REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISCELLANEOUS CIVIL APPLICATION NO 639 OF 2009

IN THE MATTER OF AN ARBITRATION ACT, 1995

AND

IN THE MATTER OF AN ARBITRATION BETWEEN

ERAD SUPPLIERS & GENERAL CONTRACTS LIMITED.....CLAIMANT/RESPONDENT

VERSUS

NATIONAL CEREALS AND PRODUCE BOARD…….....… RESPONDENT/APPLICANT

RULING

1. The brief facts of this case are that a dispute between the Applicant and Respondent was referred to arbitration before Evans Thiga Gaturu, arbitrator. He published his Final Award on 7th July 2009. The Applicant filed an application to set aside the said Arbitral Award but the same was dismissed by Njagi J on 28th June 2011. Thereafter several applications were filed and determined. I will return to this issue later on in my ruling.
2. The Applicant's Notice of Motion application dated 2nd January 2013 is the one coming up for my determination. It has been brought under the provisions of Section 1A, 1B, 3A and 63, Order 42 Rule 6 of the Civil Procedure Rules; Rules 3(1) and 3 (2), High Court (Practice and Procedure Rules); Articles 48, 50 and 159 of the Constitution and all other enabling provisions of the law. It seeks the following orders:-

a. **THAT the application herein be certified urgent and be heard ex parte initially.**
b. **THAT (sic) application be admitted for hearing during the Court vacation.**
c. **THAT pending inter partes hearing there be stay of any and or further execution of the decree of 17th February 2012 pending the hearing and determination of the application filed at the Court of Appeal on 21st December 2012 and dated the same day seeking stay of execution.**
d. **THAT pending the hearing and determination of this application there be a stay of any or further execution of the decree of 17th February 2012 pending the hearing and determination of the application filed at the Court of Appeal on 21st December 2012 and**

dated the same day seeking stay of execution.

e. **THAT any other or further orders and or directions do issue as the court may deem fit and just in the interest of justice.**
f. **Costs be in the cause.**

3. The grounds on which the Applicant has relied on in support of its application are to be found in the body of the application. In broad and general terms, the grounds are that:-

a. That on 18th December 2012, the Court of Appeal dismissed the Applicant's application for stay of proceedings and execution of the decree of 17th February 2012 and recommended the filing of a proper application for stay of execution challenging the orders adopting the award in this court.
b. The interim and conservatory orders sought herein are to restrain execution pending the hearing and determination of an application in the Court of Appeal for stay of execution under Rule 5(2) (b), Court of Appeal Rules. It is contended that if this court does not grant stay orders and the execution proceeded for the full decretal amount, the application to the Court of Appeal will be rendered nugatory.
c. This court has jurisdiction to grant the orders sought herein.
d. The Applicant meets the conditions to be considered for an award of stay of execution pending hearing and decision of the Court of Appeal. Being a fully state owned corporation, it constitutes good security.
e. The Respondent is not in business and has no known assets or address.

3. Messrs Nyaoga, Lutta, Nyawara and Mwangi appeared for the Applicant, the lead counsel being Mr Nyaoga. The Respondent was represented by Messrs Ahmednasir and Saende with Senior Counsel Mr Ahmednasir as the lead counsel.
4. The Applicant's application is supported by the Affidavit of Patrick M. Karanja, the Assistant Board Secretary and currently the acting Board Secretary of the Respondent. The same was sworn on 2nd January 2013. Grace Sarapay Wakhungu, the Respondent's Managing Director swore the Replying Affidavit on 10th January 2013 in response thereto.
5. In addition to reiterating the grounds particularised in the said Notice of Motion application, the Applicant has stated, in its Supporting Affidavit, that pending the hearing by the Court of Appeal, there is no stay of execution of the decree issued on 17th February 2012 thus exposing it to execution of a sum of over Kshs 500 million which will have to be borne by the tax payers' money. The Applicant and all the Kenyan tax payers will suffer prejudice and irreparable loss and injure the Applicant's cash flow.
6. The Applicant has averred that following the discharge of orders for stay by the Court of Appeal on 18th December 2012, the Respondent entered the Applicant's premises on 19th December 2012 in an attempt to execute the said decree.
7. The Applicant has argued that it has meritorious grounds upon which to contest the award on appeal and has itemised the same in paragraph 18 (a)-(h) of its Supporting Affidavit. It is categorical that the gravity and nature of the case convinced the Court of Appeal to grant it leave to appeal which appeal will be rendered nugatory if further execution of this matter is not stayed.
8. It argues that the orders for a stay of execution by this court of realisation of the arbitral award are crucial to enable the Court of Appeal consider the fairness and propriety of the award.
9. On its part, the Respondent has submitted that this court does not have jurisdiction to grant the orders sought by the Applicant and in any event, it would be prejudiced if denied the fruits of its award and judgment which was given 3 ½ years ago. The Respondent was emphatic that litigation must come to an end.
10. I will proceed to make my determination adopting a two prong approach by considering:-

a. Whether the Applicant's application as drawn is *res judicata*; and
b. Whether this court has jurisdiction to grant the orders for stay of execution of the decree as sought by the Applicant.

11. The Respondent has deposed that the Notice of Motion herein is an abuse of court process as the

Applicant had previously filed several applications for stay of execution but the same had been dismissed. It has argued that the current application for stay is *res judicata.* On the other hand, the Applicant has submitted that this application is not an abuse of the court process as the several applications were distinct and separate.

12. To enable me determine whether the Applicant's application is *res judicata*, it is incumbent upon me to look at all the applications filed previously by the Applicant seeking a stay of execution pending the determination of an appeal against Njagi J's decision delivered on 28th June 2012.

13. On 6th July 2011, the Applicant filed a Notice of Motion application dated the same date under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following orders:-

a. **THAT the application be certified as urgent and be heard ex parte in the first instance.**
b. **THAT the Court be pleased to order a stay of further proceedings in this matter pending the hearing and determination of an intended appeal from the ruling and order of the Court delivered on 28th June 2011.**

14. The application was premised on the ground that the court dismissed the Applicant's application to set aside the arbitral award and feeling aggrieved by the said decision, it had preferred an appeal therefrom. It sought a stay of the court's order as execution of the same would not only lead to the loss of public funds but that it would severely affect the Applicant's statutory responsibilities and thereby make it suffer substantial loss. Further, it stated that Respondent was not only impecunious but had no place of abode and payment to it of the amount of the award would be a total loss to the Kenyan tax payer should the appeal succeed.

15. After considering the submissions by both parties, Odunga J found no merit in the Applicant's said application and dismissed it with costs to the Respondent herein as seen in his ruling of 8th February 2012.

16. In his said ruling, Odunga J considered the questions of :-

a. jurisdiction of the court in arbitral matters in granting of stay of proceedings;
b. applicability of Civil Procedure Act and Rules;
c. threat of substantial loss to the Applicant herein;
d. allegations of the Respondent's impecuniosity; and
e. the Applicant's ability to meet the conditions for provision of security.

17. On the issue of jurisdiction by the court in granting an order to stay the proceedings, in his said ruling, Odunga J observed as follows:-

"**Generally speaking the courts will be slow to interfere with the award in an arbitration having regard to the fact that parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision. The jurisdiction of the court is statutory and cannot be increased or cut down. In our case this position is reinforced by the provision of Section 10 of the Arbitration Act which states that except as provided in the Act, no court shall intervene in matters governed by the Act. Again the arbitral awards are insulated by Section 32A of the Arbitration Act wherein it is provided that except as otherwise agreed by the parties to it, no recourse is available against otherwise than in the manner provided by this Act. It follows that what must be borne in mind is that there is no appeal, in the ordinary sense, from the award of an arbitrator. The parties have chosen their tribunal and they must, generally speaking, accept the result whether it is right or wrong. The circumstances in which the court will intervene are exceptions to the general rule…."**

18. Turning to the question of applicability of the Civil Procedure Act and the Rules thereunder, in the same ruling, Odunga J had the following to say:-

"**A careful look at all the provisions cited in the present application clearly shows that the same is grounded under the provisions of the Civil Procedure Act and the rules thereunder. However, in light of provisions of Section 10 of the Arbitration Act, all the provisions**

including the Civil Procedure and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act. Accordingly, I do not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act and that includes entertaining the application the subject matter of this application seeking to stay the proceedings subsequent to the award. The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules, 1997 apply the Civil Procedure Rules where appropriate. It has been said and I agree, that Rule 11 of the Arbitration Rules, 1997 has not imported the Civil Procedure Rules, line, hook and sinker to regulate arbitrations under the Act. It s clear to the (sic) me that no application of the Civil Procedure Rules would be regarded as appropriate if its effects would be to deny an award finality and speedy enforcement both of which are the major objectives of arbitration. It follows therefore all the provisions invoked in this application do not apply or give jurisdiction to the court to intervene…"

19. In regard to the issue of the irreparable loss that the Applicant and the people of the Republic of Kenya would suffer, he said:-

"**It is not law that in every suit where a decision has been made against a body set up under a statute and funded by the treasury courts, should, as a matter of course, grant stay. Statutory bodies are, ordinarily, legal persons with capacity to sue and be sued. They enter into contracts just like any person and accordingly must be liable for their actions… I am not, therefore, expected to base my decision merely on the ground that one party is funded by public resources…."**

20. In addressing the question of the Respondent's impecuniosity, Odunga J stated thus:-

"**…I must mention that apart from mere allegations of impecuniosity on the part of the Respondent, I have not been provided with any material that I can make such a finding…"**

21. Subsequently, on 14th March 2012, the Applicant filed a Notice of Motion application dated the same date under Sections 1A, 1B, 3A and 63 of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following orders:-

a. **THAT the application be certified as urgent and be heard ex parte in the first instance.**
b. **THAT pending the hearing and determination of the application, there be a stay of execution of the decree issued in this matter.**

c. **THAT this court be pleased to set aside the decree issued on the 9th day of March 2012 and all subsequent proceedings in this matter.**
d. **THAT alternatively, there be a stay of execution of the decree issued on 9th March 2012 pending the hearing and determination of Civil Application NAI 48 of 2012 pending at the Court of Appeal.**

22. The grounds in support of the application were that the decree had been issued in defiance of the procedure provided by Order 21 of the Civil Procedure Rules, that the Respondent had applied for and obtained warrants without ascertainment of costs payable under the decree and that an application filed at the Court of Appeal which had been certified as urgent would be rendered nugatory should execution proceed. The gist of the Applicant's application was that the decree issued by the court was irregular.
23. On 16th March 2012, the Applicant filed a Certificate of Urgency supported by affidavits by its advocate and acting Board Secretary indicating that it had not been aware that the Respondent had extracted warrants of execution when it argued its application dated 14th March 2012 that

afternoon. Odunga J issued a temporary stay of execution pending the inter partes hearing on 23rd March 2012.

24. In his ruling dated 28th March 2012 dismissing the Applicant's said application, Odunga J said that:-

"**Where it is evident that a party has attempted to comply with the rules but have fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the process. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue."**

25. On the 4th April 2012, the Applicant filed another Notice of Motion application dated the same date requesting for the status quo to be granted to enable it take appropriate steps in the Court of Appeal. The same was granted.

26. Thereafter, the Honourable the Attorney General filed Objector proceedings dated 27th April 2012 on the same date in which he sought prayers for a stay of execution of the decree pending inter partes hearing of the same. Around that time, the Applicant's advocate applied to withdraw an affidavit that had allegedly been sworn by Mr Joseph Kinyua, Permanent Secretary Ministry of Finance on 27th April 2012 as the same was disowned by the Attorney General's office.

27. In dismissing the Notice of Motion application dated 4th April 2012 by the Honourable the Attorney General, on 18th May 2012, Musinga J who heard the application stayed the sale of 100,000 bags of maize and 100,000 bags of beans. Part of his ruling stated that:-

"**All the other proclaimed items and any other property that belongs to the Defendant are available for attachment by the Interested Party in execution of the decree save for the Strategic Grains Reserves and relief maize that may be in possession of the Defendant."**

28. Senior Counsel Ahmednasir has submitted that this is the fourth application for a stay of execution of the said decree by the Applicant.

29. From the court records, I see that the Applicant's present application for determination has been brought under the provisions of Section 1A, 1B, 3A and 63, Order 42 Rule 6 of the Civil Procedure Rules. Save for a change in wordings in the body of the applications, all the applications filed by the Applicant were seeking the relief of a stay of execution of the decree issued on 9th March 2012 pending the hearing and determination of an appeal at the Court of Appeal. The present application is on all fours with the Notice of Motion applications filed on 6th July 2012 and 14th March 2012.

30. I have carefully gone through the rulings delivered by Odunga J and Musinga J and find that they both dismissed the Applicant's requests for a stay of execution of the said decree. It does not matter whether the prayers sought by the Applicant were for a stay of proceedings or execution. The prayers were intended to achieve the same result.

31. I have also painstakingly combed through the court record and noted that in the Notice of Motion application dated 14th March 2012, the Applicant sought a stay of execution of the decree issued on 9th March 2012 while in the present application the Applicant has sought a stay of execution of the decree of 17th February 2012. Perusal of the decree shows that the said decree was given on 17th February 2012 and issued on 9th March 2012. This is the same document. I find that the use of different dates in the face of the different applications is intended to mislead the court about the distinct nature of the applications.

32. It would be a sad day for justice if the Applicant was allowed to hide behind different phrases and dates when all it wants is a stay of execution of the decree given on 17th February 2012 and issued by the court on 9th March 2012. Accordingly, I wholly concur with the submissions of Senior Counsel Ahmednasir that this application is *res judicata* and reject Mr Nyaoga's arguments that the different applications were separate and distinct. Relying on the provisions of the Constitution to make the present application look different cannot assist the Applicant. Accordingly, I find the

Applicant's Notice of Motion dated 2nd January 2013 is *res judicata.*

33. Having found that the present application is *res judicata*, I would have proceeded to dismiss the same without further considerations. However, in view of the long winded history of this matter, it is important for me to establish whether if I had found that this application was not *res judicata*, this court would have had jurisdiction to entertain an application for a stay of execution as has been sought by the Applicant. The determination of the issue of the jurisdiction by the courts where parties have opted for arbitration should not be left hanging. I say this because as Senior Counsel Mr Ahmednasir has submitted, litigation must come to an end at some point. This court must make a bold decision to bring the arbitral proceedings as envisaged in the Arbitration (Amendment) Act, 2009 to an end.

34. Arbitration is a consensual process. This means that once parties choose arbitration as their preferred mode of settlement of their dispute, the court can only intervene as provided by the law.

35. Section 10 of the Act clearly stipulates that:-

"**Except as provided in this Act, no court shall intervene in matters governed by this Act."**

36. I am in total agreement with the holding of the court in **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR** when it stated that:-

"**In light of the above, the Superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Act. This includes entertaining the application the subject matter of this appeal and all other applications purporting to stay the award or judgment/decree arising from the award."**

37. The Court of Appeal also took a similar view in **Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR** when it held that:-

"**Arbitration is one of the several dispute resolution methods that parties may choose to adopt outside the courts. Parties may either opt for it in the course of litigation or provide for it in contractual obligations in which event the Arbitration Act would apply and the courts take a back seat. "**

38. I can say without any fear of contradiction that this court's jurisdiction is ousted when one looks at the Applicant's prayers in the application herein. It seeks a temporary stay of execution to enable it appeal against the decision of Njagi J when he dismissed the Applicant's application to set aside the arbitral award.

39. The mechanism of setting aside the arbitral award is dealt with under Section 35(2)(a) of the Arbitration (Amendment) Act, 2009. A party making the application must furnish the court proof:-

i. **That a party to the arbitration agreement was under some incapacity; or**
ii. **The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**
iii. **The party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or otherwise unable to present his case; or**
iv. **The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or**
v. **The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or**
vi. **The making of the award was induced or affected by fraud, bribery, undue influence or corruption;**

40. Under Section 35 (2) (b), the arbitral award may also be set aside where the High Court finds

that:-

i. **The subject matter of the dispute is not capable of settlement by arbitration under the laws of Kenya; or**
ii. **The award is in conflict with the public policy of Kenya.**

41. Section 35(4) of the Act then provides that the High Court may set aside such an arbitral award for such period that it may determine to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such action as in the opinion of the arbitral tribunal would eliminate the grounds for setting aside the arbitral award.
42. In its Chamber Summons application dated 2nd October 2009, the Applicant sought to have the arbitral award set aside. After consideration of the matter, Njagi J did not find the Applicant to have provided proof of the grounds set down in Section 35 (2) (a) and (b) and therefore dismissed its application. He said:-

"**I find that the Applicant's allegations do not rise to the level where the court would be entitled to be(sic) interfere with the arbitral award. If this had been an appeal, matters would possibly have been different since the court would have gone into the merits of the evidence adduced before the arbitral tribunal which is not the case here."**

43. The judge's finding that the arbitral award could not be set aside was final. The Court proceeded to recognise and enforce the award upon being satisfied that there were no grounds under Section 37 of the Arbitration (Amendment) Act, 2009 upon which it could refuse to recognise the arbitral award.
44. It is clear from the Act that no further action was required to be done by the High Court essentially bringing the matter to a close. The arbitral award became final and binding upon the Applicant and the Respondent. My conviction on this issue is reinforced by Section 32A of the said Act which provides as follows:-

"**Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."**

45. This finality of the arbitral award is one of the hallmarks of arbitration comes. Its effect is to limit the applicability of the Civil Procedure Rules and intervention by the court in arbitral proceedings. In the circumstances, stay of execution of the decree issued by the court on 9th March 2012 under the Civil Procedure Rules could therefore not have arisen.
46. As Odunga J had rightly pointed out in his ruling of 8th February 2012, the Civil Procedure Rules are only applicable to arbitral proceedings as appropriate and certainly Order 42 of the Civil Procedure Rules is not of them.
47. I therefore wish to reiterate his views that this court does not have jurisdiction to entertain the application that has been filed by the Applicant herein. This is because the court can only intervene in arbitral proceedings as provided for under Sections 6, 7, 12 , 14, 15, 16A, 17, 18, 28, 32B,35, 36, 37, 38 and 39 of the Act.
48. The Notice of Appeal dated 1st July 2011 and filed on 4th July 2011 shows that the Applicant herein intends to appeal to the Court of Appeal against the whole decision of Njagi J for refusing to set aside the arbitral award. The Applicant was clear in its application that it wanted the Court of Appeal to look at the fairness and probity of the arbitral award.
49. Perusal of the Section 39(3)(b) of the Act reveals that an appeal to the Court of Appeal from the High Court will lie where:-

"**The Court of Appeal, being of the opinion that a point of law of general importance is involved in the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2)"** which are:-

a. Determine the question of law arising **in the course of the arbitration or out of the award (emphasis mine);**

b. Confirm, vary or set aside the tribunal award or remit the matter to the arbitral tribunal for re-consideration or where another tribunal has been appointed, to that tribunal for consideration.

50. The Applicant opted to apply for the setting aside and not file an appeal to the High Court for the determination of any question of law arising in the course of the arbitration or out of the arbitral award. I must add here that the Court of Appeal could only have determined a question of law that the High Court would have decided on. In my mind, a decision by Njagi J for not setting aside the arbitral award is not appealable as the same did not arise out of the course of the arbitration or out of the award.
51. Nowhere in the Act does it state that the appeal to the Court of Appeal would be on the decision of the High Court for having refused to set aside the arbitral award. If the drafters of the law had intended that a party would appeal against such refusal, nothing would have been easier than for the drafters to have said so.
52. The circumstances of this case clearly show that the Applicant's door for orders for a stay of the decree issued on 9th March 2012 in the superior court is shut and it must remain so if the courts are to reinforce the speedy nature of the arbitral process.
53. The Court of Appeal acknowledged this principle of finality in **Re Anne Mumbi Hinga** case when it said:-

"We are concerned that contrary to the broad principles of finality of arbitral awards as set out in the Arbitration Act, the superior court all the same entertained incompetent applications which have in turn resulted in 10 years delay in the enforcement of the award."

54. In this regard, Senior Counsel Mr Ahmednasir has successfully and ably demonstrated that this court does not have any jurisdiction to grant the orders sought by the Applicant and I so find.
55. The issue of execution of the Applicant's goods was determined by Musinga J. In his ruling of 18th May 2012, he stated that the objection proceedings succeeded to the extent of 100,000 bags of maize and 100,000 bags of beans and that all other property belonging to the Applicant was available for attachment. The said judge substantively heard the merits regarding the Applicant and the Kenyan tax payer suffering irreparable loss and I need not say more. The only observation I would want to make is that the Applicant did not provide me with any such proof. However, for the reasons that this court lacked jurisdiction, it would not have made any difference in my determination of its application.
56. On the ground of the Respondent's impecuniosity, I wholly concur with Odunga J's finding of 8th February 2012 that it was incumbent upon the Applicant to provide proof of the Respondent's financial status. The Applicant has not provided me with proof that the Respondent is impecunious and I have not attached any weight to the assertion as it remains a mere allegation at this stage.
57. I have considered the authorities that have been furnished by the Applicant and do not find the same to have been helpful to the Applicant's case. The cases of **Erinford Properties Limited vs Cheshire County Council [1974] 2 All ER** and **Madhupaper International Limited vs Kerr [1985]** are distinguishable from the facts of this case as the same did not involve arbitral proceedings. As has been seen above, the dynamics of arbitration are very distinct from litigation and the process of intervention by the court in the two (2) is even more distinct.
58. From my interrogation of this matter, consideration of all the documents before me and oral submissions by Senior Counsel Mr Ahmednasir and Mr Nyaoga, the following facts are evident:-

a. the provisions of Civil Procedure do not apply in arbitral proceedings;
b. the fact that the Applicant is a statutory body does not mean that it will be granted automatic stay because as was rightly pointed out by Odunga J in his ruling of 8th February 2012, it had capacity to sue and be sued;
c. the Applicant did not successfully demonstrate what loss it would suffer if execution of the decree issued on 9th March 2012 is executed;
d. the Applicant did not satisfy me that the Respondent is impecunious;
e. most importantly, this court does not have jurisdiction to entertain the application for stay of execution of the decree by the Applicant.

59. I have attempted to examine the history of the matter and the way the Applicant has conducted itself in this matter with a view to establishing the Respondent's arguments that the Applicant's application is an abuse of the court process.
60. To enable me determine whether there has been abuse of court process by the Applicant, I have deemed it appropriate to re-state the aforesaid issues to demonstrate that Odunga J had made the exact findings that the Applicant wanted me to make when it brought this application. It therefore appears to me that the Applicant has abused the court process in an effort to defeat the interests of justice.
61. The Applicant has been given adequate access to justice as provided for by Article 48 of the Constitution. It has had its day, in fact many days, in court as stipulated in Article 50 of the Constitution. Article 159 which the Applicant has cited in its application has called for justice to be done to all irrespective to status and that justice shall not be delayed. Unfortunately, Section 1A & 1B of the Civil Procedure Act cannot assist the Applicant for the reason that the inherent jurisdiction it asks the court to invoke can only be exercised within the confines of the law and of which this court has found it has no jurisdiction to exercise.
62. In conclusion, I want to state that Article 48 says that justice shall not be impeded and under, Article 159, that it shall not be delayed. It is time for the Respondent to have this chapter of stay of execution of the decree issued on 9th March 2012 in the superior court closed and for it to exercise the rights that have accrued and vested in it as was similarly found in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 22 others [2012] eKLR.** In that case, the Court of Appeal stated as follows:-

"**The judgment conferred absolute rights on the respondents. Those rights have now accrued and vested. The rights cannot be taken away in the absence of express provisions of the law."**

63. This court should not grant orders in futility or where they are not supported by the law. The several applications filed by the Applicant were unacceptable and the integrity of the court must be protected. The court must at all times respect the choice of dispute resolution mechanism that parties opt for and intervene accordingly only within what is permitted by the law.
64. I find that the Applicant has successfully demonstrated that the Applicant's Notice of Motion application dated 2nd January 2013 is not merited for the reason that this court does not have jurisdiction to determine the same. I am convinced that it is an abuse of the court process intended to defeat the ends of justice by ensuring that the Respondent never enjoys the fruits of its judgment. For the reason that this court's hands are tied for lack of jurisdiction in this matter, I hereby dismiss the Applicant's Notice of Motion application dated 2nd January 2013 with costs to the Respondent.
65. Orders accordingly.

J. KAMAU

JUDGE

DATED and **DELIVERED** at **NAIROBI** this 23rd January 2013