



**Kisia t/a Steg Consultants v Kay Construction Company Limited (Commercial Case 60 of 2016) [2024] KEHC 8214 (KLR) (Commercial and Tax) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8214 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 60 OF 2016**

**PM MULWA, J**

**JULY 4, 2024**

**BETWEEN**

**PATRICK SAGWA KISIA T/A STEG CONSULTANTS ..... PLAINTIFF**

**AND**

**KAY CONSTRUCTION COMPANY LIMITED ..... DEFENDANT**

**RULING**

1. Through a Notice of Motion dated 24<sup>th</sup> January 2024, the applicant seeks that the Court set aside the respondent's warrants of attachment dated 8<sup>th</sup> May 2023. The applicant's case is that the warrants were issued before the larger portion of the decree was ripe for execution as the applicant had not received sums due to them from the Government of Kenya through the Ministry of Defence.
2. The grounds, from the applicant's supporting affidavit and written submissions, are that on 25<sup>th</sup> March 2022, Hon. Majanja J. entered judgment directing the applicant to pay the respondent KES. 142,234,956.60. The payment was conditional upon the receipt of payment from the Government, as had been agreed upon by the parties. The Court also clarified that if any portion of the sums due to the applicant from the Government had been paid as at the judgment date, the respondent would be entitled to be paid part of the judgment sum in proportion of the amount received from the Government.
3. Before the judgment, the applicant had been paid KES. 350,000,000/-, less than 20% of what remained outstanding from the Government. Thus, the respondent was only entitled to 15% of KES. 350,000,000/-.
4. The respondent extracted a warrant of attachment to execute the entire sum of KES.142,234,956.60/-. On 7<sup>th</sup> September 2023, the applicant applied for review of the judgment. Through a ruling of 31<sup>st</sup> October 2023, the Court dismissed the application for review but pronounced that if the defendant



had already received the sum of Kshs. 350,000,000/- then the plaintiff would have been entitled to 15% thereof. The same would apply to any subsequent payments received by the Defendant from the Government.

5. According to the applicant, no execution proceedings are necessary for the 15% of the KES. 350,000,000 as it is ready and willing to settle that portion of the decree which is ripe for execution.
6. The applicant highlighted that the respondent filed an application dated 24<sup>th</sup> August 2023 for review of the judgment, which is pending determination. It argued that it is premature for the respondent to proceed with execution while the application is pending as this may cause embarrassment in the event the judgment is set aside. It also argued that its stands to be prejudiced in the event that it is subjected to double execution to its detriment as to auctioneer's costs and other incidental costs.
7. In response, the respondent put in a replying affidavit sworn by Patrick Sagwa Kisia on 12<sup>th</sup> February 2024 and written submissions dated 30<sup>th</sup> March 2024. The respondent's case is that it obtained judgment against the applicant in the sum of KES. 142,234,956.60 on 25<sup>th</sup> March 2022. However, after the judgment, the applicant abused the court process by filing numerous applications for stay of execution before this Court and the Court of Appeal which were all dismissed.

### **Analysis and Determination**

8. I have considered the application, the replying affidavit and the parties' respective submissions and authorities. The issue for determination is whether the applicant has made out a case for the setting aside of the warrants of attachment dated 8<sup>th</sup> May 2023.
9. Through the judgment of 25<sup>th</sup> March 2022, the Court awarded the respondent Kshs. 142,234,965.60 with costs. It is not disputed that the payment was conditional upon the applicant receiving payment due to it from the Government.
10. However, the applicant claims that the last payment by the Government was made before the delivery of the judgment and that there have been no further payments since. On the other hand, the respondent contends that on 29<sup>th</sup> June 2020, it was confirmed that the applicant received the Kshs. 350,000,000 and that the applicant has not remitted 15% thereof as ordered by the Court in the ruling of 31<sup>st</sup> October 2023. Nevertheless, the respondent conceded that it had no proof that the applicant had received any additional payment from the Government.
11. In the ruling dated 31<sup>st</sup> October 2023, the Court confirmed that the Kshs. 142,234,965.60 awarded to the respondent was 15% of the arbitral award of Kshs. 1,018,233,104.00. The Court also found that the respondent was entitled to proceed with execution to its logical conclusion. However, it is notable that, at para. 16 of the ruling, the Court observed that:

“16. The Defendant does not deny that prior to the delivery of the Judgment, it had been paid Kshs. 350,000,000.00. In accordance with the holding of the court I have outlined, payment to the Plaintiff was to be in due proportion of sums already received from the Government. I therefore reject the Defendant's interpretation of the Judgment that the Plaintiff was only entitled to payment after the entire sum due to it was paid by the Government. I reiterate that the Plaintiff is entitled to 15% of all portions of sums paid to the Defendant by the Government until the award is liquidated.”



12. Having considered the parties' respective arguments, I am persuaded that the warrants of attachment are illegal to the extent that they seek to execute the entire judgment sum of Kshs. 142,234,965.60, prior to the payment of the entire award by the Government to the applicant.
13. As to the respondent's application for review dated 24<sup>th</sup> August 2023 which is limited to the question of interest, I am of the view that its pendency is not a bar to the execution process.

### **Disposition**

14. In the upshot, the application dated 24<sup>th</sup> January 2023 is allowed in the following terms:
  - i). The warrants of attachment dated 8<sup>th</sup> May 2023 are hereby set aside.
  - ii). Costs of this application awarded to the applicant
  - iii). The applicant to pay the respondent Kshs. 52,500,000/- being 15% of the sum of Kshs. 350,000,000/- received by it from the Government failure to which the respondent is at liberty to take out fresh warrants limited to Kshs. 52,500,000/- or the execution of the portion of the award that has been received by the applicant from the Government as at the time.
  - iv). The respondent to set down the application for review dated 24<sup>th</sup> August 2023 for hearing.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY 2024.**

**P. MULWA**

**JUDGE**

In the presence of:

Dr. Tito for the DH/applicant

Mr. Ometto h/b for Dr. Arwa for JD/applicant

Court Assistant: Carlos

