



REPUBLIC OF KENYA



KENYA LAW

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**See Bound Limited v London Distillers (K) Ltd (Commercial Case 184 of 2001)
[2024] KEHC 9345 (KLR) (Commercial and Tax) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 184 OF 2001**

MN MWANGI, J

JULY 19, 2024

BETWEEN

SEE BOUND LIMITED DECREE HOLDER

AND

LONDON DISTILLERS (K) LTD JUDGMENT DEBTOR

RULING

1. The Judgment debtor/applicant filed a Notice of Motion application dated 11th October, 2022 pursuant to the provisions of Article 159 of the Constitution of Kenya, 2010, Sections 1A, 1B & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling laws. The applicant seeks orders that the delivery of the ruling on the decree holder's/respondent's Notice to Show Cause dated 20th June, 2022 be deferred pending the determination of the applicant's application dated 27th July, 2022, and that the said application be determined in priority to the said ruling.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Mohan Galot, the applicant's principal Shareholder and Chairman of the Board of Directors. He averred that the applicant sought extension of time to file a Notice and Record of Appeal against a judgment delivered by Kimaru J., on 30th May, 2008. That the said request was made vide an application dated 15th September, 2022, which application was allowed by Musinga JA., in a ruling delivered on 23rd September, 2022. He further averred that the applicant has filed and served a Notice and Record of Appeal in Nairobi Civil Appeal No. E672 of 2022, London Distillers (K) Limited v See Bound Company.
3. It was stated by Mr. Mohan that on 11th June, 2010, the applicant was granted stay of execution pending appeal by this Court (differently constituted), on condition that it furnishes security of



- Kshs.2,000,000/=, and the applicant met the said condition by providing a bank guarantee from Prime Bank Limited dated 18th June, 2010, which remains valid to date. Mr. Mohan averred that the Record of Appeal is incomplete as the applicant has not yet received certified typed copies of the proceedings due to ongoing frustrations by some individuals in the Court, thus the applicant intends to file a supplementary Record of Appeal once the said proceedings are availed. He asserted that the applicant stands to suffer substantial loss if the orders sought are not granted.
4. The application herein was opposed vide a replying affidavit sworn on 28th October, 2022 by Zeyun Yang, the respondent's Director. He averred that on 30th May, 2008, this Court (differently constituted) entered judgment for the respondent against the applicant. That the applicant dissatisfied with the said judgment, filed a Notice of Appeal on 10th June, 2008, but it did not file a Record of Appeal or a substantive appeal, and the respondent filed an application dated 14th June, 2021 in the Court of Appeal (Civil Appeal Application No. 205 of 2021 - See *Bound Company Limited v. London Distillers (K) Limited*), seeking to strike out the Notice of Appeal dated 10th June, 2008, and to be allowed to execute the judgment against the applicant. He deposed that in a ruling delivered on 18th March, 2022, the Court of Appeal allowed the respondent's application.
 5. That subsequently, the applicant filed an application dated 27th July, 2022 in Civil Application No. E265 of 2022, seeking leave to file a Notice and Record of Appeal out of time, against the High Court judgment delivered on 30th May, 2008. Mr. Yang contended that although the said application was allowed by Musinga JA., in a ruling delivered on 23rd September, 2022, the said ruling conflicts with the Court of Appeal's ruling dated 18th March, 2022, as the issues had already been addressed and determined between the same parties.
 6. Mr. Yang stated that in the ruling delivered on 18th March, 2022, the Court of Appeal noted that the applicant first requested for certified copies of the proceedings on 26th July, 2013, five (5) years after the High Court judgment was delivered. The applicant then sent a reminder on 11th September, 2014, and another reminder on 25th March, 2021, after the Deputy Registrar had ordered certification of the proceedings in the year 2019. Mr. Yang argued that the Notice and Record of Appeal filed by the applicant lack a legal basis and cannot justify granting any orders. He also noted that the Notice to Show Cause scheduled for ruling was based on the Court of Appeal's ruling dated 18th March, 2022.
 7. The applicant in its supplementary affidavit averred that it first applied for certified typed proceedings vide a letter dated 30th May, 2008 and filed in Court on 3rd June, 2008 by its then Advocates Meshack Odero & Company Advocates. It further averred that Musinga JA., in the ruling delivered on 23rd September, 2022 granted the applicant leave to file a Notice & Record of Appeal out of time, against the judgment delivered 30th May, 2008, and that the said ruling has neither been challenged, varied and/or set aside.
 8. The application herein was canvassed by way of written submissions which were highlighted on 13th February, 2024. The applicant's submissions were filed by the law firm of Tiego & Company Advocates on 26th September, 2023, whereas the respondent's submissions were filed on 31st January 2023 by the law firm of Prof. Tom Ojienda & Associates Advocates.
 9. Mr. Tiego, learned Counsel for the applicant relied on the case of *Bandari Investments & Co. Ltd v Martin Chiponda* [2022] eKLR which cited the case of *Locabail International Finance Limited v Agro Export and others* [1986] ALL ER 906, where it was held that Courts must not hesitate to exercise their judicial authority to maintain sanity especially in circumstances where it is clear that a party has taken up processes meant to steal a match as against the other. He submitted that if the orders sought are not granted, the applicant's appeal if successful will be rendered an academic exercise.



10. Ms. Misiati, learned Counsel for the respondent relied on the *Black's Law Dictionary's* definition of the word "discretion" and the case of *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission* [2012] eKLR, in submitting that whether or not to grant the orders sought in this application is purely dependent on the Court's application of its discretion. She further submitted that the dispute giving rise to the Notice to Show Cause and the application herein was instituted in 2001 and determined in favour of the respondent in the year 2008. She cited the case of *Machira T/ A Machira & Co. Advocates v East African Standard* (No 2) [2002] KLR 63 and asserted that the respondent's right to enjoy the fruits of its judgment is at stake and ought to be jealously protected.
11. Counsel referred to the case of *Attahiro v Bagudo* 1998 3 Nwll Pt 545 Page 656, cited by the Court of Appeal in *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR and contended that the instant application is not only an abuse of the Court process but is also another attempt by the applicant to deny the respondent fruits of its judgment, thus it should be dismissed.

Analysis And Determination.

12. On consideration of the application herein, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the respondent and the written submissions by Counsel for the parties, the issue that arises for determination is whether the instant application is merited.

Whether the instant application is merited.

13. The applicant is seeking an order for this Court to defer the Deputy Registrar's ruling on the respondent's Notice to Show Cause dated 20th June, 2022, pending the hearing and determination of the applicant's application dated 27th July, 2022, seeking an order for stay of execution of this matter pending the determination of the appeal from the judgment delivered on 30th May, 2008. The applicant contended that if the ruling on the said Notice to Show Cause is delivered; the aforesaid appeal may be rendered an academic exercise.
14. The suit between the parties herein was filed sometime in the year 2001 and judgment was entered in favour of the respondent against the applicant by Kimaru J., on 30th May, 2008. Immediately thereafter, vide a letter dated 30th May, 2008, the applicant through its former Advocates on record requested for a copy of the said judgment and typed proceedings. It also filed a Notice of Appeal dated 10th June, 2008. It is not disputed that on 11th June, 2010, the applicant was granted stay of execution pending appeal by this Court (differently constituted), on condition that it furnishes security of Kshs. 2,000,000/= . The applicant met this condition by providing a bank guarantee from Prime Bank Limited dated 18th June, 2010.
15. However, vide a ruling delivered by the Court of Appeal on 18th March, 2022 in Civil Appeal Application No. 205 of 2021 - See *Bound Company Limited v. London Distillers (K) Limited*, the Court of Appeal held that –

“The Notice of Appeal dated 10th June 2008 is deemed as having been withdrawn pursuant to Rule 83 of the Rules of this Court with costs to the applicant. As no appeal is pending before this Court, the stay orders granted by the High Court on 11th June 2010 are hereby discharged...”
16. The applicant averred that on application to the Court of Appeal, in a ruling delivered on 23rd September, Musinga. JA., granted it leave to file a Notice & Record of Appeal out of time, against the judgment of the High Court delivered on 30th May, 2008. I note that the decision by Musinga. JA., has



- not been varied and/or set aside, thus the respondent's submissions that the applicant's appeal is based on an illegality are of no probative value. Further, the respondent would be ill informed to discuss its perceived illegality of the ruling of the Court of Appeal in this Court, which is bound by decisions of the Court of Appeal.
17. I note that the applicant has since filed and serve a Notice & Record of Appeal in Nairobi Civil Appeal No. E672 of 2022 (London Distillers (K) Limited v See Bound Company Limited), and it has also filed the application dated 27th July, 2022, seeking an order for stay of execution of this matter pending the determination of the said appeal.
 18. In determining whether or not to grant the orders sought by the applicant calls for the exercise of this Court's discretion. The *Black's Law Dictionary* (Tenth Edition) defines judicial discretion as -

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.”
 19. In the case of *Coast Water Services Board v Rebema Charo Kabindi & Kache Chare Mramba (Legal Representatives of the Estate of Fredrick Charo Kadenge (Deceased) & another* [2020] eKLR, the Court relied on SA Desmith and J M Evans *Judicial Review of Administrative Action* 4th Edition [1980] 278 definition of judicial discretion that -

“is the legal concept of discretion which implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem.”
 20. This suit was filed by the respondent in the year 2001, and judgment was entered for the respondent against the applicant on 30th May, 2008. On 11th June, 2010. The applicant applied for, and was granted an order for stay of execution of the said judgment pending an appeal to the Court of Appeal. The applicant enjoyed the orders for stay of execution until 18th March, 2022 when the Notice of Appeal dated 10th June, 2008 was marked as withdrawn and the orders for stay of execution were discharged by the Court of Appeal in a ruling delivered on 18th March, 2022.
 21. In this Court's view, it would be against good order and the interest of justice to allow the ruling on the NTSC to be delivered, when there is a pending appeal in the Court of Appeal. If the ruling on the NTSC is rendered in favour of the respondent herein, it will lead to execution proceedings taking place against the applicant in the High Court, whereas there is an appeal pending hearing and determination before the Court of Appeal. I agree with Mr. Tiego that if the ruling for the NTSC is delivered in favour of the respondent, it will render the hearing of the appeal before the Court of Appeal to be an academic exercise.
 22. In the premise, I hereby exercise my discretion in favour of the applicant and defer the Deputy Registrar's ruling on the respondent's Notice to Show Cause dated 20th June, 2022. The applicant should be granted an opportunity to pursue its appeal to finality. As a condition for deferring the ruling on the for the Notice To Show Cause, I hereby make an order for the applicant to deposit the sum of Kshs.2,000,000/- as security in an interest earning bank account in the names of the Advocates on record. The said deposit shall be made within thirty (30) days from today.
 23. The upshot is that the application dated 11th October, 2022 is granted on the above condition. Costs of the application shall be in the cause.



It is so ordered.

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

NJOKI MWANGI

JUDGE

In the presence of:

Ms Akinyi h/b for Mr. Tiego for the judgment debtor/applicant

Ms Misiati h/b for Prof. Tom Ojienda SC for the decree holder/respondent

Ms. B. Wokabi – Court Assistant.

