

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MISC CIVIL APPLICATION No. E115 OF 2024**

**WILLIAM KANYA KIAMA..... APPLICANT/DECREE  
HOLDER**

**VERSUS**

**ELITE WESTLANDS LIMITED.....  
1<sup>ST</sup>RESPONDENT/JUDGEMENT DEBTOR**

**VAAL REAL ESTATE  
LIMITED.....2<sup>ND</sup> RESPONDENT/JUDGEMENT  
DEBTOR**

**RULING**

1. What is before Court for determination is the Respondents'/Judgement debtors' Notice of Motion application dated 18<sup>th</sup> June 2025 where they seek the following Orders:

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**a) Spent.**

**b) Spent.**

**c) Pending the hearing and determination of Milimani Constitutional Petition No. E368 OF 2025 Elite Westlands Towers Limited & 2 others v William Edwards Kosar & 2 others, the execution of the decree in Nairobi ELC Misc. Application No. E115 OF 2024 William K Kiama v Elite Westlands Limited & anor be stayed.**

**d) The execution application for Kshs. 8, 816, 158, the warrants of execution and proclamation dated 17<sup>th</sup> June 2025 be set aside ex debito justitiae.**

**e) The decree holder be ordered to meet the auctioneer's charges and the Court do assess the compensation to be paid to the judgement debtors for the illegal execution of the decree.**

**f) The execution of the decree be stayed pending determination of costs by the arbitral tribunal.**

2. The application is premised on grounds on its face and on the supporting affidavit of Edith Muchiri, Human Resource and Administration Manager of the 2<sup>nd</sup> Respondent. She avers that the arbitral award dated 19<sup>th</sup> June 2024 was adopted as a Decree of the Court on 30<sup>th</sup> October 2024 and that compensatory damages were not quantified by the Arbitrator yet the decree holder has included the sum of kshs.2 million in his application for execution of the Decree. Further, that the execution application before ascertainment of costs by the Arbitral tribunal and subsequent adoption as a Decree of the court /without obtaining leave under Section 94 of the Civil Procedure Act is illegal. She explains that on 17<sup>th</sup> June 2025, the judgement debtors' moveable assets were proclaimed by Dikemwa Auctioneers who demanded the sum of kshs.8,608,575.94 and purported auctioneers' charges of kshs.350,000/=.

3. She avers that the judgment debtors have filed a constitutional petition, **Milimani Constitutional Petition ELC MISC NO. E115 OF 2025**

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**No. E368 OF 2025 Elite Westlands Towers Limited & 2 others v William Edwards Kosar & 2 others** seeking to set aside the arbitral proceedings and arbitral award dated 19<sup>th</sup> June 2024 and this Court's Ruling and Decree dated 30<sup>th</sup> October 2024 adopting the arbitral award dated 19<sup>th</sup> June 2024, thus the application for execution ought to be stayed as the judgment debtors' will be exposed to irreparable loss on unlawful execution of decree.

### **Response**

4. The application is opposed by the Decree holder who filed a replying affidavit and a further affidavit. He avers that the dispute arises from arbitration proceedings between the judgement debtors and himself, which was heard on merit and determined by the Arbitrator through an award published on 19<sup>th</sup> June 2024. The judgement debtors' challenged the said award in **ELC Misc. E003 of 2024** on the basis that it was illegal and their application was dismissed with costs on 30<sup>th</sup> October 2024, following which

the Deputy Registrar taxed the costs of the said application at Kshs. 109,981.67 which the judgement debtors paid. He contends that the dismissal of the challenge to the Award paved way for its adoption and it was adopted as a judgement in this matter on 30<sup>th</sup> October 2024 by Lady Justice Lucy Mbugua and decree of the Court was subsequently issued on 21<sup>st</sup> November 2024.

5. He explains that in the arbitral award, the Arbitrator awarded him costs of the arbitration and asked him to prepare a Bill of Costs but due to expiry of timelines and the adoption of the award on 30<sup>th</sup> October 2024, the tribunal is functus officio and so is this Court on the said issue of costs. He points out that his advocates filed a party and party bill of costs dated 18<sup>th</sup> December 2024 before the Deputy Registrar to recover the costs of the arbitration and in a Ruling dated 27<sup>th</sup> May 2025, the Deputy Registrar struck out the Bill of Costs and as such, he is bound to enforce the Decree as it is, without costs of the arbitration because costs

cannot be determined now by operation of law and by doing so, judgement debtors do not suffer prejudice, but benefit because they will pay a less amount.

6. He asserts that the Decree is being enforced through valid execution proceedings and that the interest charged is in accordance with the Court Decree. He also points out that the Judgement debtors sought leave of the Court of Appeal to challenge the legality of the award via **Nairobi Civil Appeal Application No. E666 of 2024: Elite Westlands Limited & Another Versus William Kanya Kiama** but in a Ruling dated 30th May 2025, the Court of Appeal dismissed the application with costs. Subsequently, they filed **Nairobi High Court Constitutional Petition No. E368 of 2025: Elite Westland Limited and another versus William Kanyua Kiama** to challenge the execution, of which the High Court declined to issue temporary orders to stop the execution process.

7. He avers that the application is an attempt to challenge lawful execution proceedings and that it offends the doctrine of res judicata and finality of arbitration proceedings. Further, that there is no valid legal basis for this Court to stay execution of a valid Decree that has not been set aside or varied by an Appellate Court. He contends that should the Court be compelled to issue the orders sought, then a conditional order that mandates the judgment debtors to pay him at least half of the decretal sum of Kshs. 8,608,575.94 within fourteen (14) days should issue and alternatively, they should deposit the entire decretal sum of Kshs. 8,608,575.94 within fourteen (14) days into an interest earning account opened and maintained jointly by advocates of both parties.

### **Rejoinder**

8. Ms. Edith Muchiri also swore a supplementary affidavit in which she avers that pursuant to this Court's Orders of 23<sup>rd</sup> June 2025, an escrow account was opened with Stanbic Bank

Kenya Limited in the joint names of the parties advocates and the decretal sum of Kshs. 8,608, 576/= was deposited on 4<sup>th</sup> July 2025. The Decree holder also filed a further affidavit reiterating his averments and confirming that costs had been paid.

9. The application was canvassed by way of written submissions.

### **Submissions**

10. The judgement debtors reiterate that the execution application filed by the Decree holder is void as it includes amounts not decreed and without ascertainment of costs. Further, that the jurisdiction of the said Tribunal is in contention vide **Milimani Constitutional Petition No. E368 OF 2025**. They reiterate that that there is a misconception that the Decree holder's claim for costs is time barred under Section 34 of the Arbitration Act, arguing that the provision does not deal with costs which is covered by Section 32 B under which the Tribunal had directed filing

of a Bill of Costs. They argue that execution contravenes section 94 of the Civil Procedure Act and aver that while adopting the Award on 30<sup>th</sup> October 2024, this Court ordered that each party bears its own costs. Further, that adopting the Award cannot be executed in the absence of an additional Award on costs or the filing of an application under Section 94 of the Civil Procedure Act. They further submit that this Court has power to stay proceedings as the judgement debtors pursue their constitutional petition.

**11.** To buttress their averments, they relied on the following decisions: **Bamburi Portland Cement Co. Ltd v Hussein [1995] KLR 1870 (CAK); Mercedes Sanchez Rau Tussel v Samken Ltd & 2 others [2002] eKLR; James Juma Muchemi And Partners Limited v Barclays Bank Of Kenya Ltd [2011] eKLR; Erinford properties v Cheshire county council [1974]2 ALL ER 448 and Madhupaper International Ltd v Kerr[1985]KLR 840.**

- 12.** On his part, the Decree Holder reiterates his averments in his replying affidavit and submits that while the arbitral Award dated 19<sup>th</sup> June 2024 was rendered in his favour with costs, he lost the opportunity for the Tribunal to award costs of arbitration pursuant to expiry of the timelines provided under Section 32B and 34(4) of the Arbitration Act,1995. Further, that this Court having adopted the award on 30<sup>th</sup> October 2024 after merit hearing, it is functus officio.
- 13.** He also submits that the issue of costs within the meaning of Section 94 of the Civil Procedure Act was conclusively determined pursuant to the Deputy Registrar's Ruling dated 27<sup>th</sup> May 2025, thus he should be allowed to enforce the Decree without costs of the arbitration. To this end, he relied on the case of **Kartar Singh Dhupar and co Ltd v Lianard Holdings Ltd [2017] eKLR.**
- 14.** On the allegation that he included fees and costs not ascertained by the Tribunal to the Decree, he submits that during the arbitral proceedings, evidence was produced

showing that the unit in issue had been sold for Kshs. 14 million while the purchase price was kshs.12 million, meaning the difference is kshs.2 million. Further, that the issue is res judicata as it is offends Section 7 of the Civil Procedure Act.

15. He also cites the case of **Nyutu Agrovat Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR** to submit that the doctrine of finality of arbitration proceedings does not permit the judgement debtors to file an application seeking stay of execution of a valid Decree.

### **Analysis and Determination**

16. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether there should be stay of execution of the Decree herein pending determination of the Milimani Constitutional Petition No. E368 of 2025.

- 17.** This dispute arose from an arbitral Award dated 19<sup>th</sup> June 2024 in favour of the Decree holder. It was adopted as a judgement of the court on 30<sup>th</sup> October 2024 and the Decree holder commenced execution proceedings.
- 18.** The Judgment debtors' contention is that the Decree holder's execution application includes Kshs. 2 million not decreed by the arbitral tribunal and that the costs of the arbitration have not been ascertained. They also contend that the Court's adoption of the arbitral award does not permit execution without an additional award on costs or a filing under Section 94 of the Civil Procedure Act.
- 19.** On his part, the Decree Holder asserts that the adoption of the arbitral award dated 19<sup>th</sup> June 2024 constitutes a final judgment thus execution application is valid, though the arbitration costs are not part of the Decree. Further, that the doctrine of res judicata and the finality of arbitration proceedings do not allow for issuance of stay orders.

**20.** The Court of Appeal stated as follows in **Bamburi Portland Cement Company Limited v Hussein (1995) KLR**;

**“Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be sought by way of a notice of motion.”**

**21.** Further, Order 42 Rule 6 of the Civil Procedure Rules, gives the Court discretion to grant a stay of execution so long as the Applicant demonstrates sufficient cause.

**22.** In the case of **Geothermal Development Company v Lantech Africa Limited [2024] KECA 981 (KLR)**, the Court of Appeal held that:

**“The principle of finality of the arbitration process which is the basis of limitation of the court’s intervention has been reiterated in numerous decisions of this Court. In Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR which position was upheld in Nyutu Agrovet**

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**Limited ..... this Court in upholding the principle decided that as a matter of public policy, it is in the public interest that there should be an end to litigation and the Act underscores that policy.”**

**23.** In this instance, the Court had adopted the Arbitral Award. Further, the Applicants/Judgement debtors sought leave of the Court of Appeal to challenge the legality of the award via **Nairobi Civil Appeal Application No. E666 of 2024: Elite Westlands Limited & Another Versus William Kanya Kiama** but in a Ruling dated 30th May 2025, the Court of Appeal dismissed the application with costs. The Applicant contends that the Decree cannot be executed but I note there is no stay barring the Respondent from executing it. Further, the Respondent has admitted that he did not include costs of the Arbitration proceedings in the Decree since the Taxing Officer struck off his Bill of Costs on 27<sup>th</sup> May, 2025, for being time barred.

**24.** Based on the facts as presented while relying on the legal provisions cited as well as associating myself with the decisions quoted, I opine that the Applicants cannot bar the Respondent from executing the Decree herein. Further, I do not find that the execution contravenes section 94 of the Civil Procedure Act since the Decree emanates from a properly adopted Award. To my mind, I find that the instant application offends the doctrine of res judicata since the issues had been dealt with in the arbitral proceedings and the Applicant also filed an application in the Court of Appeal, to challenge the legality of the award, which was dismissed. Further, that even though the decretal sum was deposited in a joint interest earning account, there has to be finality of arbitration proceedings.

**25.** In the foregoing, I find the instant Notice of Motion application unmerited and will dismiss it with costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY**

**OF DECEMBER, 2025**

**CHRISTINE OCHIENG**  
**JUDGE**

**In the presence of:**

Allen Gichuhi SC for Judgement Debtors /Applicants

Wanyama for Decree Holder /Respondent

Court assistant: Joan

ORIGINAL