



Goodison Sixty-One School Limited v Symbion Kenya Limited (Miscellaneous Civil Cause 131 of 2016) [2025] KEHC 550 (KLR) (Commercial and Tax) (29 January 2025) (Ruling)

Neutral citation: [2025] KEHC 550 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL CAUSE 131 OF 2016
A MABEYA, J
JANUARY 29, 2025
IN THE MATTER OF ARBITRATION ACT

BETWEEN

GOODISON SIXTY-ONE SCHOOL LIMITED APPLICANT

AND

SYMBION KENYA LIMITED RESPONDENT

RULING

1. This is a ruling on the applicant's Motion dated 11/10/2024. It was brought under sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*. It sought orders to stop the sale by public auction of the property known as Nairobi/Block192/607 that was scheduled for 16/10/2024 and to declare the same as a nullity for want of proper Notification of sale.
2. The grounds were that the Court had issued a decree on 6/3/2024 in favour of the respondent, that on 1/8/2024 the Court directed for issuance of warrants of attachment, that on 3/9/2024, the applicant received a letter from Regent Auctioneers dated 9/8/2024 attaching a Notification of sale dated 7/8/2024 intended for 16/10/2024 in order to recover Kshs.282,738087/09.
3. It was further contended that the applicant sought the postponement of the aforesaid intended sale because there was a material discrepancy in the Conditions of sale published in the newspaper which provided payment of 10% deposit and the balance within 90days while the Court had ordered the payment of the deposit of 25% and the balance after 15days.
4. That further, the notification was not received until 3/9/2024 and the 45 days period was not complied with in terms of Rule 15(d) of the Auctioneers Rules. That the applicant was willing to deposit 50% of the decretal sum, within 30days and endeavour to settle the decretal sum in the days granted by the



- Court. The other ground was that the value of the attached property far much exceeded the decretal sum.
5. The application was opposed by the respondent vide the replying affidavit of Oscar Ogunde sworn on 14/10/2024 and a Preliminary Objection dated 13/10/2024. He swore that the application sought to make the work of deputy registrars useless as the are the ones who supervise execution of decrees. That the parties had been appearing before Hon. Adisa until 8/10/2024 who had given all the necessary directions as regards the execution process.
 6. That at all times the applicant had confirmed that the process proper and that it was confident that it would pay the decretal sum before 16/10/2024. That as at 8/10/2024 when the parties appeared before Hon. Adisa, the applicant did not raise any objection to the process of execution. That as a result, judicial estoppel had arisen against the applicant.
 7. It was contended that the 45 days period for Notification of Sale had lapsed on 30/9/2024. That the respondent was to object to the application in limine on points of law which it set out in the Notice of Preliminary Objection.
 8. In the objection, the respondent contended that the stay application was res-judicata having been heard and declined by Mwongo J on 2/5/2017, by the Court of Appeal on 24/7/2023 and the Supreme Court on 21/12/2023. That the doctrine of exhaustion behoved the applicant to seek the present orders before the deputy registrar first; that judicial estoppel had arisen against the applicant on what it had intimated to the deputy registrar on 8/10/2024 and that in any event the Company was incapable of giving instructions as it had pleaded that it was dysfunctional in Misc. Civ. Appln. No. E159 of 2024.
 9. On 15/10/2024, the parties appeared and the Court directed that since the objection had raised matters of fact, the same be argued as one of the grounds of opposition to the Motion. The Court also noted that there were no new matters that had been raised to warrant the filing of a further affidavit by the applicant. The Court therefore directed Learned Counsel to argue the Motion.
 10. Counsels rehearsed what their respective clients had deposed in the affidavits and cited authorities in support of their contestations. Mr Amin observed that the property the subject of the sale was valued over Kshs.1.8b while the decree was for about Kshs.300m only. That the applicant had offered to pay 50% of the decretal sum and the balance thereafter. Among other cases cited were; Delphis Bank vs. Praful & 2 Others [2005] and Ukay Estate Ltd vs. Shah [2006] eKLR.
 11. Mr Omondi for the respondent cited Order 49 of the Civil Procedure Rules in support of the submission that applications under Order 22 are at the first instance a reserve of the deputy registrar. That both the Court of Appeal and the Supreme Court had allowed the respondent to realize its judgment.
 12. Due to the issues raised, the Court was unable to make a ruling immediately considering the sale was slated for the following day. For reason on record, the Court suspended the said public auction pending the ruling.
 13. Having carefully considered the Motion, the replying affidavit and the preliminary objection, I think that there are several legal issues that need to be determined first. Indeed, were the objection not having certain evidential issues, it would have been a perfect case for a preliminary objection.
 14. First, there was the issue of res-judicata. It was sworn on oath that both this Court (Mwongo J), the Court of Appeal and the Supreme Court have already pronounced themselves on the issue of stay. Counsel for the applicant admitted that this was a proper point of law.



15. Although this is an issue which was sworn to on oath, the same was neither challenged by Counsel for the applicant nor denied. If the three Courts had declined to stay execution of the decree for any reason and rendered their determinations thereon, this Court is bereft of any jurisdiction to entertain any further application for stay by dint of section 7 of the Civil Procedure Act. On that ground alone, the Motion is for striking out.
16. Secondly, there was the issue of the doctrine of exhaustion. It was contended that the application should have first been heard by the deputy registrar before being brought to this Court. Order 49 of the Civil Procedure Act provides generally for the powers of Registrars. Under Rule 7(1) thereof, the deputy registrar is mandated to hear and determine applications from the Orders set out thereunder. One of them is Order 22 other than Rules 28 and 75.
17. It is true that the present application was predicated under sections 1A, 1B and 3A of the Civil Procedure Act. However, a close check on the Motion shows that it sought to challenge the process of execution under Order 22 of the Civil Procedure Act. Indeed, the procedure had been undergoing before the deputy registrar whose directions the applicant alleges in the present application had been breached by the Conditions of Sale given by the auctioneer.
18. Both the Supreme Court of Kenya and the Court of Appeal have ruled that the doctrine of exhaustion should be adhered to. That enlarges the parties' access to justice as it enables them to exercise their rights through the various forums and levels of appeal. In the present case, it is clear from Rule 2 of Order 7 that the orders of the deputy registrar are appealable to a Judge in Chambers.
19. To the extent that the Motion breached the doctrine of exhaustion, the same is for striking out.
20. The third issue is the judicial estoppel raised by the respondent. It was contended that the applicant had acceded to the entire process of execution before the deputy registrar until 8/10/2024. That ever since it received the Notification of Sale, it had actively participated in the proceedings before the deputy registrar without raising any objection on the same.
21. This fact was also not denied. In both the replying affidavit and the submissions of Learned Counsel for the applicant, it came out clear that the applicant had offered to pay 50% of the decretal sum and the balance before the date of the auction. That being the case, why should the applicant later turn around and challenge the auction scheduled for 16/10/2024.
22. Indeed, were it not for the pressure of work of a long Cause List for the day, the Court should have dealt with the matter summarily on the hearing day. The Court therefore holds that the applicant cannot be heard to turn around and purport to challenge the same process which it had willingly gone along with up to the last minute. Accordingly, the applicant is estopped from challenging that it had acceded to all along.
23. In view of the foregoing, it is clear that the application is for striking out. In any event, what the application was seeking was to suspend the auction of 16/10/2024 which is now past. The applicant had stated that it was to pay 50% of the decretal sum if the auction was suspended and the balance shortly thereafter. I think for the foregoing reasons, the date of auction having long passed, the matter is moot.
24. Accordingly, the application dated 14/10/2024 is hereby struck out with costs. The order of stay made herein on 15/10/2024 is hereby set aside.

It is so ordered.

SIGNED AT NAIROBI THIS 22ND DAY OF JANUARY, 2025.



A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JANUARY, 2025

F. GIKONYO

JUDGE

