



**JTG Enterprises Limited v China Gezhouba Group; Attorney General (Third party) (Commercial Case E649 of 2021) [2024] KEHC 3284 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3284 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E649 OF 2021**

**A MABEYA, J  
MARCH 21, 2024**

**BETWEEN**

**JTG ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**CHINA GEZHOUBA GROUP ..... DEFENDANT**

**AND**

**THE ATTORNEY GENERAL ..... THIRD PARTY**

**RULING**

1. This is a ruling on the application dated 3/1/2024 by the plaintiff. It was brought under Order 42 rule 6 of the [Civil Procedure Rules 2010](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#) CAP 21 Laws of Kenya. It was supported by the grounds on the face of it and the affidavit of Joseph Thuo Gichuhi sworn on 3/1/2024.
2. The applicant averred that on 9/8/2023, the Court entered judgment against the respondent for Kshs 682,753,067/- together with interest. That subsequently, the respondent was directed to pay Kshs 84,054,610/- but failed to do so. Being dissatisfied with the said ruling, the respondent proceeded to the Court of Appeal and interim orders were obtained halting the payment of the said sum of Kshs 84,054,610/-.
3. The applicant contended that the subject matter of the dispute, the construction of Thwake Dam was set to be completed soon and it was apprehensive that the respondent, being a foreign company may disappear from the jurisdiction of the Court. The applicant therefore urged the Court to direct that the balance of the decretal sum in the sum of Kshs 598,708,457/- in respect of which no stay has been granted be deposited in a joint interest earning account and have the directors deposit their passports in Court.



4. The respondent opposed the application vide a replying affidavit of Tang Yazhou sworn on 8/1/2024. He averred that the application had been brought under the wrong provisions of the law and had no legal basis since the judgment was against the respondent and not the directors and shareholders of the respondent.
5. Further, that the application was res sub-judice since the application dated 16/8/2023 filed by the respondent for stay of execution was still pending.
6. It was the respondent's contention that the project was still ongoing and the completion date of the project was 31/12/2024. That the defendant had a one year defects liability period therefore the defendant would not leave the country until that period lapses.
7. The plaintiff filed a supplementary affidavit sworn on 15/1/2024 by Joseph Thuo Gichuhi in response to the replying affidavit. It contended that it was uncontroverted that the contract was not given an extension and it stood to terminate on 6/2/2024. That order 42 rule 6(2) gives the Court the discretion to order security for the due performance of a decree. That the amount of Kshs 598,708,457/- should be put in an interest earning account and no prejudice will be suffered by the respondent.
8. The application was canvassed by way of written submissions which I have carefully considered. The applicant submitted that the application could not be defeated on the grounds that it had been brought under the wrong provisions since order 51 rule 10 of the Civil Procedure Rules cures the technicality.
9. That in any event, it had invoked sections 1A and 3A of the Civil Procedure Act for the inherent powers and overriding objective of the Court. That the applicant had a genuine intention in bringing the application as it only sought to have the decretal amount secured in the event the contract of the respondent terminates.
10. On its part, the respondent submitted that the application before court was sub-judice as the applicant sought for a partial order of stay of execution whereas the respondent's application for stay of execution dated 16/8/2023 was still pending. That the application was therefore an abuse of the court process. That it had been brought under the wrong provisions of the law. That the determination of the application would render the application dated 16/8/2023 *res-judicata*.
11. I have considered the application, the rival affidavits and the submissions on record. The main issue for determination is whether the applicant has made out a good case for the grant of the orders sought.
12. The applicant sought the deposit in an interest earning account of the balance of the decretal sum. According to the applicant, the respondent was in Kenya for the construction of the Thwake Dam project which contract was coming to an end this year. The applicants concern was with respect to the uncertainty of the contract expiration time as well as the different nationality of the respondent and its officials.
13. The applicant was apprehensive that once the contract comes to an end, the respondent may leave the jurisdiction and there would be no way of recovering the decretal sum. It on this basis that the applicant sought that the balance of the amount of judgment be deposited in an interest earning account and for the officials of the respondent to also deposit their travel documents with the Court.
14. On its part, the respondent challenged the legality of the application stating that it was an abuse of the court process for being sub-judice and for being brought under the wrong provisions of the law.
15. The Court proposes to first determine the legality of the application. The applicant invoked the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and order 42 rule 6 of the Civil Procedure Rules. The application does not seek a stay of execution but rather a deposit of security and



this does not specifically relate to an application for stay. Consequently, it is clear that Order 42 rule 6 was not the correct provision in this case. The question is whether this renders the application fatally defective.

16. In the case of *Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscone* [2013] eKLR, the Supreme Court stated: -

“The question then is, whether this omission is fatal to the applicant’s case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the *Constitution*, as stipulated in Article 259 of the *Constitution*. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant’s cause.”

17. In *Republic v Anti-Counterfeit Agency & 2 others Ex-Parte Surgippharm Limited* [2014] eKLR, the court held: -

“However, in light of the provisions of Article 159(2)(d) of the *Constitution* the mere fact that a party cites the wrong provisions of the law ought not to deprive the Court of a jurisdiction where such jurisdiction exists.”

18. In view of the foregoing, citing a wrong provision is not incurable. It cannot lead to the defeat of an application. The applicant also invoked section 1A, 1B and 3A which in this case is sufficient to sustain the application. In any event, Order 51(10) of the Civil Procedure Rules provides that no application should be defeated for not citing the correct provision under which is brought or for citing a wrong provision.

19. The respondent raised the issue that the application was res subjudice. A matter is sub-judice when it is before a court for determination. Section 6 of the *Civil Procedure Act* correctly defined this principle as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

20. Addressing the same issue in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [202] eKLR) the Supreme Court of Kenya stated as follows: -

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over



the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

21. It is not in dispute that there is an application by the respondent for stay of execution which is pending determination. The application before Court is not for stay but for depositing of the judgment amount in an interest earning account for security.
22. While I note that in determining the application for stay of execution, the requirement for deposit for security is a condition that should be addressed, this application seeks the courts inherent power to grant the provision for security pending any other applications. In this regard, I find that this application does not qualify to be subjudice.
23. As to the pending application for stay, the defendant went to slumber and has not prosecuted the same since August, 2023.
24. The third issue is whether applicant’s prayer for security should be granted. On whether to grant or reject these orders is in discretion of the Court which should be exercised judicially and reasonably. This can be only achieved when there is a level ground for all the parties where on one hand the respondent is allowed to pursue its applications that are pending before this Court or in the Court of Appeal and the decree holder’s rights to the judgment is safeguarded.
25. It is not in dispute that there is a judgment on record that has not been set aside. The respondent did not dispute that it is a foreign company and its presence in the country is limited to the construction of the Thwake Dam Project. There is evidence that the project is coming soon.
26. In this regard, the court finds that the applicant has raised a genuine concern. The respondent has not provided the Court with any evidence of any property within the jurisdiction of the Court which execution can issue against. Further, the fact that the respondent is a foreign company, there is a threat of the company leaving the jurisdiction.
27. Based on these findings, the Court finds that this is a proper case for depositing security before court. In balancing the interests of both parties, greater prejudice would be on the applicant if its judgment is rendered nugatory.
28. Should the officials of the respondent be compelled to deposit their official passport and travel documents? The Court appreciates the principle of corporate personality of companies and the separation between the company and its directors, shareholders and promoters. When the security is deposited, there would be no need to bond their movement out of the country.
29. Accordingly, the court finds merit in the application and allows the same on the following terms: -
  - a. Pending the hearing and determination of the pending proceedings in this matter, the defendant do deposit the sum of Kshs 598,708,457/- in an interest earning account in the joint names of the advocates for the applicant and the respondent within 15 days of this ruling.
  - b. The prayer for depositing of travel documents by the officers of the defendant is declined.
  - c. The costs of the application be borne by the Defendant.

It is so ordered.



**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2024.**

**A. MABEYA, FCI ARB**

**JUDGE**

