



REPUBLIC OF KENYA



**Njoroge v Njuguna & Partners Advocates (Civil Appeal E023 of 2023)
[2024] KEHC 15690 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E023 OF 2023
FN MUCHEMI, J
DECEMBER 5, 2024**

BETWEEN

JOHN GUCHU NJOROGE APPELLANT

AND

NJUGUNA & PARTNERS ADVOCATES RESPONDENT

RULING

Brief facts

1. The application dated 9th August 2024 seeks for orders of review of the order issued on 14th May 2024 which directed the applicant to deposit half of the decretal amount. The applicant seeks orders to deposit security in form of a title Deed of a value equivalent to a half of the decretal sum.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 11th October 2024.

Appellant's/Applicant's Case

3. The applicant states that he filed an application dated 9th May 2024 seeking stay of execution of the judgment emanating from a consent dated 30th March 2022. The court granted interim stay of execution on 14th May 2024 on condition that the applicant deposits half the decretal amount in court within 30 days and in default, the stay orders be vacated. The application was slated for inter parties hearing on 3rd June 2024.
4. The applicant states that he is unable to raise half the decretal amount which is about Kshs. 1,464,434/- as per the warrants of attachment dated 21st June 2022, within the 30 days. The applicant further states that his business is facing serious financial setbacks and that he has made all efforts including attempts to liquidate some of his assets but the same has been in vain and therefore he is only capable of depositing in court security in the form of a Title Deed of a value equivalent to the decretal sum.



As such, the applicant urges the court to exercise its discretion pursuant and review its orders issued on 14th May 2024.

5. The applicant is apprehensive that unless the orders sought are granted, he shall be exposed to the execution of the decretal amount which shall render the appeal nugatory. The applicant further states that he shall suffer irreparable loss and damage if the application is not allowed.

The Respondent's Case

6. The respondent states that the court lacks jurisdiction to hear and determine the instant application as the same is sub judice in violation of Section 6 of the *Civil Procedure Act*. The respondent argues that the orders sought in the instant application are similar to those in the application dated 9th May 2024 which is pending determination before the court. As such, the instant application constitutes gross abuse of the court process. The respondent states that the instant application is incompetent, a waste of the court's precious time, is misconceived, bad in law and ought to be dismissed with costs.
7. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

8. The applicant relies on Order 45 of the Civil Procedure Rules and the case of Republic vs Cabinet Secretary for Interior and Co-ordination of National Government ex parte Abulahi Said Salad [2019] eKLR and submits that it was not within his knowledge that liquidating some of his assets to raise half the decretal sum as security would be a difficult task. The applicant argues that his reason is sufficient and analogous to the other grounds provided for warranting review.
9. The applicant further relies on the case of Arun C Sharma vs Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 Others [2014] eKLR and submits that the sole purpose of security is not to punish the judgment debtor but to guarantee performance of the decree. The applicant argues that the performance of the decree can be guaranteed by depositing a title deed of a value equivalent to half the decretal sum. The applicant further argues that no prejudice shall be suffered by the respondent if the orders sought are granted.

The Respondent's Submissions

10. The respondent relies on Section 6 of the *Civil Procedure Act* and the cases of Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (2020) eKLR and Kauty Academy vs Star Gold Enterprises Limited & Another (Miscellaneous Application E105 of 2023) [2023] KEHC 27316 (KLR) (18 October 2023) and submits that the issues raised in the current application are directly and substantially the same as those in the application dated 30th May 2024 which violates the doctrine of sub judice. The respondent argues that the decision in the earlier application operates as res judicata in the present application.
11. The respondent further relies on the case of Fred Waswala vs Everline Nasimiyu Ejilo & Another [2022] eKLR and submits that the applicant failed to disclose the existence of the application dated 30th May 2024 which is strikingly similar to the current application. As such, the said application constitutes an abuse of the court process.
12. The main issues for determination are:-
 - a. Whether the application dated 9th August 2024 is sub judice.
 - b. Whether the applicant has satisfied the conditions warranted for review.



The Law

Whether the application dated 9th August 2024 is sub judice.

13. The doctrine of sub judice is established in Section 6 of the *Civil Procedure Act* and provides:-

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

14. Mativo J. (as he then was) discussed the concept of sub judice in *Republic vs Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya* [2020] eKLR where he stated as follows:-

.....there exists the concept of sub judice which in Latin means “under judgment.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.

15. The Supreme Court in *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)*[2020] eKLR stated:-

The term sub judice is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

16. From the foregoing, it is clear that the key words in applying the sub judice rule is that the matter in issue is directly and substantially in issue in the previous instituted suit. The applicant herein filed an application dated 9th May 2024 seeking for the orders of stay of execution of the judgment emanating from a consent dated 30th March 2022. On 14th May 2024, the court granted interim stay of execution on condition that the applicant deposit in court half the decretal sum within 30 days and in default, the stay orders be vacated. The court then set the application for inter parties hearing on 3rd June 2024. Before the application was heard inter parties, the applicant filed another application dated 30th May 2024 seeking for orders of review of the orders issued on 14th May 2024 on depositing half the decretal sum in court. On 30th May 2024, the court directed that both applications be mentioned on 13th June 2024 for directions.



17. The matter came up for mention on 15th July 2024 whereby the court consolidated both applications and directed them to be heard together by consent of the parties. The court then scheduled the matter to be mentioned on 23rd August 2024 but before the said date, the applicant filed an application dated 9th August 2024. The said application was brought before the judge on 20th August 2024 and the court directed that the parties were at liberty to record any consent on review of the deposit of security. The matter was slated for further directions on 14th October 2024.
18. On 18th November 2024, Counsel for the applicant notified the court that he had filed and served a Notice of Withdrawal of the application dated 30th May 2024. I have perused the court record and noted that the Notice of Withdrawal of the application dated 30th May 2024 was filed however, the court cannot ascertain when it was filed or served. From the submissions by the counsel for the respondent and grounds of opposition, it is evident that they were not aware that the said application was withdrawn.
19. Following the withdrawal of the application dated 30th May 2024, the current application cannot be said to be sub judice.

Whether the applicant has satisfied the conditions for review.

20. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows:-
Rule 1 (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 order made 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 which he applies for the review.
21. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.
22. In the instant application, the applicant prays for review of the orders made on 14th May 2024 on depositing half the decretal sum in court and instead allow the applicant to deposit his title deed. The applicant bases his reason on the ground that it was not within his knowledge that liquidating his assets to raise half the decretal sum would be a difficult task. The reason advanced by the applicant does not suffice as a reason to warrant review orders. The same does not fall into the category of discovery of new and important matter or evidence that was not within his knowledge or could not be produced at



the time nor is it analogous to the grounds set out in Order 45 Rule 1 of the Civil Procedure Rules. It is therefore my considered view that the applicant has not met the threshold of the orders of review.

23. Accordingly, it is my considered view that the application dated 9th August 2024 lacks merit and ought to be dismissed with costs.

24. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5TH DAY OF DECEMBER 2024.

F. MUCHEMI

JUDGE

