



**Mshanga v China Henan International Co-operation (Group) Company Limited
(Environment & Land Case 245 of 2017) [2024] KEELC 3671 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 245 OF 2017**

FM NJOROGE, J

MAY 9, 2024

BETWEEN

GILBERT CHARO MSHANGA PLAINTIFF

AND

**CHINA HENAN INTERNATIONAL CO-OPERATION (GROUP) COMPANY
LIMITED DEFENDANT**

RULING

1. The application for determination is a Notice of Motion application dated 4th March 2024 and filed on 5th March 2024 by the Defendant. The application, which is brought under Section 1A, 1B, and 3 of the *Civil Procedure Act*, and Order 22 Rule 22 of the *Civil Procedure Rules*, 2010 seeks the following orders: -
 1. Spent
 2. This honourable court be pleased to order stay of execution of the decree dated 2nd December 2019 pending the hearing and determination of the notice of motion application dated 16th December 2019.
 3. The costs of this application be hereby provided for
2. The application which is supported by the affidavit sworn by Wu Pengchao, is premised on the following grounds: -
 - a. The Plaintiff/respondent commenced this suit against the defendant/applicant vide a plaint dated 6th November 2017.
 - b. The defendant/applicant's advocates who were on record at the time did not file a defence nor did they notify the defendant/applicant of the hearing date.



- c. The plaintiff/respondent obtained ex parte judgment against the defendant/applicant and extracted the decree dated 2nd December, 2019 for execution.
 - d. The defendant/applicant came to learn that judgment had been pronounced in the matter when they were served with a warrant of sale and proclamation by Sure Auctioneers.
 - e. The defendant/applicant instructed the firm of Rutto Erica & Associates to take over from its previous advocates and filed a notice of motion application dated 16th December 2019 (hereinafter referred to as the application) wherein it sought to have the judgment and decree set aside.
 - f. The defendant/applicant obtained an interim order for stay of execution of the decree pending hearing and determination of the application.
 - g. Prior to obtaining the order for stay of execution, the Plaintiff/respondent had already executed the decree against the defendant/applicant by way of attachment and sale of its assets to a tune of Kshs. 3,760,000/-.
 - h. The stay of execution has since lapsed as the application was heard and determined.
 - i. The defendant/applicant being dissatisfied with the outcome of the application, appealed against the ruling vide Malindi Civil Appeal E030 of 2021.
 - j. The Malindi Court of Appeal issued a judgment dated 27th October, 2023 directing that the application be heard *de novo* before ELC Judge other than Hon. JO. Olola.
 - k. The application was scheduled for hearing on 15th February 2024 however, the hearing did not proceed as the plaintiff/respondent's counsel sought leave to file an application to come on record for the plaintiff/respondent being that judgment in the matter had already been delivered.
 - l. The defendant/applicant is apprehensive that unless an order for stay of execution is granted, the plaintiff/respondent shall proceed with execution and the defendant/applicant's assets stand the risk of dissipation to its detriment.
 - m. The defendant/applicant will suffer great prejudice in the event this application is not allowed.
 - n. There has been no inordinate delay in bringing this application to court.
3. As per the affidavit of service sworn by Ms. Emma Gitau, the Plaintiff was served via his advocate's email on 8th February 2024. However, no response was filed. The application is therefore unopposed. Be that as it may, this court issued directions on 7th March 2024, that the application be canvassed by way of written submissions to be filed by the Defendant within 14 days from the date thereof. I have carefully perused the court records and it is clear that the Defendant has failed to do so. In the circumstances, the application dated 4th March 2024 is dismissed for failure to comply with the court's directions. There shall be no orders to costs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 9TH DAY OF MAY 2024.

MWANGI NJOROGE
JUDGE, ELC, MALINDI

