



Third Engineering of China City Construction Group v Otieno & another (Civil Appeal E004 of 2023) [2024] KEHC 10133 (KLR) (7 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E004 OF 2023**

**KW KIARIE, J
AUGUST 7, 2024**

BETWEEN

**THE THIRD ENGINEERING OF CHINA CITY CONSTRUCTION
GROUP APPELLANT**

AND

**SALOME AKOTH OTIENO 1ST RESPONDENT
STRATEGIC OUT COMES CONSULTANT LIMITED 2ND RESPONDENT**

RULING

1. The appellant/applicant herein moved the court through a Notice of Motion dated the 2nd day of April 2024. It was brought under sections 1A, 1B, 3A & 80 of the [Civil Procedure Act](#), Order 45 Rule 1(1) & (2) of the [Civil Procedure Rules](#). The applicant is seeking the following orders:
 - a. The application herein be certified urgent and the same be heard on a priority basis.
 - b. That pending hearing of this application, the honourable court be pleased to grant interim orders of stay of execution and/or further execution of party and part costs taxed vide the ruling and certificate of costs dated the 1st day of December 2023.
 - c. That the honourable court be pleased to review and/or vary the limb of the judgment and decreedated the 3rd day of October 2023, granting costs of the appeal generally and vary/review the same to specifically direct that the costs of the appeal so awarded are payable to the 1st respondent only. d) That the court be pleased to recall, rescind and/or annul the warrants of attachment and sale of movable properties issued to M/s Odongo Investment Auctioneers, pursuant to instructions issued by counsel for the 2nd respondent.
 - e. That the 2nd respondent be ordered to be the costs incurred by the Auctioneers in the unlawful execution, if any.



- f. A declaration that the appellant has been constrained to single-handedly pay the full decretal sum whereas the 2nd respondent ignored its obligation to pay 50 percent decreed by the trial court as liability was joint and several, the 2nd respondent was obliged to make a refund/reimburse to the appellant of its portion the appellant was forced to payout to decree hold and the 2nd respondent has been indebted to the appellant, the same ought to have offset the costs assessed from monies it owed the appellant and the recovery process initiated against the appellant at its instance was thus illegal and made in bad faith.
 - g. In the alternative and without prejudice to the preceding prayers, an order be made for the sum of Kshs 136,460/- being costs assessed and due from the appellant be offset from monies the 2nd respondent owes the appellant.
 - h. That the court be pleased to order that the monies (security) held in a fixed account in the jointnames of the law firm of O.M. Otieno & Company Advocates & Ochilo & Company Advocates at I&M Bank Ltd Kisii Branch), be released to APA Insurance Limited in form of Bankers cheque, the Decretal sum having been settled in full a confirmation by the letter dated the 17th day of November 2023, by the 1st respondent's advocates.
 - i. The 2nd respondent bear costs of this application.
 - j. Such other and/or further orders as this honourable court may deem just and expedient be granted.
2. The application was premised on the following grounds:
- a. That the 1st respondent herein proceeded ex parte to tax party and party cost at Kshs 130,460/- and has since proceeded to instruct M/s Odongo Investment Auctioneers, who have since proclaimed the movable assets of the applicant in the execution of the taxed costs thereof.
 - b. That besides the 2nd respondent or its counsel never entered an appearance in the Magistrate's court or participated in the proceedings, and neither were they served with the record of appeals owing to the same reasons, and their advocate has never filed or served with the record of appeal due to the same reasons and their advocate has never filed or served any documents of appearance or any submissions upon counsel for the appellant, thus the orders for costs made in the appeal ought not to have applied to the 2nd respondent and there is an error, apparent on the face of record as the 2nd respondent is not entitled to any costs.
 - c. That at any rate, the appellant has security deposited in fixed term joint interests account in excess of Kshs 900,000/- which is yet to be released and has equally settled the entire decretal sum without the mandatory contribution of 50 percent from the 2nd respondent as decreed by the lower court as the appellant and 2nd respondent were jointly and severally liable and in light of the fact that the 2nd respondent is indebted to the appellant, the decision to instruct an Auctioneer to make recover was in bad faith, illegal and malicious as the 2nd respondent ought to offset the costs from the debt it owed the appellant.
 - d. There is, thus, an urgent need for the court's intervention to grant the instant application to enable the decree herein to be implemented in order for the applicant to enjoy the fruit of her judgment.
 - e. That there is a grave danger that the Auctioneer may attach the movable properties of the appellant any moment from now to recover costs assessed by the 2nd respondent, whereas it is the 2nd respondent who should be refunding the appellant the 50 per cent contribution



of the same failed to pay to decree holder as a consequence to which the appellant was forced to single-handedly settle the entire decretal sum alone in full.

- f. That at worst, the 2nd respondent would have offset the costs payable to it from its indebtedness arising to its portion of the 50 per cent decretal sum it ought to have paid to the decree-holder, but it failed as a consequence to which full recovery was made against appellant alone.
 - g. That there is a gross miscarriage of justice, which calls for the court intervention and redress the 2nd respondent cannot be allowed to benefit from their own acts of omission.
 - h. That this is a special case which warrants the court's intervention and grant of interim orders.
 - i. That there exist special circumstances that necessitate the instant application being heard on priority.
 - j. There is thus an urgent need for the court's urgent intervention to pre-empt the illegalities being perpetrated by the 2nd respondent in the very eyes of the court.
 - k. That in the alternative, the court should direct that the 2nd respondent should offset the costs owing to it from the part of the 50 per cent liability the appellant was forced to pay single-handedly and recall the execution process initiated by the 2nd respondent.
 - l. The sum held in a fixed deposit account with I&M Bank Limited, which was deposited as security, be released to the appellant's Insurers, M/s APA Insurance Limited, payment of the decretal sum having been made in full to the 1st respondent as confirmed in writing.
 - m. That there exist special circumstances that necessitate the instant application being heard on priority and orders sought being granted.
 - n. That it is in the interest of justice that the application herein be heard and allowed.
3. The respondent opposed the application on the following grounds:
- a. That the applicant herein enjoined the second respondent in the appeal.
 - b. That the second respondent participated in all the Court sessions.
 - c. The applicant's complaints are matters of law and not within the ambit of the provisions for "Review."
4. When the appellant filed the appeal, he cited the respondents herein. Costs follow the event. It was expected that if the appeal succeeded, the respondents would be condemned to pay the costs. The converse is true.
4. The taxing master addresses the issue of costs, and each party must prove that (s)he incurred the costs being sought. This is not an issue for review.
5. Order 45 Rule 1 provides as follows:
- (1) Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within



his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent, he can present to the appellate court the case on which he applies for the review.

7. Joint and several liability is defined in *Black's Law Dictionary* 10th Edition as follows: liability that may be apportioned with among two or more parties or to only one or a few select members of the group at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties.
8. In the case of *Republic v PS charge of Internal Security ex parte Joshua Mutua Paul* [2013] eKLR, the court held as follows:

Clearly, therefore, where you have joint liability, all the tortfeasors are, and each one of them is liable to settle the full liability; each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several, the Plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability... Either he cannot recover more than the total sum decreed. However, the Defendants are entitled to reimbursement from the co-defendants in the event that the Plaintiff only opts to recover from one of them.

7. The court, in the case of *Kenya Airways Limited v Mwaniki Gachobi*, stated as follows: ...The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree. 10. These two decisions put to rest the issue the applicant raised on who pays what amount.
11. To request a review of previously issued orders, a party must demonstrate that an error is evident in the record or that new and significant evidence or matters have been discovered that, despite the exercise of due diligence, were not known or able to be presented at the time the decree was issued. In this application, the applicant has not shown that he falls within the scope of Order 45 of the *Civil Procedure Rules*.
12. The applicant has not demonstrated that the application has passed the requisite threshold to warrant a review.
13. I find that the application lacks merits. It is, therefore, dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 7TH DAY OF AUGUST 2024

SIGNED BY: HON JUSTICE W. KIARIE

THE JUDICIARY OF KENYA.

HOMABAY HIGH COURT

HIGH COURT DIV

DATE: 2024-08-08 14:23:22+03

