereby vacated and set aside.**

**b) To that end the Notice of Motion dated 2<sup>nd</sup> November 2013 is hereby struck out with no orders as to costs. 2<sup>nd</sup> Defendant is awarded costs of attendance on 27<sup>th</sup> November, 2013.**

c) The 2<sup>nd</sup> Defendant is also granted costs of the Notice of Motion dated 11<sup>th</sup> February 2014.

DATED and DELIVERED at MOMBASA this 2<sup>ND</sup> day of APRIL, 2014.

MARY KASANGO

JUDGE