Osmond & 2 others (Suing as administrator of the Estate of Keith Howard Osmond) v Banita Sisal Estates Limited (Civil Suit 77 of 2020) [2025] KEHC 2064 (KLR) (Civ) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2064 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 77 OF 2020

JN MULWA, J

FEBRUARY 13, 2025

BETWEEN

SUZANNE OS,OMD ..... 1ST APPLICANT

GERALD OSMOND ..... 2ND APPLICANT

PATRICIA HEATHER HAYES ..... 3RD APPLICANT

SUING AS ADMINISTRATOR OF THE ESTATE OF KEITH HOWARD OSMOND

AND

BANITA SISAL ESTATES LIMITED ..... RESPONDENT

RULING

1. Before this Court for determination is the motion dated 03.07.2024 filed by Suzzane Osmond, Gerald Osmond and Patricia Heathers Hayes (hereafter referred to as the Applicants) against Banita Sisal Estate Limited (hereafter called the Respondent) brought under Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 40 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules (CPR) seeking inter alia:

    1. Spent

    2. spent

    3. That this honorable Court be pleased to issue a mandatory injunction order that the Respondent's advocates M/s T. O K'Opere & Company Advocates be compelled to execute instructions for the investment of the sum of Kshs. 3,268,540.61 presently held under the

Account No. 2xxxxxxxx5 with Absa Bank Kenya Plc under the joint names of Coulson Harney LLP and M/s T. O K'Opere & Company Advocates, within thirty (30) days.

4. In the alternative to the above prayer, the Deputy Registrar of the High Court, Milimani Law Courts do execute the instructions in place of M/s T. O K'Opere & Company Advocates.

5. That the honorable Court be pleased to give further orders and directions as it may deem fit and just.

6. The costs of the application be in the cause.

2. The motion is premised on grounds stated in the supporting affidavit sworn by Suzzane Osmond on 3/7/2024. The gist of her deposition is that a ruling in respect of the Applicants motion seeking stay of execution pending appeal was delivered by this Court on 31/01/2024 allowing the same on condition that the Applicants would deposit the decretal sum of Kshs. 3,628,540.61 into an interest earning account in the joint names of the parties' advocates. The joint account was opened on 06/05/2024 at ABSA Bank Kenya Plc whereafter the Applicants deposited the decretal sum on 15/05/2024. She goes on to depose that the joint account being an interest earning account, the signatories thereto were required to agree on the duration of placing the funds into a one-year fixed deposit account at a particular interest rate.

3. It is the Applicants deposition that on 04/06/2024 their counsel sent to the Respondents Advocate a partially signed instruction letter for their execution, but which, despite follow ups with the Respondent's advocates through emails and telephone calls, they failed, refused and or neglected to execute the instruction letter thereby forcing the parties to sit in limbo regarding the interest to be earned on the decretal sum.

4. Additionally the Applicants aver that the Respondent has since applied for warrants of attachment and threatens execution despite the set-up of the joint interest earning account, which is security in respect of the pending appeal, further stating that it is in the interest of justice that the motion is allowed as the Applicants are ready to abide by any terms and conditions as this Court may seem just to impose.

5. The Respondent opposes the motion by what appears to be grounds of opposition dated 03/07/2024. It takes issue with the motion on grounds that the order of this Court granting stay of execution on 31.01.2024 was conditional on the Applicants depositing the sum of Kshs. 3,268,540.61 within 45 days into an interest earning account in the joint names of the parties advocates; that 45 days lapsed on 16/03/2024 and consequently the orders of stay equally lapsed without any deposit of the amount in a joint interest earning account; that notwithstanding the condition set by the Court lapsing on 16/03/2024, the Applicants advocate requested for an extension of 14 days to 30/03/2024, which the Respondent agreed subject to opening of the account and depositing of the entire decretal sum on or before 30/03/2024; that by the Applicants own admission, no account was opened within the 45 days or within the agreed extension period.

6. The Applicant states that the account was eventually opened on 06/05/2024 and the subsequently deposited the decretal sum on 15/05/2024 which was beyond the stipulated and agreed duration; that as a consequence the actions of depositing the sums outside the agreed duration was invalid, void and of no effect, more so that no leave was obtained from court for extension of time. The respondent therefore deposes that the application is frivolous, incompetent, vexatious and inept and has urged that the motion be to be struck out, with costs and execution allowed to proceed.

7. The Applicant's motion was disposed of by way of oral submissions of which this Court has duly considered alongside the rival affidavits.

Issues for determination

1. Whether the Court ought to order M/s T. O K'Opere & Company Advocates to execute the instructions for investment of the decretal sum currently held at ABSA Bank Kenya Plc.
2. In the alternative whether the Court ought to order the Deputy Registrar of this Court execute the instructions in place of M/s T. O K'Opere & Company Advocates
3. Who ought to bear the costs of the motion?

8. The Court proposes to address issues (1) and (2) contemporaneously. However, before proceeding to consider the same, it would be apt to state that the Respondent having opted to oppose the Applicants motion by way of grounds of opposition, it confined itself to issues of law and legal arguments only, as observed by the Court of Appeal in Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR).

> Whether the Court ought to order M/s T. O K'Opere & Company Advocates to execute the instructions for investment of the decretal sum currently held at ABSA Bank Kenya PLC?

9. The applicant invokes provisions of Section 3A of the 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" as observed by the Court of Appeal in the case of Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR and as a consequence requires no restatement.

10. Conjunctively with the above provisions, the Applicants have equally relied on Order 40 Rule 2 of the CPR which provides that: -

    1. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
    2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

11. The principles governing the granting of an interlocutory injunction have since long been settled. In Nguruman Limited v Jan Bonde Nielsen, Herman Philipus Steyn Also Known As Hermannus Phillipus Steyn & Hedda Steyn [2014] KECA 606 (KLR) the Court of Appeal restated the principles enunciated in the locus classicus decision in Giella v Cassman Brown & Co. Ltd [1973] EA 358 at page 360 where it was stated that: -

> " First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. (E. A Industries vs Trufoods [1972] EA 420)."

12. In addition, the Court emphasized that the three (3) conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicants. That is to say, that the Applicants who establishes a prima facie case must further establish irreparable injury, being injury for which damages recoverable could not be an adequate remedy and that where the Court is in doubt as to the adequacy of damages in compensating such injury, the Court will consider the balance of convenience. Finally, where no prima facie case is established, the Court need not look into the question of irreparable loss or balance of convenience.

13. As to the grant of a mandatory injunction as sought herein by the Applicants, the Court of Appeal in the case of Kenya Breweries Limited & another v Washington O. Okeyo [2002] KECA 284 (KLR) stated thus: -

> " The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:
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> "A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application".
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> Further in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:- "A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

14. With the above in mind, a cursory perusal of the record before this Court reveals the following: - That he instant suit was dismissed with costs vide a judgment rendered on 19/10/2021. Thereafter, the Respondent lodged a Party and Party Bill of Costs that was taxed on 23/03/2023 to the tune of Kshs. 3,628,540.61/ -.

15. Meanwhile, the Applicants on their part, preferred an appeal against the judgment of this Court rendered on 19/10/2021 vide Court of Appeal Civil Appeal No. E035 of 2022, upon which the Applicants lodged a motion seeking stay of execution of the taxed costs pending determination of the lodged appeal. It is on the premise of the latter motion that this Court rendered a ruling on 31/01/2024, allowing the Applicants motion on condition that they within 45 days of the ruling deposit Kshs. 3,268,540.61/- into an interest earning account in the joint names of the parties.

16. By the rival submissions, the Applicants contend that delay in complying with this Court's ruling rendered on 31/01/2024 was a design of the Respondent by delaying to provide and or execute the requisite account opening documents. It was further submitted that on accord of the Respondent's counsel having eventually executed the account opening documents, and the escrow account being active, and the appeal being live and the funds having since been deposited as security therefore this Court ought to do substantive justice by allowing the motion by keeping in mind that the principles of equity consider done, that of which is done.

17. In reply, the Respondent argues that the stay order was conditional and that no application for extension of time to comply with the Court's orders was filed, and as such delay cannot be attributed to the Respondent's counsel. The respondent further argues that delay before execution and after execution of the account opening forms has not been explained and therefore any action by the Applicants in respect of opening of the joint account out of time is void. It was further posited that the funds were deposited in the Applicant's advocates name and not a joint account as deposed. The Respondent urged this Court to dismiss the motion.

18. From the foregoing, the core issue for this Court's consideration on accord of the rival arguments is whether there was delay in opening of the account and at whose behest was the delay may be attributed to.

    By this Court's ruling on 31/01/2024, it was obligatory of the Applicants to open the joint interest account on or before 16/03/2024. A review of the materials attached to the Applicants affidavit "Annexure SO-1" it would appear that the first interaction and or communication between advocates on opening of a joint interest account was on 21/02/2024; that on 23/02/2024 the Applicants counsel forwarded the account opening forms and requested for documentation to be utilized towards opening of the escrow account. There appears to have been no further communication between the parties up until sometime in April 2024.

19. Whereas a further perfunctory review of the trail of emails thereto, it seems that counsel for the Respondent was non-responsive or uncooperative to the email dated 23/02/2024, towards opening of the joint interest account. In any event, it was obligatory of the Applicants to open the account on or before 16/03/2024 and the Respondent to be cooperative towards the said endeavor, of which was not done. Patently, the Respondent failed to offer any alternative facts by way of affidavit evidence but opted to file grounds of opposition.

20. Thus, to address whether an injunctive relief is warranted in the matter, as to the nature of a prima facie case, the same was reasonably addressed in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125.

21. It is undisputed that there is an active appeal before the Court of Appeal – Civil Appeal No. E035 of 2022 – a fact acknowledged by the parties meanwhile the Respondent has initiated execution proceedings in respect of the taxed costs "Annexure SO-1". It is equally not disputed that the decree being executed is a money decree. The Applicants have not demonstrated to this Court, notwithstanding the Respondent's role on delay, that if execution were to proceed it would create a state of affairs that would prejudice them, to wit, an award of damages would be insufficient and or if Applicants appeal were to succeed, they would not be in a position to recoup the paid-out funds from the Respondent.

22. Consequently, this Court reasonable believes that no prima facie case has been established by the Respondent's and as held by the Court of Appeal in Nguruman Ltd Case, supra, where no prima facie case is established, the Court need not inquire into the consideration of irreparable damage or balance of convenience.

23. The foregoing notwithstanding, it is equally not lost on the Court the role the Applicant played in the delay in the opening of the escrow account. No explanation has been offered for the actions the Applicant took between 23/02/2024 and 16/03/2024 to salvage the situation. If there was a realization that the opening of the account was being frustrated by the Respondent, the instant motion or an application for extension of time ought to have been presented to court before the lapse of the compliance period and not in July 2024, after the orders had lapsed.

24. The Applicants are equally guilty of inaction despite the Respondent's contribution thereof. That said, given non-compliance with this Court's conditional orders on stay it can reasonably be stated that the Respondent cannot equally proceed with execution, with clean hands.

    Nevertheless, as deposed by the Applicants, as at 15.05.2024, monies to be applied as security pending appeal had been set aside in an account, though as rightly argued by the Respondent, not a joint interest account, but an account in the name of the Applicant's advocates "Annexure SO-1". There is equally an active appeal that is pending determination and as earlier noted both parties hereto are guilty towards delay in opening of the escrow account as directed by this Court on 31/01/2024.

25. In the circumstances, for the ends of justice, by way of preserving the pending appeal before the Court of Appeal and securing the Respondent's interests, the Court is persuaded that this is a deserving situation for the invocation of aspects of Section 3A of the CPA which provision reserves "the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".

26. The upshot is that the court is persuaded that the motion dated 03/07/2024, in the interest of substantive justice and in light of the events leading hereto, be allowed and an order be and is hereby issued by way of an order of mandatory injunction directed at M/S T. O K'Opere & Company Advocates to execute instructions for the investment of the sum of Kshs. 3,268,540.61 presently held under the Account No. 2xxxxxxxx5 with Absa Bank Kenya Plc under the joint names of Coulson Harney LLP and M/s T. O K'Opere & Company Advocates, within fourteen (14) days.

27. The court further orders that should the above orders at (23) above not been complied with within the 14 days timeline, the Deputy Registrar of the court is directed to execute the instructions in place of M/S T.O.K'Opere & company Advocates to facilitate opening of the joint account, subject of this motion as stated thereon.

Who ought to bear the costs of the motion?

28. For reasons earlier canvassed in this ruling, the Court directs and orders that each party bears its own costs of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED NAIROBI THIS 13TH DAY OF FEBRUARY 2025.

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JANET MULWA.

JUDGE