



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 7 OF 2015

JAMES KIMANI MAINA.....PLAINTIFF

VERSUS

ATHI WATER SERVICES BOARD.....DEFENDANT

BIRDI CIVIL ENGINEERS LIML.....THIRD PARTY

RULING

The application dated 6th February, 2020 seeks the following orders:-

1. **THAT** the Honourable Court be pleased to order the release of **Kshs. 8,140,335/55** plus interest thereon until fully released, being the total amount held in the fixed joint interest-earning Account No. [...] at KCB Bank Kenya Limited, Milimani Branch, as at 17th December, 2019, as follows:

(a) The sum of **Kshs. 267.748/85** plus interest thereon until fully released, be released to the firm of Evans Thiga Gaturu Advocates on behalf of the Plaintiff in full and final settlement of the Decretal amount of Kshs. 44,750/= plus interest thereon and costs as awarded by the Court vide its Judgment per the Honourable Lady Justice J. Kamau delivered on 10th December, 2019.

(b) The balance of the sum of **Kshs. 7,872,586/70** plus interest thereon until fully released, be released to the firm of Nyachae & Ashitiva advocates on behalf of the Defendant through the following account details:

ACCOUNT NAME ; NYACHAE & ASHITIVA ADVOCATES

BANK : CREDIT BANK LIMITED

BRANCH NAME : KOINANGE STREET BRANCH

BANK CODE :025

BRANCH CODE :001

ACCOUNT NO : [...]

SWIFT CODE :CRBTKENA

2. **THAT** the costs of this Application be provided for.

3. **THAT** this Honourable Court be pleased to make any other or further orders as the circumstances and interests of justice herein may require.

The application is supported by the affidavit of Tamari Kaidza Katana Advocate sworn on the same date. The respondent filed a notice of Preliminary Objection dated 19th February, 2021. The applicant filed grounds of opposition to the Notice of preliminary Objection. Parties agreed to have the Preliminary Objection determined first.

Mr. Gaturu appeared for the plaintiff/respondent. Counsel submitted that the court delivered its judgment and soon thereafter the defendant

applied for the release of the money held in an escrow account of counsel for both parties. The Plaintiff raised an objection and both parties were advised to make formal applications. Counsel further submitted that he filed a notice of appeal against the judgment of this court. Proceedings were availed to counsel on 12th November 2020 and the record of appeal was filed in February, 2021. Counsel engaged his colleague to see if the application seeking the release of the funds could be withdrawn so that they could wait for the determination of the appeal but he declined. It is that refusal to withdraw the application that led to the filing of the preliminary objection.

Mr. Gaturu maintain that the High Court is *functus officio*. The court of Appeal has not heard the pending appeal. According to Mr. Gaturu, for the High Court to hear the application, that amounts to sitting on appeal on its judgment. The defendant has arrogated itself the role of the Court of Appeal by stating that the appeal has no chance of success. Counsel contend that his client is bitterly complaining about the trial judge being biased, unjust and unfair to him. The trial judge allowed counsel to adduce fresh evidence. Most of the submissions by counsel are in line with the preliminary objection which will be reproduced verbatim below.

Counsel further urge that the Court of Appeal can find in favour of the appellant and it is that court that will determine the appeal. Releasing the money from the joint account will be premature. Should the Court of Appeal find in favour of the appellant, the money will be released to the appellant. That would avoid execution proceeding. Counsel urged the court to strike out the application from the record and the preliminary objection be upheld so that the money can be held in the escrow account. The plaintiff was only awarded Kshs.44,000 in respect of a claim for Kshs.7,092,746. When the court made an order for deposit of the money until the determination of the proceedings, it did not distinguish an appeal and a High Court judgment. The dispute is still active. The defendant has been waiting for five years. It can be patient for another two years.

Mr. Ashitiva appeared for the defendant and relied on his grounds of objection. It is submitted that the plaintiff's claim partly succeeded. The money deposited in a joint account was to stay execution against the defendant. If there were no execution proceedings, the money would not have been deposited. The deposit was as a condition for allowing the defendant to defend the suit. No defendant is ever required to deposit money in an account unless it is for purposes of staying execution. The court delivered its judgment on 10th December 2019 and advised both parties to make formal application. According to Mr. Ashitiva, a Preliminary Objection cannot raise accusation against the court. The only relevant objection is the contention that the court is *functus officio*. The defendant is not seeking the release of all the money. It is seeking the release of the portion due to the defendant.

The Preliminary Objection dated 19th February, 2021 is made up as follows:-

- 1. The Plaintiff/Respondent has now Filed and Served an Appeal to the Court of Appeal against the whole of the Judgment delivered by the Trial Judge the Hon. Lady Justice Jackie Kamau on 10th December 2019 being CACA E043 of 2021. JAMES KIMANI MAINA -VS- ATHI WATER SERVICES BOARD, the said Judge is now functus officio," this Suit," and She no longer has any Jurisdiction to hear this matter since doing so, would amount to sitting on Appeal, against her own Judgment.**
- 2. THAT Defendant/Applicant has arrogated herself the Role of the Court of Appeal by deciding that the Plaintiff's/Respondent's Appeal cannot succeed and the Impugned Judgment, should be executed by the High Court, as the Final Judgment, without the Appellant being heard on His Appeal, as required by Law.**
- 3. THAT an Appeal having been Preferred against the Hon. Lady Justice Kamau, delivered on 10th December 2019, in which the Plaintiff/Respondent has bitterly complained against the Trial Judge, whom he is accusing of being biased, Unfair and Unjust to him, and being guilty of an abuse of the due Process of the Court, by taking Sides, and allowing the Respondent to give Fresh Evidence which had not been Canvassed during the Trial, from the Bar, under the Pretext of "High-lighting" Her Submissions, despite Serious Objections by the Plaintiff/Respondent, and the Judge denied the Plaintiff/Respondent, an opportunity to refute such Irregular, Unjust, and Unfair Breach of the Law, and if the Judge Insists on going on with the Application while there is already an Appeal against Her said Judgment, will only confirm the Plaintiff's fears that the Judge was biased against him throughout the proceedings and a recusal will be fully justified in view of the Judge's entry into the Arena of conflict, and she would end up being "Buried in the Dust."**
- 4. THAT the court is an independent Arbiter, sitting to dispense justice by the Innocent Litigant coming to seek justice in her court, and the role of the Judge is not to dispense injustice to the litigant**
- 5. THAT Justice demands that Justice be dispensed to both parties equally and the Sum of KShs. 8,140,335/55 having been held in KCB Bank Ltd under an Order of the Court in "Joint Names of "Counsel for both the Plaintiff and the Defendant, and now Appellant and the Respondent, under an Order of the Court made more than five (5) Years ago, there is no good reason why, the Defendant/Applicant cannot wait for another one or two years for the Appellate Court to make a Final Determination of the Suit, as was Ordered by the Court in 2015 and such Final Determination is from the Court of Appeal where the Decision of the High Court has been challenged, and not as assumed by the Defendant while Purporting to sit as the Court of Appeal.**
- 6. THAT It would be Premature to release the Money held in the KCB Bank Ltd, while an Appeal is still pending in the Court of Appeal, and the Trial Judge should appreciate that the "Appeal can go either Way, and all the money in the Joint Account Ordered to be due to the Plaintiff/Respondent and all of it released to him, and not the Defendant, as the Decretal Amount, and thus enable the Plaintiff to enjoy the fruits of his Judgment without the necessity of execution Proceedings, for Its recovery.**
- 7. THAT the Plaintiff therefore Prays that the Defendant's Application dated 6th February 2020, be struck out from record and dismissed with Costs to the Plaintiff/Respondent in any event, and on the Higher scale.**

In the case of **GITAU –V- THUO & 2 OTHERS (2009) KLR 86**, the Court of Appeal held *inter alia*:-

“It was settled law that a preliminary objection raised a pure point of law which was argued on the assumption that all the facts pleaded by the opposite side were correct and that it cannot be raised if any fact had to be ascertained.”

Similarly, in the case of **B -V- ATTORNEY GENERAL, (2004) KLR, 431**, Ojwang J (as he then was) held *inter alia*:-

“A preliminary objection should be founded on pure points of law and should be truly prefatory and preparatory to the issues of substance in the claim in question. Such an objection may also touch on uncontested facts, on the basis of which decision by the court would dispose of the whole matter coming before it in *limine*.”

Further, the court in the case of **NJOYA & 6 OTHERS –V- ATTORNEY GENERAL & ANOTHER (2004) KLR 233**, it was held as follows:-

“A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The plaintiff in his plaint dated 24th December, 2014 sought Kshs.7,092,496/90 as special damages plus interest from 1st October, 2011 until payment in full. The defendant was served but failed to enter appearance and a request for judgment dated 18th February, 2015 was made. On 25th February, 2015 the Deputy Registrar entered judgment in favour of the plaintiff. The defendant filed an application dated 16th April, 2015 seeking to stay execution and have the default judgment set aside. Justice Onyancha (as he then was) certified the application as urgent, granted interim orders of stay of execution on condition that the defendant deposit in court the decretal sum of Kshs.7,092,497. On 28th May, 2015, parties sent a consent letter that was received by the court on 9th June, 2015 indicating that the decretal sum was to be deposited in an escrow account of both counsels instead of being deposited in court. The defendant was allowed to defend the suit.

The suit was fully heard and Justice J. Kamau delivered her judgment on 10th December 2019. The plaintiff was awarded Kshs.44,720. The defendant is now seeking the release of the money from the escrow account and leave what is payable to the plaintiff as per the court order. This ruling is in relation to the Preliminary Objection and not the main application for the release of the money.

It is contended that this court is now *functus officio* and does not have the jurisdiction to hear the matter as doing so would amount to sitting on Appeal against its own judgment. The delivery of a judgment by a court does not make the court *functus officio*. A party can still approach the same court for other orders such as stay of execution, leave to appeal or enlargement of time to file appeal out of time, setting aside the judgment, rectification of the judgment due to errors apparent on the face of the record, payment of the decretal sum by way of instalments or in the case of the court of Appeal, Certification that an intended Appeal to the Supreme Court raises constitutional issues or that the appeal is of great public interest and leave ought to be granted for an appeal to be heard by the Supreme Court. There are several instances where a party can still approach the court for various orders after a judgment is delivered and decree extracted. That does not amount to sitting on appeal on the court’s own decision.

The defendant is seeking to have the money deposited in the escrow account released on *pro rata* basis. It is this court which gave the order for the deposit of the money as security. The defendant has the right to make such an application and cannot be told to wait for the determination of the appeal first. That application will be heard on its own merit and a ruling delivered. The preliminary objection is misplaced as this court is not *functus officio*. The fact that the plaintiff has appealed does not entitle him to all the money in the escrow account. Whether the funds should continue to be held in the escrow account or not will be for the court to decide upon hearing the application.

I do note that the rest of the Preliminary Objection does not raise any issues of law. Challenging a decision of the High Court before the Court of Appeal is a constitutional right. However, that right does not fetter the jurisdiction of the High Court to hear and determine subsequent applications in the same matter. There is no order from the Court of Appeal staying any further proceedings in this matter.

The upshot is that the Preliminary Objection dated 19th February 2021 lacks merit and the same is hereby dismissed with costs. The plaintiff is hereby ordered within fourteen (14) days to file a replying affidavit or grounds of opposition in relation to the defendant’s application dated 6th February, 2020.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF MAY, 2021

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S. CHITEMBWE

JUDGE