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. This ruling arises from post-judgement proceedings in the nature of execution proceedings. Those proceedings have been riddled with procedural bottlenecks at every stage arising from non-compliance with the rules relating to preparation of a court decree.
2. On 6th February, 2013, I gave directions with respect to the settlement of the decree herein. That was the second time I was giving directions on the same issue the first directions having been given on 20th December, 2012.
3. In the 2nd set of directions I directed as follows:

"…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.."

4. The Defendant is once again back before this Court with an application dated 5th February, 2004 seeking substantially an order that the execution against it be stayed pending compliance with the aforesaid directions and the ascertainment of the sum if any due from the Defendant to the Plaintiff arising from the judgement the subject of this suit. There was also a formal prayer for leave to permit the firm of P K Mbaabu & Co. Advocates to represent the Defendant in place of Mohammed Muigai & Co. Advocates.
5. According to the defendant, the plaintiff instead of complying with the aforesaid directions, confronted the Defendant with an amended decree issued on 27th February, 2013 in the sum of Kshs 35,354,362.74 and the Defendant deposited Kshs 37,000,000.00 as security in court pending an appeal which was released without the Defendant's knowledge.
6. In the Defendant's view, there is a need for the exact sum to be ascertained to avoid unjust enrichment of the Plaintiff and deprivation of the Defendant.
7. The application was opposed by the Plaintiff whose view was that this Court having settled the decree it is *functus officio* since the Defendant has neither appealed against the decision nor complied therewith. It was further contended that since the terms of the decree were settled close to two years ago at the behest of the Defendant, the Defendant was just a vexatious litigant.

8. In the Plaintiff's view the warrants were in accordance with the directions given by this Court and since any party to the suit is at liberty to prepare a decree and as the terms thereof had been settled, it was incumbent upon the Defendant to extract an appropriate decree.
9. Before the application could be heard and disposed of the Plaintiff filed a preliminary objection dated 12th June, 2014 in which the Plaintiff took issue with the jurisdiction of this Court and the competence of the Motion. It is that preliminary objection which forms the subject of the instant ruling.
10. I have considered the submissions filed in support of and in opposition of the preliminary objection.
11. The 1st issue for determination is whether this Court having given the aforesaid directions it is *functus officio* as contended by the Plaintiff. In this Court's directions given on 6th February, 2013, this Court was clear in its mind that a proper decree be extracted. If as is being alleged no such decree was extracted at all as opposed to the decree extracted being deficient, it cannot be successfully contended that the matter before the Court is *functus officio*. Section 3A of the ***Civil Procedure Act*** reserves the Court's unlimited inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process It is not a power conferred by section 3A but a power reserved thereunder.
12. Apart from that section 1A of the ***Civil Procedure Act*** introduced the overriding objective of the said Act. That overriding objective, it has been held, is meant for the attainment of justice. In the case of **John Gakure & 148 Others vs. Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007, Waki, JA** expressed himself thus:

"Jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court's view, dealing with a case justly includes inter alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases".

13. One of the powers that a Court of law has, in my view is the claw back residuary jurisdiction. In my view those residual powers are inherent in any court of justice. As held by **Ouko, J** (as he then was) in **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004**:

"The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

14. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005** held:

"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent

jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

15. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.
16. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.
17. Similarly, in **Mawji vs. Arusha General Store Civil Appeal No. 19 of 1969** [1970] EA 137, the East African Court of Appeal held:

"A Court must have power to effect its orders. This is not a case of recalling an order but giving effect in one part of the order to the decision arrived at in another part. It would be non-sense to stultify the activities of any court of justice that it would be unable to give effect to a decision which it had just handed down. No provision of the rules should be so construed as to preclude a court from giving effect to its decision…Under the inherent powers of the court, a court should not be precluded by anything incidentally set out in the Code or in the rules made under the Code from giving effect to its decision, and giving effect in a way which will result immediately in justice between the parties and in saving of unnecessary proceedings. Even if section 89(2) does give the power to give effect to this judgement by a separate suit, that would not preclude the High Court from giving effect to its judgement in a more efficacious way. Even if section 89(1) restricts the power given by it to the court of first instance, which in the circumstances of this case has no jurisdiction, to order restitution, and there is no provision elsewhere vesting this power in the High Court, that would not prevent the High Court giving effect to its decision. A court must have power, unless it is most clearly set out to the contrary by legislation, to give effect to its decision and that is all that the court sought to do here. It is not suggested that the discretion, which, of course must lie in the court as to the manner in which to give effect to its decision, was wrongly exercised in this case but the argument is that the court did not have the power to make this order. The Court is satisfied that it did, and, indeed, that any court must have the power to give effect to its decisions...There is an abundant authority for a court in certain circumstances to recall its order and the Court is satisfied that the inherent power of that court conferred upon it by the Civil Procedure Code would override the provisions of rule 3 of Order 20 of the Civil Procedure Rules."

18. In **Central Bank of Kenya & Another vs. Uhuru Highway Development Ltd. & 4 Others Civil Appeal No. 91 of 1999,** the Court of Appeal held that a Court must only make orders, obedience of which it can compel and it is the Court's duty to compel such obedience.
19. Similarly in **Eastern Radio Services vs. Tiny Tots [1966] EA 392** the then President of the East African Court of Appeal, **Sir Charles Newbold, P** held:

"There are, however, many occasions in which further matters remain for determination in the suit after final judgement has been given on one or more issues raised in the suit. If a litigant in the course of the proceedings for determination of such further matters wilfully disregards an order of the court, the court must have an inherent jurisdiction to make an appropriate order. In addition to this inherent jurisdiction Order 10 rule 20 when it speaks of liability of a plaintiff "to have the suit dismissed" must be construed in such circumstances as meaning a liability to have those issues which remain for determination in the suit dismissed. There is absolutely no difficulty in so construing that rule and every reason to do so. That being the position in law it is clear that the judge, in making the order that the suit as a whole be dismissed with costs, made an order in excess of his jurisdiction in respect of those matters which had already been finally determined. In so far ,

however, as his order related to matters still for determination in the High Court he had power to make the order; and such an order would have been an appropriate order in the circumstances of the case."

20. It follows that the mere fact that a Court has given orders sought in the settlement of a decree, it does not follow that, it is precluded from giving further orders in the matter to ensure that the legal proceedings subsequent to the said settlement are in compliance therewith. It would, in my respectful view be a mockery of justice if the Court was made hapless and helpless after its decision, to effectuate its decision.
21. However, it is my view that the power to ensure its orders are implemented is a limited jurisdiction and does not justify the Court in reopening the matter and granting new orders which were not in the contemplation of the parties at the time they approached the Court.
22. Therefore as was held in **Aneriko M Simiyu vs. Redempta Simati Civil Appeal No. 227 of 2004,** it cannot be correct that a court of law would be said to be *functus officio* when moved to correct a mistake or mistakes on the face of the record because the ultimate result would be injustice.
23. Therefore the Court has jurisdiction to investigate whether or not its directions were complied with. Whether or not the application is merited is another matter altogether.
24. On the issue of the competency of the application, **Ringera, J** (as he then was) in the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460** had this to say:.

"Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue".

25. The Court further recognises that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See **Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR 103.**
26. Apart from that the law is clear that a preliminary objection ought not to be raised where what is sought is an exercise of judicial discretion. Whereas in issues where what is alleged is lack of jurisdiction, the Court has no option, where it is contended that the application is incompetent for failure to comply with the rules of procedure, a default which the Court may waive in the exercise of its discretionary powers, that ought not to be raised as a preliminary objection but ought to be raised in opposition to the application. See **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696.**
27. In the result I find no merit in the preliminary objection which I hereby dismiss with costs in the cause.

Dated at Nairobi this 19th day of May, 2015

G V ODUNGA

JUDGE

Delivered in the presence of

Mrs Mbaabu for the Defendant

Mr. Nyamogo, the Plaintiff in person

Cc Patricia