



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL SUIT NO. 1736 OF 1993**

**NYAMODI OCHIENG NYAMOGO .....**  
**PLAINTIFF**

**VERSUS**

**TELKOM KENYA LIMITED .....** **DEFENDANT**

**RULING**

1. By a Notice of Motion dated 12<sup>th</sup> October, 2015, the applicant/defendant herein, **Telkom Kenya Limited**, substantially seeks an order unconditionally setting aside the warrants of attachment and sale of its movable property issued on 6<sup>th</sup> October, 2015 and the proclamation dated 8<sup>th</sup> October, 2015. It further sought an order that the decree issued on 23<sup>rd</sup> September, 2015 be amended by deleting the amount of Kshs 3,433,100.00 and substituting it with Kshs 2,833,100.00. In addition the said applicant sought stay of execution of the said warrant pending compliance with this Court's directions given in the ruling of 14<sup>th</sup> July, 2015.
2. According to the applicant, the auctioneers on 8<sup>th</sup> October, 2015 proclaimed its movable property based on an unsigned and undated warrant of attachment of movable property and a signed warrant of sale dated 6<sup>th</sup> October, 2015. The said proclamation was for a sum of Kshs 9,485,556.00 and the date of the decree was indicated as having been issued on 20<sup>th</sup> December, 2012. The warrants of attachment on the other hand indicated it was ordered by a certificate of taxation passed on 20<sup>th</sup> December, 2012 to pay the sum of Kshs 36,972,391.45 yet there is no such certificate or decree to that effect.
3. To the applicant the Plaintiff/Respondent intends to unjustly enrich himself despite the fact that the Court stayed the warrants of attachment. It was contended that there is no application for execution which would have been the basis for the issuance of the said warrants and in ignorance of the directions of this Court and without ascertaining the amount due from the judgement herein.
4. To the applicant, the decree issued on 30<sup>th</sup> August, 2012 having been set aside, there is no decree capable of being amended. To the applicant despite having applied for the correction of an error in the judgement, the Deputy Registrar is adamant in issuing a decree with the erroneous amount. It was contended that despite the court having released Kshs 37,000,000.00 to the Respondent without any basis, it is still issuing warrants of attachment.
5. According to the Applicant the warrants were issued based on a letter by the Plaintiff. It was therefore contended that the warrants of attachment and sale as well as the proclamation are irregular, illegal and an abuse of the court process.
6. In response to the application, the Plaintiff contended that the application is incurably defective, vexatious, malicious, licentious, frivolous and incompetent and this Court has no jurisdiction to

- entertain the same. To the respondent, the issues raised herein ought to be the subject of a review or an appeal.
7. It was averred that the Deputy Registrar served the applicant with a draft decree to which the Applicant did not comment only stating that this Court had conferred the Deputy Registrar with jurisdiction to correct the judgement. To the applicant the issue of the amount payable was the subject of an application which led to the delivery of the ruling of 14<sup>th</sup> July, 2015 hence the Court has no jurisdiction to deal with the same.
  8. With respect to the accident slip or omission it was contended that the same ought to have been brought before **Nambuye, J.**
  9. I have considered the application, the affidavit in support of as well as in opposition to the application as well as the submissions made.
  10. It is contended that the Deputy Registrar issued the warrants before the judgement the subject of these proceedings was amended. The power to amend a judgement is however conferred by section 99 of the **Civil Procedure Act** which provides as follows:

***Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.***

11. Under section 2 of the same Act:

***“court” means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.***

12. The powers of the Deputy Registrar are provided under Order 49 of the **Civil Procedure Rules**. Nowhere in that Order is the Deputy Registrar empowered to correct a judgement of the Court. Accordingly, I have no hesitation in finding that the applicant ought not to blame the Deputy Registrar for not correcting the judgement. As correctly submitted by the Plaintiff, the Defendant had ample time within which to apply for the correction of the judgement before the Judge who delivered the judgement but instead opted to appeal the same which appeal was eventually withdrawn.
13. By an application dated 5<sup>th</sup> February, 2014, the Defendant sought *inter alia* an order that the correct and exact amounts payable to the Respondent pursuant to the judgement of this Honourable court delivered on 12/6/2012 be determined and declared by this Honourable Court. To my mind that prayer cannot by any stretch of imagination be said to amount to a prayer for correction of judgement. Ascertainment of the exact sum payable under a decree is not the same thing as correction of errors in a judgement. Ascertainment of the sum payable is a ministerial action to be performed by the Deputy Registrar while correction of a judgement is judicial action which can only be performed by a judge. That was the position adopted by this Court in its ruling of 14<sup>th</sup> July, 2015 and any party who felt aggrieved by the said decision had the option to appeal against the same instead of blaming the Deputy Registrar for failing to clothe himself with a jurisdiction he does not have.
14. It has been contended that the Plaintiff herein has sought to execute the decree without complying with the directions of this Court issued on 14<sup>th</sup> July, 2015.
15. In that ruling this Court expressed itself *inter alia* as follows:

**“On 6<sup>th</sup> February, 2013, I gave further directions with respect to the settlement of the decree herein and at the end thereof I directed that:**

***“...the decree extracted herein in disregard of the directions issued herein be set aside and a proper decree be extracted in accordance with the said directions leaving the particulars of the interests and recurring or periodical payments such as pensions to be dealt with in the warrants of attachment since warrants of attachment unlike the decree can be easily amended to reflect the amount payable at any given period in time..”***

**It is therefore clear that not only did I set aside the decree but specifically ordered that a proper decree be extracted in accordance with my directions. It would seem that no such decree was extracted. Instead fresh execution proceedings were initiated notwithstanding the fact that there was no longer any decree on record capable of being executed... This Court having set aside the decree which was extracted herein, any party wishing to take steps in execution or for which the decree was required was under an obligation to extract the same... It is therefore clear that the process of execution commenced by the Plaintiff herein in the absence of an extracted decree was invalid and the Registry ought not to have issued the warrants for execution.”**

16. In this application it is contended that there was no decree extracted pursuant to the directions of this Court. By a letter dated 4<sup>th</sup> September, 2015, the Plaintiff submitted a draft decree to the Defendant for approval. In response, the Defendant, in a rather terse tone, which I find unnecessarily unflattering to the Court, took issue with the figures contained in the decree and asked the Deputy Registrar to “amend the draft, issue the decree and ascertain the amount payable under the decree.” Advocates must always remember that inasmuch as they are retained by parties they are officers of the Court and they owe a duty to the Court to treat the Court with due respect and dignity. Advocates ought to remember that the client has only retained their services and is not their employer. Therefore they are not servants of the client and ought not to be the mouthpiece through which virulent averments are spewed out. In other words advocates must take care not to turn the fact of retainer into a launch pad from which scurrilous and unnecessary but undignified missiles are unleashed at the Court. As was held by the Court in **Wamwere vs. Attorney General [1991] KLR 107**, as officers of the court, advocates are expected to conduct themselves properly and with some degree of decorum in court.
17. Advocates have a duty to protect the dignity of the Court and whereas they owe a duty to protect the interest of the client with as much vigour and force as the case deserves, such vigour and forcefulness ought not to be transmuted into a condescending attitude or an unnecessary aggression towards the Court. Their duty is to assist the Court in arriving at fair and correct decisions and not necessarily to win the case at all costs. As was held in **Malindi Air Service Limited & Another vs. Halima Abdinoor Hassan Civil Application No. Nai. 103 of 1999**:

**“Advocates are honourable people. Learned friends should not take undue advantage of the absence of the opponents. They are officers of the Court. Their duty first lies to the Court and then to their clients.”**

18. I however wish to say no more on that issue.

19. In extracting the decree, even where the parties consent to the draft, the Deputy Registrar is not bound by the draft submitted by the parties since Order 21 rule 8(3) of the ***Civil Procedure Rules*** requires the Deputy Registrar to be satisfied that the decree reflects the correct amounts. In this case, the Defendant did not propose that the decree be settled by the Judge. Instead, it gave the Deputy Registrar the go ahead to make the necessary corrections and issue the decree thereafter. As I have stated the Deputy Registrar was not bound to agree with any of the parties in the extraction of the decree if in his view the decree conformed to the Judgement. In fact in the ruling dated 14<sup>th</sup> July, 2015, this Court directed the Deputy Registrar in the following terms:

**“to avoid further litigation, the Deputy Registrar of the Civil Division to ascertain the sum due under the decree herein before issuing warrants for execution.”**

20. This Court in **Erad Suppliers & General Contracts vs. National Cereals & Produce Board** Nairobi Commercial & Admiralty Division Miscellaneous Civil Case No. 639 of 2009, expressed itself on a similar issue as follows:

**“Order 21 rule 8 provides for the procedure for preparation of a decree. Before the advent of the Civil Procedure Rules, 2010, that procedure was only applicable to decrees emanating from the High Court since decrees from the subordinate courts were to be drawn by the Court itself. However, the said rules made the procedure uniform for both the High Court and the Subordinate Courts. That procedure provides that any party to a suit may draw decree and submit it for**

approval to the other party who is supposed to reject, amend or approve the same and that process is to be undertaken without undue delay. After the lapse of 7 days if no reaction is received from the other side, the party submitting the draft is entitled to submit the same to the Deputy Registrar for signature and sealing. Whether the parties agree on the decree or not, the Deputy Registrar must still satisfy himself that the decree is drawn in accordance with the judgement. If the parties are not in agreement with the format of the decree then the matter is placed before the judge who made the decision, if available, for the settlement of the same. In my view, this presupposes that the receiving party should intimate his disagreement within 7 days of receipt of the draft since if he does not do so within the said period he runs the risk of the decree being signed and sealed by the Deputy Registrar. The rationale for this elaborate procedure, in my view, is to ensure that the decree reflects the terms of the judgement itself. In fact the main consideration is not the approval by the parties per se but the reflection of the judgement since the Deputy Registrar is not bound to sign and seal the draft approved and submitted by both parties if in his opinion the same is not drawn in accordance with the judgement. Until the decision in the case of Edward Maina Njanga T/A Maina Njanga & Co Advocates vs. National Bank Of Kenya Ltd Civil Appeal (Application) No. 111 of 2005 which was decided on 27<sup>th</sup> July 2006, the Court of Appeal's view was that decrees extracted without following the provisions of Order 20 rule 7 (now Order 22 rule 8) were a nullity. However, by that decision, the Court of Appeal held that for the purposes of Appeal failure to comply with the said provision in the extraction of the decree did not render the appeal fatally defective.”

21. In my view the Deputy Registrar in the circumstances had the jurisdiction to extract the decree and if the decree extracted was incorrect, the same can only be challenged as provided in the *Civil Procedure Rules*. Accordingly, I decline to interfere with the decree as extracted.
22. I have however perused the Court file and I agree that the directions given by this Court on 14<sup>th</sup> July, 2015, with respect to the steps to be followed in the process of execution were not adhered to. Accordingly, I set aside the process of execution, including the issuance of the warrants and the consequential proclamation and direct the Deputy Registrar, Civil Division to ensure strict compliance with the said directions, in particular the need to ensure that there is a formal order recorded on the file giving directions on the manner in which the execution is to be undertaken.
23. In the result each party will bear own costs of this application.

Dated at Nairobi this 19<sup>th</sup> day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyamogo, the Plaintiff

Mrs Mbaabu for the Defendant

Cc Patricia