



Isaac's Investments Company Limited v First Community Bank Limited (Civil Suit 536 of 2020) [2024] KEHC 2478 (KLR) (Commercial & Admiralty) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 2478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL SUIT 536 OF 2020
MN MWANGI, J
JANUARY 19, 2024**

BETWEEN

ISAA'S INVESTMENTS COMPANY LIMITED PLAINTIFF

AND

FIRST COMMUNITY BANK LIMITED DEFENDANT

RULING

1. The applicant filed a Notice of Motion application dated 30th March, 2023 brought under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 10 Rule 11 of the Civil Procedure Rules and all other enabling provisions of the law. The applicant seeks the following orders -
 - i. Spent;
 - ii. That the orders made on the 8th February, 2022 be set aside, vacated and/or be declared as having lapsed;
 - iii. That this Honourable Court be pleased to lift and/or uphold the orders issued by Hon Lady Justice Abigail Mshila on 14th December, 2022 and Hon. Deputy Chief Kadhi Sukyan Omar be duly appointed as the Arbitrator in the dispute herein;
 - iv. That this Honourable Court be pleased to dismiss the defendant/respondent's application dated 31st January, 2022;
 - v. That this Honourable Court be pleased to issue any further orders and/or directions as it may deem fit in the interests of dispensing justice in this suit; and
 - vi. That the costs of this application be borne by the respondent.



2. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 30th March, 2023 by Ali M. Isaac, the applicant's Director. In opposition thereto, the respondent filed a replying affidavit sworn on 12th June, 2023 by Claris Ogombo, the respondent's Legal Manager.
3. The application was canvassed by way of written submissions. The applicant and respondent filed written submissions dated 20th June, 2023 and 12th July, 2023, respectively.
4. In summary, the grounds are that upon dismissal of the respondent's application for stay before the Court of Appeal, the orders made on 8th February, 2022 by Mshila J., to stay arbitration proceedings pending the hearing and determination of Civil Appeal No. E386 of 2021 at the Court of Appeal have been overtaken by events.
5. In furtherance of the depositions made by the applicant, Ms Arum, learned Counsel for the applicant stated that the Court of Appeal in its ruling delivered on 17th March, 2023 in Misc. Civil Application E386 of 2021, dismissed the respondent's application for stay pending appeal under Rule 5(2)(b) of the Court of Appeal Rules for lack of merit. She pointed out that the rationale of the said decision was that the execution of the orders issued on 22nd July, 2021 shall not at all render the respondent's Civil Appeal No. E757 of 2021 nugatory since the said appeal is not an appeal from the orders issued on 22nd July, 2021 but on a ruling dated 13th October, 2021 that dismissed the application seeking review of the ruling of 22nd July, 2021. She argued that for this reason, the order of 8th February, 2022 was in conflict with the Court of Appeal ruling.
6. She submitted that the Court became functus officio vide the orders issued on 22nd July, 2021 and the orders issued on 14th December, 2022. Ms Arum contended that this Court has no jurisdiction to re-open and hear afresh the respondent's application dated 10th December, 2020 seeking to have the dispute being referred to arbitration and that this Court cannot therefore interfere with the orders issued on 22nd July, 2021. She stated that no appeal has been filed so far against the rulings dated 22nd July, 2021 and 14th December, 2022, therefore the two rulings and orders issued therein remain unchallenged and in force. For the submission that this Court is functus officio on the foregoing issues, Counsel relied on the decisions in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & others v IEBC & others* [2013] eKLR and Jersey Evening Post Limited v Al Thani [2002] JLR 542.
7. Ms Arum relied on the case of *Wringles Company (East Africa) v Attorney General & 3 others* [2013] eKLR, to support the submission that Courts cannot rewrite contracts for the parties where they had agreed to resolve disputes through arbitration. The applicant also submitted that there is no legal basis for the extension of the stay orders of 8th February, 2022, as the matters and issues raised in the respondent's replying affidavit are res judicata and cannot be adjudicated by this Court. That they are the same issues raised by the respondent before the Court in the application dated 10th December, 2020 which was heard on merits and a final determination made on 22nd July, 2021.
8. For these reasons, the applicant urged this Court, to vacate the orders dated 8th February, 2022 and allow the arbitration proceedings to continue as ordered by the Court on 22nd July, 2021.
9. On its part, the respondent's case is that the applicant consented to the sale of 15 apartment units in HCCC 316 of 2016 and a consent was recorded on 19th February, 2020. That the sale was subject to the condition that if the applicant paid 50% of the debt to the respondent, the sale would be suspended. The respondent averred that the applicant did not settle the amount and the former disposed of the 15 units by public auction on 17th September, 2020, pursuant to the Court's ruling of 22nd July, 2021.



10. Ms Githongo, learned Counsel for the respondent contended that any reference to arbitration can only relate to the 5 apartments that were not sold since the purchaser of the 15 units is protected under Section 99(3) of the *Land Act*, and the only remedy available is damages. She submitted that the applicant's equity of redemption was extinguished upon the fall of the hammer in a public auction. To support her arguments, she relied on the decisions in *Captain Patrick Kanyagia & another v Damaris Wangechi & 2 others* [1995] eKLR and *Mbuthia v Njimba Credit Finance Corporation & another* Civil Appeal No. 111 of 1986.
11. The respondent's Counsel asserted that this suit is not res judicata as the specific issue regarding the subject matter before the Court has not been finally adjudicated. She stated that this Court retains the authority to determine the subject matter of arbitration. Additionally, that this Court is not functus officio and can exercise its inherent jurisdiction to recognize that its previous orders resulted in the sale of 15 units and to therefore determine the scope of arbitration. Ms Githongo urged this Court to exercise its inherent jurisdiction under Section 3A of the *Civil Procedure Act* to make such orders as are necessary to achieve the ends of justice.
12. She contended that this application is an abuse of the process of the Court in that it seeks to refer the dispute regarding the 20 apartment units to arbitration. She submitted that the referral of the dispute to arbitration on a matter that has already been determined by this Court is an abuse of the process of the Court. Counsel relied on the case of *Civicon Limited v. Kenya Revenue Authority & another* [2014] eKLR, where the Court held that it is an abuse of the Court process for a litigant to seek to obtain a different decision from the one rendered from in other proceedings over the same matter. She placed reliance in *The Matter of the Estate of George M'mboroki Meru* HCSC No. 357 of 2004 and *Rev. Madara Evans Okanga Dondo v Housing Finance Company of Kenya Nakuru* HCCC No. 262 of 2005 on the inherent power of the Court to prevent abuse of the due process of the Court. She also relied on the decision made in *R v Chief Magistrates Court, Director of Public Prosecutions & 2 others Ex Parte Pravin Galot* [2020] eKLR on the rules for interpretation of Court orders.

Analysis And Determination

13. I have considered the application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the respondent and the written submissions filed in support of the rival positions advanced by the parties. The issues that arise for determination are –
 - i. Whether the issues raised by the respondent are res judicata; and
 - ii. Whether the interim stay orders made by Hon. Lady Justice Abigail Mshila, to stay arbitration proceedings pending the hearing and determination of Civil Appeal No. E386 of 2021 at the Court of Appeal have been overtaken by events.
14. On the first issue, I have looked at the ruling of 22nd July, 2021 by Hon. G. Ngenye J., (as she then was), in respect to the applicant's earlier application dated 10th December, 2020 seeking referral of the matter to arbitration. I note that the issues raised by the respondent in this application regarding 15 apartments, the effect of the consent order on the suit and on the referral of the suit to arbitration were already addressed by the Court in the previous ruling. The Court pronounced itself at paragraphs 41 to 43 of the ruling of 22nd July, 2021 as follows-
 41. In my considered view, I find that the doctrine of res judicata does not apply in the instant suit as Commercial Civil Suit No. 316 of 2018 – Isaac's Investments Company Limited v First Community Bank Limited & Regent Auctioneers was withdrawn. This was done vide a Notice of Withdrawal & Discontinuance of Suit dated 17th November, 2020 by counsel for



the Plaintiff. What this implies is that, that previous suit was not determined on merits. That is to say that the issues pending for determination herein were never canvassed to conclusion; simply stated, no conclusive order or judgment was made.

42. There is also no contestation that in the suit, the Applicant filed a Notice of Motion which was compromised by a consent of the parties of the 16th May, 2019 and one of the terms was that the Applicant avails 15 apartments on the security property for mutual valuation. This means that parties did not consent on sale of the 15 apartments as alluded by the Respondent. That being the case, it is trite that the Applicant did not sanction the sale of the apartments. Furthermore, a consent is an agreement between parties which court cannot interfere with. It is therefore improper for the Respondent to impute terms that were never agreed upon in the consent. Consequently, this limb of dispute remains unresolved as it was not addressed in the consent.
 43. As such upon withdrawal of the previous suit, the Applicant herein was at liberty to file a fresh suit relating to the same parties and on the same subject matter without offending the res judicata principle. That is the scenario obtaining herein, hence the res judicata principle has not been offended."
15. In *Mohamed Dado Hatu v Dhadho Gaddae Godhana & 2 others* [2017] eKLR, the Court captured the meaning and purport of the doctrine of res judicata as follows-
- “The law is thus clear on the principle of res judicata. Parties cannot litigate in instalments and cannot give their cases a cosmetic uplift by having new parties reopening issues that have already been heard and determined by courts of competent jurisdiction. ... The doctrine aims at bringing litigation to an end and affords parties closure and respite from the specter of being vexed by issues and suits which have already been determined by a competent court”.
16. From the excerpt of the ruling of 22nd July, 2021, it is clear that the issues raised by the respondent herein are res judicata and the law does not allow parties to give their cases a makeover by reopening issues that the Court of competent jurisdiction has already heard and determined.
17. In regard to the issue of the interim orders for stay, the respondent preferred an appeal against the Court’s Order of 13th October, 2021, being Civil Appeal No. E757 of 2021 filed on 18th October, 2021. The respondent also filed a Notice of Motion dated 31st January, 2022, seeking stay of execution of the orders issued by Hon. Justice A. Mshila, vide a ruling delivered on 14th December, 2021, appointing Hon. Sukyan Omar - the Deputy Chief Kadhi, as the Arbitrator, pending the hearing and determination of Civil Application No. E386 of 2021 (UR SS 2021) (being an Application for stay pending the hearing and determination of the substantive appeal being Civil Appeal Number E757 of 2021 filed on 18th October, 2021).
18. From the proceedings, on 8th February, 2022, Hon. Mshila J., granted stay of execution of the orders of 14th December, 2021 up to 16th February, 2022. On 16th February, 2022, the Court granted orders in terms of prayer No. 2 of the Notice of Motion dated 31st January, 2022 up to 4th April, 2022. Prayer No. 2 of the Motion was crafted as follows-
- “That pending the hearing and determination of this application, this Honourable court be pleased to order a stay of execution of the ruling and orders issued by Honourable Justice



A. Mshila vide a ruling delivered on 14th December 2021, appointing Hon. Sukyan Omar- the Deputy Chief Kadhi - as the Arbitrator.”

19. The Court extended the interim orders for stay indefinitely on 4th April, 2022. The application is still pending determination. Therefore, the interim orders are still subsisting. In my considered view however, the application has been overtaken by events following the ruling by the Court of Appeal on 17th March, 2023, in Civil Application No. E386 of 2021 (UR SS 2021). The following is an excerpt of decision by the Court of Appeal and reasoning in that ruling-

(16) On the issue of arguability, it is evident that the Bank has not filed any notice of appeal against the Ruling delivered on 22nd July 2021, instead the Bank has filed a notice of appeal against the Ruling delivered on 13th October 2021 that dismissed the application seeking to review the Ruling of 22nd July 2021. The main issue in regard to that appeal is whether the learned Judge erred in exercising her discretion in dismissing the application for review. However, the application for stay of the Ruling of 22nd July 2021 cannot be anchored on the appeal against the order dismissing the application for review of the Ruling of 22nd July 2021. If the Bank was aggrieved by the Ruling and orders made on 22nd July 2021, it ought to have filed an appeal against that order.

(17) The effect of the Ruling of 22nd July 2021 is that the dispute between the Bank and the respondent is now subject of arbitration proceedings, and the court can only intervene in accordance with the *Arbitration Act*. The orders issued by the High Court on 22nd July 2021 were interim preservatory orders issued in accordance with Rule 6 of the *Arbitration Act*. The Court explained in part, the rationale upon which the orders were issued as follows:

“...On account that the Respondent has already sold the greater chunk of the Applicant’s property speaks volumes that the Bank may have substantively recovered its debt. The noble thing to do, as the anchor of justice, is for the court to preserve the remaining property pending resolution of the dispute by a Tribunal. Furthermore, the dispute revolves around the amounts owed to the Respondent and/or whether the Applicant has overpaid. If the court does not preserve the suit property, it implies that the Defendant will sell the remaining units at the risk of recovering more than is entitled to it.”

(18) We do not see how the execution of the orders referring the dispute to arbitration, or the interim orders during the pendency of the arbitration proceedings, restraining the Bank from selling or transferring the disputed properties, can lead to the Bank’s intended appeal against the order of dismissal for review being rendered nugatory. The Bank has raised the issue of third party claims, but no such third party has been enjoined in the proceedings, nor was anything produced to demonstrate the interest of the alleged third parties.

(19) In addition, the order that the Bank intends to appeal against, is an order of dismissal of the application for review of the order of 22nd July 2021. In *George Ole Sangui v. Kedong Ranch Limited* [2015] eKLR this Court dealing with a similar application stated:

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the



reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

20. Needless to state, an order staying execution of the order of dismissal that was made on 13th October 2021 will not have the effect of staying the orders that were issued on 12th July 2021, the execution of which is already in progress through arbitration proceedings. In the circumstances before us, the Bank has not met the threshold for granting orders of stay of execution under Rule 5(2) (b) of the Court of Appeal Rules. Without complying with the principles in this Rule, the Bank cannot seek refuge under section 3A and 3B of the Appellate Jurisdiction Act, that requires the Court to facilitate the just, fair, expeditious, proportionate and accessible resolution of disputes.
21. Accordingly, the Bank’s notice of motion dated 10th November 2021 is dismissed with costs.”
20. Accordingly, from my reading of the above excerpts, there is no reason for the subsistence of the interim orders for stay given by Mshila J., on 16th February, 2022. I find that respondent’s application dated 31st January, 2022 for stay of execution of the order of 14th December 2021 appointing Hon. Sukyan Omar-the Deputy Chief Kadhi - as the Arbitrator in the dispute between the parties herein has been overtaken by events and rendered moot.
21. The upshot is that the application dated 30th March, 2023 is merited and it is hereby allowed in the following terms –
 - i. The interim orders of stay issued by Hon. Mshila J. on 8th February, 2022 and extended on 16th February 2022 and extended further on 4th April, 2022 are hereby vacated. In essence, that gives effect to the ruling made by Hon. G. Ngenye J., (as she then was), on 22nd July, 2021; and
 - ii. Costs are awarded to the plaintiff/applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Murage for the plaintiff/applicant

Mrs. Mwendwa h/b for Mrs Kiiru for the defendant/respondent

Ms B. Wokabi – Court Assistant.

