



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)*

**PETITION (APPLICATION) NO. E012 OF 2023**

– BETWEEN –

**DARI LIMITED ..... 1<sup>ST</sup> APPELLANT/APPLICANT**  
**RAPHAEL TUJU ..... 2<sup>ND</sup> APPELLANT/APPLICANT**  
**MANO TUJU ..... 3<sup>RD</sup> APPELLANT/APPLICANT**  
**ALMA TUJU ..... 4<sup>TH</sup> APPELLANT/APPLICANT**  
**YMA TUJU ..... 5<sup>TH</sup> APPELLANT/APPLICANT**  
**S.A.M COMPANY LIMITED ..... 6<sup>TH</sup> APPELLANT/APPLICANT**

– AND –

**EAST AFRICAN DEVELOPMENT BANK ..... RESPONDENT**

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*(Being an application for stay of proceedings before the Supreme Court pending the hearing and determination of the complaint lodged before the Judicial Service Commission)*

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**Representation:**

Paul Muite SC, appearing with Paul Nyamodi, SC & Duncan Okatch for the appellants/applicants  
*(V. A. Nyamodi & Company Advocates and Okatch & Partners Advocates)*

Prof. Githu Muigai, SC appearing with Mr. Micheal Sullivan, Peter Kabatsi and Ronald Makokha for the Respondent  
*(Mohammed Muigai, LLP)*

## **RULING OF THE COURT**

[1] This Ruling disposes of the Notice of Motion dated 16<sup>th</sup> May 2024 and filed on 17<sup>th</sup> May 2024, seeking *stay of this Court's proceedings pending the determination of the complaint lodged before the Judicial Service Commission (hereinafter JSC) as well as costs*. The Motion is brought pursuant to Articles 48, 50(1), 163(3) and (4) of the Constitution, Section 24 of the Supreme Court Act, and Rule 32 of the Supreme Court Rules. It is instructive to note that prayers 1, 2, and 3 are now spent following the Court's directions for the disposal of the instant application issued on 21<sup>st</sup> May 2024.

[2] The proceedings before this Court were instituted by the appellants/applicants through their Petition No. E012 of 2023 dated 25<sup>th</sup> April 2023 and lodged on 26<sup>th</sup> April 2023, against the Judgment of the Court of Appeal (*M'inoti, Laibuta & Gachoka, J.J.A.*) delivered on 20<sup>th</sup> April 2023 in Civil Appeal No. 70 of 2020. The crux of the appeal is the interpretation of the jurisdiction of the High Court under the Foreign Judgment (Reciprocal Enforcement) Act. We shall say no more on the appeal, its merits or demerits as it is not for determination before us at this juncture.

[3] However, it is imperative to set out in summary the proceedings before this Court leading to the instant application. Following the filing of the appeal, on one hand, the appellants/applicants filed the Notice of Motion (***Application E017 of 2023***) dated 25<sup>th</sup> April 2023, seeking stay of execution and stay of proceedings before the High Court. On the other hand, the respondent filed two Motions, ***Petition (Application) E012 of 2023*** dated 23<sup>rd</sup> June 2023, and ***Application E017 of 2023*** of even date, both seeking to strike out the appellants/applicants' supplementary affidavits by Raphael Tuju, Amos Oketch and Edward Kenneth Okundi. By a composite Ruling delivered on 6<sup>th</sup> October 2023, the Court disposed of all three applications, dismissed the appellants/applicants' application and allowed the respondent's applications.

[4] Aggrieved, the appellants/applicants filed two new applications; Notice of Motion (**Application E017 of 2023**) dated 12<sup>th</sup> October 2023, seeking review of the Court's Ruling dated 6<sup>th</sup> October 2023; and Notice of Motion (**Petition (Application) E012 of 2023**) dated 26<sup>th</sup> October 2023, seeking to strike out the respondent's replying affidavit sworn by Justa Kiragu on 12<sup>th</sup> May 2023, or in the alternative, leave to adduce additional evidence in terms of the affidavits of Raphael Tuju, Amos Oketch and Edward Kenneth Okundi sworn on 26<sup>th</sup> October 2023.

[5] On 31<sup>st</sup> October 2023, the Court issued a hearing notice scheduling the main appeal for hearing on 13<sup>th</sup> November 2023. Of pertinence is that the two applications were pending when the Court listed the appeal for hearing. In reaction to the hearing notice, by a letter dated 6<sup>th</sup> November 2023, addressed to the President of the Court, the appellants notified the Court of the two pending applications and requested the Court to have the main appeal set down for hearing after the determination of all the pending applications.

[6] In response, vide a letter dated 6<sup>th</sup> November 2023, the Court through its Deputy Registrar categorically communicated that it had no intention or reasons to rush the matter unprocedurally. Further, that the Court's only objective was to expeditiously dispose of all cases filed before it without undue delay. Noting the pending applications, the hearing notice of 13<sup>th</sup> November 2023 was vacated to allow for their determination. Thereafter, the two applications were determined by way of submissions and dismissed by two separate Rulings dated 7<sup>th</sup> November 2023.

[7] After the Rulings of 7<sup>th</sup> November 2023, the appellants/applicants filed two more applications; the Notice of Motion (**Petition (Application) No. E012 of 2023**) dated 26<sup>th</sup> January 2024, seeking to adduce additional evidence in a further witness statement dated 21<sup>st</sup> December 2023, recorded by one David Washington Barnabus Ochieng with the Directorate of Criminal Investigations; and the Notice of Motion (**Petition (Application) No. E012 of 2023**) dated 2<sup>nd</sup> February 2024, seeking to strike out the respondent's replying affidavit sworn by Carol Luwaga on

31<sup>st</sup> January 2014, in response to the latter motion. By a composite Ruling delivered on 26<sup>th</sup> April 2024, both applications were dismissed.

**[8]** By a second letter dated 5<sup>th</sup> February 2024, addressed to the President of the Court, the appellants/applicants complained of the manner in which the Court handled their applications, challenging the merits of the Rulings of 6<sup>th</sup> October 2023 and 7<sup>th</sup> November 2023. They accused the Court of handling the applications in a manner that led them to believe that the Court was working towards a pre-determined outcome. In a response dated 13<sup>th</sup> February 2024, the full Bench of the Court, through the Registrar, acknowledged receipt of the letter dated 5<sup>th</sup> February 2024, and reassured the appellants/applicants that the Judges were mindful of the oath of office as they discharge their constitutional mandate. Be that as it may, the Court made it clear that it cannot be directed as to the manner in which it discharges this mandate.

**[9]** Subsequently, on 30<sup>th</sup> April 2024, the appellants/applicants through the firm of Okatch & Partners Advocates, filed a complaint before the JSC against a Bench of the Court (*Mwilu, DCJ & VP; Ibrahim, Wanjala, Njoki, & Ouko, SCJJ*) that had heard and determined the impugned Rulings. The complaint was brought pursuant to Section 3 of the Judicial Service Act, Part II, Sections 8,9,11,14,15 and 16 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 and Section 29E of the Supreme Court Act. The gist of their complaint is that the Court has dealt with applications filed before it and issued case management directions in a manner that disregards the appellants/applicants' rights to fair hearing and access to justice. Further, that the Court has been working towards a pre-determined goal in the matter.

**[10]** Thereafter, vide a Notice of Change of Advocates dated 2<sup>nd</sup> May 2024, the appellants/applicants appointed the firm of Okatch & Partners Advocates, to conduct this matter on their behalf and in place of the firm of V. A. Nyamodi & Company Advocates. Upon the determination of all the pending interlocutory applications, on 6<sup>th</sup> May 2024, the Court issued a hearing notice to the parties

scheduling the matter for hearing on 21<sup>st</sup> May 2024. The Court's hearing notice triggered the instant application under certificate of urgency. Upon considering the Certificate of Urgency, on 17<sup>th</sup> May 2024, the Court directed that the application be mentioned on the 21<sup>st</sup> May 2024, when the main appeal was scheduled for hearing.

**[11]** On 21<sup>st</sup> May 2024, when the appeal came up for hearing, the question of the appellants/applicants' representation was raised. It was unusually contended that the firm of Okatch & Partners Advocates was on record for the appellants/applicants with regards to the instant application only, while the firm of V. A. Nyamodi, led by Paul Muite SC (to the exclusion of the firm of Okatch & Partners Advocates) was on record for the appellants/applicants in the main appeal. The Court adjourned the hearing pending the determination of the instant application. Moreover, it directed that the application was to be determined by way of written submissions, and issued consequential compliance directions to that effect.

**[12]** Turning back to the motion before us, we note the grounds on the face of the application, and supporting affidavit sworn by Raphael Tuju on 16<sup>th</sup> May 2024. Wherein, the appellants/applicants argue that; the jurisdictional issues raised in the appeal transcend the parties' case and the Court's determination is binding on all the courts below. The deponent avers that the Court (*specifically Lady Justice Philomena Mwilu (DCJ & VP), Justice Mohammed Khadar Ibrahim, Justice (Dr.) Smokin Wanjala, Lady Justice Njoki Ndungu and Justice William Ouko, SCJJ*), has ignored important and pertinent matters and procedures that are directly relevant and integral to the main issues in the appeal. It is his assertion that despite the appellants/applicants' complaints, the Court has ignored or refused to take any action in remedy thereof. The deponent is categorical that the Judges' actions are not only unfair to the appellants/applicants, they are also indicative of the fact that the Court is working towards a predetermined outcome. The deponent goes on to aver that the Court has actively and continually worked to defeat the appellants/applicants' rights to fair hearing and access to justice.

[13] It is the appellants/applicants' further case that the five Judges have conducted themselves in a manner that is impartial and departs from the basic expectations of a court of law; that the Court has fallen short of its mandate under the Constitution; that the said Judges' conduct falls short of the required standard of conduct under the Judicial Service (Code of Conduct and Ethics) Regulations 2020, and the Judicial Service Act; and that the impugned actions and omissions necessitated the filing of the complaint against the five Judges to the JSC.

[14] Consequently, it is their case that once the complaint is heard and determined, the Judges will have a chance to introspect, recalibrate and appreciate the impact of their decisions and the JSC will give proper directions on the hearing of the main appeal. In the foregoing, it is only fair to first allow the complaint before the JSC to run its course, and as such, it is just and equitable that the instant application be determined on a priority basis.

[15] In their submissions dated 16<sup>th</sup> May 2024, the appellants/applicants reiterate their grounds in support of the application. In addition, they argue that they have completely lost faith in the Court's administration of justice and would ideally call for the recusal of the said Judges. They cite the House of Lords decision in ***R vs. Bow Street Metropolitan Stipendiary Magistrates & Others Ex Parte Pinochet Urgate*** to the effect that where a Judge's action gives rise to a suspicion of lack of impartiality, this is enough for the Judge to recuse himself from the proceedings. However, they are quick to add that guided by this Court's decisions in ***Gladys Boss Shollei & Another vs. Judicial Service Commission and Another*** (Petition 34 of 2014) [2022] KESC 5 (KLR), despite the fact that they have adduced enough grounds for recusal, the doctrine of necessity and of statutory authority would militate against such a prayer. In the circumstances, they urge that it is only fair for the Court to allow the JSC to hear and determine the pending complaint before proceeding to hear the main appeal.

[16] Opposing the motion, the respondent filed its replying affidavit sworn by Carol Luwaga on 27<sup>th</sup> May 2024, to the effect that the application lacks merit as no justification has been demonstrated for the orders prayed to issue. The respondent states that the application has failed to meet the principles for grant of stay of proceedings and is therefore, one for dismissal. In response to the specific arguments by the appellants/applicants, the respondent sets out in great detail the sequence of the proceedings and court orders issued by this Court and the superior courts below, illustrating the appellants/applicants' continued contempt and disobedience of the same.

[17] Moreover, the respondent sets out the events and parties' conduct during the proceedings before this Court leading to the impugned Rulings, urging that the application fails to demonstrate how the Court's determination would warrant the grant of stay. It is the respondent's further case that in any event there is no nexus between the appeal and the complaint before the JSC. Furthermore, it is the respondent's case that the allegations levelled by the appellants/applicants against the Court are unsubstantiated by evidence.

[18] The respondent also asserts that the appellants/applicants are undeserving of the orders for stay of proceedings on account of their continuing contempt and non-compliance with the superior court rulings and orders as well as this Court's case management directions. It is also the respondent's averment that the appellants/applicants have intentionally delayed the conclusion of the dispute; attempted to harass the Judges handling this matter with unsubstantiated allegations of bias and/or applications for their recusal both before the superior courts and this Court; continually advanced a false basis for their failure to pay the outstanding loan amount; and therefore, have approached the courts with unclean hands and are underserving of any equity.

[19] In its written submissions dated 28<sup>th</sup> May 2024, the respondent submits that the appellants/applicants have failed to meet the principles for grant of stay of proceedings under Section 23A of the Supreme Court Act settled in ***Khan vs.***

***International Commercial Company (K) Ltd*** (Petition (Application) E009 & E010 of 2023 (consolidated) [2023] KESC 84 (KLR) (Ruling). It emphasises that grant of stay of proceedings is only entertained in very deserving cases, to protect parties' right to expeditious trials. In any event, it is the respondent's argument, firstly, that the appellants/applicants have lodged an unsubstantiated complaint before the JSC and failed to expressly identify the law the Court has contravened as a consequence of its impugned Rulings or case management directions. The respondent submits that the JSC has yet to acknowledge or confirm the substance of the complaint. Therefore, the mere lodging of the same by the appellant cannot operate as a basis for grant of stay. It is the respondent's argument that the appellants/applicants have failed to explore all the legitimate avenues for redress before the Court including moving the Court for review of the impugned Rulings. The respondent submits that the real intention of the appellant vide the instant application, is to inhibit the Court from exercising its mandate under Article 163 of the Constitution.

[20] Secondly, the respondent submits that the appellants/applicants have not approached the Court in good faith and therefore are not entitled to the discretionary prayer sought. The respondent contends that the appellants/applicants have employed reprehensible tactics to delay the conclusion of the appeal including employing calculated and deliberate intimidation of the Judges of the Court; their application is not in compliance with the Supreme Court Rules or the Civil Procedure Rules that guide litigation in Kenya; and that the conduct of the appellants/applicants' counsel is without decorum and does not preserve the dignity of the Court.

[21] The respondent relies on this Court's jurisprudence in ***Odinga & 16 Others vs. Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae)*** (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions) (Judgment); and ***R vs. Ahmad Abolfathi Mohamed & Sayed Mansour Mousavi*** (Petition 39

of 2018) [2019] KESC 48 (KLR) (Judgment) to caution and frown against behaviour unbecoming of advocates, as officers of the court. In conclusion, it is urged that justice delayed is justice denied and the respondent should be allowed to enjoy the fruits of its Judgment based on the foreign court Judgment issued on 19<sup>th</sup> June 2019. In the circumstances, the respondent urges that it will be greatly prejudiced if the application is allowed.

**[22]** The Court also takes note of the appellants/applicants' rejoinder affidavit sworn by Raphael Tuju on 4<sup>th</sup> June 2024 and supplementary submissions of even date both filed on 10<sup>th</sup> June 2024, reiterating the grounds in support of the application. The appellants/applicants also urge the Court to render justice and allow the application by exercising its powers to grant discretionary orders under Section 24A, or to grant interlocutory reliefs under 24(1) of the Supreme Court Act, or exercise its inherent powers under Articles 159, 163 of the Constitution and Rule 3(3) and(5) of the Court's Rules to regulate its own processes as settled in **Board of Governors, Moi High School Kabarak & Another vs. Bell & 2 Others** (Petition No. 6 &7 of 2013 & Civil Application No. 12 &13 of 2012(consolidated) [2013] KESC 12 (KLR) (Ruling). It is also their submission that contrary to the respondent's argument, the JSC complaint was registered on 17<sup>th</sup> May 2024 as **JSC Petition No. 35 of 2024**; and the instant application can be distinguished from the facts leading to the **Khan vs. International Commercial Company (K) Ltd [supra]** decision, for reasons that the instant application was brought in good faith, filed in the earliest time possible without any delay, and seeks to economically utilise the Court's time;

**[23]** Furthermore, the appellants/applicants urge that the complaint before the JSC raises clear grounds of impropriety and misconduct which has affected their perception of fairness; the application is not meant to delay the determination of the appeal before this Court; and, even though restrained from arguing the merits of the appeal at this stage, in response to the respondent's assertions, it is imperative to point out that the Judgment of the foreign court was acquired by reliance on

perjured evidence and statement. In conclusion, they contend that the rights to fair hearing and access to justice are inalienable and must be protected by all institutions including the apex court.

## **ANALYSIS**

**[24]** The appellants/applicants herein are seeking a stay Order from this Court in the most unusual, strange, and we daresay, disingenuous strategy. Through this application, they are moving the Court to stay these proceedings awaiting the conclusion and determination of a complaint they have filed at the JSC against the Five-Judge Bench constituted to hear and determine their Appeal. In their Petition before the JSC, the appellants/applicants have brazenly accused the five Judges of impropriety and misconduct. They allege that the Court is working towards a predetermined outcome. The details of their petition have already been highlighted in paragraphs 12, 13, 14 and 15 of this Ruling.

**[25]** We shall limit ourselves to the technical and substantive adequacy of the Motion before us, so as not to prejudice the appellants/applicants' prosecution of their petition before the JSC. Towards this end, it is clear that the appellants/applicants are not seeking a stay of the Judgment of the Court of Appeal. Instead, they are seeking a stay of their own appeal pending the determination of a complaint they have filed against the five of us at the JSC. As such, the principles established for grant of stay by this Court in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR are not applicable to this application. In the same vein, it does not require superlative archival effort to discover that there exists no provision of the Constitution, the Supreme Court Act, or Rules of this Court as would entitle a litigant to make such an application.

**[26]** What is undeniable, is the fact that by resorting to this course of action, the applicants are unequivocally accusing this Bench of lack of impartiality, fairness, and integrity. Such an accusation against a Judge goes to the very core of his/her oath of office. Coming from a party to ongoing proceedings, such an allegation, must strongly persuade the Judge to recuse him/herself from further participation in the

proceedings. Indeed, the honourable recourse by the litigant is to seek the recusal of the Judge. This is precisely what has happened to us, save that instead of applying for our recusal, the applicants herein would rather this Court stayed the proceedings until the JSC determines their complaint, a very strange move, to say the least.

**[27]** Having arrived at the inescapable conclusion that we are being accused of bias and working towards an undisclosed predetermined outcome, we are strongly persuaded that our further participation in these proceedings would not serve the ends of justice, at least in the eyes and perception of the appellants/applicants. Consequently, and inevitably, each of us on this Bench does hereby recuse him/herself from further participation in the hearing and determination of the appeal dated 25<sup>th</sup> April 2023 and filed on 26<sup>th</sup> April 2023.

**[28]** In taking this decision, we are keenly aware of its consequences on the appeal before us, given the constitutional provisions as to quorum of this Court. Indeed, such a decision is one that ought only to be taken very sparingly, on a case by case basis, and in the most compelling circumstances. However, in the face of the accusations of impropriety and bias, levelled against an entire Bench of the Court, even the doctrine of necessity cannot be available to the appellant/applicants. Furthermore, what would become of the administration of justice in the Country, if courts of law, leave alone the Supreme Court, were to be required to stay proceedings before them, pending the determination by the Judicial Service Commission of complaints filed against Magistrates and Judges?

**[29]** The following Orders shall issue:

- (i) The Notice of Motion dated 16<sup>th</sup> May 2024, is hereby dismissed.***
- (ii) The Judgment of the Court of Appeal dated 20<sup>th</sup> April 2023, shall stand until it is either affirmed, or reversed by a competent Bench of this Court.***
- (iii) Each party shall bear its own costs.***

**It is so Ordered.**

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> Day of October, 2024.**

.....  
**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF**  
**THE SUPREME COURT OF KENYA**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a**  
**true copy of the original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**