



REPUBLIC OF KENYA



KENYA LAW
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**Samaki Industries (K) Ltd v Kenya Ports Authority (Civil Appeal
E104 of 2021) [2025] KECA 783 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 783 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E104 OF 2021
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MAY 9, 2025**

BETWEEN

SAMAKI INDUSTRIES (K) LTD APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

*(Being an application for stay of execution pending appeal from the Judgment
of the Court of Appeal of Kenya at Mombasa (Gatembu, Murgor & Laibuta,
JJ.A.) delivered on 12th July 2024 in Civil Appeal No. E104 of 2021)*

RULING

1. Before us is the applicant's Notice of Motion dated 2nd September 2024 seeking orders to stay execution of this Court's judgment dated 12th July 2024 (Gatembu, Murgor & Laibuta, JJA.) pending hearing and determination of its Civil Application No. E093 of 2024 (in which the applicant, Samaki Industries (K) Limited, seeks certification to appeal to the Supreme Court from the impugned judgment of this Court), and pending appeal to the supreme Court.
2. The applicant's Motion is supported by the annexed affidavit of Salim Verjee sworn on 2nd September 2024 essentially deposing to the grounds on which the application is anchored, but which we need not replicate here, save to point out that the Motion seeks orders to stay the impugned judgment pending certification and the intended appeal to the Supreme Court.
3. The applicant filed written submissions and case digest dated 17th September 2024 citing 3 judicial authorities in support of its Motion, which we have considered. Its submissions were accompanied by Salim Verjee's supplementary affidavit sworn on 17th September 2024 subsequent to which he filed a further supplementary affidavit sworn on 6th December 2024.



4. The respondent opposed the applicant's Motion vide the replying affidavit of Lillian M. Kamau, its Senior Legal Officer, sworn on 27th November 2024 stating that this Court lacks jurisdiction to hear the application; that the Court is now functus officio; that the applicant has anchored its Motion on rule 5(2) (b) of the Court of Appeal Rules, which

is not applicable to this case; and that there is nothing to be stayed as this Court merely dismissed the applicant's appeal.
5. Learned counsel for the respondent filed written submissions, a digest of cases and authorities dated 12th December 2024 citing 3 judicial authorities in support of their submissions, which we have also considered.
6. On the issue as to the competence of the applicant's Motion pursuant to rule 5(2) (b) of the Court of Appeal Rules, we hasten to observe that this rule is only applicable in cases that call for stay of execution of impugned decisions of a trial court, or for conservatory orders to preserve the substratum of the appeal before this Court. The rule reads:

5 (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

.....

(b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just. [Emphasis ours]
7. It is also instructive that this Court became functus officio upon pronouncement of the impugned judgment. The Supreme Court of Kenya in *Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832, which reads:

"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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."
8. The doctrine of functus officio was also considered by this Court 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."
9. In view of the foregoing, we need not say more save to underscore the fact that the applicant is asking this Court to arrogate itself powers and grant orders which it has no jurisdiction to grant. In this regard,



the Supreme Court of Kenya in Samuel Kamau Macharia v KCB & 2 Others [2012] eKLR laid down the general principle thus:

“A Court’s jurisdiction flows from either *the Constitution* or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”

10. In Owners of the Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Ltd. [1989] eKLR, a locus classicus in this subject, this Court pronounced itself thus:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

11. Last but not least, in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, this Court explained what jurisdiction denotes in the following words:

“In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio, and any determination made by such court will be amenable to being set aside ex debito justitiae.”

12. In the same vein, this Court in Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR held:

“... that where *the Constitution* or statute confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with *the Constitution* or statute.”

13. Having considered the record as put to us, the applicant’s Motion, the affidavits in support and in reply thereto, the rival submissions of the respective counsel, the cited authorities and the law, we hasten to observe that this Court is functus officio and has no jurisdiction to hear and determine the instant application.

14. The Notice of Motion dated 2nd September 2024 be and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY 2025.

A. K. MURGOR

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARB, FCIARB.

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA



JUDGE OF APPEAL

