



**Rupra Construction Company Limited v Longonot Place
Limited (Commercial Miscellaneous Application 155 of 2017)
[2023] KEHC 3250 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION 155 OF 2017
DAS MAJANJA, J
APRIL 20, 2023**

BETWEEN

RUPRA CONSTRUCTION COMPANY LIMITED APPLICANT

AND

LONGONOT PLACE LIMITED RESPONDENT

RULING

1. In its Notice of Motion dated April 12, 2022, the Applicant has invoked section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 45 of the *Civil Procedure Rules*. It seeks review of the order made by the court on 31st February 2022. Although there is no order made on 31st February 2022, it is agreed that the order sought to be reviewed arises from the ruling delivered by Okwany J, on 31st March 2022 allowing the Respondent's application dated July 2, 2021 ("the Ruling"). In the said application the Respondent sought the following reliefs:
 - (1) Spent
 - (2) That this Honourable Court be pleased to set aside, discharge and or vacate the Status Quo orders made herein on March 31, 2017 extended from time to time preventing the defendant from enforcing and or receiving payment pursuant to the recalled Performance Bond from Spire Bank Limited on March 20, 2017.
 - (3) That the Defendants be at liberty to pursue its rights pursuant to the demand made on March 20, 2017 pursuant to the performance bond.
 - (4) That subject to the above orders, the suit herein be marked as adjusted and/or concluded.
 - (5) That costs of this application be provided for.



2. By allowing the said application, the court, in effect allowed the Respondent to enforce the Performance Bond dated January 5, 2017 for Kshs 49,999,999.00 issued by Spire Bank Limited in favour of the Respondent. As a result, the matter was marked as closed.
3. The application is supported by the affidavit sworn on April 12, 2022 by the Applicant's advocate, Lawrence Ng'ang'a. It is opposed by the Respondent through the replying affidavit sworn on April 20, 2022 by its General Manager, Judy Wanjiku Njuguna. The parties filed written submissions. Although the parties have raised technical issues, I do not propose to address them but will deal with the substance of the application.
4. The Applicant's case is that there is an irregularity on the face of the record as Okwany J, delivered the Ruling when there was subsisting an order that the Applicant's application dated February 28, 2022 be heard on April 26, 2022. In that application, the Applicant sought an order that the ruling on the Respondent's application dated July 2, 2021 which was scheduled for delivery on March 24, 2022 be stayed and that it be allowed to file supplementary submissions to the said application under consideration.
5. The Applicant urges despite the fact that the court fixed its application for hearing, the Learned Judge proceeded to deliver the Ruling contrary to its legitimate expectation that its application would be heard. That allowing the Ruling to stand will not only deny it the right to a fair hearing but also the legitimate expectation to be heard on its application.
6. The Respondent opposes the application on the ground that the Applicant has not made out a case for review and that its application amounts to an appeal. It urges that the orders granted on March 31, 2017 were granted on a temporary basis and therefore the reliefs sought in the application seeking reinstatement of the suit are untenable as there is nothing further to determine. It states that allowing the application would be oppressive since this matter was instituted five years ago. It points out the Learned Judge considered all relevant material before coming to the conclusions reached in the Ruling and that a fresh hearing would not serve any purpose.
7. There is no dispute regarding the principles governing the determination of an application for review under section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules*. The latter provision states as follows:

"45 Application for review of decree or order

- (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 review of judgement to the



court which passed the decree or made the order without unreasonable delay.”

8. As I understand, the basis of the Applicant’s case is the court ought to have heard its application dated February 28, 2022 seeking to admit supplementary submissions first before delivering the Ruling. In its view this amounts to an irregularity on the face of the record. It not in dispute the Learned Judge proceeded to deliver the Ruling while the Applicant’s application remained on record and unheard.
9. Whether to grant an order for review is discretionary. An applicant may establish grounds for review but the court may yet decline to grant an order based on the circumstances of the case and if the review may result in an order in vain, the futility of which may be obvious when the order review order has been overtaken by events.
10. I have read the supplementary submissions which the Applicant sought to be admitted. The Applicant’s argument is that the Award dated December 10, 2020 fully compensated the Respondent and if the Performance Bond were to be enforced then the Respondent would gain an additional benefit. In considering this argument, it must be borne that this suit was filed by the Applicant under section 7 of the Arbitration Act seeking interim measures of protection pending arbitration. It is not in dispute that on March 31, 2017, the court granted an order that, “[T]he status quo with regard to the Performance Bond is to be maintained and if no payment has been made on account of the Performance Bond, none is to be made.”
11. The arbitration has now been completed and an Award issued. It now beyond argument that by a ruling dated November 26, 2021 in Rupra Construction Co Limited v Longonot Place Ltd HC Misc Application No E209 of 2021 [2021] eKLR, Seron J, adopted the Award as a judgment of the court and dismissed the Applicant’s application to set aside the Award. The implication of this is that the dispute between the parties has now been resolved by a Judgment of the court. As the arbitration process has been completed, this matter cannot be resurrected by allowing the Applicant’s application as there is nothing further to adjudicate.
12. The Applicant argues that the Award directed that it be paid Kshs 167,105,197.87 together with costs and interest while the Respondent was awarded Kshs 88,951,991.00 meaning that the Applicant is entitled to get Kshs 78,153,207.87. While this is an attractive argument, it should now be made in the matter where the decree was passed and is being executed. Since the Award is a judgment of the court, section 34 of the Civil Procedure Act provides that the all matters concerning execution of the decree must be decided in the suit where the decree was passed.
13. I agree with the Respondent that this court is now functus officio as the Award has been published and adopted as a judgment. The court cannot entertain any further issue on interim orders that were granted pending determination of the arbitral proceedings. Since the orders of *status quo* were granted pending the determination of the arbitral proceedings, they would as a matter of law, lapse once the arbitral proceedings came to an end.
14. For the reasons I have set out, I dismiss the application dated April 12, 2022. The Applicant shall bear the Respondent’s costs which I assess at Kshs 50,000.00 only.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango



Mr Ng'ang'a instructed by Taibjee and Bhalla Advocates LLP for the Applicant.

Mr Mwangi instructed by Macharia Mwangi and Njeru Advocates for the Respondent.

