



Republic v County Government of Mombasa & another; Kooba Kenya Limited (Exparte Applicant) (Judicial Review Application E031 of 2023) [2024] KEHC 7188 (KLR) (14 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E031 OF 2023**

OA SEWE, J

JUNE 14, 2024

**IN THE MATTER OF AN APPLICATION TO APPLY FOR
ORDERS OF JUDICIAL REVIEW ORDER OF MANDAMUS**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF SECTIONS 8 & 9 OF THE
LAW REFORM ACT, CAP 26, LAWS OF KENYA**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

**IN THE MATTER OF THE DECISION AND/OR JUDGMENT IN
CONSTITUTIONAL & HUMAN RIGHTS DIVISION PETITION NO. 12 OF 2017**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR
FINANCE 2ND RESPONDENT**

AND

KOوبا KENYA LIMITED EXPARTE APPLICANT



RULING

1. The Notice of Motion dated 27th May 2024 is expressed to have been filed under articles 1(4), 47, 48, 50, 176 of the *Constitution of Kenya*, Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Section 16 of the *Government Proceedings Act*, Order 40 Rule 7, Order 51 Rule 15 of the *Civil Procedure Rules*, 2010. It was filed by the respondents for orders that:
 - (a) Spent
 - (b) The Court be pleased to arrest and/or stay the judgment on the application dated 17th October 2023 scheduled to be delivered on 30th May 2024 pending the hearing and determination of the application.
 - (c) The Court be pleased to arrest and/or stay the judgment scheduled to be delivered on 30th May 2024 and the proceedings in respect of the application dated 17th October 2023.
 - (d) The Court be pleased to review its directions/orders issued on 12th March 2024 and have the execution proceedings kept in abeyance until the determination of the application lodged before the Court of Appeal in Civil Application No. E012 of 2024: *Mombasa County Government v Kooba Kenya Limited*.
 - (e) The Court be pleased to issue further orders as shall meet the ends of justice.
 - (f) Costs of the application be provided for.
2. The application was supported by the affidavit sworn by the respondent's County Attorney, Mr. Jimmy Waliula, and is premised on the grounds that the ex parte applicant's application dated 17th October was scheduled for delivery of judgment on 30th May 2024; and that if the judgment was rendered as scheduled, the respondents' appeal would be curtailed. The respondents accused the applicant of stealing a march so as to render the application lodged before the Court of Appeal and their right of appeal nugatory.
3. In support of their averments, the respondents annexed copies of the Notice of Motion filed before the Court of Appeal in Mombasa *Civil Application No. E102 of 2024* and related documents. That application seeks extension of time for filing and serving a Notice of Appeal, and for leave to appeal out of time against the judgment delivered herein on 10th March 2022.
4. The applicant opposed the application. It relied on the Replying Affidavit of its Chief Executive Officer, Mr. Richard Bell, sworn on 5th June 2024. The applicant furnished the background of the matter and asserted that the instant application is not only bad in law but is also ill- advised because there is no provision known in law for arresting a judgment that is due for delivery. Accordingly, the applicant prayed for the dismissal of the application.
5. On the 30th May 2024, the application was fixed for hearing on 6th June 2024. That hearing date was taken in the presence of counsel for the respondent, yet no appearance was made on the 6th June 2024 by or for the respondent to prosecute the application. Instead of seeking its dismissal for non-attendance, the respondent opted for a merit consideration. Accordingly, the respondent reiterated its stance that there is no law providing for arrest of judgment; and added that such a law would, in any case, be in conflict with the *Constitution* that requires that justice be administered without undue delay.
6. Reliance was placed on the following persuasive authorities by courts of concurrent jurisdiction:



- (a) [*Duale Maryan Gurre v Ainal Mohamed Mahamood & another*](#) [2014] eKLR
 - (b) [*Rosemary Akinyi Kijana v Nairobi City Water and Sewerage Company Limited*](#) [2020] eKLR
 - (c) [*Rosemary Kaari Murithi v Benson Njeru Muthitu*](#) [2020] eKLR
 - (d) [*Mary Igoki Mutuaruchi v Johnson Rwigi*](#) [2019] eKLR
7. While it is true that there is no particular provision brought to the Court’s attention to warrant what has been referred to herein as “arrest of judgment”, it is true that this Judicial Review application has been brought with a view of enforcing a decree of the Court in Petition No. 12 of 2017. In that regard it is pertinent to note that, in rule 32 of the [*Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules*](#), otherwise known as the Mutunga Rules, it is provided that:
- (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.
 - (2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.
 - (3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.
8. It is notable that one of the prayers sought by the respondent is for stay of the judgment in this matter. My considered view therefore that it is perfectly in order for the respondent to move the Court for such an order granted the provision aforesaid, bearing in mind that judicial review is now provided for as a constitutional remedy. Moreover, Rule 3(8) of the [*Mutunga Rules*](#) recognized that:
- (8) Nothing in these rules shall limit or otherwise affect 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.
9. The applicant seeks to stay the judgment in this matter on the ground that it has filed an application before the Court of Appeal, namely Civil Application No. E102 of 2024: *Mombasa County Government v Kooba Kenya Limited*. The documents annexed to the application confirm that indeed the respondent has filed an application for extension of time to file and serve a Notice of Appeal. However, the annexures also show that the application is dated 22nd April 2024 and yet the judgment sought to be appealed was passed way back on 10th March 2022. No justification was given by the respondent for the belated motion.
10. It is therefore my finding that no convincing justification was proffered for the Court to stay its judgment in this matter. Accordingly, the application dated 27th May 2024 is utterly devoid of merit and is hereby dismissed with costs.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 14TH DAY OF JUNE 2024

OLGA SEWE

JUDGE

