



**Gatere v Co-operative Merchant Bank Limited & 2 others; Ndirangu (Interested Party)  
(Civil Case 500 of 2008) [2023] KEHC 19529 (KLR) (Civ) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19529 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 500 OF 2008**

**EC MWITA, J**

**JUNE 23, 2023**

**BETWEEN**

**MICHAEL KAREKO GATERE ..... PLAINTIFF**

**AND**

**CO-OPERATIVE MERCHANT BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MODO UNIPACKERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**GEORGE GACHARA GATERE ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**GEORGE KAMAU NDIRANGU ..... INTERESTED PARTY**

**RULING**

1. This ruling disposes of an application dated December 18, 2020 for stay of execution pending appeal. Co-operative Merchant Bank Limited (Co-operative Merchant) sought stay of execution of the judgment delivered on August 18, 2016, pending appeal on grounds that parties had recorded a consent on November 29, 2016 for stay of execution on condition that the applicant provided an unconditional bank guarantee for Kshs 10.5 million with a reputable bank. The bank guarantee was to be addressed to the Deputy Registrar of the court and deposited within 30 days of that order.
2. According to Co-operative Merchant, the bank guarantee was secured on December 15, 2016 and was renewed from time to time. That notwithstanding, the plaintiff moved to execute before the intended appeal had been determined, which was highly prejudicial and would cause substantial loss.
3. Co-operative Merchant argued that the plaintiff may not refund the huge amount of money, (in excess of Kshs 17,000,000), were the appeal to succeed. Reliance was placed on *Carter & sons Ltd v*



- Deposit Protection Fund Board* (Civil Appeal No 29 of 1997), among other decisions, to argue that Co-operative Merchant had established that it would suffer substantial loss and had also provided security.
4. Co-operative Merchant also argued that the application had been made without delay, and cited the decision in *Jaber Mohsen Ali & another v Priscillah Boit & another* [2012] eKLR to support this assertion.
  5. Co-operative Merchant again relied on *Butt v Rent Restriction Tribunal* [1982] eKLR, urging that the court should grant stay unless there was overwhelming hindrance.
  6. The plaintiff opposed the application through a replying affidavit and written submissions. It is the plaintiff's case that the application is *res judicata* and an abuse of the court process.
  7. The plaintiff argued that a similar application was made on October 5, 2016 and on October 13, 2016, a consent order for stay was recorded pending determination of that application. In the consent, Co-operative Merchant was to provide the bank guarantee alluded to by Co-operative Merchant.
  8. The court (Nzioka, J) delivered a ruling on June 14, 2017 and vacated the order on the bank guarantee. The court granted a conditional stay that the decretal sum be deposited in a joint account in the joint names of the advocates for parties within 15 days. In default, the order for stay would stand set aside. Co-operative Merchant did not comply with the order and, instead, filed this application only after execution process had commenced.
  9. The plaintiff maintained that the application is similar to the one that had been heard and determined, a fact that was not disclosed to the court when this application was filed.
  10. The plaintiff relied on section 7 of the *Civil Procedure Act* and the decisions in *William Koros v Hezekiah Kiptoo Komen & 4 others* [2015] eKLR and *Lal Chnd v Radha Kishan* AIR 1977 SC 789 on *re judicata*.
  11. The plaintiff maintained that Co-operative Merchant had disobeyed court orders and should not benefit from the court's discretion. Reliance was placed on *Hadkinson v Hadkinson* (1952) All ER 567 and *Wildlife Lodges v County Council of Narok & another* [2005] 2 E A 344 that court orders must be obeyed.
  12. The plaintiff again cited the decision in *Muchanga Investmednts Limited v Safari Unlimited (Africa) Ltd & 2 others* (CA 25 of 2009) [2009] KLR 229 on the abuse of court process.
  13. I have considered the application and argument by parties. I have also perused the record and in particular the ruling by Nzioka, J delivered on June 14, 2017. The court vacated the order on the bank guarantee and in place therefor, granted a conditional stay that the decretal sum be deposited in a joint account in the joint names of the advocates for parties within 15 days. In default, stay would stand set aside.
  14. For avoidance of doubt, the court stated:

[20] In my considered opinion, the Applicant has offered a security for due performance. I however find that, the offer of a Bank guarantee may not allow the decretal sum an opportunity to attract any interest. I am inclined to go by the submissions that any decretal sum owing to the plaintiff/respondents as of the date of this ruling, (be calculated by the court), shall be deposited in an interest earning Bank Account in the joint names of the Counsels of the plaintiff/respondent and the 1<sup>st</sup> Defendant/Applicant in a reputable Bank, (not the 1<sup>st</sup> Defendant's Bank) within 15 days of this order....



15. In the final orders, the court ordered that in default of compliance with the orders within the time frame, the order (for stay) would stand vacated without reference to the court.
16. It is not denied that Co-operative Merchant did not comply with the court order to deposit the decretal amount in a joint account. It is also true that Co-operative Merchant filed this application when execution process was commenced.
17. The plaintiff argued that co-operative Merchant attempted to comply with the conditions for stay and requested for details of the account from the plaintiff's advocates but did not go beyond this.
18. When the court drew Co-operative Merchant's counsel's attention to paragraph 20 of the court's ruling regarding depositing the decretal amount in a joint account, counsel feigned ignorance of the order and maintained that the consent order on the bank guarantee was still in force and, therefore, execution could not take place.
19. It is plain from the ruling of Nzioka, J that the court reviewed the order on the bank guarantee and granted a conditional stay that Co-operative Merchant deposit the decretal amount in a joint account within 15 days. In default, order for the stay would lapse. That order was not complied with and, therefore, the conditional order of stay lapsed. That left it upon the plaintiff to proceed and execute which was done prompting this application.
20. This application is not only *judicata* but also an abuse of the court process. It is *res judicata* because a similar application, in all respects, was heard and determined by this court (Nzioka, J) on June 14, 2017. Co-operative Merchant could not file a similar application on similar grounds and on the same issue, namely; stay of execution.
21. The application is also fundamentally an abuse of the court process. The court having rendered itself on the issue, granted a conditional stay and Co-operative Merchant having failed to comply with those conditions, could not again approach the court without disclosing that the court had issued a conditional stay and seek the court's discretion in its favour.
22. In *Muchanga Investments Limited v Safari Unlimited (Africa) Ltd & 2 others* (supra), the court of Appeal stated with regard to abuse of the court process that "The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."
23. In *Beinosi v Wivley* [1973]SA 721 SCA the South African Court of Appeal (Mohamad CJ) stated that "an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."
24. In *Atta hiro v Bagudo* 1998 3 N WLR Pt 545, abuse of court process was defined to mean proceeding which is wanting in bonafides and is frivolous vexatious or oppressive. (see also *Saraki v Icotoye* [1992] NWLR 9 (Ft 264) 156, that abuse of court process is the improper use of judicial powers by a party in litigation to interfere with the administration of justice.)
25. In *African Continental Bank PLC v Damian Ikechukukwu Mwaigwe 82 Others* SC 35 of 2001 January 14, 2011, the Supreme Court of Nigeria stated;

Abuse of Court Process has been variously defined by this court over the years and includes a situation where a party improperly uses judicial process to the irritation harassment and annoyance of his opponents and to interfere with the administration of justice where two or more similar processes are issued by a party against the same party/parties in respect of



the exercise of the same right and same subject matter, or where the process of the court has not been used bonafide and properly.

26. From the facts of this application, and taking into account the authorities above, it is clear that the application was filed without bonafides. The facts reveal that Nzioka, J determined the issue of stay pending appeal, a fact that was within the knowledge of Co-operative Merchant. That notwithstanding, Co-operative Merchant again filed this application seeking the same orders that had been granted but not obeyed.
27. This court takes the view, that this application is being improperly used not only for the irritation, harassment and annoyance of the plaintiff, but also to interfere with the administration of justice by obstructing the imminent execution. This application is, therefore, aimed at achieving some improper purpose. This Court cannot allow its process to be abused in the manner proposed by Co-operative Merchant.
28. Consequently, and for the above reasons, the application dated December 18, 2020 is declined and dismissed with costs to the plaintiff.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2023**

**E C MWITA**

**JUDGE**

