



**Aldermen Limited v Shah & 3 others (Civil Appeal E004 of 2021)  
[2022] KEELC 12588 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12588 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL APPEAL E004 OF 2021  
MD MWANGI, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**ALDERMEN LIMITED ..... APPELLANT**

**AND**

**ZAVERCHAND RAMJI SHAH ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**LATAL JAYANTILAL SHAH ..... 3<sup>RD</sup> RESPONDENT**

**BLOSSOM HILL ESTATE AGENTS CO. LTD ..... 4<sup>TH</sup> RESPONDENT**

*(In respect of the Appellant's application seeking stay of execution and or proceedings of the orders of the Chief CIVIL APPEAL NO E004 OF 2021 RULING 1 Magistrate's Court pending hearing and determination of an intended appeal to the Court of Appeal)*

**RULING**

**Background**

1. On April 27, 2022, this court delivered a judgment in respect of the appeal by the appellant herein, Alderman ltd, dismissing the appeal in its entirety with costs. The appellant being dissatisfied with the said judgment intends to appeal to the Court of Appeal. The appellant has indeed filed a notice of appeal dated April 28, 2022 under rule 75 of the [Court of Appeal Rules](#).
2. This intended appeal is a second appeal which is allowed under section 72 of the [Civil Procedure Act](#), cap 21 Laws of Kenya on any of the grounds stipulated thereunder, namely: -
  - a. the decision being contrary to law or to some usage having the force of law.
  - b. the decision having failed to determine some material issue of law or usage having the force of law;



- c. a substantial error or defect in procedure provided by the Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
3. It is not my duty to determine whether the proposed appeal fits into either of the 3 grounds. That will be determined at the Court of Appeal.
4. Pending the hearing and determination of the intended appeal, the appellant moved this court by way of a notice of motion application dated April 28, 2022, under the provisions of order 42 rule 6 of the *Civil Procedure Rules* and sections 3A & 63(e) of the *Civil Procedure Act*. The appellant prays that this court be pleased to stay further proceedings before the Chief Magistrate's Court, city court, Nairobi city court civil case No 16 of 2013 or stay of execution of the order of the Chief Magistrate's Court issued on February 3, 2021 pending the hearing and determination of the appellant's appeal against the judgment and order of this court given on April 27, 2022 by the Court of Appeal.
5. The application is premised on the grounds that if the order of stay of further proceedings and execution is not granted, the appellant stands to suffer substantial loss if not irreparable loss. The appellant pleads that he is in possession of the suit property LR 209/6/5 Nairobi which it has extensively developed since it purchased it in a public auction pursuant to a decree of the Nairobi city court Magistrate's Court in CMCC 16 of 2013. The appellant avers that it runs a business on the said premises and unless the order sought is granted, it risks being evicted.
6. The appellant states that it had in total paid a sum of Kshs 60,000,000/= over the suit property. At first, it alleges that it paid a sum of Kshs 30,000,000/- through Ideal Auctioneers and later a further similar sum of Kshs 30,000,000/- directly to the 1<sup>st</sup> respondent pursuant to a settlement agreement dated October 22, 2018. This agreement was supposedly entered into after the auction.
7. It is the appellant's case that the 1<sup>st</sup> respondent is an elderly man who lives in London with no known properties in Kenya. Should he have the title to the suit property registered in his name, he is likely to dispose of it before the intended appeal is heard and determined thereby rendering it a nullity.
8. The appellant argues that he filed the notice of appeal without inordinate delay and further that he has an arguable appeal that stands high chances of success. The appeal, according to the appellant, is likely to be rendered nugatory in the event stay is not granted and the appeal ultimately succeeds.
9. The application is further supported by the affidavit of Bharat Ramji Manji sworn on the April 28, 2022. The deponent reiterates all the averments in the application. In essence, what the deponent is saying is that in setting aside its judgment, the trial court in CMCC 16/2013 and this court by dismissing the appeal by the appellant in this matter, left the appellant's interests over the suit property exposed and at risk.
10. The deponent reiterates that the appellant has an arguable appeal with high chances of success. He has attached a draft memorandum of appeal marked 'BRM 2' where the appellant's grounds of appeal are enumerated.
11. The deponent pleads that if no stay is granted by this court pending the hearing and determination of the intended appeal, the respondents are likely to evict the appellant from the suit property; have the same transferred to a third party or dispose of the same before the appeal is heard and determined, in which event, the appellant will suffer irreparable loss and damage. Further that the 1<sup>st</sup> respondent is likely to invade the suit premises and evict the appellant as well as disrupt the commercial activities on the property.



## **Response By The Respondents.**

### **A. Response by the 1<sup>st</sup> respondent.**

12. The 1<sup>st</sup> respondent opposed the appellant's application by way of grounds of opposition dated May 9, 2022. The 1<sup>st</sup> respondent avers that the application by the appellant does not meet the threshold for grant of stay pending appeal; that it is incompetent, misadvised, bad in law, scandalous, frivolous and vexatious and is an abuse of the court process. The 1<sup>st</sup> respondent states that the application is fatally flawed and incurably defective. Finally, that the appellant has not demonstrated any prejudice it will suffer if stay is not granted.

### **B. Response By The 2<sup>nd</sup> Respondent.**

13. The 2<sup>nd</sup> respondent too opposed the appellant's application by way of grounds of opposition dated May 10, 2022. The 2<sup>nd</sup> respondent averred that the application has not met the threshold for grant of an order of stay pending appeal.
14. It is the 2<sup>nd</sup> respondent's position that the intended appeal does not raise any triable issues and that the same is frivolous, since the appellant has not averred how this court and the trial court misinterpreted the law.
15. The 2<sup>nd</sup> respondent further opines that the appellant has not offered any security for the due performance of the decree; neither has it established the substantial loss it is likely to suffer if the order of stay is not granted.
16. The 2<sup>nd</sup> respondent avers that there are no orders of eviction issued against the appellant hence no prejudice is likely to occur to the appellant.
17. The 2<sup>nd</sup> respondent alleges that the auction that was allegedly conducted on December 20, 2013 was unlawful and unprocedural as it did not abide by the conditions of sale attached to the 'notification of sale' of the said auction, the *Auctioneers Act*, 1996, the rules, 1997 and the *Civil Procedure Rules, 2010*.
18. The 2<sup>nd</sup> respondent further claim that the appellant has not proved that it was the one that paid the bid of Kshs 30,000,000/- after the auction. The 2<sup>nd</sup> respondent's position was that the bank receipts that were produced showed that the bid was paid for by 'Gami Properties Ltd' and not the appellant. This, according to the 2<sup>nd</sup> respondent is an issue that is in contention and has not been determined. The appellant cannot therefore rely on the allegation that it was an innocent purchaser for value.
19. The 2<sup>nd</sup> respondent finally insists that the appellant has not proved it was the one that paid the alleged aggregated amount of Kshs 60,000,000/-. Accordingly, the plea that it will suffer loss and prejudice is unfounded. The 2<sup>nd</sup> respondent argues that, granting the appellant the orders sought will be highly prejudicial to it as it will continue being denied justice.

### **C. Response By The 4<sup>th</sup> Respondent.**

20. The 4<sup>th</sup> respondent opposes the appellant's application too by way of grounds of opposition dated May 20, 2022. The 4<sup>th</sup> respondent asserts that the appellant's case is hopeless and baseless as the vesting order that had been issued in his favour was actually set aside by the Environment and Land Court in Nairobi on July 18, 2016.
21. Further, the 4<sup>th</sup> respondent avers that the appellant's case is hinged on the alleged possession of the suit property arising from the impugned and scandalous public auction which was set aside by the



trial court anyway. It is the 4<sup>th</sup> respondent's position that the appellant deliberately constructed on the suit premises with the intention to 'dupe' and mislead the court to earn its sympathy into giving them favourable treatment at the expense of the 4<sup>th</sup> respondent who has laid a claim of lawful proprietorship over the suit property.

### **Court's Directions**

22. The court's directions were that the appellant's application be canvassed by way of written submissions. The appellant filed its submissions dated June 13, 2022, whereas the 1<sup>st</sup> respondent's are dated June 14, 2022. The other respondents did not file any submissions. The court has had the opportunity to read the submissions and the authorities cited by the parties in support of their respective positions.

### **Issues For Determination.**

23. Having considered the appellant's application and the supporting affidavit thereof, as well as the grounds of opposition by the respondents and the submissions filed by the appellant and the 1<sup>st</sup> respondent, the issues for determination in this matter are: -

A. Whether this court has the jurisdiction to stay issue an order of execution of the ruling of the Nairobi city Chief Magistrate's Court or stay the proceedings therein after hearing and determining the appeal filed before it.

B. Dependent on the finding on (A) above, whether the appellant's application meets the legal threshold for the grant of an order of stay of execution or stay of proceedings pending appeal.

Analysis and determination

A. Whether this court has the jurisdiction to stay issue an order of execution of the ruling of the Nairobi city Chief Magistrate's Court or stay the proceedings therein after hearing and determining the appeal filed before it.

24. I wish to start by noting that the appellant in this case does not seek to stay the execution of the judgment of this court that was delivered on April 27, 2022 pending the hearing and determination of the intended appeal to the Court of Appeal, rather, the appellant seeks to stay the execution of the order of the Nairobi city Chief Magistrate's Court issued on February 3, 2021.

25. The appellant's application though, is brought under the provisions of order 42 rule 6 which provides as follows; -

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on an application being made; to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."



26. I need not overemphasize that the issue of jurisdiction is weighty and fundamental. In the now famous case of the *Owners of Motor Vessel Lilian S v Caltex Kenya Ltd*, (1989) eKLR the court held that: -
- “Jurisdiction is everything. without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
27. The Court of Appeal in the case of *Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR affirmed the issue above and stated that; -
- “It is settled that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the oxygen principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even article 159 of the *Constitution* to remedy the same.”
28. I have carefully read and re-read the provisions of order 42 rule 6 of the *Civil Procedure Rules*. From my reading, I have no doubt in my mind that this court has the jurisdiction to stay execution of its own decree or order appealed from, and or stay proceedings before it on an application by an aggrieved party where sufficient cause is shown. Indeed, the power of the court to stay execution of its decree or order pending appeal is one of the recognized exceptions to the doctrine of ‘*functus officio*’.
29. The Court of Appeal in the case of *Telkom Kenya Ltd v John Ochanda* (2014) eKLR while discussing the doctrine of *functus officio* held that; -
- “functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. 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 judgement has been entered and a decree thereon issued.”
30. The court pointed out that there are several proceedings that can (only) be taken after judgement and not before, notably: -Application for stay;Application to correct the decree;Application for accounts;Application for execution including garnishee applications;Application for review; andApplication under section 34 of the Act.
31. What the appellant in this matter is seeking however, is not a stay of this court’s judgement nor a stay of the proceedings before this court. (There are no further proceedings before this court in any event as the court has already delivered its judgement on the appeal that was before it.) The appellant seeks a stay of execution of the order of the Nairobi city Chief Magistrate’s Court issued on February 3, 2021 and or a stay of the proceedings before the said Magistrate’s Court.
32. My finding is that rule 6 of order 42 of the *Civil Procedure Rules* does not confer this court with the authority to grant the orders sought by the appellant. As the Court of Appeal noted in the case of *Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour Travel* (supra), where jurisdiction does not exist, parties cannot seek refuge either under the oxygen principle or the overriding objective. Even reliance on article 159 of the *constitution* cannot cure the same. The appellant in its application has sought refuge under section 3A of the *Civil Procedure Act*. It is of no use. It cannot remedy the lack of jurisdiction.



33. Accordingly, having formed the opinion that it lacks jurisdiction to grant the orders sought by the appellant, this court cannot make one more step. It must lay down its tools at this juncture.
34. Accordingly, I hereby strike out the appellant's notice of motion application dated April 27, 2022 with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2022.**

**M.D MWANGI**

**JUDGE**

In the Virtual Presence of: -

Mr. Masore Nyang'au for the Appellant

Ms. Sheunda h/b for Ms. Ann Were for the 1<sup>st</sup> Respondent

Mr. Gathara for the 4<sup>th</sup> Respondent

Court Assistant: Hilda

**M.D MWANGI**

**JUDGE**

