



**Kenya Chemical & Allied Workers Union & 3 others v East African
Portland Cement PLC (Employment and Labour Relations Cause
2119 of 2014) [2024] KEELRC 1859 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1859 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2119 OF 2014**

AN MWAURE, J

JULY 12, 2024

BETWEEN

**KENYA CHEMICAL & ALLIED WORKERS UNION 1ST GRIEVANT
JULIET CHEPCHUMA TUWOT & 227 OTHERS 2ND GRIEVANT
JOSEPH KARITHI MITHIKA & 219 OTHERS 3RD GRIEVANT
MORRIS MUTETI KAWINZI 4TH GRIEVANT**

AND

EAST AFRICAN PORTLAND CEMENT PLC RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 3rd April 2024 seeking the following orders that: -
 1. spent
 2. pending the hearing and determination of this instant application inter parties, this Honourable Court be pleased to issue a temporary stay of execution or injunction prohibiting the Respondents herein (in particular the 1st Respondent) whether by itself, its agents (including those auctioneers referred as Messrs Mbusera Auctioneers), members, servant, employees and or representatives from executing the Decree of this Honourable Court issued on 06/07/2015 as read together with the order of 13/01/2020 (or any other decree or order for that matter).
 3. in the circumstances, it is only right and just that the prayers in this instant application be granted as prayed.



4. In no prejudice will be suffered by the Respondents should the orders sought herein be granted as all the Applicant is asking for is that this Honourable Court do hold that the decretal sum has already been satisfied and any further execution by the Respondents effectively amounts to unjust enrichment.

Grievants/Respondents' Case

2. In opposition to the Application, the Respondents filed a Notice on Preliminary Objection on grounds that: -
 1. The Honourable Court is Functus Officio on the issue of stay of the judgment entered on 6th July 2015 having heard and dismissed similar applications. Such applications were also dismissed by the court of appeal rendering this application an abuse of the court process.
 2. The Application is res judicata since the order lapsed on 14th July 2018 when similar applications dated 21st March 2018 was determined. Further the court lacks jurisdiction a similar application having been filed and dismissed by the Court of Appeal in Civil Appeal No. 14 of 2016 East Africa Portland Cement Ltd vs KCAWU.
 3. The application is frivolous and an abuse of the court process meant to deny the Grievants from enjoying fruits of their judgment.
 4. The application mischievous and intended to delay execution beyond the 12 years.
 5. The application is an abuse of the court process and the same ought to be struck out or dismissed with costs.
3. The 1st Respondent filed a Notice of Preliminary Objection dated 22nd April 2024 on grounds that:
 1. The application is res judicata since this Honourable Court and the Court of Appeal have dealt with similar applications.
 2. The application offends clause 8 of the consent signed between the parties on 13/01/2020 which allowed execution in the event of default.
 3. The Honourable Court has previously held that it is functus officio and therefore has no jurisdiction to entertain the said application.

Respondent/Applicant's Submissions

4. The Applicant submitted that on 07.07/2023, this court ordered the attachment of 24 parcels of land in Athi River; as at 30/06/2022 they were valued at Kshs 30,729,300,000. The value of the properties is therefore in excess of the balance of the decretal sum.
5. The Applicant submitted that the Respondents seeking to execute against the Applicant company again they are seeking to unjustly enrich them. If their action is allowed it would amount to double jeopardy as it would mean that the Applicant not only loses earmarked moveable goods but attached immovable property.
6. It is the Applicant's submission that the Respondents seeking to double execute through warrants and attachments of sale dated 15/03/2024 are engaged in not only abuse of this Court's process but are in violation of the principle of res judicata.



7. The Applicant submitted that this court is functus officio and cannot entertain the Auctioneer's application which seeks to execute the decree through the impugned warrants and attachments of sale dated 15/03/2024.
8. The Applicant submitted that it is seeking a stay to an abuse of this court process seeking to double execute against it. It is calling the court to put a stop to the attempted abuse of court process by the Respondents and attempted injustice in so far as its rights are concerned.
9. The Applicant submitted that the court retains jurisdiction even when its functus officio in order to ensure justice is done and to prevent an abuse of the court process.

1st Respondent's Submissions

10. It is the Respondents submission that the warrants of attachment of Kshs 2,638,804,729.91 by Mbusera Auctioneers are valid and the auctioneer having proclaimed the Respondent's goods; it is only fair that they are allowed and given police protection to carry out their duties.
11. The Respondents submitted that this court is functus officio as in Court of Appel, Civil Application No. 236 of 2018; East African Portland Cement Company Limited vs Kenya Chemical and Allied Workers Union; thee court issued a conditional stay of execution. The Respondent/ Judgment debtor failed to meet the conditions set including depositing Kshs 350,000,000 or a suitable bank guarantee of a similar amount.
12. Subsequently, the Respondent/ Judgment debtor filed Court of Appeal Civil Application No. 233 of 2023 which was dismissed with costs.
13. It is the Respondent's submission that this court has no jurisdiction to entertain another application for stay of execution.

3rd Respondents' Submissions

14. It is the Respondents' submission that the court is Functus Officio on the issue of stay of the judgment entered on the 06/07/2015 having heard and dismissed similar applications. Further, similar applications were also dismissed by the Court of Appeal rendering this application an abuse of court process.
15. The Respondents submitted that the court lacks jurisdiction as a similar application was filed and dismissed by Court of Appeal in Civil Appeal No. 14 of 2016 East Africa Portland Cement ltd vs KCAWU. The ruling and previous applications in the High Court and Court of Appeal are on record. Further, by a consent order dated 13/01/2020, the Applicant agreed to a mode of settlement of the decree. This order was never appealed against or set aside.
16. It is the Respondents submission that the Applicant breached the terms of the consent order and is undesirable of the equitable remedies sought. The orders sought are only intended to frustrate the Respondents from enjoying the fruit of the judgment for no justifiable reason.
17. The Respondents submitted that the execution proceedings are within the jurisdiction of the Deputy Registrar and who has issued the necessary warrant to attach the judgement debtor's assets in satisfaction of the decree. The Applicant has no intention to pay and has not demonstrated any willingness to do so. The warrants issued by the court is the only way for the grievant to receive their dues.



Analysis and Determination

18. Having considered the application, affidavits and submissions on record, the main issue for determination is whether the court is functus officio.
19. The Supreme Court aptly described the concept of functus officio in the case of Raila Odinga vs IEBC & 3 others [2013] eKLR where it was stated that:

“We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

This principle has been aptly summarized further in Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available” [emphasis supplied].”

20. As submitted by all the parties herein, the court is functus officio as illustrated in its ruling of 07/07/2023 in which the issue of execution was substantially determined that the Applicant’s assets be attached to satisfy the decree. In particular the court stated that judgment debt could be realised from whichever source and therefore not only from the sale of land in issue.
21. Having finalised the proceedings and delivering its judgment and several rulings subsequently on different applications on the same matter, this court does not have jurisdiction to further determine issues raised by the Applicant herein and as the court has repeatedly stated. The file is now conclusively closed and only thing to do is to settle the judgment debt.
22. Costs will be paid by the applicant.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER



In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

