



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 1389 OF 2004**

**SOUTHDOWN DEVELOPERS LIMITED.....PLAINTIFF**

**=VERSUS=**

**HAITHAR HAJI ABDI.....1ST DEFENDANT**

**ABDI RAHIM HAITHAR HAJI.....2ND DEFENDANT**

**RULING**

1. Judgment herein was delivered by Hon Judge Mutungi way back on 29.4.2013. There are now two applications before me. One is dated 30.3.2021, filed by the defendants, while the other one is dated 6.4.2021 filed by the Plaintiff. Each litigant has also filed their own preliminary objection, one dated 13.4.2020 filed by the plaintiff and another one dated 12.5.2021 filed by the defendant.

**Application Dated 30.3.2021**

2. The Defendants have sought for the following orders:

**1) Spent.**

**2) The current orders inforce, do remain inforce and be extended until the full hearing and determination of the application herein.**

**3) A declaration that the Plaintiff/decree-holder is not a proper party before the court.**

**4) A declaration that at all material times, the purported Plaintiff herein was not and is not a legal person or a Company registered under the provisions of the Companies Act 485 laws of Kenya (now repealed) and is not a proper party before this court as a decree-holder.**

**5) A declaration that the judgment and decree issued herein was or were obtained by a fraud practiced upon the court by one Paul Omondi Mbago who knowingly misled the court to believe that the Plaintiff was a Company or legal entity registered under the said Companies Act.**

**6) A declaration that the judgment and decree issued herein is or are invalid, null and void ab initio.**

**7) The said judgment and decree be recalled and cancelled.**

**8) Alternatively, that all further proceedings including execution of the decree herein be stayed pending the hearing and determination of the Constitution Petition No. E341 of 2020 between the Defendants as Petitioners and the Plaintiffs together with Paul Omondi Mbago as Respondents concerning the constitutionality or validity of the actions referred to herein by Paul Omondi Mbago under the Constitution of Kenya.**

**9) The costs of this application be provided.**

3. The Applicants contend that the Plaintiff was not and is not a registered Company hence the Judgment and the decree herein were a product or outcome of unlawful and criminal offenses. That the Plaintiff is not a proper legal person and that the issue of fraud was only discovered recently, hence the decree is invalid.

4. In rejoinder, the Plaintiff/Respondent states that there is a judgment in this file of which the Defendant had appealed against which appeal

was dismissed. That they filed an application for review which too was dismissed. That the Defendant went back to the Court of Appeal to challenge the ruling on review which too was dismissed on appeal. It is further averred that the Hon. Judge Eboso delivered another ruling on 4.3.2021 and the Defendants were granted 30 days to appeal but they never lodged any appeal.

5. A perusal of the record reveals that indeed judgment was delivered against the Defendant almost 9 years ago on 29.4.2013. The history of the post judgment litigation is well captured in the ruling of Hon. Judge Mutungi dated 20.6.2014 where the defendant had sought a review of the judgment and the ruling of Judge Eboso dated 4.3.2021. What I discern is that the Defendants had lodged an appeal against the judgment which appeal was dismissed. They went back before Hon. Judge Mutungi for a review of the said judgment amongst other orders and in well detailed ruling delivered 20.6.2014, the application was dismissed. They apparently appealed against the ruling thereof but lost. The Defendants were back in court before Hon. Judge Eboso seeking inter-alia orders of stay of the Judgment or notice to show cause until the hearing and determination of some matters before the High Court. Again their application was dismissed.

6. It is quite clear that the issues being raised by the Defendant were well articulated in the aforementioned rulings. This court cannot purport to cloth itself with appellate attires to warrant the revisiting of the judgment herein. The role of this court is only to effectuate the said judgment and to do no more.

7. In that regard, this court is *functus officio* in so far as the dispute appertaining to the suit is concerned.

8. In the case of **Brian Muchiri Waihenya vs. Jubilee Haulers Limited and Another; Jeminia Insurance Company Ltd (interested party) 2018 eKLR**, the court made reference to the Court of Appeal case of **Telkom Kenya Limited vs. John Ochanda ( suing on his behalf and on behalf of 996 former employees of Telkom Kenya Limited) 2014 eKLR**, where the doctrine of *functus officio* was described as follows:

***“functus officio is an enduring principle of law that prevents the opening of a matter before a court that rendered the final decision thereof.....”***

9. In light of the foregoing analysis, I find that the application dated 30.3.2021 is not merited and the same is dismissed with costs to the Plaintiff.

#### **Application dated 6.4.2021**

10. The Applicant/Plaintiff is seeking for the following orders:

***1) That the instant application be certified urgent and be placed before Honourable B. M. Eboso***

***2) That the sums Kshs. 14,077,145 comprising decretal sum, costs and interest in this case deposited in court on 3rd November 2020 b the Respondents as security pursuant to a court order issued on 23rd October 2020 be released to the Plaintiff/Applicant's advocates Ms. Ayieko Kangethe & Company Advocates.***

***3) That the costs of this application be provided for***

11. The grounds in support thereof are that by an order dated 23.10.2020, the court granted a stay of execution on condition that the Respondents deposit the decretal sum, costs and interest of Kshs. 14,077,145 into a joint interest earning account in the names of the Applicant's and Respondent's advocates or directly to court within 14 days of which the Respondents deposited the money in court on 3.11.2020.

12. That vide the ruling of this court dated 4.3.2021, the Respondents applications were dismissed but they were granted a stay of execution for 30 days to enable them appeal against the said ruling to the Court of appeal and seek further stay of execution, but no appeal was filed.

13. The Defendants have opposed the application through the replying affidavit of the 2nd Defendant. They contend that Paul Omondi Mbago is deceased and he is the one who purported to illegally and irregularly be the principal shareholder of the plaintiff and that he was facing criminal trials before the Magistrate court. It is further contended that the decretal amount deposited as security should not be released until the intended appeal to the Court of Appeal is heard and determined. It is further averred that the Plaintiff's advocates wants the monies to be released purely for purposes of converting the same to their personal use.

14. I have considered the issues raised herein. The application before me relates to execution proceedings. The Defendants have tried all means to challenge the judgement of the court to no avail. On 4.3.2021, the court had given the following orders.

***“ The decretal sum together with costs have been deposited in court. I will in the circumstances grant the judgment debtor a stay of 30 days within which to lodge and canvass a stay application in the Court of Appeal as requested. Secondly, the decree holder will be at liberty to bring a formal application for release of the money if there will be no stay order from the court of appeal upon expiry of the 30 days stay granted herein”.***

15. The 30 days grace period expired on 4.4.2021. There is no stay order from the Court of Appeal. The orders sought by the plaintiffs are geared towards effectuating the judgment delivered against them close to nine years ago, but they have not been successful. There is no indication that the decree herein as well as the deposit of the security was in any way tied to any criminal proceedings. In that regard, I find that the objections raised by the Defendants are not merited.

16. The application dated 6.4.2021 is allowed with no orders as to costs.

17. The two preliminary objections have been subsumed in the determination of the two applications and are therefore marked as spent.

18. This matter is marked as CLOSED.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Kahuthu for the Applicant/Defendants

Ayecko Plaintiff/Decree holder

Court Assistant: Eddel Barasa