



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO. 140 OF 2008**

**GIDEON MOSE ONCHWATI..... PLAINTIFF**

**-VERSUS-**

**RUBIS ENERGY KENYA PLC formerly**

**KENYA OIL COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**NATION MEDIA GROUP.....2<sup>ND</sup> DEFENDANT**

**RULING**

1) Pursuant to Article 40(1) of the Constitution of Kenya, 2010, Sections 1A, 1B, 34 and 91 of Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules, **Rubis Energy Kenya PLC (Formerly Kenya Oil Co. Ltd)**, the 1<sup>st</sup> defendant herein took out the motion dated 23<sup>rd</sup> July 2020 whereof it sought for the following orders:

***i. THAT the application herein be certified as urgent.***

***ii. The plaintiff be ordered to restitute to the 1<sup>st</sup> defendant/ applicant the sum of Kenya shillings 16,129,272/= and interest at the rate of 12% per annum from 15<sup>th</sup> May 2017 until payment in full.***

***iii. Failure by the plaintiff to restitute the 1<sup>st</sup> defendant/ applicant the sum of Kenya shillings 16,129,272/= and interest at the rate of 12% per annum from the date of 15<sup>th</sup> May 2017 until payment in full, the 1<sup>st</sup> defendant/applicant be at liberty to execute for the said sums as against the plaintiff.***

***iv. THAT the plaintiff be ordered to pay the 1<sup>st</sup> defendant/applicant the costs of this application.***

2) The 1<sup>st</sup> defendant/applicant filed in support of the motion the affidavit sworn by Martin Kimani. Gideon Mose Onchwati, the plaintiff herein filed the affidavit he swore to oppose the application.

3) When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the application disposed of by written submissions.

4) I think it is appropriate at this juncture to first state the background of this application before considering its substance. The plaintiff filed a claim before this court vide the amended plaint dated 19<sup>th</sup> May 2009. On 2<sup>nd</sup> July 2015, the plaintiff was awarded a sum of kshs.15,500,000/= as compensation plus costs and interest jointly and severally payable by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

5) The plaintiff proceeded to attach two of the applicant's jet fuel trucks in Mombasa forcing the applicant to pay the plaintiff a sum of ksh.21,641,217/= being full and final settlement of the decretal sum and auctioneer charges.

6) Nation Media Group, the 2<sup>nd</sup> defendant herein appealed against the judgment in the Court of Appeal. The applicant supported the 2<sup>nd</sup> defendants appeal.

7) The Court of Appeal found merit in the appeal and by its judgment delivered on 11<sup>th</sup> October 2019, the award given to the plaintiff by the High Court was reduced from ksh.15,500,000/= to ksh.4,500,000/= plus costs and interest.

- 8) Following the successful appeal the 1<sup>st</sup> defendant is now before this court seeking for restitution of the surplus sum it paid to the plaintiff being ksh.16,129,272/= plus interest at the rate of 12% per annum from 15<sup>th</sup> May 2017 until payment in full.
- 9) It is the submission of the 1<sup>st</sup> defendant that it is entitled to restitution of the surplus amount paid to the plaintiff. The 1<sup>st</sup> defendant avers that it made a written demand to the plaintiff but the plaintiff is yet to pay the amount demanded to be refunded.
- 10) It is the 1<sup>st</sup> defendant's submission that a failure to order and direct the plaintiff to refund the monies paid in excess would lead to unjust enrichment on the part of the plaintiff. Nation media Group, the 2<sup>nd</sup> defendant/respondent supported the 1<sup>st</sup> defendant's application.
- 11) The plaintiff opposed the 1<sup>st</sup> defendant's application stating that the applicant did not find any need to file an appeal against the dismissal of the application it had filed seeking to review this court's decree.
- 12) The plaintiff further pointed out that the applicant did not seek for an order for stay of the order authorising the plaintiff to execute the decree for recovery of the decretal sum pending the assessment of costs of the suit.
- 13) According to the plaintiff, the failure to appeal made the decree final as against the 1<sup>st</sup> defendant/applicant. The plaintiff also argued that there is no evidence that the 1<sup>st</sup> defendant supported the 2<sup>nd</sup> defendant's appeal and therefore applicant is not entitled to any benefit by way of restitution upon the reversal of the decree.
- 14) The plaintiff further stated that the applicant failed to show that the plaintiff has been conferred with an unjust benefit which he must retribute. He argued that he only enjoyed the fruits of his judgment.
- 15) Having considered the material placed before this court plus the rival submissions, it is not in dispute that on 2<sup>nd</sup> July 2015 this court passed judgment in favour of the plaintiff and against the defendants jointly and severally in the sum of kshs.15,500,000/= plus costs and interest.
- 16) **Secondly**, it is also not disputed that the 2<sup>nd</sup> defendant successfully appealed against this court's judgment whereof the court of Appeal reduced the award from ksh.15,500,000/= to ksh.4,500,000/=.
- 17) **Thirdly**, it is not denied that when the plaintiff executed the decree to recover the decretal sum, the 1<sup>st</sup> defendant was compelled to pay the plaintiff a sum of ksh.21,641,217/= to avoid its trucks being carted away by the auctioneers.
- 18) **Fourthly**, that as per the judgment of the Court of Appeal, the plaintiff is entitled to a total of ksh.4,500,000/= plus interest at court rates from 2<sup>nd</sup> July 2015 to 15<sup>th</sup> May 2017 bringing the total amount to ksh.5,511,945/=
- 19) Fifthly, that it is apparent from the calculations provided that the plaintiff was paid by the 1<sup>st</sup> defendant in excess of ksh.16,129,272/=. This is the amount the 1<sup>st</sup> defendant is now demanding to be refunded by the plaintiff by way of restitution.
- 20) I have already set out the grounds the plaintiff has relied in resisting the 1<sup>st</sup> defendant's claim. It is argued by the plaintiff that since the 1<sup>st</sup> defendant did not appeal against the judgment of this court, it is not entitled to benefit from the judgment of the Court of Appeal.
- 21) A careful perusal of the Court of Appeal judgment attached to the supporting of Martin Kimani, will reveal that in page 10 of the judgment, the 1<sup>st</sup> defendant (2<sup>nd</sup> respondent in the appeal) actually supported the 2<sup>nd</sup> defendant's (appellant) appeal. It cannot therefore lie in the mouth of the plaintiff to say that the 1<sup>st</sup> defendant did not participate in the appeal.

22) In the case of **Peter Okello Obilo =vs= South Nyanza Sugar Co. Ltd. (2017) e KLR**, Okwany J, stated inter alia as follows:

**“A reading of the above sections of the Civil Procedure Act clearly shows that the correct court to handle the application for restitution is the court of first instance in this case, the High Court, that passed the decree that is the subject of the refund. It is therefore my finding that this is the court of the first instance and therefore the proper court to handle the instant application and not the Court of Appeal as had been suggested by the respondent. I further find that there is no mandatory legal requirement that the claim for refund be made before the Court of Appeal. In any event, restitution as a remedy that automatically flows from the reversal or variation of a decree and therefore, there was no way the applicant could have sought restitution of the monies paid at the Court of Appeal before knowing the outcome of the said appeal. In the instance case, the applicant paid the decretal sum to the respondent to avoid an impending execution after its application for stay of execution pending appeal was dismissed by this court. Upon succeeding on appeal, it is only fair and just that the respondent refunds the sums of money that he had received in respect to court orders that had been overturned by the Court of Appeal. In essence therefore, the respondent has no basis for continuing to withhold monies that should not have been paid to him in the first place. The applicant should be taken back to the position that it was in before the impugned orders that were subject of the appeal were made.”**

23) I am persuaded by the holding made in the cited authority.

24) In the case of **Kenya Commercial Bank Ltd & Another =vs=**

Samuel Kamau Macharia & 2 others (2008) e KLR the Court of Appeal made reference to the case of **Fibrosa Spolka Akayina =vs= Faibarn Lawson Combe Barbour ltd (1943) A.C** which provides that:

**“It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another, which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.”**

25) It is clear in my mind that pursuant to the provision of Sections 34 and 91 of the Civil Procedure Act and on the basis of the authorities cited that the 1<sup>st</sup> defendant/applicant is entitled to restitution of the amount he paid in excess of the decretal sum determined by the Court of Appeal.

26) In the end the motion dated 23<sup>rd</sup> July 2020 is found to be meritorious. The same is allowed giving rise to issuance of the following orders:

**i. The plaintiff is hereby ordered to restitute to the 1<sup>st</sup> defendant/applicant a sum of ksh.16,129,272/= plus interest at 12% p.a from 15<sup>th</sup> May 2017 until the date of full payment within 60 days from the date of this order.**

**ii. In default the 1<sup>st</sup> defendant/applicant be at liberty to execute the order of restitution for recovery of the amount from the plaintiff.**

**iii. The plaintiff/respondent to pay the 1<sup>st</sup> defendant/applicant costs of the application.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF MAY, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants