



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT GARSEN**  
**CIVIL APPEAL NO. 4 OF 2016**

**(Being an Appeal from the Judgement of Honourable J.M.Macharia –  
in Garsen PMCC No.14 of 2011 delivered on 16<sup>th</sup> March, 2016)**

**TAHIR SHEIKH SAID T/A TSS BUS SERVICES**

**TAHIR SHEIKH SAID TRANSPORTERS LTD**

**SALIM HASSAN NASSIR.....APPELLANTS**

**VERSUS**

**MOHAMED SHEE AHMED.....RESPONDENT**

**CORAM: Hon. Justice S. M. Githinji**

**Kimondo Gachoka & Company Advocates for the Appellants**

**Wambua Kilonzo & Company Advocates for the Respondent.**

**RULING**

The Appellants/ Applicants herein have filed a Notice of Motion Application under Certificate of urgency dated 22<sup>nd</sup> November, 2021 seeking the following orders: -

- 1. Spent**
- 2. Spent**
- 3. Spent.**
- 4. THAT the warrants of Attachment and Proclamation dated 8<sup>th</sup> November, 2021 be set aside and/or lifted unconditionally.**
- 5. THAT the Appellants/ Applicants be granted time to release funds from court for payment of the balance of the decretal**

sum.

**6. THAT the Auctioneer do tax their bill to scale.**

**7. THAT this Honourable Court be pleased to issue any other order and/or direction it deem fit to grant in the circumstances.**

**8. THAT the costs of this application be provided for and the same be borne by the Respondent.**

The application is premised on the grounds set out in the application and the supporting affidavit of **SALIM HASSAN NASSIR** herein deposed on the 22<sup>nd</sup> day of November, 2021 stating that the Respondent is in the process of execution of the decretal amount pursuant to Judgment delivered on 6<sup>th</sup> April, 2021. He deposed that they have already paid the Respondent the entire sum save for the monies that was deposited in Court as security pending the hearing and determination of the appeal which amount is a total of Kshs. 409,930/-.

He also deposed that it is the amount of Kshs. 409, 930/- that is pending payment and that parties have executed consents authorizing release of the said amount to the Respondent. It is their contention that they require time to release funds from court to enable them pay the Respondent.

The Respondent in response filed a Replying Affidavit sworn by Geoffrey Kilonzo on the 20th day of January, 2021. He deposed that the application by the Appellant lacks merit, it is meant to deny the Respondent from enjoying fruits of litigation, it is an abuse of the court process, the same has been brought in bad faith, it is bad in law and incompetent. He also deposed that the said application is meant to embarrass the due process and the same is an afterthought, brought after inordinate delay.

He further stated that the court was *functus officio* as it does not have jurisdiction to adjudicate over the application. That in fact, he has not taken out warrants of execution in this matter but in the lower court matter. He further contended the warrants of attachment and proclamation dated 18/11/2021 were not issued in this matter hence this court has no jurisdiction to set aside or lift them and therefore the said application violates the provision of Section 6 of the Civil Procedure Rules.

### **Submissions**

The Appellants/ Applicants filed their submissions on the 2<sup>nd</sup> day of February, 2022. They identified three issues for determination; whether this Honourable court has jurisdiction to entertain the application, whether the warrants and proclamation is illegal and irregular and whether this court should set aside the warrants and proclamations. On whether this Court is vested with jurisdiction to determine the application, the Appellants merely stated that the court has jurisdiction to entertain the application as the Judgment the Respondent is executing emanated from this Honourable Court.

On whether the warrants and proclamation are illegal and irregular, they submitted that the warrants were illegal and unjust since the entire decretal sum was paid in full by 18<sup>th</sup> October, 2021. They also submitted that counsel for the Respondent was aware that there were monies deposited in court which ought to have been released to him and according to them, it was up to the Respondent's counsel to follow up on funds deposited in court instead of obtaining warrants and proclamation against their client. On this issue, they pointed the court to **Order 42 Rule 6 of the Civil Procedure Rules** and the authorities of **Gianfranco Manenethi & another Vs Africa Merchant Assurance Company Ltd (2019) eKLR** and that of **Factory Guards Limited vs Abel Vundi Kitungu (2015) eKLR**. They further submitted that their client having paid the decretal sum in full, it was up to the Respondent counsel to pursue the amount deposited in court.

### **Respondent's Submissions**

The firm of **Wambua Kilonzo & Co. Advocates** on behalf of the Respondent filed submissions on the 27<sup>th</sup> day of January, 2022 and addressed two issues; first whether the court should stay execution of judgment delivered on 6<sup>th</sup> April, 2021 and 16<sup>th</sup> March, 2016 and second whether the court should order the stay and /or set aside unconditionally the warrants of attachment and proclamation. On the first issue, he submitted that the court does not have jurisdiction to stay execution as it has become *functus officio* with the dismissal of the appeal, and the Respondent herein is a successful litigant entitled to enjoy the fruits of a successful litigation.

On the second issue for determination, the warrants of attachment and proclamation dated 18/11/ 2021 were not issued in this matter hence this court has no jurisdiction to set aside or lift them.

### **Analysis and Determination**

I have analyzed the application, the response and the Submissions by the respective parties and the main issue for determination in this application is whether this court has jurisdiction to grant the prayers sought. The Appellant submitted that this court has jurisdiction to hear and determine the application before it since the judgment the Respondent is executing emanated from this Court. The Respondent on the other hand, submitted that the court does not have jurisdiction to stay execution as it has become *functus officio* with the dismissal of the Appeal on the 6<sup>th</sup> day of April, 2021.

I agree with counsel for the Respondent that indeed this court became *functus officio* with the dismissal of the appeal and there was no reason to take out the warrants of attachment and proclamation in the present appeal.

It is trite that courts are creatures of statute, based on the constitution with their jurisdiction prescribed therein. That being the case, jurisdiction is the authority a court has to decide matters that are litigated before it or take cognizance of matters prescribed in a formal way for a decision. Jurisdiction cannot be implied and nor can it be conferred by agreement of parties. For that matter, jurisdiction cannot be assumed or lifted from the vacuum. Such was held in the celebrated case of *Owners of the Motor Vessels Lillian (Supra)*. This same principle is discussed in *Halsburys Laws of England 9<sup>th</sup> Edition* At Pg 927 which provides *inter alia* that:

**“procedure for involving the jurisdiction of the court should not be confused with the authority of the court to decide matters which on the fact of the proceedings have been properly prescribed in the formal way for its decision and which are within its jurisdiction.”**

**The Respondent urged this court to dismiss the application by the Appellant as the same is an abuse of the court process, brought in bad faith.** The issue of abuse of court process is a serious one, and once raised by a party, it behoves the court to make a determination thereon at the earliest opportune time and the same cannot be taken lightly.

In the case of *Chairman Co-Operative Tribunal & 8 Others Ex-Parte Management Committee Konza Ranching & Farming Co-Operative Society Ltd (2014) Eklr*, the Honourable Justice Odunga referred to the words of his brother Judge the Honourable Justice Kimaru in the precedent setting case of *Stephen Somek Takwenyi & Another –Vs- David Mbuthia Githare & 2 Others Nairobi (Milimani) Hcc No. 363 of 2009*, where it was stated;

**“..... The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, ..... there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.”**

It goes without saying that once the appeal was dismissed, this court became *functus officio* and as such it has no jurisdiction to adjudicate over the present application and I therefore agree with the Respondent’s counsel that this application was brought in bad faith. The court of Appeal stated 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*, 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”**

In conclusion and having considered all the issues canvassed before me, it is my view that I lack jurisdiction to grant the prayers sought. I therefore decline the orders sought and dismiss the Applicants’/ Appellants’ application dated 22<sup>nd</sup> November, 2021 and filed on 23<sup>rd</sup> November, 2021. I also wish to state that this Court has equally no jurisdiction to set aside or lift the Warrants of Attachment and Proclamation dated 8<sup>th</sup> November, 2021 as they were not issued in this matter. Costs goes to the Respondent.

**RULING FOR GARSEN READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23<sup>RD</sup> DAY OF MARCH, 2022**

.....

**S.M. GITHINJI**

**JUDGE**

**In the presence of: -**

1. Kimondo Gachoka & Company Advocates for the Appellants (absent)
2. Wambua Kilonzo & Company Advocates for the Respondent.



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