



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

J.R. MIISC. APP. NO. 617 OF 2016

PETER M. KARIUKI.....APPELLANT

VERSUS

ATTORNEY GENERAL.....1<sup>ST</sup>RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE.....2<sup>ND</sup> RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF FINANCE.....3<sup>RD</sup>RESPONDENT

CHIEF OF THE KENYA DEFENCE FORCES.....4<sup>TH</sup> RESPONDENT

COMMANDER, KENYA AIR FORCE.....5<sup>TH</sup> RESPONDENT

*(An appeal from the Ruling of the Deputy Registrar of the High Court at Nairobi- Judicial Review Division.*

*(Honourable E.W. Mburu (Mrs) in Nairobi Judicial Review, J.R. Misc. Application No. 617 of 2016 delivered on 31<sup>st</sup> May 2018).*

**JUDGMENT**

**Introduction**

1. The long unpreceded history of this case is rehashed with sufficient detail in the judgment of the Court of Appeal in Civil Appeal Number 79 of 2012.<sup>[1]</sup> It will add no value for me to spent ink and paper repeating it here. It will suffice only to mention a few highlights. Briefly, in the early morning of 1<sup>st</sup> August 1982, non-commissioned officers of the defunct Kenya Air Force staged an abortive coup to overthrow the government of the Republic of Kenya. However, loyal forces from the Kenya Army crushed the coup within twelve or so hours of its inception. This unfortunate event left behind a trail of destruction of human life, property and gross violations of human rights.

2. The appellant, Peter M. Kariuki was the Commander of the defunct Kenya Air force at the material time. He joined the Air Force soon after independence and rose through the ranks and by 1981, he had attained the rank of a Major General when he was appointed the Commander of the Kenya Air Force by the then President of the Republic of Kenya.

3. Shortly after the mutiny was quelled, he was arrested, confined at Kamiti and Naivasha Maximum Prisons in solitary confinement for a total 147 days. He was charged before the court Martial with the offences of failing to prevent a mutiny and failing to suppress a mutiny.<sup>[2]</sup> He was tried, convicted, and sentenced to serve four years imprisonment. In addition, he was dismissed from the armed forces, and, was stripped of his rank, benefits, medals and decorations. He never appealed against the said conviction and sentence. The Commissioner of prisons unilaterally declared that he was not entitled to remission, so, he served his full term.

4. On 21<sup>st</sup> July 2006, he filed a Petition in the High Court citing violation of his constitutional rights and freedoms arising from his arrest and trial before the court martial. On 26<sup>th</sup> October 2011, the High Court allowed his Petition and awarded him damages in the sum of Ksh. 7,000,000/=. However, the High Court declined his prayer seeking restoration of his rank, attained benefits, honours and decorations on grounds that he never appealed against the conviction and sentence imposed by the Court Martial.

5. Aggrieved by the above judgment, he successfully appealed to the Court of Appeal. The final orders of the Court of Appeal are as follows:-

- a) *The appellant is awarded Kshs. 15,000,000/= as damages for violation of his constitutional rights;*
- b) *The appellant's conviction and sentence by the court martial is hereby set aside;*
- c) *The appellant is awarded Ksh. 22,965,460/= being salary arrears and allowances;*
- d) *The appellant's rank, benefits, honours and decoration are hereby restored; and*
- e) *The appellant is awarded costs both in the High Court and in this Court.*

6. By an amended Notice of Motion dated 18<sup>th</sup> April 2017, expressed under the provisions of Article 47 of the Constitution, Order 53 Rule 1 (2), (3), (4) and 2 of the Civil Procedure Rules, 2010, section 8 of the Law Reform Act, [3] Section 7 (2) (j), section 11 (1) (f) of the Fair Administrative Action Act [4] and section 30 of the Contempt of Court Act, [5] the appellant moved this Court seeking orders:-

- a) ***That*** *there be an order directed to the Registrar of the High Court, directing him/her to forthwith, and without delay, to issue a Certificate of Order Against the Government for the sum of Ksh. 210,818,890 to the ex parte applicant.*
- b) ***That*** *there be an order of Mandamus directed to the Principal Secretary, Ministry of Defence and the Principal Secretary, Ministry of Finance compelling them to forthwith, and without delay, pay to the ex parte applicant the sum of Ksh. 210,818,890 and subsequent amount that will accrue in interest until payment in full.*
- c) ***That*** *there be an order of Mandamus directed to the Chief of Kenya Defence Forces and the Commander, Kenya Air Force to forthwith, and without delay, restore the ex parte applicant's rank, benefits honours and decorations and expunge all records of proceedings and judgment in the court martial case under reference.*
- d) ***That*** *in default of (2) and (3) above, all or any of the Respondent's in breach be cited for contempt of court and be committed to civil jail for a term not exceeding six months.*
- e) *Costs of this suit be borne by the Respondent.*

7. Counsel for both parties appeared before the Hon Justice Aburili on 6<sup>th</sup> February 2018, and informed her that the matter was at **“the execution stage.”** Consequently, the judge directed as follows:-

*“The Court of Appeal did...decreed among others... the appellants rank, benefits, honours and decorations are hereby restored. That the decree has to be enforced by this court pursuant to section 4 of the Appellate Jurisdiction Act Cap 9 Laws of Kenya. The applicant has not been issued with a Certificate of Order against the Government to facilitate enforcement of the Decree of the Court of Appeal...between the applicant herein and the Attorney General. Accordingly, I direct that the Deputy Registrar of this Court to proceed to hear submissions from the parties on the benefits due to the applicant upon which she shall proceed and issue a Certificate of Order against the government for purposes of enforcement of the said decree of the Court of Appeal. I so direct parties shall appear before the Deputy Registrar on 16 February, 2018 for submissions.”*

8. Before the Deputy Registrar, counsel for both parties agreed that dispute was order number (d) issued by the Court of Appeal. The said order decreed that *the appellant's rank, benefits, honours and decoration are hereby restored.* The crux of the contention between the parties was whether the benefit ordered in the said order should be monetary or other normal benefits accrued to the appellant.

9. The appellant's position before the Deputy Registrar was that the Court of Appeal restored both monetary and non-monetary benefits. It was his case that the Deputy Registrar was required to calculate the non-monetary benefits since the same is **“an administrative role.”** The Appellant maintained that the amount were to be calculated based on official reports and regulations, already annexed to affidavits/reports in the court file. He urged the Deputy Registrar to accept the Report availed to the court as accurate record of the structure and quantum of the allowances.

10. The Respondent's position before the Deputy Registrar was that the High Court and the Deputy registrar have no jurisdiction to adjudicate over the issue, as it would amount to interpreting the orders of the Court of Appeal, a preserve of the Court of Appeal.

11. The Deputy registrar in her Ruling dated 31<sup>st</sup> May 2018 observed that the Court of Appeal allowed Ksh, 15,000,000/= for violation of constitutional Rights, Ksh. 22,965,460/= for salary arrears and allowances, plus costs both in the High Court, the Court of Appeal, and interests from the date of the decree of the High Court judgment, till payment in full. She was clear that this was the only amount she could issue a certificate as prayed.

12. As for the benefits and allowances awarded in paragraph (d) of the Court of Appeal judgment, namely, *the appellant's rank, benefits, honours and decoration are hereby restored,* the Deputy Registrar stated that calculating the same is not an administrative function since the same was a main issue in the main suit. She proceeded to issue a Certificate for of costs for Damages, Salary arrears, allowances as allowed by the Court of Appeal and Interest from 20<sup>th</sup> October 2011 to the date the certificate shall be prepared.

### **The appeal**

13. Aggrieved by the above Ruling, and in particular the refusal to assess/compute *the appellant's rank, benefits, honours and decoration*

are hereby restored, the appellant appealed to this court citing the following grounds:-

- a. **That** the Learned Deputy Registrar erred in law by entertaining and hearing a challenge on jurisdiction.
- b. **That** the learned Deputy Registrar erred in law by overturning an order of a High Court Judge and declining to comply with it.
- c. **That** the learned Deputy Registrar erred in law by departing from an express order of the High Court and her decision offends the doctrine of hierarchy of courts.
- d. **That** the learned Deputy Registrar erred in finding that she was not clothed with jurisdiction to calculate both monetary and non-monetary benefits in spite of an order by a High Court judge issued on 6<sup>th</sup> February 2018.
- e. **That** the learned Deputy Registrar erred in law in re-hearing a challenge jurisdiction and in effect sat on appeal of a High Court order.
- f. **That** the Deputy Registrar erred in law in failing to calculate monetary benefits as awarded and therefore abdicated her judicial function envisaged in section 4 of the Appellate Jurisdiction Act.
- g. **That** the learned Deputy Registrar failed to give effect to a decision of the Court of Appeal and the High Court sitting in enforcement of the decree.

14. The appellant prays that the appeal be allowed, that the said ruling be set aside, and that this court computes the monetary and non-monetary benefits due to the appellant and order that the Deputy Registrar issues a Certificate of Order against the Government. In the alternative, the appellant urges this court to order that the matter be remitted back to another Deputy Registrar for compliance with the order issued on 6<sup>th</sup> February 2018 and specifically for computation of monetary and non-monetary benefits as awarded by the Court of Appeal.

#### **Approach to a first appeal.**

15. The duty of a first appellate court is to re-evaluate the evidence and all the material placed before the trial court as well as the judgment or ruling and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the parties first hand.<sup>[6]</sup>

16. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.<sup>[7]</sup>

17. Additionally, a first appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him.<sup>[8]</sup> The first appeal is decided on both facts and the law. Thus, in a first appeal, parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act,<sup>[9]</sup> a court of first appeal can appreciate the entire evidence and come to a different conclusion.

#### **The arguments**

18. Snr. Counsel Paul Muite, appearing for the appellant submitted that the objection to jurisdiction raised by counsel for the Respondent was misconceived. He pointed out that the motion that gave rise to the orders issued by Justice Aburili was argued *inter partes*, hence, the Respondent acquiesced to the jurisdiction of the court and the late challenge to jurisdiction was not permissible in the circumstances. He argued that this appeal is brought under the provisions of Order 49 of the Civil Procedure Rules which vests special powers on Deputy Registrars and any party aggrieved may appeal to the High Court.

19. He argued that the Deputy registrar had no power to entertain and determine the issue of jurisdiction, because, in his view, justice Aburili who referred the matter to her determined jurisdiction. It was his submission that entertaining the question of jurisdiction amounted to sitting on appeal on the High Court decision.

20. Further, he argued that the submissions on jurisdiction in the lower court fell outside the ambit of the High Court order, since, the order related to enforcement and not interpretation. He submitted that the Deputy Registrar had no powers to entertain a challenge to the express orders of the court, and, in any event, no clarification was required from the Deputy Registrar. To him, the challenge on jurisdiction was *res judicata*, and, in any event, he argued that, if there was challenge of her jurisdiction, she ought to have referred back the matter to the High Court.

21. Snr. Counsel Mr. Muite further argued that the Deputy Registrar erred in finding that she was not clothed with jurisdiction to calculate both monetary and non-monetary benefits in spite of an order by a High Court judge. In addition, he argued that it is common ground that there exists a Court Order restoring the *ex parte* applicant's benefits and honours, hence, in order to give effect to the Court of Appeal decision, a calculation of the benefits is necessary. It was his submission that it cannot be argued that the appellant is not entitled to pension because the Court of Appeal did not take the laborious path of calculating the pension. To him, the required calculation **is an administrative**

**task exercisable by the Deputy Registrar.** He drew a parallel with the role played by Deputy Registrars in taxation of costs and faulted the Deputy Registrar for refusing to compute the said benefits.

22. In addition, Mr. Muite submitted that it would result in a legal absurdity if the Court of Appeal were to make orders that cannot be enforced simply because it did not compute all the figures as proposed by the Respondent. He submitted that the said figures are mathematical and can be discerned from the record and the documents provided. He further argued that the order by Judge Aburili is a judicial pronouncement that must be obeyed.

23. Snr. Counsel Mr. Muite argued that the Certificate as issued does not give full effect to the order of the court; hence, the refusal to compute the said sum is erroneous. He stated that all that the Deputy Registrar was required to do was to certify that the figures as submitted in the motion conform to the amounts that were due to the *ex parte* applicant. He pointed out that there has never been a response to the motion, hence, in absence of a reply to the motion, the orders flow. In his view, the Deputy Registrar erred in failing to calculate monetary benefits as awarded and therefore abdicated her judicial function envisaged in section 4 of the Appellate Jurisdiction Act. <sup>[10]</sup> He urged the court to allow the appeal.

24. In opposition to the appeal, Mr. Munene, counsel for the Respondent argued that the Deputy registrar's mandate is limited only to issuance of the Certificate of Order Against the Government as per the Court of Appeal Orders and not to interpret or clarify the orders.

25. He argued that the Deputy Registrar declined the invitation to construe benefits to mean monetary obligation. It was his submission that the appellant ought to have reviewed the decision rather than file an appeal. He argued that the appellant invites this court to clarify what the court of appeal meant by using the word benefit, and, that, the High Court is devoid of jurisdiction to interpret/vary orders issued by the Court of Appeal. It was his submission that this court lacks jurisdiction. He argued that the Deputy Registrar's mandate is limited to issuance of the Certificate of Order against the Government as per the court of appeal order. He submitted that the appellant did not particularize the benefits both in the High Court and in the Court of Appeal; hence, he cannot come at the execution stage and seek the benefits. It was his submission that this is a matter of evidence and getting into the merits and demerits of the matter is outside the scope of judicial review jurisdiction

### **Determination**

26. Upon considering the parties diametrically opposing positions, I find that only one broad issue falls for determination, namely, *Whether the Deputy Registrar erred in entertaining the issue of jurisdiction and in holding that, she lacked jurisdiction to compute the figures claimed under order (d) of the Court of Appeal judgment.*

27. It is an established jurisprudence that jurisdiction is the very basis on which any Tribunal or a court tries a case. It is the lifeline of all trials. It is also an established position that a trial without jurisdiction is a nullity. It is uncontested that the importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this Court; *a fortiori* the Court *can suo motu* raise it.

28. It is desirable that a Preliminary Objection on jurisdiction be raised early; but once it is apparent to any party that the court may not have jurisdiction, it can be raised even *viva voce*. It is always in the interest of justice to raise issues of jurisdiction to save time and costs and to avoid a trial in nullity.<sup>[11]</sup> The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*<sup>[12]</sup> where the Court of Appeal held as follows:-

*"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

29. **John Beecroft** in *"Words and Phrases Legally Defined"*<sup>[13]</sup> put it bluntly when he addressed the question of jurisdiction in the following words:-

*"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"*

30. A Court's jurisdiction flows from either the Constitution or legislation or both. Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.<sup>[14]</sup> Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.<sup>[15]</sup>

31. The wisdom flowing from the above jurisprudence is that the moment the jurisdiction of the court is objected to; the court seized of the matter is obliged to decide the issue right away on the material before it. This is because jurisdiction is everything. Without it, a court has no

power to determine the question before it. Consistent with the foregoing, the Deputy Registrar did not error in law in determining the question of jurisdiction after it was raised.

32. The next question is whether she erred by holding that she lacked jurisdiction to compute the amounts in question. True, the learned judge had directed that she proceed to hear submissions from both parties and determine the issue of benefits. Faced with the High Court directive, which Snr. Counsel Mr. Muite submitted ought to have been complied with, and the challenge to her jurisdiction, the Deputy Registrar ruled that she lacked jurisdiction to determine the matter.

33. Simply put, the Deputy Registrar was faced with two competing legal positions, namely, a court directive, which must be obeyed, and the legal question of jurisdiction. This unpleasant scenario had two potential consequences. Either to obey or disobey a court order and bear the consequences, or, act without jurisdiction and render a legally frail decision. Whichever option the Deputy Registrar chose, there was bound to be consequences. Put bluntly, it can be said that it was a question of either siding with an illegality or siding with the law, a scenario that brings into sharp focus the primary duty and function of a court. In *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another*,<sup>[16]</sup> discussing the primary duty of the court, I remarked:-<sup>[17]</sup>

*"... perhaps, it would be fitting to recall the words of Albert Camus, noble prize winner who said "either cooperate with injustice or fight with it" and the words attributed to Elie Wiesel, a holocaust survivor who remarked that "... we must always side with the Rule of Law."* <sup>[18]</sup> (Emphasis added).

34. In the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council<sup>[19]</sup> who said that:-

*"Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct which could threaten our safety and security, establishing the rules by which we live. It is the baseline."*

35. Law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safeguard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become an instrument of social change.<sup>[20]</sup> One can confidently say that peace is not absence of war. It is absence of justice.

36. Therefore, what was the justice of the case before the Deputy Registrar, and how did she dispense it. Simply put, for her to entertain the matter before her, whether she was exercising a judicial function or an administrative function as Snr. Counsel Paul Muite argued, the source of her power traceable to the law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

*"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"*<sup>[21]</sup>

37. Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law.<sup>[22]</sup> The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the Deputy Registrar was constrained by that doctrine to exercise powers conferred to her by the law.

38. Simply put the power to entertain the matter before her and to exercise a judicial function, flows from the law, not from the ruling of the judge. The ruling cannot be construed to direct her to exercise powers she did not possess. The file was referred to her to perform her duties under the law, and as stated below, the function in question is a judicial function not an administrative function. This being a judicial function, she could only exercise jurisdiction conferred upon her by the law. It was imperative she satisfies herself on the question of jurisdiction; hence, she was right in entertaining the challenge on jurisdiction.

39. On the source of her jurisdiction and whether it was a judicial function, I find backing in the provisions of Order 49 Rule 7 of the Civil Procedure Rules, 2010, which provides as follows:-

*7(1) The Registrar may-*

*a. Give directions under Order 42 rule 1 and Order 51 rule 8;*

*b. Hear and determine an application made under the following Orders and rules-*

*i. Order 1, rules 2,8,10,17 and 22;*

*ii. Order 2, rules 1 and 10;*

*iii. Order 3,5 and 9;*

*iv. Order 6;*

*v. Order 7, rules 16 and 17 (2);*

vi. Order 8;

vii. Order 19, rules 1 and 8;

viii. Order 20;

ix. Order 21, rule 12;

x. Order 22 other than rules 28, and 75;

xi. Order 23,24,25,26,27,28, 30, 31 and 33; and

xii. Order 42, rule 13.

40. The above provisions enumerate the matters, which the Deputy Registrar can hear and determine. In addition, Order 29 Rule 3 provides that:-

*Any application for a certificate under section 21 of the Government Proceedings Act (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.*

41. In exercising duties and functions under Order 49 and 29 Rule 3, a Deputy Registrar is exercising a judicial function as opposed to an administrative function. In fact, the decisions flowing therefrom is appealable to the High Court as stated below.

42. Earlier, I reproduced the prayers sought in the application dated 18<sup>th</sup> April 2017 and the provisions under which the application was brought. Clearly, it was not expressed under any of the above provisions. I am acute aware of the fact that I cannot sit on an appeal against a decision rendered by a court of coordinate jurisdiction, but, my reading of the application as drawn and the prayers sought leaves me with no doubt that it was meant to be heard and determined by a judge. The applicant/appellant in wisdom did not file an application under the provisions of Order 49 reproduced above. That is the first difficulty posed by the application as drawn.

43. It is common ground that the parties informed the learned judge that the matter was at the execution stage and they agreed that the matter be referred to the Deputy Registrar. The court granted their request.

44. Counsel for the appellant argued that details of the amounts payable under paragraph (d) of the orders granted by the Court of Appeal are available in an affidavit filed in court and all the Deputy Registrar was required to do, was to confirm the said amounts and issue a Certificate as required.

45. The Deputy Registrar's position was different. In her view, the amount in question was a major issue at the trial; hence, she cannot determine it since it is outside her jurisdiction. The appellant's counsel invited this court to find fault in the said reasoning arguing that the said function **is an administrative** function as opposed to **a judicial function**. He compared the said function to taxation of costs.

46. I am unable to be persuaded by the above argument. *First*, as appears from the above-cited provisions of the Civil Procedure Rules, the judicial functions of a Deputy Registrar are provided for under the Rules and their decisions are appealable to the High Court as provided for under Order 49 Rule 7 (2). The function the Deputy Registrar was being invited to undertake is not provided for under Order 49 Rule 7 (b) reproduced above.

47. Moreover, the assessment the Deputy Registrar was being invited to undertake would in my view require a merit hearing to determine the veracity or correctness of the amounts in question. In fact, the learned Judge had directed her to hear submissions from the parties. In my view, the requirement to hear submissions clarifies that the Deputy Registrar was required to perform a judicial function as opposed to an administrative function. Simply put, the contested function cannot be administrative. This is because once the assessment is done; an order capable of being enforced would be issued. The order or decision is appealable to the High Court as per the Rules. This extinguishes the argument that the said function is administrative in nature.

48. It should be remembered that the Deputy Registrar, was expected to act within the confines of the Court of Appeal judgment. The said judgment did not compute the said figures, as as Mr. Munene correctly stated, the amounts were not pleaded in the High Court. The relevant portion of the Court of Appeal holding on the issue reads- "*we would also direct that the appellant's rank, benefits, honours and decorations be restored forthwith.*" It is noteworthy that the Court of Appeal did not specify any figures. I find it useful to refer to the Southern African case of *Firestone South Africa (Pty) Ltd v Genticuro AG* [23] in which the court made some general observations about the rules for interpreting a Court's judgment or order. It stated:-

*"...the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning*

*does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it...*

*It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment.”*

49. The Deputy Registrar in exercise of her functions can only do what the order states. Computing the amounts in question is not part of the order. Similarly, interpreting the meaning of the order is outside her mandate under Order 49. In my view, the Deputy Registrar cannot determine quantum. This would amount to asking the Deputy Registrar determine a matter she has no jurisdiction. As stated in the above passage, if the meaning of the order is clear and unambiguous, it is decisive and it cannot be extended to anything else.

50. Lastly, the attempt to compare the said assessment of the said benefits with taxation of costs is in my view legally frail. This is because taxation of costs is a regime governed by the Advocates Act<sup>[24]</sup> and the Advocates Remuneration Order. A Taxing Master performs a judicial function while taxing Bills of costs.

51. Lastly, the assessment in question cannot be an administrative function. This it because if it is done, a Certificate of Order capable of being enforced would be issued. As stated earlier, the process and the outcome is subject to an appeal because it is a judicial function.

52. By way of orbiter, I must mention that it does not escape my attention that this Judicial Review application was not heard on merits by the High Court. This is despite the fact that the application as framed was to be heard and determined by a judge. Simply put, the orders prayed are available from a judge and not a Deputy Registrar. Nevertheless, the parties appeared before the learned judge and informed the court that the matter was at the execution stage. Based on the said information, the learned judge referred the matter to the Deputy Registrar. In my view, had the application proceeded before a judge, the parties would have had the excellent opportunity of addressing the question at hand and afford the court the opportunity to make a determination. By clearing and forwarding the file to the Deputy Registrar under such unclear and legally frail circumstances, a golden opportunity to pronounce the law slipped through the fingers of the parties and the court.

## **Conclusion**

53. It is my finding that the learned Deputy Registrar cannot be faulted for declining jurisdiction. I find no misdirection on her part for entertaining the challenge premised on jurisdiction. As stated earlier, questions relating jurisdiction if raised must be disposed at the earliest opportunity possible.

54. Moreover, the assessment in question is a judicial function, which falls outside the ambit of the Deputy Registrar's jurisdiction provided under the provisions of Order 49 of the Civil Procedure Rules.

55. My reading of the law is that a Deputy Registrar can only issue a Certificate as expressly decreed by the court. It follows that any attempt to ask a Deputy Registrar to include any item or detail that is not expressly provided for in the decree is tantamount to asking her to exercise a jurisdiction she/he does not possess. Simply put, such a function, if performed cannot be read in a manner that is consistent with the express mandate provided under Order 49 of the Civil Procedure Rules, 2010, or any of the enabling provisions.

56. The above position becomes evident if we consider that the function in question is not a simple execution of a decree where the Deputy Registrar issues a Certificate in conformity with a Decree. More was expected from the Deputy Registrar. She was required to hear submissions and make a determination. In my view, the ensuing determination would fundamentally alter the character of the original decree issued by the Court of Appeal. It will specify amounts not assessed or expressly decreed by the Court of Appeal. It will be speculating what the Court of Appeal meant in its order. It is a mini-trial, which will determine rights by adding meat and flesh into the court of appeal decree. That cannot be construed be within the ambit of Order 49 of the Civil Procedure Rules, 2010.

57. Such an assessment, if permitted, has the potential of altering the original character of the Decree sought to be enforced. Only the court issuing the decree has powers to vary, review or set aside such a decree. It cannot be compared with taxation of costs.

58. In view of my analysis and conclusions arrived herein above, it is my finding that this appeal fails. Consequently, I dismiss it with no orders as to costs.

Right of appeal.

**Signed and Dated and Delivered at Nairobi this 9<sup>th</sup> day of August 2019**

**John M. Mativo**

**Judge**

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<sup>[1]</sup> *Peter M. Kariuki v Attorney General*, delivered on 21<sup>st</sup> March 2014, P.O. Kiage JA, K. M'inoti JA and J. Mohammed JA

<sup>[2]</sup> Contrary to section 26(a) of the Armed Forces Act, Cap 199, Laws of Kenya. (Repealed).

[3] Cap 26, Laws of Kenya.

[4] Act No. 4 of 2015.

[5] Act No. 14 of 2016. NOTE:- The Contempt of Court Act has since been declared Unconstitutional by the High Court.

[6] See **Selle & another –vs- Associated Motor Boat Co. Ltd.& others {1968} EA 123.**

[7] See *Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs* {2001} 3 SCC 179.

[8] See *Kurian Chacko vs. Varkey Ouseph* AIR 1969 Kerala 316.

[9] Cap 21, Laws of Kenya.

[10] Cap 9, Laws of Kenya. Section 4 of the act provides:- “Any judgment of the Court of Appeal given in exercise of its jurisdiction under this Act may be executed and enforced as if it were a judgment of the High Court.”

[11] Belgore J.S.C. See *Petrojessica Enterprises Ltd v. Leventis Technical Co. Ltd*, (1992) 5 NWLR (Pt. 244) 675 at 693

[12] {1989} KLR 1, Nyarangi JA.

[13] Volume 3:1-N, at Page 113

[14] The Supreme Court in the matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (unreported)

[15] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[16] {2018}eKLR.

[17] Ibid.

[18] Mr. Dainius Zalimas, President of the constitutional Court of the Republic of Lithuania, *The Rule of Law and Constitutional Justice in the Modern World*, 11-14 September 2017, Vilnius, Lithuania, delivering a speech at the Farewell Dinner for the 4<sup>th</sup> Congress of the World Conference on Constitutional Justice, 13<sup>th</sup> September 2017.

[19] Published in Just Law {2004}.

[20] *Masinga vs Director of Public Prosecutions and Others* (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.

[21] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council [2006] ZACC 9; 2007 (1) SA 343 (CC).

[22] National Director of Public Prosecutions vs Zuma, Harms DP

[23] 1977 (4) SA 298 (A) Trollip JA

[24] Cap 16, Laws of Kenya.