



**Ogelo v Crawford Capital Limited; Kenya Pipeline Company Ltd & another (Interested Parties) (Civil Suit E007 of 2024) [2025] KEHC 475 (KLR) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 475 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E007 OF 2024  
RN NYAKUNDI, J  
JANUARY 27, 2025**

**BETWEEN**

**KENNEDY OMONDI OGELO ..... PLAINTIFF**

**AND**

**CRAWFORD CAPITAL LIMITED ..... DEFENDANT**

**AND**

**KENYA PIPELINE COMPANY LTD ..... INTERESTED PARTY**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**RULING**

**Representation:**

M/s Ham & Hamsley Advocates

M/s Appolo & Co. Advocates

1. Before me for determination is an application dated 29<sup>th</sup> October, 2024 expressed to be brought under the provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 2 rule 15, Order 42 Rules 6 and Order 51 of the Civil Procedure Rules. The Applicant seeks orders to wit: -
  - a. That the supplementary affidavit dated 28<sup>th</sup> October, 2024 be struck out for being an abuse of the court process.
  - b. That the Honorable court be pleased to stay the proceedings herein pending the hearing and determination of an appeal by the defendant/applicant challenging the ruling of this court on jurisdiction to try this suit delivered by this honorable court on 3<sup>rd</sup> May, 2024.
  - c. That costs of the application be provided for.



2. The application is supported by an affidavit sworn by Ham K. Lagat and predicated upon grounds that:
- a. That the Plaintiff/Respondent instituted a suit via a plaint dated 16<sup>th</sup> April, 2024 seeking orders inter-alia a declaration do issue that the defendant/applicant is not a custom agent; the defendant/applicant be barred from enacting clearance procedures and customs fees for petroleum products destined for South Sudan and a permanent injunction to that effect.
  - b. That the Plaintiff/Respondent also filed a notice of motion dated 16<sup>th</sup> April, 2024 seeking conservatory orders to the effect that pending the inter-parte hearing and determination of that application the court issue a temporary injunction restraining the defendant whether by themselves or their agents, employees, servants or any person acting at their behest, from carrying out clearance procedures, customs controls and collecting any fees for petroleum products destined to the Republic of South Sudan in any other manner.
  - c. That on the 18<sup>th</sup> April, 2024 this honorable court did issue conservatory orders in favor of the Plaintiff/Respondent.
  - d. That on the 20<sup>th</sup> April, 2024 the defendant/applicant did move the court to set aside the conservatory orders which application was not successful which then made the defendant/applicant owing to the urgency at the time to move the review the orders of 20<sup>th</sup> April, 2024.
  - e. That on the orders issued on 22<sup>nd</sup> April, 2025 the Honorable court set down the matter for hearing owing to the urgency and nature of the dispute which involved multiple state agencies both in Kenya and South Sudan.
  - f. That all parties to this suit save for Kenya Pipeline Corporation filed responses to the Plaintiff's application for interim conservatory orders along with submissions.
  - g. That in a ruling dated 3<sup>rd</sup> May, 2024 this Honorable Court lifted the interim conservatory orders and declined to issue any conservatory orders herein. Consequently, the Plaintiff's application dated 16<sup>th</sup> April, 2024 failed.
  - h. That on 28<sup>th</sup> October, 2024 the Plaintiff filed a supplementary affidavit of even date sworn by Kennedy Omondi Ogelo and captioned as supplementary "To the Plaint dated 16<sup>th</sup> April, 2024."
  - i. That the pleading titled as supplementary affidavit in support of a plaint is bad in law for want of form by introducing new facts as opposed to testifying to the veracity of the statements contained in the Plaint. Consequently, it violates the strict dictates of Order 4 Rule 1(2) and ought to be struck out.
  - j. That supplementary affidavit is sworn in support of a 'plaint' and introduces new facts not contained in the Plaint and seeks to amend the Plaint.
  - k. That the defendant/respondent has moved to the Court of Appeal to appeal the Ruling of this Honorable Court dated 3<sup>rd</sup> May, 2024 challenging the finding of this Honorable Court that it has jurisdiction to hear this suit.
  - l. That in the circumstances it would be prudent to stay the proceedings herein pending the hearing and determination of the suit herein.
3. In opposition to the instant application, the Plaintiff filed grounds of oppositions. The Plaintiff advanced grounds that:



- a. The Defendant/Applicant has not satisfied the conditions of Order 42 Rule 6 of the Civil Procedure Rules for grant of stay of proceedings pending appeal.
  - b. The application is seeking stay of a negative order, which is incapable of being stayed because there is nothing to stay.
  - c. The application is contradictory in that it seeks the Honorable court to strike out the Plaintiff's supplementary affidavit dated 28<sup>th</sup> October, 2024 while simultaneously challenging the jurisdiction of this Honorable Court to continue with the proceedings.
  - d. The application does not disclose any case number of the Appeal lodged at the Court of Appeal challenging the jurisdiction of this Honorable Court and/or the Ruling of this Honorable Court dated 3<sup>rd</sup> May, 2024.
  - e. The application is a ruse to continue benefitting from the lifting of the conservatory orders of 18<sup>th</sup> April, 2024 and to collect the illegal levies from oil marketers.
  - f. The defendant/applicant's sole intention is to delay finalization of this matter in order to continue collecting illegal levies and fees from Oil marketers.
4. At the time of drafting the instant ruling, both parties had not filed any submissions in the court's e-filing system but I shall nonetheless proceed and make a determination based on the material on record.

#### **Analysis and determination**

5. Having reviewed the Notice of Motion application dated 29<sup>th</sup> October 2024, together with the supporting affidavit and having taken into account the grounds of opposition filed, and upon considering the submissions ventilated on behalf of the Parties, the following issues arise for determination:
- a. Whether this Honorable Court should grant stay of proceedings pending the hearing and determination of the appeal challenging the ruling on jurisdiction.
  - b. Whether the supplementary affidavit dated 28<sup>th</sup> October 2024 should be struck out for being an abuse of court process.
6. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

No order for stay of execution shall be made under sub rule 1 unless:-

- a) The Court is satisfied that substantial loss may result to the 1<sup>st</sup> Applicant unless the order is made and that the application has been made without unreasonable delay; and



- b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
7. In the case of William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others [2019] eKLR, a five-judge bench of the High Court conducted a comprehensive review of Kenyan jurisprudence regarding stays of proceedings. Drawing from established precedents, including Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR, Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000), and David Morton Silverstein v Atsango Chesoni [2002] eKLR, the Court articulated six definitive principles governing the grant of stays of proceedings pending appellate determination of interlocutory matters. These principles now serve as the authoritative framework for courts considering stay applications in such circumstances. They include:
- “ a. First, there must be an appeal pending before the higher Court;
  - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
  - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
  - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
  - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
  - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.”
8. Having said that, something peculiar lies in the defendant’s quest. It approaches this court seeking substantive orders while simultaneously maintaining a vigorous challenge to this court’s jurisdiction to entertain these proceedings. The Defendant has lodged an appeal challenging the ruling of this court on jurisdiction, which appeal is currently pending before the Court of Appeal. It is a well-established principle that a party cannot approbate and reprobate, one cannot affirm and disaffirm the same thing; one cannot blow hot and cold. The Defendant cannot, on one hand, maintain that this court lacks jurisdiction to entertain these proceedings while on the other hand seek substantive orders from the same court.



9. The Court of Appeal in *Owners of Motor Vessel "Dolphin Star" v ET Timbers PTE Limited* (Civil Appeal (Application) E078 of 2021) [2023] KECA 437 (KLR) aptly observed that:

“The law is clear that a party who has consistently maintained the position that it is challenging the jurisdiction of the Court cannot be deemed to have waived that challenge unless he voluntarily and unequivocally waives the challenge. The test of whether there exist voluntariness in the action was laid out in *Global Multimedia International Ltd Paramedia Services and Ors* [2006] EIZT-IC 3612 (Ch) where it was held that:

“Now a person voluntarily submits to the jurisdiction of the Court if he voluntarily recognizes, or has voluntarily recognized, that the Court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in the proceedings which in all the circumstances amounts to a recognition of the Court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the Court, amounts to a voluntary submission to the jurisdiction must depend upon the circumstances of the Particular case.”

10. Additionally, as emphasized in *Winkler v Shamoan* [2016] ELVA-IC 217 (Ch), which was cited with approval in the *Motor Vessel "Dolphin Star"* case (*supra*):

“Furthermore, I do not accept that this question is answered by asking whether the defendant has done more than is required or is necessary in order to challenge jurisdiction. Rather, the Court must be satisfied that the defendant has unequivocally renounced his right to challenge the jurisdiction. There is no question of statutory submission in the present case. Therefore, the issue is whether there has been a waiver of the right to challenge jurisdiction (see *Deutsche Bank* (*supra*)). The relevant test for submission to the jurisdiction was set out by Lord Collins in *Rubin & Anor v Eurofinance SA and Ors* [2012] 3 WLR 1019:

“The general rule in the ordinary case in England is that the Party alleged to have submitted to the jurisdiction of the English Court must have "taken some step which is only necessary or only useful if" an objection to jurisdiction "has actually been waived, or if the objection has never been entertained at all.

Applying these principles to the acts relied on by Mr Winkler, it is clear that none of them amount to a submission to the jurisdiction. In respect of the Procedural Strike Out Application, the Set Aside Application and the Request for Further Information, Mrs Angela Shamoan and Ms Alexandra Shamoan have consistently made clear that such steps were without Prejudice to their jurisdictional challenge. This is the very opposite of an unequivocal renunciation of such a challenge.”

11. The wisdom of this principle is particularly relevant in the present case. By seeking substantive orders from this court while simultaneously pursuing an appeal on jurisdiction, the Defendant/Applicant is essentially attempting to have it both ways. To benefit from this court's jurisdiction when convenient



while challenging it when not. Such an approach cannot be countenanced in our jurisprudence. As Lord Denning aptly observed in *Re Dulle's Settlement (No.2)* [1951] Ch 842:

“I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction.”

12. In the present case, by seeking substantive orders from this court, the Defendant appears to be acting in a manner inconsistent with its position on jurisdiction. The proper forum for seeking any interim reliefs would be the Court of Appeal where the jurisdictional challenge is pending.
13. This preliminary issue strikes at the heart of this application and effectively disposes of the matter. A party cannot legitimately seek orders from a court while simultaneously denying that court's authority to grant such orders. To allow such an approach would be to countenance an abuse of the court process and create a jurisprudential paradox.
14. Having reached this finding, it becomes unnecessary to delve into the other grounds raised in the application. Accordingly, the application dated 29th October 2024 is hereby dismissed with costs to the Respondent.
15. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 27<sup>TH</sup> DAY OF JANUARY 2025**

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**R. NYAKUNDI**

**JUDGE**

