

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**  
**HCCOMM NO. 500 OF 2008**

**JOYCE MBITHE MUTUA (*as the administrator of the estate of the late MICHAEL KAREKO GATERE*)**

**.....PLAINTIFF**

**VERSUS**

**THE CO-OPERATIVE MERCHANT BANK**

**LIMITED.....1<sup>ST</sup> DEFENDANT**

**MODO UNIPAKERS LIMITED.....2<sup>ND</sup>**

**DEFENDANT**

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

**DEFENDANT**

**AND**

**GEORGE KAMAU MURIUKI.....INTERESTED  
PARTY**

**RULING**

1. This ruling concerns the Notice of Motion dated 18<sup>th</sup> July 2023 by the 1<sup>st</sup> Defendant/Applicant, brought under sections 1A, 1B, 3A and 80 of the Civil Procedure Act and all other enabling provisions of the law. The Applicant seeks, *inter alia*, an order of stay of execution of the decree and any resultant proceedings arising from the judgment and orders delivered on 18<sup>th</sup> August 2016, the ruling of 23<sup>rd</sup> June 2023, the

warrants of attachment and proclamation dated 17<sup>th</sup> July 2023 be granted, an order for assessment of the amounts due to the Plaintiff arising from the judgment and decree, and costs of the application.

2. The application is supported by the affidavit of Lawrence Karanja, the Head of Legal Services and Company Secretary of the 1<sup>st</sup> Defendant, who has set out the factual background culminating in the judgment of 18<sup>th</sup> August 2016, the subsequent unsuccessful applications for stay, and the issuance of fresh warrants of attachment in July 2023. The Applicant's central grievance is that interest was included in the warrants and proclamation despite not being expressly awarded in the judgment or decree, thereby inflating the decretal sum by approximately Kshs. 9,731,818/=. It is contended that execution will occasion substantial loss and render the intended appeal and pending application for review nugatory.
3. The application is opposed. The Plaintiff/Respondent, Joyce Mbithe Mutua, swore a replying affidavit on 4<sup>th</sup> April 2025, contending that the application is misconceived and seeks to vary or correct a lawful decree through the back door. She avers that the judgment awarded damages of Kshs. 100,000/= per month from 1<sup>st</sup> January 2008 until payment in full, and that interest and costs accrue by operation of law under the Civil Procedure Act. She further asserts that the

computation of the decretal sum, interest, and costs lies within the mandate of the Deputy Registrar and not the Court, and that so long as the decree has not been amended or set aside, it must be enforced as drawn.

4. The 3<sup>rd</sup> Defendant/Respondent filed Grounds of Opposition dated 20<sup>th</sup> March 2025, arguing that the application is procedurally defective, barred by the Applicant's earlier non-compliance with conditional stay orders granted on 29<sup>th</sup> November 2016, that the decree is final and self-executing, that the Court is *functus officio*, and that the application is an abuse of the court process intended to delay execution.
5. The application was canvassed by way of written submissions. The Applicant relied on the equitable doctrine of restitution and unjust enrichment, citing, among others, **Chase International Investment Corporation v Laxman Keshra & Others [1978] KLR 143** and **Madhupaper International Ltd & Another v Kenya Commercial Bank & 2 Others [2003] eKLR**, while the Respondents urged dismissal on grounds of finality of judgment, *functus officio*, and abuse of process.

### **Analysis and determination**

6. I have carefully considered the application, the affidavits on record, the grounds of opposition, and the rival submissions.

The issues for determination are:

- i. Whether the Applicant has satisfied the threshold for grant of stay of execution,
- ii. Whether this Court has jurisdiction to order assessment or interfere with execution of a final decree.
- iii. Whether the application is barred by the doctrines of *functus officio* and abuse of process.

7. The legal framework governing stay of execution is found in Order 42 rule 6 of the Civil Procedure Rules, which requires an applicant to demonstrate substantial loss that the application has been made without unreasonable delay, and the provision of security.

8. The principle governing substantial loss was succinctly stated by the Court of Appeal in **Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1986] KLR 410** as follows:

***“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay.”***

9. It is not in dispute that judgment in this matter was delivered on 18<sup>th</sup> August 2016, and a decree extracted on 9<sup>th</sup> November 2020. The Applicant previously sought and was granted a conditional stay on 29<sup>th</sup> November 2016, which it admittedly failed to comply with, leading to dismissal of subsequent applications for stay, including the ruling delivered on 23<sup>rd</sup> June 2023. The present application was filed after the issuance of fresh warrants of attachment in July 2023.
10. In the present case, the judgment sought to be stayed was delivered in August 2016, and the Applicant has not demonstrated how execution at this stage would render any pending appeal nugatory. The inordinate delay and the absence of any proposal for security militate against the exercise of discretion in favour of stay.

*Jurisdiction of the Court and the doctrine of functus officio*

11. The Applicant further seeks an order for “assessment” of the decretal sum. That prayer invites this Court to interrogate or vary the effect of a final judgment. On jurisdiction, the doctrine of *functus officio* is now well settled. Once a court has pronounced a final judgment, it becomes *functus officio* and cannot revisit the merits of the decision except as provided by law. The Supreme Court in **Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR** stated thus:

***“The doctrine of 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. Once a court has finally pronounced itself on a matter, it lacks jurisdiction to re-open or reconsider that decision, except as provided for by law.”***

12. **In Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) Court of Appeal [2014] eKLR, it was stated that:**

***“Functus officio is a doctrine that prevents a court from revisiting the merits of a decision once it has rendered a final judgment. The doctrine is meant to bring litigation to an end and ensure certainty and finality in judicial proceedings.”***

13. The gravamen of the Applicant’s complaint concerns the computation of the decretal sum and the inclusion of interest. Under section 34(1) of the Civil Procedure Act, all questions arising between the parties relating to the execution, discharge, or satisfaction of a decree are to be determined by the court executing the decree and not by a separate or collateral application. In addition, Order 21 rule 8 and Order 49 rule 7 of the Civil Procedure Rules vest the Deputy Registrar with the primary mandate to assess, compute, and settle decretal sums, interest, and costs. Consequently, where a party is aggrieved by the manner in which interest or

costs have been computed, the proper course is to raise the issue before the Deputy Registrar, with recourse to the Judge only by way of reference.

14. As regards interest, section 26(1) of the Civil Procedure Act grants the court a discretionary power to award interest on any money decree and to determine the rate and period for which such interest shall run. Where a judgment is silent on interest, the question whether interest accrues, and at what rate, becomes a matter of interpretation and computation at the execution stage in accordance with the law.

15. In **Peter Baraza Rabado v Nation Media Group Limited [2017] eKLR** the Court of Appeal observed that:

***“Interest is not automatic. It is a discretionary relief which must be specifically provided for in the judgment or flow from statute. Where a judgment is silent on interest, the court cannot imply it retrospectively at the execution stage.”***

16. A perusal of the judgment delivered on 18<sup>th</sup> August 2016 reveals that the court expressly awarded interest only in respect of the refund of Kshs. 1,500,000/= to the Interested Party at the rate of 16% per annum, being the amount paid for the annulled public auction. Save for this specific award, the judgment did not expressly grant interest on the damages awarded to the Plaintiff, thereby underscoring that

interest was not universally decreed but was limited to the particular sum expressly stated by the court.

17. In light of the foregoing, this Court finds that the Applicant's grievance does not warrant the intervention of the Court by way of the present application. The dispute raised is not one touching on the validity of the judgment or decree but rather concerns the computation and settlement of the decretal sum, a process squarely within the statutory mandate of the Deputy Registrar.
18. Entertaining the application as framed would amount to this Court usurping a function expressly reserved by statute and the Civil Procedure Rules, and would offend the principle of finality of judgments.
19. Further, the record demonstrates a consistent pattern of non-compliance and repetitive litigation on the part of the Applicant. The Applicant was previously granted a conditional stay of execution on 14<sup>th</sup> June 2017 by Hon. Justice Grace Nzioka, which it failed to comply with. Thereafter, the Applicant filed a second application dated 18<sup>th</sup> December 2020 seeking stay of execution pending appeal. That application was dismissed on 23<sup>rd</sup> June 2023 by Hon. Justice Chacha Mwita, who expressly found that the Applicant was seeking orders similar to those earlier granted and disobeyed, and that the repeated applications were

calculated to frustrate the Plaintiff in the execution of a lawful judgment.

20. This conduct disentitles the Applicant to the equitable relief of stay, as equity does not aid a litigant who approaches the court with unclean hands or in deliberate disregard of prior court orders.

21. In this regard, the Court is guided by the holding in **Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] KLR 410**, that a party seeking stay must demonstrate bona fides and substantial loss, and by the principle articulated in **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR** that a court of law should not allow its process to be abused by a party who seeks to litigate the same issue repeatedly under the guise of different applications. Courts will guard against litigants who deploy multiplicity of applications as a tactic to delay or obstruct the enjoyment of the fruits of a judgment.

22. The Applicant's repeated failure to comply with conditional stay orders and its persistence in filing similar applications amounts to an abuse of the court process and militates against the exercise of this Court's discretion in its favour.

23. The Court is also persuaded that the present application, coming several years after judgment and following repeated

unsuccessful attempts to stay execution, amounts to an abuse of the court process. As was held in **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd (supra)**, equitable relief is not available to a party who has acted in bad faith or in deliberate disregard of court orders.

24. Consequently, this Court holds that it is *functus officio* in so far as the merits of the judgment delivered on 18<sup>th</sup> August 2016 are concerned, and that the Applicant's recourse, if any, lies strictly within the execution framework provided under section 34 of the Civil Procedure Act and the attendant rules.

25. In the result, the Notice of Motion dated 18<sup>th</sup> July 2023 is bereft of merit and is hereby dismissed with costs.

It is so ordered.

**RULING** delivered virtually, dated and signed at **NAIROBI**

This **12<sup>th</sup>** day of **February** 2026.

**P.M. MULWA**

**JUDGE**

**In the presence of:**

*Mr. Namada* for Plaintiffs

*Ms. Muraguri* for 1<sup>st</sup> Defendant/Applicant

*Ms. Kado h/b for Mr. Thongori* for 3<sup>rd</sup> Defendant

Court Assistant: *Carlos*