



REPUBLIC OF KENYA



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**Gab International Construction Co Ltd v Ndungu (Miscellaneous Application
E045 of 2023) [2023] KEHC 22143 (KLR) (11 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E045 OF 2023**

**DK KEMEL, J
SEPTEMBER 11, 2023**

BETWEEN

GAB INTERNATIONAL CONSTRUCTION CO LTD APPELLANT

AND

ZACHARY KABUCHO NDUNGU RESPONDENT

RULING

1. The Applicant vide its Notice of Motion application dated 19th July 2023 expressed to be brought under section 1A, 1B, 3A & 79B of the Civil Procedure Act, Order 21 Rule 22(1), Order 42 of the Civil Procedure Rules, 2010, Article 50 and 159 of the Constitution of Kenya, 2010 and all enabling provisions of the law seeks the following orders: -
 - a. Spent;
 - b. That pending the hearing and determination of this application interpartes, this Honourable Court be pleased to stay further proceedings, execution, decree, order, rulings and judgement in Bungoma CMCC No. 303 of 2020 as issued by the Honourable Court;
 - c. That upon granting prayer 2, the Honourable Court be pleased to grant leave and extend time to the Applicant to file an Appeal out of time from the ruling of Hon. Mutai (SPM) dated 15th October 2021, in Bungoma SPMCC No. 303 of 2020.
2. The application is premised on the grounds on the face of the application, annexures and the supporting affidavit of Noor Haji Ali, the director of the Applicant herein sworn on 19th July 2023. The Applicant's case is inter alia; that a notice of judgement was entered against it in the primary suit, Bungoma CMCC No. 303 of 2020, and that the Respondent herein proceeded to have the same executed; that the Applicant proceeded to instruct its Counsel on record to lodge an application in the lower Court for setting aside the said judgement which was allowed with conditions to the effect that a third of the decretal sum be deposited in a joint interest earning bank account under the names of



both Counsels on record and that Kshs. 60,000/= be released to the Advocates for the Respondent as deposits for costs which should be complied within 30 days and in default orders would lapse, and further that the auctioneer's costs be assessed at Kshs. 320, 511/= and which must be paid by the Applicant; that due to the current economic situation, the Applicant felt that the release of more than Kshs. 3,000,000/= as per the conditions for grant of stay would expose it to financial constraints; that it instructed its Counsel on record to appeal but who instead proceeded to seek for review the decision and which application was dismissed; that an appeal was later filed and which was dismissed vide judgement dated 19th May 2023; that on realizing his mistake, his Counsel abandoned the Applicant forcing it to seek a second opinion from its current Counsel on record; that the Respondent is about to execute the decree since on the 31st May 2023, he took out warrants of attachment and sale, and proceeded to proclaim the Applicant's goods; that the lower Court on 17th July 2023 vacated its orders setting aside the warrants but that the auctioneer visited the Applicant's yard on 18th July 2023 and tried to forcefully take away its machines; that the Applicant was never served with a notice to show cause as per law despite the fact that it had a right of reply; that upon consultation with its counsel, it was advised that the best route would be to file an intended appeal of the ruling of Hon. D. Mutai in Bungoma CMCC No. 303 of 2020.

3. In response to the application, the Respondent filed a replying affidavit sworn by Peris Wachuka Ndung'u on 20th July 2023 who averred inter alia; that she is the personal and legal representative of the Respondent, now deceased; that according to her, the application dated 19th July 2023 is simply frivolous, vexatious and an abuse of the due process of the Court and it ought to be dismissed; that the Applicant herein challenged the ruling delivered on 15th October 2021 by way of review vide an application dated 25th November 2021; that on 18th March 2021, the Applicant's application for review was dismissed with costs and being aggrieved by the same, the Applicant proceeded to lodge an appeal in this Honourable Court vide Civil Appeal No. E032 of 2022, which was dismissed with costs vide a judgement dated 19th May 2023; that upon the delivery of the judgement in Civil Appeal No. E032 of 2022, the Applicant lodged an appeal to the Court of Appeal and that it also filed an application for stay of execution in the High Court Civil Appeal No. E032 of 2022 which is pending determination; that on 15th June 2023, the Applicant also filed another application seeking stay of execution of Bungoma CMCC No. 303 of 2020 and it is still pending hearing; that the orders sought by the Applicant in this application are unavailable due to the fact; that this Court is functus officio having determined the Civil Appeal No. E032 of 2022 arising from review of the same orders; the orders sought contravene Section 6 and 7 of the Civil Procedure Act; the Applicant having applied for review against the orders issued on 15th October 2021 and whose outcome was the subject of Bungoma High Court Civil Appeal No. E032 of 2022 which is now appealed to the Court of Appeal, thus it cannot appeal against the same order under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 and that litigation has to come to an end.
4. In response to the replying affidavit, the Applicant vide Noor Haji Ali swore a supplementary affidavit on 22nd July 2023, where he averred that the current Applicant's application arises out of orders issued on 15th October 2021 by this Court while setting aside the decree of the Court and that no appeal was filed and determined touching on the decree of the lower Court nor the ruling on setting aside the exparte judgement as issued on 29th June 2021 and ruling of 15th October 2021. He averred that the Applicant's application is not frivolous or an abuse of the Court process.
5. The application was canvassed by way of written submissions. Both parties duly complied.
6. The Applicant vide submissions dated 22nd July 2023 and filed on 24th July 2023, submitted that the above matter was commenced by way of a Complaint on 15th October 2020 and that the Court



entered an interlocutory judgement in the sum of Kshs. 5, 385,500/= on default of appearance by the Defendant (Applicant herein). The Applicant moved to Court faulting the service aspect and that the interlocutory judgement was set aside vide ruling dated 18th October 2021 on condition that a third of the decretal sum be deposited in a joint interest earning bank account under the names of both Counsels for the parties on record; Kshs. 60,000/= was also to be paid to the Respondent's Counsel and that the Court proceeded to condemn the Applicant to pay auctioneers costs assessed at Kshs. 325,811/=. The Applicant argued that it instructed its Counsel to lodge an appeal as it was able to meet the set conditions but the then Counsel filed a review which was heard and dismissed on 18th March 2022. The Counsel then proceeded to lodge an appeal vide Bungoma High Court Civil Appeal No. E032 of 2022 but which was dismissed on 19th May 2023, a decision they appealed to the Court of Appeal. It was submitted that the Applicant proceeded to secure the services of another Counsel, who confirmed that recourse lied with it revisiting the decree and ruling that set aside the decree and thus the current application dated 19th July 2023. Counsel submitted that the Applicant has unsuccessfully sought stay at the Court of Appeal.

7. Counsel argued that this Court ought to grant the Applicant an opportunity to challenge the decree and ruling of 21st January 2021 and the subsequent decree of June 2021. Reliance was placed on the case of Dennis Mugambi Muthuri & Enterprise Limited vs Geoffrey Muiruri Ndegwa (Deceased).
8. On stay of execution, Counsel for the Applicant submitted that the same has been sought pending hearing and determination of the intended appeal. Reliance was placed on Order 42 Rule 6 of the Civil Procedure Rules, 2010. Counsel reiterated that the current process only dwells on the ruling that refused the grant of the prayers sought in the application for review which ruling was issued by the Court on 18th March 2022. Counsel argued that the Applicant is a busy entity with various obligations and unless the stay is granted, it stands to experience substantial loss. The Applicant argued that it is ready to abide with the conditions to be set by the Court i.e. deposit a bank guarantee to secure the decretal sums and/or sign an insurance bond to secure the decretal sums. Counsel relied on the cases of Nairobi Court of Appeal Civil Application No. E049 of 2022 Andrew Kariuki Njoroge vs Paul John Kimani and Nairobi HC MISC. E.430 of 2021 John Odhiambo Anditi vs Charles Maina Mwenda & Another.
9. Opposing the application, the Respondent filed submissions dated 20th July 2023 and filed on even date in which four grounds were raised. On the ground of whether a party can apply for review and an appeal against the same order or ruling, Counsel referred to Section 80 of the *Civil Procedure Act* which provides that a party which opts for review cannot after rejection of the same prefer the option to appeal against the same order he sought in the review. He further relied on Order 45 of the Civil Procedure Rule that provides for the procedure and the conditions that an applicant must satisfy in an application for review and making it clear that a party cannot seek review of an order and an appeal of the same. He relied on the case of Gab International Construction Company Limited vs Zachary Kabucho Ndung'u Bungoma High Court Civil Appeal No. Eo32 of 2022
10. On the ground of whether the order sought is sub judice, Counsel submitted that the order of stay of execution of the decree/order/ruling in Bungoma CMCC No. 303 of 2020 as sought in this application is the same order sought in Bungoma High Court Civil Appeal No. E032 of 2022 vide the application dated 24th May 2023 thus the same cannot be granted as they contravene section 6 of the *Civil Procedure Act*. He relied on the case of David Ndi & Others vs Attorney General & Others (2021) eKLR.
11. On whether this Honourable Court is functus officio, Counsel submitted that this Honourable Court having determined Bungoma High Court Civil Appeal No. E032 of 2022 which arose out of a decree/



order/ruling based on review application dated 15th October 2021 and that this Honourable Court is thus functus officio and cannot grant the orders sought. He relied on the cases of C.K Bett Traders Limited & 2 Others Vs. Kennedy Mwangi & Another (2021) eKLR and John Gilbert Ouma vs Kenya Ferry Services Limited (2021) eKLR.

12. On whether the Applicant's application has met the requisite conditions for grant of stay of execution, Counsel submitted that the application is shallow and fails to meet the requirements set out under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. He urged this Court to dismiss the same with costs. He relied on the case of Machira T/A Machira & Co. Advocates vs East African Standard (2002) eKLR and Mossy Khaemba Muchanga & Another vs Paul Khawanga (2020) eKLR.
13. I have carefully considered the grounds in support of and against the application together with the submissions by both parties and the relevant law and authorities cited. I find the only issue for determination is whether the application dated 19th July 2023 has merit.
14. Before I delve into my analysis and determination of this application, I need to give a brief history of this case. GAB INTERNATIONAL CONSTRUCTION CO. LTD "the Applicant" was the Defendant while ZACHARY KABUCHO NDUNGU "the Respondent" was the Plaintiff in the trial Court. An interlocutory Judgement was entered against the Applicant on 21st January 2021 for failure to enter appearance and file defence. The Respondent proceeded to extract a decree and obtained warrants of attachment and sale of the Applicant's moveable property.
15. Upon service with the aforesaid decree and warrants of attachments of its moveable property, the Applicant moved the trial Court vide a Notice of Motion application dated 19th July 2021 seeking to have the default judgment entered against it on 21st January 2021, set aside on the ground that it was irregular and deserving to be set aside as a matter of right as the Appellant had never been served with any summons to enter appearance and only learnt of the existence of the suit when it was served with the warrants of attachment and sale of its moveable property.
16. Vide a ruling delivered on 15th October 2021, the Hon. C.A.S Mutai-SPM noted that although service was not properly effected upon the Applicant, the Applicant had none the less appeared to have admitted the claim in the Plaintiff's suit and he proceeded to set aside the interlocutory judgement entered on 21st January 2021 on condition that: a third of the decretal sum be deposited in a joint interest earning bank account under the names of both Advocates on record; Kshs. 60,000/= be released to the Advocates for the Plaintiff as deposit for costs; 30 days' period of compliance failing which the stay will lapse. Further, the auctioneers who had been tasked with execution of the interlocutory judgement filed a bill of costs which the trial Magistrate proceeded to tax to a tune of Kshs. 325, 511/= and in which the Applicant was ordered to pay.
17. Aggrieved by the ruling delivered on 15th October 2021, the Applicant moved the lower Court vide a Notice of Motion application dated 25th November 2021 seeking a review of the said conditions on grounds that the interlocutory judgement having been found irregular then other subsequent events taken as a consequence of the irregular judgement including the auctioneers were irregular and deserving to be set aside.
18. Vide a ruling delivered on 18th March 2022, the Honourable lower Court dismissed the Appellant's application on grounds that no new and important evidence was tendered by the Applicant to warrant a review.
19. Aggrieved by the ruling of the lower Court delivered on 18th March 2022, the Appellant preferred an appeal vide Bungoma High Court Civil Appeal No. E032 of 2022 wherein this Court held that it found no merit in the Appellant's appeal. The Court further held that as per Section 80 of the



Civil Procedure Act and Order 45 Rules 1 and 2 of the Civil Procedure Rules, 2010 which makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. Thus, the Applicant exhausted the process of review and could not go back to the same order it sought review of and failed and to try its luck with an appeal.

20. Aggrieved by the judgement of this Court delivered on 19th May 2023, the Applicant proceed to lodge notice of appeal at the Court of Appeal at Kisumu vide Civil Appeal No. 059 of 2023. The Applicant also filed a stay of execution application before the said Court of Appeal which was later withdrawn.
21. It is imperative to note that the Applicant proceeded to file an application for stay of execution before this Court and in the lower Court.
22. Based on the above it is quite evident that the Applicant filed both a review and appeal against the decision of the Hon. Mutai (SPM) delivered on 15th October 2021 in Bungoma CMCC no. 3030 of 2020.
23. With regard to grant of leave and extension of time to file an appeal, under Section 80 of the Civil Procedure Act where a party opts to apply for review such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of. Order 45 of the Civil Procedure Rules which provides the procedure and the conditions that an applicant must satisfy in an application for review equally makes it clear that a party cannot seek review of an order and appeal the same order: -

Section 80 provides:

80. Any person who considers himself aggrieved –

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
24. Order 45 rule 1(a) and (b) in addition to setting out the conditions that an Applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party. Sub-rule (2) of Order 45 of the Civil Procedure Rules further makes the matter clearer. It provides: -

Order 45 (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 review.

25. As pointed out in my judgement dated 19th May 2023, it is evident that Applicant exhausted the process of review and now wishes to go back to the same order it sought review of and failed and to try its luck with an appeal. The Applicant wants to have a second bite of the cherry. It cannot be permitted to do so. I further held that the Applicant was for all the time represented by counsel and must therefore have exercised its options consciously.



26. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”

27. The Black’s law Dictionary 10th Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

28. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- i. what issues were really determined in the previous Application;
- ii. whether they are the same in the subsequent Application and were covered by the decision.
- iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a Court of competent jurisdiction.

29. In the case of *Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991* (unreported), it was held that:

“If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata.....”

30. Hon. Justice G.V. Odunga (as he was then) in *Republic – Vs – Attorney General and Another Exparte James Alfred Koroso*, expressed himself thus on the issue of access to justice: -

“Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by Courts or Tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others.”

31. The Judgement of this Court must be respected as fundamental to any civilized and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the Court.

32. Whether a suit is allowed or dismissed by consent, default or after a contested hearing, the need for finality is the same in each instance. This Court does not care to go into the root of what instructions the Applicant gave its Counsel then or the current advice of the newly appointed Counsel. The need



for finality is the reason why prayer 3 in the application as is before this Court dated 19th July 2023 must be refused. To this end, it is accommodating for this Court to refer back to the reasons for the principle of finality including that decision of this Court delivered on 19th May 2023, unless set aside or quashed by the Court of Appeal, must be accepted as incontrovertibly correct. The principle is quite clear, and quite strict. The Court reaches this conclusion on an orthodox application of the principle.

33. With regard to the prayer for stay of execution, this Court takes cognizance of the fact that there exists a similar application before the subordinate Court seeking similar orders for stay of execution. It is imperative to note that the Applicant is seeking to stay an order that was already successfully appealed and judgement was issued. It has been argued by learned Counsel on behalf of the Applicant, that the Applicant is unable to deposit a third of the decretal sum (Kshs. 3, 085, 805/=) as directed by the trial Court. The Applicant's application is premised on Order 42 Rules 6 of the Civil Procedure Rules, 2010 which stipulates as follows: -

“No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

- (a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

34. It is imperative for me to remind the parties that the stay of execution orders sought are against a ruling delivered on 15th October 2021 which the Applicant sought for review in the trial Court and even attempted to successfully appeal against the ruling by the trial court before this Honourable Court. The ruling on appeal before this Court was dismissed vide judgement delivered on 19th May 2023. It is self-evident that the doctrine of *functus officio* does not bar a Court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein. The doctrine of *functus officio* was considered by the Court of Appeal in *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR, where the Court held that -

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

35. It is my finding that this Court cannot proceed to entertain the suit and the prayer sought under paragraph 2 of the application which it had already rendered its judgment thereon. It is evident that this Court will be attempting to sit on appeal of its own decision, a practice that is frowned upon by the



law and is meant to be barred by the doctrine of functus officio. Due to the existence of the judgment delivered on 19th May 2023, this Court was functus officio and if I proceed to deliberate on the same prayers as sought I shall be arrogating myself power to re-examine that decision that was unsuccessfully appealed to this Court vide judgement dated 19th May 2023, a role which is beyond me at this juncture.

36. It will be a chaotic state of affairs for this court to purport to engage the parties on matters which have ended up before the Court of Appeal. It is rather ingenious for the Applicant to go all the way to the Court of Appeal and then come back to try a second bite at the cherry even after opting to pursue a review instead of appeal. As the Applicant has come to a cul- de- sac, it cannot be permitted to regurgitate the issues already dealt with by this court. The only recourse is for it is to pursue its pending appeal at the Court of Appeal.
37. From the foregoing, it is evident that the Applicant is employing judicial process in a manner which invokes irritation and annoyance of his opponent and the efficient and effective administration of justice. In this application, the process of the court has not been used or resorted to fairly, properly, honestly but rather it has been used to offend the best interest of access to justice and that this Court has to put a stop to this kind of mischief.
38. In the result, it is my finding that the Applicant's applications dated 19th July 2023 lacks merit. The same is dismissed with costs to the Respondent

It so ordered

DATED AND DELIVERED AT BUNGOMA THIS 11TH DAY

of september ,2023

D.Kemei

Judge

In the presence of:

Okaka for Wafula for Applicant

Sichangi for Respondent

Kizito Court Assistant

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