REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

CIVIL CASE NO. 1208 OF 2003

AFRICAN COMMUTER SERVICES LTD .....DECREE HOLDER

VERSUS

THE KENYA CIVIL AVIATION AUTHORITY .....JUDGMENT DEBTOR

AND

NATIONAL BANK OF KENYA LIMITED.....1ST GARNISHEE

CFC STANBIC BANK LTD .....,,,,,.....2ND GARNISHEE

R U L I N G

1. Before me is a Motion on Notice dated 18th February, 2015 by the 2nd Defendant/Judgment-debtor. The application is expressed to be brought under Sections 1A, 1B, 3A and 26 of the Civil Procedure Act and Order 21 Rule 7 of the Civil Procedure Rules. The application seeks the review of the decree dated 20th March, 2014 and/or the decretal amount resulting therefrom as computed by the decree holder at Kshs.1,421,671,718/- or thereabouts. That consequently, the parties do extract a fresh decree and/or the amount owing under the judgment be computed by the court. The other prayers are to stay and set aside all executions undertaken pursuant to the said decree.

2. The grounds upon which the application was grounded were set out in the body of the motion and in the Supporting Affidavit of Judith Ng'ethe and the Supplementary Affidavit of Cyril Simiyu Wayong'o sworn on 18/2/2015 and 2nd June, 2015, respectively. These were that on 30/9/09 the decree holder had a decree extracted from a judgment made in its favour on 18/12/08 that was grossly exaggerated; that the Court of Appeal reduced the decretal amount by approximately Kshs.600,000,000/= vide a judgment delivered on 7/2/14; that the Decree-holder once again extracted a fresh decree for Ksshs.1,421,671,718/-; that the Judgment-debtor has since caused the decretal amount to be professionally computed by a leading interest advisory firm in Kenya known as Interest Rates Advisory Centre ("IRAC") which showed that the amount payable under the decree as at 31/03/15 was Kshs.820,671,225/24.

3. It was further contended that the judgment debtor was entitled to challenge the correctness of the decree notwithstanding that it had had knowledge of said decree and that the professional computation undertaken by the Judgment debtor was approximately Kshs.601,000,493/= in excess of what is due

to the decree holder which was a colossal sum and that therefore this court need to interrogate the amount of the decree.

4. In his written submissions, Mr. Gatonye learned Counsel for the Judgment-debtor submitted that it was open to the Judgment-debtor to apply to review the decree as the same did not agree with the judgment. He cited the case of **Mobil Oil Kenya Ltd Vs Weldwell Ltd (2008) eKLR** for that proposition. That this court has jurisdiction under Order 21 Rule 7(1) of the Civil Procedure Rules to ensure that a decree for payment of money agrees with the judgment. The case of **Highway Furniture Mart Ltd Vs Permanent Secretary Office of the President & Anor (2006) eKLR** was cited in support of that proposition. That in any event, such jurisdiction is inherent under Section 3A of the Civil Procedure Act and as expounded by the Court of Appeal in **Equity Bank Ltd Vs Westlink MBO Ltd (2013) eKLR**. That through the professional computation made by IRAC, the Judgment-debtor had demonstrated sufficient grounds for the review of the decree.

5. Mr. Gatonye further submitted that on the authority of the **Highway Furniture Mart Ltd case (supra),** an application such as the present one has to be heard by a judge and not the Deputy Registrar. That under Order 49 Rule 7(1) of the Civil Procedure Rules, the Deputy Registrar cannot entertain the present application. He concluded that under Section 48(1) of the Evidence Act Cap 80 Laws of Kenya, the Court can rely on an expert report without necessarily calling oral evidence. That since the decree holder had not produced any expert evidence to challenge that of IRAC, the latter's report should be admitted Counsel therefore urged that the application be allowed.

6. The application was opposed through the Replying Affidavit of Esmail Jibril sworn on 30th April, 2015. It was contended that the application was a mere time wasting tactic not to pay the decretal sum; that the decree has throughout been in the knowledge of the Judgment-debtor since 20th March, 2014; that the decree-holder did not recognize the professional who had made the calculations relied on by the Judgment-debtor; that the judgment-debtor's advocates had been given a draft of the decree with an opportunity to dispute the same but did not do so; that the computation of the decree was never disputed; that the judgment-debtor had previously used the same decree to mount challenges of certain decisions made by the courts and that the application was therefore an abuse of the court process.

7. In his submissions, Mr. Ahmednasir, Senior Counsel for the decree holder stated that due to the multiplicity of the applications running from the High Court through to the Supreme Court, the Judgment debtor was but in abuse of the court process; that the Court of Appeal had found the Judgment-debtor to be playing lottery with the courts in this matter. That the application for review was being brought exactly one (1) year after the decree was issued and that therefore there had been inordinate delay in bringing the application. He further submitted that the Judgment-debtor had accepted the decree in a number of applications which it had filed and that therefore it was estopped from denying the correctness of the decree; that the application did not satisfy the provisions of Order 45(1) of the Civil Procedure Rules. Counsel further submitted that this court cannot recall the orders and executions so far undertaken on the basis of the said decree. That the decree is that of the Court of Appeal and this court cannot therefore interfere with it as already held by this court in its ruling of 26/11/2014; that this court has no jurisdiction to interfere with the decree being that of the Court of Appeal. That the Judgment-debtor was litigating through trial and error and this court should tell it firmly not to do so. Counsel urged that the application be dismissed.

8. I have carefully considered the Affidavits on record, the written submissions of the parties and the authorities relied on. In order to understand the spirit and tenure of the application, I think it is imperative to set out in extenso the orders sought in the motion. These are that:-

> ***"(a) This application be certified urgent and be heard in priority to the decree holder's Notice of Motion (garnishee application) dated 10th February, 2015.***
>
> ***(b) This Honourable Court be pleased to review the decree of this Court dated 20th March, 2014 and/or the decretal amount resulting therefrom as computed by the decree***

holder at Kshs.1,421,671,718/- or thereabouts.

(c) All and any execution proceedings undertaken by the decree holder as a result of the decree dated 20th March, 2014 be set aside.

(d) The parties herein do extract a fresh decree and/or have the amount owing from the judgment dated 7th February, 2014 computed by this Honourable Court.

(e) Pending the hearing and determination of this application, this Honourable Court be pleased to order a Stay of Execution of the Judgment dated 7th February, 2014 and the decree dated 20th March, 2014."

9. It is clear from the foregoing that the principal prayer in the application is that for review of the decree dated 20th March, 2014. Mr. Gatonye set out five (5) issues which in his view are for determination in this application. To my mind, not all the said issues are correct for the determination of the present application. My view of the matter is that there are three issues for determination. Whether a party can apply for review of a decree; whether this court has jurisdiction to hear such an application and whether in the circumstances of this case, the present application has any merit. My view is that the first and second issues are to be answered in the affirmative. Order 21 Rule 7(1) provides:-

"(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit."

10. In the case cited by Mr. Gatonye for the judgment debtor of **Highway Furniture Mart Ltd vs Permanent Secretary Office of the President & Another (2006) eKLR** the Court of Appeal held:-

"By Order XX Rule 6(1) the decree should agree with the judgment of the court and by Order XX Rule 7, in case of dispute the decree is settled by a Judge before it is issued by the Court. A decree which is not in conformity with the Judgment is liable to be reversed and set aside for a party to the suit cannot suffer because of the errors committed by the Court. The Court would, however, be functus officio if the decree conforms with the judgment....."

In this regard, a court that has passed a decree has jurisdiction to hear and determine an application to review such a decree.

11. In order to determine the third issue, the court has to interrogate whether the application meets the criteria for which a court can revisit and review a decree as contended by the Judgment debtor. In order to determine that issue there are three sub-issues that fall for determination. These are firstly, whether there is a proper application for review before this court; secondly, whether the decree agrees with the judgment and if not is liable to be set aside and finally, whether this court has jurisdiction to entertain the application.

12. As stated above, the principle prayer in the motion dated 18/2/15 is to review the decree dated 20/3/14. Applications for review are made under Order 45 rule 1 of the Civil Procedure Rules. The grounds upon which a decree can be reviewed under that provision of the law are clear and well known. The decree holder faulted the application on the ground that it was not grounded upon Order 45 Rule 1, yet it was seeking to review the decree dated 20/3/14. I have looked at the provisions that the Judgment-debtor cited and the grounds for which the motion was brought. I am of the view that although Order 45 (1) was not invoked and that none of the principles or grounds therein were pleaded and proved, the motion before me is not fatally defective. Order 21 Rule 7 had been invoked and the grounds on the motion properly pleaded the grounds under that rule. To my mind, no prejudice was suffered by the decree holder by failure by the judgment debtor to invoke this court's

jurisdiction under Order 45 Rule (1) of the Civil Procedure Rules. Accordingly, I find that the application is not defective and is properly before court for determination.

13. The second sub-issue is whether the decree agrees with the judgment. It was submitted on behalf of the Judgment-debtor that the decree did not agree with the Judgment of the court. That the decretal amount as contained in the decree dated 20th March, 2014 was grossly exaggerated in that, the decree-holder applied a totally wrong interest rate in computing the amount of interest payable. The decree holder on its part contended otherwise.

14. In order to determine this sub-issue, I think it is imperative to set out the relevant parts of the judgment as well as the decree itself and compare the same. At pages 36 and 37 of the Judgment of the Court of Appeal in **CA No.311 of 2009,** that Court held as follows:-

> ***"For the foregoing reasons, this appeal only succeeds in part. The same is partially allowed in the following terms;-***
>
> ***1. The appeal by the Honourable Attorney General – (1st appellant) succeeds and is hereby allowed with costs in this court and the High Court.***
>
> ***2. The appeal by the 2nd appellant partially succeeds to the following extent***
>
> ***<u>REVENUE LOSS</u>***
>
> ***a. The award for Revenue Loss as awarded by the learned Judge of the High court is undisturbed i.e.***
>
> ***(i) Gross turnover average based on audited accounts (year 2002/2003) 7 months Kshs.110,117,338.00***
>
> ***(ii) Additional Aircrafts 9XR-AL and 9XR-A Kshs.93,499,000.00***
>
> ***(iii) Aircraft 9XR-AB Kshs.67,171,650 (for the loss of the aircrafts.)***
>
> ***b. Capital losses***
>
> ***(i) Kshs.21,980,000 (aircraft purchase instalments paid) 5Y-EMK***
>
> ***(ii) Kshs.9,847,668 payments made to Field Air Motives as instalments for the Aircraft purchase 5Y-EMK.***
>
> ***c. Consequential Loss is adjusted toKshs.50,000,000/- for reasons given above.***
>
> ***d. Aggravated damages Kshs.10,000,000/-***
>
> ***Total Kshs.362,615,656/-.***
>
> ***e. The respondent is awarded 50%. Costs of the suit in the High Court and in this court as against the 2nd Appellant.***
>
> ***f. Interest at court rates on (a) and (b) from date of filing. In (c) and (d) from the date of judgment till payment in full."***

15. Exhibit "JNMN12" produced in the Supporting Affidavit of Judith Ng'ethe sworn on 18/2/15

is the impugned decree issued on 20/3/15. It states at the relevant parts as follows:-

"IT IS HEREBY ORDERED

1. THAT the appeal by Hon. Attorney General (1st Appellant) be and is hereby allowed with costs in the Court of Appeal and in the High Court.

2. THAT the appeal by the 2nd Appellant partially succeed to the following extent:

<u>REVENUE LOSS</u>

(a) The award for Revenue Loss as awarded by the learned Judge of the High court is undisturbed i.e.

(iv) Gross turnover average based on audited accounts (year 2002/2003) 7 months Kshs.110,117,338.00

(v) Additional Aircrafts 9XR-AL and 9XR-A Kshs.93,499,000.00

(vi) Aircraft 9XR-AB Kshs.67,171,650 (for the loss of the aircrafts.)

(b) Capital losses

(iii) Kshs.21,980,000 (aircraft purchase installments paid) 5Y-EMK

(iv) Kshs.9,847,668 payments made to Field Air Motives as installments for the Aircraft purchase 5Y-EMK.

(c) Consequential Loss is adjusted toKshs.50,000,000/- for reasons given above.

(d) Aggravated damages Kshs.10,000,000

Total .....Kshs.362,615,656.

(e) The respondent is awarded 50%. Costs of the suit in the High Court and in this court as against the 2nd Appellant.

(f) Interest at court rates on (a) and (b) from date of filing. In (c) and (d) from the date of judgment till payment in full."

16. Clearly, it does not require any magic to see that the decree was uplifted from the judgment of the Court of Appeal nearly word for word. The decree perfectly agreed with the Judgment of the Court of Appeal as pronounced. Both the cases of **Mobil Oil Kenya Ltd Vs Weldwell Ltd (2008) eKLR** and **Highway Furniture Mart Ltd Vs Permanent Secretary Office of the President & Anor (supra)** relied on by the Judgment debtor related to cases where clearly the decrees were at variance with the judgment. In the Mobil case, the decree left out the particulars of the counterclaim and he determination thereof. In the **Highway Furniture Mart Ltd case**, the decree included a huge sum of Kshs.30million as claim for interest which had not been pleaded nor awarded. In the present application the decree not only agrees with the judgment, but it is nearly word for word with the judgment.

17. From prayer No. 2 of the motion and ground No.4 of the grounds, it would seem that the

complaint is about the decretal sum. Ground No. 4 states:-

> ***"On 20th March, 2014 the decree holder extracted a fresh decree as amended by the Court of Appeal stating the amount owing at Kshs.1,421,671,718/="***

In paragraph 4 of the Supporting Affidavit of Judith Ng'ethe, she swore as follows:-

> ***"4. THAT on 20th March, 2014 the decree holder extracted a fresh decree as amended by the Court of Appeal comprising of Kshs.1,421,671,718/- as the decretal amount. (Annexed hereto and marked JNMN2 is a copy of the said decree)."***

18. I have carefully scrutinized the decree produced as "JNMN 2", but I have not seen the figure of Kshs.1,421,671,18/- or any interest disclosed that is at variant with the judgment of the Court. What the decree pronounces out is what I have set out in paragraph 14 hereinabove. It is therefore clear that the Judgment-debtor not only misled the Court but has stated on oath matters that are outright falsehood. Its intention in so doing is not clear. Nowhere in the exhibit JNMN2, the decree issued on 20/3/2014, is the decretal sum of Kshs.1,421,671,718/- shown or stated.

19. The only document in the entire application by the judgment debtor that alludes to a sum of Kshs.1,421,671,718/- is a copy of the Garnishee order Nisi (Absolute) dated 27/11/14 which is produced as part of "JNMN4". Even if that is the amount demanded by the decree-holder, I do not not think it warrants an application to review a decree of the court that is in accordance with the judgment. There are other ways of dealing with such an anomaly, if that be the case, than coming to court by way of review of decree as the judgment debtor has done. To the extent that the application before me is for review of the decree on the ground that it does not agree with the Judgment, the same has no basis.

20. In any event, even if it were that the decree issued on 20/3/14 did not agree with the Judgment dated 7/2/14, which is not the case as shown above, I still do not think that this court would have had the jurisdiction to entertain the present application. In the ruling of this court delivered on 26/11/2014, this court sought to determine the position of the decree issued on 20/3/14. In paragraphs 15,16,19 and 20 of that ruling this court delivered itself as follows:-

> ***"15) On appeal, the Court of Appeal interfered with the said judgment to a great extent in that, the decree against the Attorney General was set aside and the total amount payable by the Respondent was reduced from Kshs.1,345,616,019/65 to a mere Kshs.362,615,656/= plus interest and costs. That was in Civil Appeal No. 311 of 2009. That Judgment was supplied to this court and the court has carefully examined the same. A decree was thereafter extracted in terms of that Judgment. That is the decree that is being sought to be executed by the Applicant. The question that arises is whether that decree was one passed in the exercise of the High Court's original civil jurisdiction in terms of Section 94 of the Civil Procedure Act. The Applicant contends that that decree is of Court of Appeal whilst the Respondent insists the decree is that of this court.***
>
> ***16) The Civil Procedure Act and Rules make provision on how decrees from judgments of the High Court are to be extracted and executed. On the other hand the jurisdiction of the Court of Appeal is given by both the Constitution and the Appellate Jurisdiction Act, Cap 9 Laws of Kenya. Rule 33 of the Court of Appeal Rules provides:-***
>
> ***'33.(1) Every decision of the court on an application or appeal, other than a decision on an application made informally in the course of a hearing shall be embodied in***

an order

(2) .....

(3) An order on an application shall be substantially in the Form I in the First Schedule and an order on appeal substantially in the Form J in the Schedule." (Underlining mine)

19) Apart from these two provisions, I have not seen any other provision in the Appellate Jurisdiction Act that provides for issuance of decrees for that court. The judgments of that Court are expressed in terms of orders. My view is that it is because execution of judgments in the Civil Procedure Rules are effected by way of decrees, that Section 4 of the Appellate Jurisdiction Act directs that a judgment of that court be executed as if it were a judgment of the High Court. In this regard, it would be safe to conclude that there can be no decree of the Court of Appeal. Any Judgment of that court when being executed, it will be expressed by way of a decree as if it were that of the High Court.

20) In view of the foregoing, whilst the decree annexed to the application is expressed to be under Civil Suit No. 120 of 2003 which is this suit, it is clearly not the decree of this court but that of the Court of Appeal as ordered in the Judgment of that Court of 7th February, 2014 in CA No. 311 of 2009. It emanated from the decision of that court. That court greatly interfered with the decree that had been issued by this court in its original jurisdiction on 19th December, 2008. In my view therefore, the decree sought to be executed is not that of this High Court in its original jurisdiction but of the Court of Appeal. Accordingly, I agree with the contention by the Applicant that to that extent, Section 94 of the Civil Procedure Act does not apply in the present case."

21. From the foregoing, the position taken by this court then was that, the decree issued on 20/3/14 was that of the Court of Appeal and not the High Court. This court still holds the same view. To my best of recollections that determination has not been overturned yet. The decree of 20/3/14 emanated from the Judgment of the Court of Appeal dated 7/2/14. In the premises, can this court purport to review the judgment of that court? I think it will be absurd to do so. There is a detailed procedure set out under Rules 32 and 34 of the Rules of that Court how the decisions of that court have to be embodied, prepared and settled. Rule 35 thereof provides that, it is that court that has the jurisdiction to correct errors or mistakes that arise in the preparation of the orders of that court. Clearly this court has no jurisdiction to entertain the present application. It cannot purport, by any imagination to review the decree of that court. The mere fact that the Deputy Registrar of this court issued that decree does not make it a decree of this court.

22. In view of the foregoing, the rest of the submissions by Mr. Gatonye on the application are not relevant as they pre-suppose the decree sought to be reviewed to be that of this court. I therefore do not think that I need to consider the rest of the submissions on the other prayers in the motion.

23. Accordingly, I find the application to be without merit and the same is hereby dismissed with costs to the decree-holder.

.....

A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 25th September, 2015.

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JUDGE