



Mitsumi Computer Garage Ltd v Freight in Time Ltd; Tandu Alarms Systems Limited & 3 others (Third party) (Civil Case E367 of 2016) [2025] KEHC 12905 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E367 OF 2016
F GIKONYO, J
SEPTEMBER 18, 2025**

BETWEEN

MITSUMI COMPUTER GARAGE LTD PLAINTIFF

AND

FREIGHT IN TIME LTD DEFENDANT

AND

TANDU ALARMS SYSTEMS LIMITED THIRD PARTY

SECUREX AGENCIES (K) LIMITED THIRD PARTY

EVEREADY SECURITY GUARDS COMPANY LTD THIRD PARTY

GA INSURANCE LIMITED THIRD PARTY

RULING

1. There are five applications before the court. Three are filed by the defendant; the motions on notice dated 30th November 2023, 30th July 2024 and 22nd November 2024. Two by the plaintiff: Motions dated 26th November 2024 and 11th December 2024.

Defendant's application dated 30th November 2023

2. The defendant filed this application seeking that the Managing Director of the plaintiff, be held in contempt of court due to his wilful disobedience of the orders of 17th February 2023. Further, that this Court be pleased to issue orders staying the further execution of the Decree and the Bill of costs until the Court of Appeal deals with the application in Nairobi Court of Appeal Civil Application No. E457 of 2022.



3. The application is supported by an affidavit sworn on 30th November 2023 by Vinesh Shah and written submissions dated 26th February 2025.

Defendant's application dated 30th July 2024

4. The defendant seeks extension of the interim orders issued on 3rd December 2023 and orders restraining the respondent and/or agents from attaching, auctioning, selling, transferring and/or in any other way interfering with the defendant's properties that have been listed in the proclamation notice dated 29th November 2023.
5. The application is based on the grounds set out in its body, the supporting affidavit sworn by Vinesh Shah on 30th July 2024 and written submissions dated 26th February 2025.
6. The plaintiff opposed the application through a replying affidavit sworn on 21st August 2024, by its legal manager, Consolata Kiura.

Defendant's application dated 22nd November 2024

7. The defendant filed this application, seeking that pursuant to the court order issued on 20th August 2024 and on account of the parties' failure to agree on the auctioneer's costs/ charges this court be pleased to determine the costs payable to the auctioneer.
8. The defendant also seeks that upon the hearing and determination of this application, the court be pleased to issue an order directing the respondents to return all the applicant's proclaimed goods and items unconditionally.
9. The application is premised on the grounds outlined in its body, the annexed affidavit sworn by Vinesh Shah on 22nd November 2024 and written submissions dated 29th November 2024.
10. The application is opposed by the plaintiff through a replying affidavit sworn by Wamae Ndegwa, Advocate, on 26th November 2024.

Consolidated opposing submissions

11. In response to the defendant's applications, the plaintiff filed consolidated opposing written submissions dated 10th March 2025. It urged the court to dismiss the defendant's motions with costs, to decline any further extensions of interim orders that have long lapsed and to hold the defendant accountable for its abuse of court process.

Plaintiff's application dated 26th November 2024

12. The plaintiff filed this application seeking that the orders of 9th August 2024 and 7th October 2024 staying execution of the judgment and all other consequential orders and proceedings in relation to the judgment be set aside.
13. The plaintiff also sought that, in the alternative, the defendant provide such security for performance of the judgment and decree of 18th March 2021 pending the hearing and determination of its case against Third Parties.
14. The application is based on the grounds outlined in the supporting affidavit sworn by Consolata Kiura on 26th November 2024.



15. The defendant opposed the application through a replying affidavit sworn by Elijah Kiva, on 26th February 2025 written submissions dated 26th February 2025.

Plaintiff's application dated 11th December 2024

16. Through this application, the plaintiff sought an order to arrest the delivery of the ruling scheduled for 19th December 2024 in respect of the defendant's motion of 22nd November 2024 seeking release of its proclaimed goods, pending the hearing and determination of the motions of 30th November 2023 and 30th July 2024 and 26th November 2024. It also sought that the said applications be placed before the incoming judicial officer or any other current judicial officer.
17. The application is based on the grounds set out in the body of the application, the supporting affidavit sworn by Consolata Kiura on 11th December 2024 and written submissions.
18. In response, the defendant filed a replying affidavit sworn by its general manager, Elijah Kiva, on 26th February 2025 and written submissions.

Analysis and Determination

19. I have carefully considered the entirety of the pleadings, the affidavits, the evidence and submissions. I will consider the submissions in my analysis.
20. The key issues for determination are: -
 1. Whether the defendant has made a case for the plaintiff's managing director to be held in contempt of court;
 2. Whether the defendant has met the threshold for stay of execution/injunction pending appeal;
 3. Whether the plaintiff has made a case for setting aside the interim orders of stay of 9th August 2024 and 7th October 2024;
 4. Whether the defendant is deserving of an order directing the plaintiff to return all its proclaimed goods and items unconditionally; and
 5. Auctioneer's costs.

Plaintiff's motion of 11th December 2024

21. The plaintiff sought an order to arrest the delivery of the ruling scheduled for 19th December 2024 in respect of the defendant's motion of 22nd November 2024 seeking release of its proclaimed goods, pending the hearing and determination of the motions of 30th November 2023, and 30th July 2024 and 26th November 2024.
22. The record shows that on 22nd November 2024, Mabeya J. directed parties to file and exchange submissions to the motion of 22nd November 2024. The ruling date was scheduled for 6th December 2024. The court issued further orders that all the motions pending be responded to within 14 days.
23. To my mind, the court intended to deliver a ruling on all the pending motions. However, the court did not deliver the ruling on 19th December 2024.
24. Subsequently, the matter was mentioned on 13th February 2025, whereupon this court stated that earlier directions remain in situ.



25. Therefore, the plaintiff's motion of 11th December 2024 is overtaken by events.

Third-party proceedings

26. Prayer 4 of the motion dated 30th November 2023 and Prayers 5, 8 and 10 of the defendant's motion of 30th July 2024 relate to directions on third-party proceedings.

27. The defendant submitted that it should be granted the opportunity to have the issue against the third parties decided as soon as possible so that the plaintiff does not enforce the judgment of 18th March 2021 against it before the third-party issue is determined on merit.

28. The plaintiff submitted that the prayers in the defendant's motions have been overtaken by events.

29. On 17th October 2024, Hon. Mabeya J. set the hearing of third-party proceeding for 5th March 2025. Hearing took place on 5th March 2025 and was adjourned to 3rd November 2025.

30. Therefore, the court finds that the said prayers have been overtaken by events.

Stay of execution of the ruling of 2nd December 2022

31. On 18th March 2021, judgment was entered in favour of the plaintiff. The court noted at para. 6 of the judgment that the defendant failed to take directions on the hearing of its claim against the third parties. That at the hearing on 22nd January 2021, the defendant failed to attend, although it was aware of the hearing date and the hearing therefore proceeded ex parte.

32. The defendant filed the motion of 13th April 2021 seeking the setting aside of the proceedings of 22nd February 2021 and the judgment dated 18th March 2021 in favour of the plaintiff.

33. Through the ruling of 10th January 2022, the court observed that:-

“22. As regards prejudice, the proceedings of 22/1/2021 were regular. The judgment of 18/3/2021 was regular. The defendant would not suffer any prejudice as it can still pursue its claim against third parties as ordered on 19/12/2019. To the contrary, were those proceedings set aside, there would be a waste of judicial time and the plaintiff would suffer prejudice as it would be made to once again re-litigate its case which is already concluded.”

34. The defendant filed another motion of 18th January 2022 seeking directions on third party proceedings and that the judgment be stayed pending the determination of the third party proceedings. Through the ruling of 2nd December 2022, the court quoted the above excerpt from the ruling of 10th January 2022, observing that:-

“15. Based on the directions of Kasango J. aforesaid and the said ruling of 10/1/2022, I believe that the issue of setting aside and/ or staying the execution of the judgment is not open to the defendant. It has already been determined.”

35. Aggrieved, the defendant filed Nairobi Court of Appeal Civil Application Number E457 of 2022, and the duty judge declined to certify its application dated 9th December 2022 as urgent.



36. On 13th December 2022, the defendant filed the motion of 9th December 2022 before this court, seeking:-
- “2. That pending the hearing and determination of this application this Honourable Court be pleased to stay the ruling of 2nd day of December 2022.
 3. That pending hearing and determination of Nairobi Court of Appeal Civil Application Number E457 of 2022 this Honourable Court be pleased to stay the ruling of the Honourable Justice Alfred Mabeya delivered on the 2nd day of December.”
37. On 16th February 2023, the court noted that despite clear directions of 13th December 2023, on the filing of submissions, the plaintiff failed to comply. The court observed that it was entitled to consider the application undefended.
38. On 17th February 2023, the court heard the motion of 9th December 2022 and reiterated its earlier finding that the plaintiff had failed to comply and struck out its replying affidavit filed on 16th February 2023.
39. The court then granted prayer 2 of the motion as prayed and declined prayer 3.
40. This is the scope of the said ruling.

Defendant’s motion of 30th November 2023

41. The defendant filed the motion of 30th November 2023, before this court, seeking:-
- a. That the plaintiff’s managing director, Mr. Manish Shah, be held in contempt of court due to his wilful disobedience of the orders issued on the 17th February 2023.
 - b. A stay of execution of the decree pending the hearing and determination of Nairobi Court of Appeal Civil Application Number E457 of 2022.

Contempt of court

42. The first issue here is whether the defendant has made a case for the plaintiff’s managing director to be held in contempt of the court orders of 17th February 2023.
43. In my view, the proper question or inquiry is whether there were subsisting orders of stay of execution during proclamation between 24th November 2023 and 23rd July 2024.
44. The defendant attached a copy of the proclamation notice dated 29th November 2023 based on the warrant of attachment dated 24th November 2023.
45. The plaintiff submitted that at the time the proclamation was carried out, no stay orders were in force. That the defendant’s claim is contradictory to the defendant’s prior statements on oath admitting that there were no stay orders in place at the time of execution. That the contradiction is sufficient to discredit the contempt allegations.
46. Conversely, the defendant argued that para. 9 of the affidavit in support of the plaintiff’s application of 11th December 2024 is misleading. It asserted that there are a number of orders of stay of execution of the judgment of 18th March 2021, admitted in para. 14 of the said affidavit.



47. What is apparent from para. 38 and 39 above is that on 17th February 2023, the court granted an interim stay of execution pending the hearing of the application dated 30th November 2023.
48. However, the application was undefended, and the court proceeded to make its determination of the application. It declined to grant a stay pending hearing and determination of Nairobi Court of Appeal Civil Application Number E457 of 2022.
49. Therefore, to my mind, there were no subsisting orders of stay during the proclamation of 29th November 2023.
50. “To make a case for contempt the applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant.” Contempt in Modern New Zealand
51. This, therefore, leads to the conclusion that the prayer seeking an order to hold the plaintiff’s managing director in contempt of court due to his wilful disobedience of the orders issued on the 17th February 2023 is without legal basis.
52. Furthermore, the prayer seeking an extension of the interim orders based on the application has been overtaken by events, given that the interim orders had lapsed. Therefore, the defendant’s motions dated 30th July 2024 stands to be dismissed for want of merit.

Stay pending appeal

53. The second issue concerns the prayer for a stay of execution pending the appeal. The plaintiff faulted the defendant for filing numerous applications seeking similar orders of stay of execution. It contended that the issue of stay pending appeal has already been considered by this court and is res judicata.
54. Indeed, as earlier noted at paras 38 and 39 above, on 17th February 2023, the court considered the motion of 9th December 2022 through which the defendant sought a stay of execution pending its appeal vide prayer 3. The court granted prayer 2 on interim stay and declined prayer 3.
55. Therefore, the prayers seeking stay of execution pending appeal and/ or injunction pending appeal in the motion of 30th November 2023 are res judicata. Its proper code name is abuse of process.
56. The court having pronounced itself on the issue is now functus officio.

Directions of 3rd December 2023

57. Hon. Mabeya J. directed:-
- “ 1. That the application be served and responded to within 21 days for directions on 7/2/2024.
 2. That within 30 days thereafter, the parties do file and exchange submissions on 15 day basis beginning with the applicant.
 3. That, in the meantime, there shall be a stay of execution in terms of prayer 2 of the Motion until then.”
58. Prayer 2 of the motion was to the effect:-
- “ That pending the hearing and determination of this Application, this Honourable Court be pleased to issue orders restraining the Respondent by themselves their employees and/ or



agents from attaching, auctioning, selling, transferring or in any other manner interfering with the Applicant's properties that have been listed in the proclamation notice.”

59. On 7th February 2024, Mr. Okatch indicated that the parties needed time to negotiate, and the court set a mention for 27th February 2022 to record a settlement. It also extended the interim orders until then.
60. On 27th February 2024, the court did not sit. On 23rd July 2024, the court noted that the matter seemed to be bungled up and directed the parties to seek proper procedural directions.
61. The interim orders of stay issued on 3rd December 2023 lapsed on 27th February 2024. The defendant did not move the court to extend the interim orders of stay until 30th July 2024 when it filed its application of the same date seeking reinstatement of the interim orders of stay of execution of 3rd December 2023.
62. During the mention of the matter on 9th August 2024, the defendant's counsel brought up the motion of 30th July 2024.
63. The court directed in part that:-
 - “(e) In the meantime....I order a stay of further execution until 7/10/2024 when the pending applications shall be heard”
64. On 7th October 2024, the court extended the interim orders till 5th March 2025. On 5th March 2025, this court directed that the earlier orders remain in force until further orders.

Plaintiff's application dated 26th November 2024

65. The plaintiff filed this application seeking that the orders of 9th August 2024 and 7th October 2024 staying execution of the judgment and all other consequential orders and proceedings in relation to the judgment be set aside.
66. The plaintiff also sought that, in the alternative, the defendant provide such security for performance of the judgment and decree of 18th March 2021 pending the hearing and determination of its case against Third Parties.
67. The defendant urged the court to dismiss the plaintiff's application of 26th November 2024 with costs, claiming that it is an afterthought tailored to blur its application of 22nd November 2024.
68. The issue emanating from this application is whether the orders of 9th August 2024 and 7th October 2024 staying execution of the judgment and all other consequential orders and proceedings in relation to the judgment ought to be set aside
69. The court has pronounced itself on the issue of stay of execution or injunction pending appeal, and found that the issue of stay pending appeal is res judicata.
70. The defendant has not demonstrated that the interim orders should be extended. Therefore, the interim orders have lapsed.
71. The plaintiff's application dated 26th November 2024 is overtaken by events.

Auctioneer's costs

72. The defendant highlighted that its advocates have on several occasions attempted to hold virtual meetings with the applicant's advocates and Moran Auctioneers on account of reaching a settlement



as regards Auctioneers costs and charges but the same never materialized. That this is what prompted its application dated 22nd November 2024.

73. The plaintiff submitted that the auctioneers were never served or granted an opportunity to respond to the said application. That no affidavit of service was filed in proof.
74. The defendant disputed the alleged failure to serve indicating that the said application was served on both the plaintiff and the auctioneers on 26th November 2024.

Defendant's application dated 22nd November 2024

75. The defendant filed this application, seeking that pursuant to the court order issued on 20th August 2024 and on account of the parties' failure to agree on the auctioneer's costs/ charges this court be pleased to determine the costs payable to the auctioneer.
76. The defendant also seeks that upon the hearing and determination of this application, the court be pleased to issue an order directing the respondents to return all the applicant's proclaimed goods and items unconditionally.
77. The court has found that no stay orders were subsisting during the proclamation of the goods. The defendant has not applied to set aside the warrants of attachment of sale.
78. Thus, there is no basis for the release of the proclaimed goods.

Auctioneer's costs

79. On 9th August 2024, the court directed that the parties agree on the auctioneer's costs/ charges within 14 days, failure to which the court shall rule who is to bear the same.
80. Accordingly, having failed to agree on the costs, I find that the defendant shall bear the auctioneer's costs to be taxed upon filing of a bill of costs.

Abuse of the court process

81. The court earlier noted that the parties had been perpetuating the confusion of the matter, leading to "turning the proceedings to be a mockery of justice".
82. Abuse of the court process is the improper use of the judicial process in litigation. It can comprise of instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action. It can also comprise the instituting of different actions between the same parties simultaneously in different courts even though on different grounds. *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] KEHC 6100 (KLR)
83. It is my considered view that the defendant's filing of numerous applications seeking similar orders of stay fits the above description. This is a party who set out to temporize this case for as long as it wishes-something a court of law should never encourage.
84. Therefore, the defendant ought to bear the costs of the applications. They set out to abuse the court process.

Disposal

85. In conclusion, the court finds that:-



1. The plaintiff's motions of 26th November 2024 and 11th December 2024 are overtaken by events. No orders as to costs.
2. The defendant's motions of 30th November 2023 and 30th July 2024, 22nd November 2024 are dismissed for want of merit with costs to the plaintiff.
3. The auctioneer to file and serve its bill of costs within 14 days from the date of this ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025 THROUGH TEAMS ONLINE APPLICATION.

.....

F. GIKONYO M

JUDGE

In the presence of: -

Wamae for plaintiff

Ms. Murage for Wachira for defendant

Lando for 1st 3rd party

CA- Kinyua

