**Kisia t/a Steg Consultants v Kay Construction Company Limited; Krystalline Salt Limited (Objector) (Commercial Case 60 of 2016) [2023] KEHC 24514 (KLR) (Commercial and Tax) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24514 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**COMMERCIAL CASE 60 OF 2016**

**DAS MAJANJA, J**

**OCTOBER 31, 2023**

**BETWEEN**

**PATRICK SINGWA KISIA T/A STEG CONSULTANTS ..... PLAINTIFF**

**AND**

**KAY CONSTRUCTION COMPANY LIMITED ..... DEFENDANT**

**AND**

**KRYSTALLINE SALT LIMITED ..... OBJECTOR**

**RULING**

## Introduction and Background

1. `On March 25, 2022, the Court delivered judgment ("the Judgment") in this matter and issued the following final orders:

    (a) Judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of Kes 142,234,965.60.

    (b) Payment of the amount in (a) is subject to the Defendant receiving the payment due to it from the Government of Kenya through the Ministry of Defence. In the event the sum has already be received, the Defendant shall pay the sum due in proportion to the amount received from the Government of Kenya.

    (c) The Defendant shall bear the costs of the suit.

2. On May 8, 2023, the Plaintiff instructed Crescent Auctioneers ("the Auctioneers") to begin execution of the Judgment and on May 15, 2023 the Auctioneers proclaimed various goods it claimed belonged to the Defendant, in satisfaction of the Judgment and the decree issued therein. This action has prompted the Defendant to file two applications for the Court's determination.

3. The first Application by the Defendant is the Notice of Motion dated May 17, 2023 made undersections 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 Rule 22, Order 51 of the *Civil Procedure Rules* where the Defendant seeks a declaration that the execution of the Judgment by way of proclamation, attachment, removal, sale or howsoever otherwise is void *ab initio* and of no legal effect. This Application is supported by grounds set out on its face, the Affidavits of Hasmita Patel sworn on May 17, 2023 and June 9, 2023 and the Notice of Objection dated May 17, 2023. It is opposed by the Plaintiff through his undated Replying Affidavit.

4. The second Application by the Defendant is the Notice of Motion dated 07.09.2023 made, *inter alia*, under Order 45 of the *Civil Procedure Rules* seeking to review the Judgment to indicate that the Plaintiff is entitled to 15% of Kes 335,605,244.69 which is KES 50,340,786.70 and not Kes 142,234,956.60. The application is supported by the grounds on its face and the supporting affidavit of Hasmita Patel sworn on September 7, 2023 and the same is opposed by the Plaintiff through the grounds of opposition dated September 21, 2023.

**Analysis and Determination**

5. I have gone through the Applications and the responses thereto and considered them alongside the oral representations made by the parties' respective counsel.

6. The issues for determination are whether the Judgment should be reviewed and whether the execution of the Judgment commenced by the Plaintiff should be halted and annulled. I propose to first deal with the Application for review of the Judgment.

7. The principles governing the exercise of discretion to review a decree or order are now settled. Under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, an Applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason for the Court to review.

8. The Defendant's Application is anchored on an apparent error on the face of the record of the Judgment. The Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau* [1996] KLR 469 explained what constitutes an error of law apparent on the face of the record and the scope of review as follows:

> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.

9. The Defendant's case is that the apparent error in the Judgment is borne out of the Court's miscalculation of the sums due to the Plaintiff. According to the Defendant, the Court ordered that

the Plaintiff was entitled to 15% of the arbitral award which was Kes 335,605,244.69 and that 15% of this amount is Kes 50,340,786.70 and not the sum of Kes 142,234,956.60 as decreed by the Court.

10. I reject this argument for a number of reasons. I find that the Defendant is being selective in the manner of its reading and interpretation of the Judgment. It ought to be read as a whole and not in isolation. At the said Para 34 of the Judgment, the Court held that, "The arbitrator awarded the Defendant Kes 335,605,244.69 as the principal sum together with interest. On April 17, 2015, the Court adopted the Award as a judgment and decree of the Court, which was certified as Kes 826,720,638.69 as at July 16, 2015. The Defendant, in its letter dated January 25, 2016 to the Ministry of Defence calculated the amount payable to it as Kes 1,018,233,104.00. This is what the Plaintiff based the amount of Kes 142,234,965.60 on and which it now claims from the Defendant. Simple arithmetic demonstrates that this amount is less than 15% of the award even if the court was to credit the sum of Kes 3,000,000.00 already paid to the Plaintiff by the Defendant. However, since the entire decretal amount is yet to be settled, it follows that this amount is bound to increase owing to the time that has lapsed and accrual ofinterest over the same period."

11. The Plaintiff's claim was based on the certified award and the sum calculated by the Defendant itself as at January 25, 2016 which was Kes 1,018,233,104.00 and the 15% of this amount is what informed the Court to find that the claim was merited and was even less than what the Plaintiff was entitled to at the time and that this amount was bound to increase due to the ever accruing interest on the unpaid sum by the Ministry of Defence. There is therefore no error on the face of the record in respect of the calculation of the sums due to the Plaintiff.

12. In any case, I note that the Defendant had raised this issue of the calculation in its defence and at the hearing of the suit. The Court considered the same argument and still found that the Plaintiff was entitled to payment as above. At the hearing, the Defendant had also raised the issue whether the Plaintiff was being paid as a quantity surveyor as under Part 7 of the Fourth Schedule to the *Architects and Quantity Surveyors Act*. This Court held that since the Plaintiff was never appointed as a quantity surveyor, the provisions of *Architects and Quantity Surveyors Ac*t did not apply to him.

13. The Defendant is evidently seeking to have a second bite of the cherry by attempting to re-litigate similar issues which were raised at the trial and determined and which cannot be entertained in an Application for review. The Supreme Court in *Parliamentary Service Commission v Martin Nyaga Wambora & others* SCK Application No. 8 of 2017 [2018] eKLR explained the scope of a review Application as follows:

> [30] We further add that the review window so envisaged is not meant to grant an applicant a second bite at the cherry. It is not an opportunity for an applicant to re-litigate his/her case. Sight should never be lost of the shore that in an Application for review, like the one before the Court, at the core of the Application is the Court's exercise of discretion. It is the Court/Judge's decision that is impugned and not the substantive Application being re-argued. Hence an applicant is under a legal burden to lay a basis, to the satisfactory of this Court, that in exercise of its discretion, the limited bench acted whimsically or misdirected itself in reaching the decision it made.

14. I find that this is not an appropriate case for this Court to exercise its residual jurisdiction of review of its own decision as the Defendant has met the required threshold. Consequently, the Defendant's Application dated September 7, 2023 is dismissed with costs to the Plaintiff.

15. As to the Defendant's Application seeking to stop and annul the execution of the Judgment commenced by the Plaintiff, the Defendant contends that the execution is premature as it is yet to

receive any payment from the Ministry of Defence. It also contends that the goods proclaimed by the Auctioneers actually belong to the Objector. As the Court partly held in the Judgment which I have reproduced in the introductory part above, 'Payment of the amount in (a) is subject to the Defendant receiving the payment due to it from the Government of Kenya through the Ministry of Defence. In the event the sum has already be received, the Defendant shall pay the sum due in proportion to the amount received from the Government of Kenya."

16. The Defendant does not deny that prior to the delivery of the Judgment, it had been paid Kshs 350,000,000.00 on or about the year 2019/2020. In accordance with the holding of the Court I have outlined, payment to the Plaintiff was to be in due proportion of sums already received from the Government, meaning that if the Defendant had already received the sum of Kshs 350,000,000.00, then the Plaintiff would have been entitled to 15% thereof. The same would apply to any subsequent payments received by the Defendant from the Government. I therefore reject the Defendant's interpretation of the Judgment that the Plaintiff was only entitled to payment after the entire sum due to it was paid by the Government. I reiterate that the Plaintiff is entitled to 15% of all portions of sums paid to the Defendant by the Government until the award is fully liquidated.

17. As a result, I cannot fault the Plaintiff for commencing execution proceedings against the Defendant for sums that are due to it from the Kshs 350,000,000.00 already paid to the Defendant by the Government. The Defendant's contention that this sum has already been expended to pay loans and other expenses of the Defendant is an explanation for the Plaintiff to consider and maybe be accommodative and not the Court. The Court cannot force the Plaintiff to be understanding and accommodate this position taken by the Defendant when the Court itself had already determined that the Plaintiff was entitled to 15% of the sum already paid by the Government to the Defendant. Even if I was to consider the same, it would still fail for want of proof as there is no evidence from the Defendant to demonstrate that the said sum received are not with it and that they have been used up on other expenses.

18. The Defendant also attacks the execution on the ground that the proclaimed goods belong to the Objector. Order 22 Rule 51 of the *Civil Procedure Rules* provides for objection to attachment of property as follows:

> 1. Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the Court and to all the parties and to the decree-holder of his objection to the attachment of such property.
>
> 2. Such notice shall be accompanied by an Application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
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> 3. Such notice of objection and Application shall be served within seven days from the date of filing on all the parties.

19. A reading of Order 22 Rule 51 above places the Objector with the burden of proving that it is entitled to or has a legal or equitable interest on the whole or part of the proclaimed/attached goods. Other than the Notice of Objection, the Objector has not filed any deposition setting out, even in brief, the nature of its claim in regard to the proclaimed goods. It has not annexed any evidence such as receipts or such documents that can persuade the Court to conclude that the said proclaimed goods belong to the Objector or that it has proprietary interests against the same (see *Chotabhai M. Patel v Chaprabhi*

*Patel* [1958] EA 743). In the absence of such proof, I hold that the Plaintiff is entitled to proceed with execution to its logical conclusion. The Defendant's Application dated May 17, 2023 and the Objector's Notice of Objection of even date are dismissed.

**Disposition**

20. The Defendant's Applications dated May 17, 2023 and July 7, 2023 lack merit and are accordingly dismissed. The Defendant shall pay the Plaintiff's costs for both Applications which are assessed at Kshs 80,000.00.

**SIGNED AT DUBAI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2023.**

**A. MABEYA**

**JUDGE**

**Court Assistant: Mr M. Onyango**