



**Bhatti Panel Beaters Limited v Dhiman & another (Civil Appeal  
584 of 2018) [2025] KEHC 2217 (KLR) (Civ) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 584 OF 2018**

**JN MULWA, J**

**FEBRUARY 20, 2025**

**BETWEEN**

**BHATTI PANEL BEATERS LIMITED ..... APPELLANT**

**AND**

**SURJIT SINGH DHIMAN ..... 1<sup>ST</sup> RESPONDENT**

**MUCHANGI NDUATI NGINGO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. For determination is the application dated 04.06.2024 filed by Bhatti Panel Beaters Limited (hereafter the Applicant) brought pursuant to Section 3A of the *Civil Procedure Act* (CPA) seeking inter alia that this Honorable Court be pleased to vacate and set aside the stay orders issued by Hon. A. Nyoike (SPM) on 30.05.2024; and costs of the motion be provided for. The motion is predicated on the grounds set out on its face thereof and amplified by the supporting affidavit sworn by the Denis Olonde, counsel on record for the Applicant.
2. The gist of the application is the judgment of this court dated 20.12.2019 (Kariuki J) which appeal was in respect of the trial court's judgment dated 13.11.2018 in CMCC No. 1352/2016 against the Respondents. The applicant deposes that since delivery of the said judgment, the Respondents have not appealed or challenged the same. He goes on to state that vide an application dated 27.05.2024, the 2<sup>nd</sup> Respondent sought a stay of execution of the decree which order was granted *ex parte* by the trial court on 30.5.2024, staying the execution when there is no pending appeal, to which the applicant reads mischief, unprecedented but also illegal and a nullity stating that that the lower Court has no jurisdiction to stay orders issued by a superior Court, that the said orders amount to judicial misconduct on the part of the Honorable Magistrate, and further that the lower Court became *functus officio* after it rendered its decision therefore it cannot usurp the powers of a superior Court.



3. The 2<sup>nd</sup> Respondent opposes the motion by way of a replying affidavit sworn on 14.06.2024. He begins by assailing the motion as being misconceived, ill-advised and an abuse of the Court process. He equally asserts that this Court became functus officio upon determination of the appeal therefore it ought not entertain the instant motion.
4. In addition the appellant contends that the lower Court is the executing Court as such the Applicant's motion is moot however confirms that the Respondents had preferred an appeal by way of a Notice of Appeal as against the decision of this Court. He surmises by stating that the 1<sup>st</sup> Respondent died in January of 2020 and the Applicant has since not instituted substitution proceedings prior to lodging the motion.
5. The parties filed written submissions that the court has considered alongside their respective affidavits.

### **Issues for determination**

1. Whether this Court ought to set aside orders issued by the trial court, Hon. A. Nyoike (SPM) on 30.5.2024.
2. Who ought to bear the costs of the application?
6. Before proceedings to address the substance of the motion, the Court proposes to dispose of the preliminary issues raised in the motion; the Applicant's purported failure to substitute the 1st deceased respondent and this Court being functus officio on the matter. On the former, the 2<sup>nd</sup> Respondent argues that the 1<sup>st</sup> Respondent died in January 2020 and therefore the failure to substitute the deceased defendant renders the application incompetent citing Order 24 of the CPR.' as the deceased was the sole or co- proponent/antagonist and in a cause of action that survives his/her death. That said, with regard to the instant proceedings Order 24 Rule 2 of the CPR which must be read alongside Order 24 Rule 9 of the CPR, provides that: -

Where there are more Appellants or Respondents than one, and any one of them dies, and where the cause of action survives or continues to the surviving Appellant or Appellants alone or against the surviving Respondent or Respondents alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving Appellant or Appellants, or against the surviving Respondent or Respondents.

7. The purport of Order 24 Rule 2 of the CPR was recently discussed by the Court of Appeal in *Boit v Ali & Another* [2021] KECA 270 KLR wherein the Court observed in brief that; -

“The last issue is the court's alleged error of proceeding with the trial on the death of the appellant's mother contrary to Order 24 Rule 2 of the Civil Procedure Rules. That provision requires the court, where there are more defendants than one and any one of them dies, and the cause of action survives, to make an entry to that effect on the record and to proceed with the suit. The record shows that the court was informed of the death of the appellant's mother, which is reflected on the record. There is no prescribed format in which that information should be recorded.”

8. This Court's understanding of Order 24 Rule 2 of the CPR is not without due regard to the provisions of Order 24 Rule 10 as read with Rule 9 of the CPR, the former of which provides that nothing in Rules 3 (procedure in case of death of one of several appellants or of sole appellant), Rule 4 (Procedure in case of death of one of several respondents or of sole respondent and Rule 7 (effect of abatement or dismissal) shall apply to proceedings in execution of a decree or order.



9. In the instant proceedings it is not disputed that the appeal in this court was determined and concluded and what the Applicant has sought to set aside by way of the present motion, is the stay of execution order issued by Hon. A. Nyoike (SPM) on 30.05.2024, being the trial court, and upon this court allowing the appeal with costs in the High court and the trial court. The above notwithstanding, from the record it can be discerned that in compliance with the provisions of Order 24 Rule 2 of the CPR, as at when this Court issued directions on disposal of the Applicant's motion, it was duly informed of the 1<sup>st</sup> Respondent's demise and the Applicant's intent to proceed with the matter solely as against the 2<sup>nd</sup> Respondent, as the judgment rendered on 20.12.2019 was against the Respondents jointly and or severally as against the Respondents. Therefore, considering the totality of the above, it is this Court's reasoned finding that the Applicant's assertion that without the substitution of the deceased Respondent renders the proceedings herein defective cannot be sustained.
10. On the whether the Court is functus officio on the matter, in *Odinga v Independent Electoral & Boundaries Commission & 3 others (Petition 5, 4 & 3 of 2013)* [2013] KESC 8 (KLR) (Ruling), the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:
- "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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."
11. The same Court also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that; -
- "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."
12. What the Court garners to be the 2<sup>nd</sup> Respondent argument is that this Court having rendered judgment on 20.12.2019, and there being no appeal against orders issued by Hon. A. Nyoike (SPM) on 30.05.2024, this Court is functus officio on the matter. As purposefully noted in *Jersey Evening Post Limited* (supra),
- "The doctrine does not..... prevent a judicial change of mind even when a decision has been communicated to the parties.....the court is functus, when its judgment or order has been perfected.....any challenge to its ruling on adjudication must be taken to a higher court if that right is available".



13. As earlier stated, the impugned orders of stay issued on 30.05.2024 manifestly relate to a decree of the trial Court. A perfunctory review of “Annexure DOO1”, the impugned stay of execution orders sought to be vacated or set aside before this Court are in respect to warrants issued by the said subordinate Court, upon the backdrop of the appellate Court’s decree rendered on 20.12.2019, followed by the dismissal of the appeal by Justice C. Kariuki J on 20.12.2019.
14. In the premises, which court ought to execute the decree arising from the judgment of this court appeal?
15. Section 29 of the CPA defines “court which passed decree” as: -
 

The expression “court which passed a decree”, or words to that effect, shall, in relation to the execution of decrees, except where the context otherwise requires, include—

  - a. where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance; and
  - b. Where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such a suit.
16. In the instant case the stay orders sought to be vacated and set aside appertain to a decree being executed by the subordinate Court. This is so because the appellate court dismissed the appeal with costs at the appellate court and at the trial court. A decree of the appellate Court having been issued, the Applicant was entitled to realize the fruits of the said decree by execution before the court that passed the decree that is the subordinate court. It is the court of the first instance that has the requisite jurisdiction to undertake execution proceedings in terms of Section 29 of the CPA captioned above.
17. Further to the foregoing, execution of a decree of a Court equally amounts to perfection of a decree, conspicuously issued by this Court while exercising its appellate jurisdiction. The totality of the foregoing is that the plea of functus officio, is likewise rejected. see The Supreme court decision of Raila Odinga v IEBC & Others 2013 (supra) and Jersey Evening Post Limited (supra) cited above.
18. In that aspect, it is this court’s finding that the court before which execution ought to be undertaken is the court that passed the decree, in this case the subordinate court. The execution proceedings are therefore properly before the said court.

**Whether this Court ought to set aside the orders issued by Hon. A. Nyoike (SPM)?**

19. Here, the Applicant’s motion invokes the provisions of Section 3A of the *Civil Procedure Act* (CPA), which reserves the inherent power of the Court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court”. This Court has repeatedly observed that the purport of the said provision was reasonably addressed by the Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR. That said, the gravamen of the Applicant’s argument is that the orders issued on 30.04.2024 ought to be vacated and set aside for reasons that the Honorable Magistrate exceeded her jurisdiction by staying the judgment of this Court and therefore the said action was unprecedented, illegal, a nullity and tantamount to judicial misconduct by the Magistrate. In retort the 2<sup>nd</sup> Respondent asserts that this is not the executing Court



whereas an appeal has been preferred against the decision of this Court rendered on 20.12.2019 as such by dint of Order 22 Rule 22(1) of the CPR the orders were appropriately issued by the subordinate Court.

20. Order 22 Rule 22(1) of the CPR provides that: -

The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

21. This Court understands of the above provision as read alongside Section 29 and 30 of the CPA would be that, as rightly argued by the 2<sup>nd</sup> Respondent, the subordinate Court is the executing Court given that the appellate decree was sent there for execution therefore it was well endowed with jurisdiction to entertain the same. However, it must be remembered that the decree being executed was as a result of appellate jurisdiction. Therefore, any order in relation to stay of execution pending an intended appeal or appeal could only be entertained before the High Court or Court of Appeal. While the above is the correct position, the court notes that there is no appeal or competent appeal filed or pending before the Court of Appeal. The Notice of Appeal having been filed in 2019, and the substantive appeal having been filed for close to five years, the said Notice of Appeal's life, which runs to 60 days, unless extended by a court order, has since expired. There is no appeal on record or pending upon which the trial court's orders of stay of execution could be anchored.

22. On that ground, the trial court's orders dated 30.5.2024 ought to be set aside. However, the following must be taken into account as a follow up of the order setting aside the impugned orders.

23. As earlier noted, the Applicant invoked this Court inherent jurisdiction by dint of Section 3A of the CPA. However, Article 165(6) of *the Constitution* provides for the High Court's supervisory jurisdiction over subordinate Courts and to make any order it considers appropriate to ensure the fair administration of justice. The purport of the above provision was addressed by Nyakundi, J. in *Kipchirchir v Eshikoni Auctioneers & 2 others (Miscellaneous Civil Application E097 of 2024) [2024] KEHC 9169 (KLR)*.

24. The right to be heard was emphasized by the Court of Appeal in *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR* wherein it was stated that: -

“The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law.

25. Additionally, the decree that was sought to be executed was close to five years old, judgment having been delivered on 20.9.2019. It was therefore incumbent upon the Decree Holder to take out Notice to show cause proceedings and serve upon the Judgment Debtors requiring him to appear in court to and show cause why the decree has not been satisfied. The said NTSC ought to have been served upon the Judgment Debtor. Upon perusal of the court proceedings no evidence has been placed before the court to demonstrate that the judgment Debtors had knowledge of the execution proceedings including the application under review as stated above.



26. Further, the DH has not shown to the court's satisfaction that the costs of the appeal and that of the trial court have been taxed and or agreed upon by both parties to be included in the warrants of attachment against the Respondents. Once again in the matter of costs, the applicant has been condemned unheard.
27. In the totality of the matter and the motion before the court, it would be a travesty of justice and fair hearing if the court proceeds to allow and or grant the prayers sought by the Applicant unconditionally in the face of the numerous instances and failures by the Respondents to comply with due process in respect of execution proceedings of the trial court's decree against the Applicant, Bhatti Panel Beaters Limited.
28. As much as the Applicant has put up a good case for setting aside of the trial court's stay orders of execution against the Respondents as the Judgment Debtors, the court will not allow the Applicant an open ended opportunity to execute the trial court's decree without following due process as provided under Order 22 of the CPR, which the court has expounded above at paragraphs 24 to 27 above. The Judgment debtors must be served with all court proceedings in respect of execution of the decree, Notices to Show cause (NTSC) must be taken out and be served upon the Judgment Debtors. They must be given an opportunity to be heard on the NTSC.
29. On the costs that form part of the decree, the judgment debtors ought to be served with the Applicants bill of costs and be afforded an opportunity to be heard on the taxation process thereto. Only after the full due process has been complied with by the Decree Holder, will the execution process be undertaken.
30. Consequently, the court is persuaded to allow the application dated 4.6.2024, with a further order that the applicant must comply with execution procedure as provided under Order 22 of the CPR before any other execution proceedings are taken out.
31. For the foregoing, each party shall bear its own costs of the application.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**JANET MULWA**

**JUDGE**

