REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 21 OF 2014

IN THE MATTER OF: AN APPLICATION BY CENTRAL ORGANIZATION OF TRADE UNIONS (K)

AND

IN THE MATTER OF: THE CABINET SECRETARY MINISTRY OF LABOUR, SOCIAL SECURITY & SERVICES

AND

IN THE MATTER OF: THE NATIONAL SOCIAL SECURITY FUND

BETWEEN

CENTRAL ORGANIZATION OF TRADE UNIONS (K) ..... APPLICANT

VERSUS

THE CABINET SECRETARY, MINISTRY OF LABOUR SOCIAL SECURITY & SERVICES..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL..... 2ND RESPONDENT

THE NATIONAL SOCIAL SECURITY FUND BOARD

OF TRUSTEES..... INTERESTED PARTY

RULING

1. By a Notice of Motion dated 20th January, 2014, the *ex parte* applicant herein, **Central Organization of Trade Unions (K),** sought the following orders:

1. **That the Honourable Court be pleased to grant the applicant Central Organization of Trade Unions (KENYA) an Order of Mandamus directed to the 1st respondent to appoint and gazette the applicant's nominee to the Board of Trustees NSSF forthwith in compliance with the provisions of Section 6 of the NSSF Act Cap 258 of the Laws of Kenya.**
2. **That the Honourable Court be pleased to grant the applicant Central Organization Of Trade Unions (KENYA) an order of prohibition directed to the 1st respondent to stop and/or restrain the 1st respondent by himself or through his authorized servants or agents namely the NSSF Board of Trustees from convening any board meeting pending the appointment of the applicant's nominee to the board.**
3. **That costs of this application to be paid by the respondents.**

2. After hearing the said application I granted an order of mandamus directed to the 1st respondent compelling him to appoint and gazette the applicant's nominee to the Board of Trustees NSSF forthwith in compliance with the provisions of Section 6 of the ***NSSF Act*** Cap 258 of the Laws of Kenya and awarded the applicant the costs of the application.
3. On 12th May, 2014, the parties appeared before me at the instance of the Respondents.
4. On the said date **Mr. Bitta** learned counsel for the Respondent informed the Court that the mention was requested by the Respondents after they came across an amended order dated 8th May, 2014 when they were in the process of preparing the record of appeal. According to him the amended order was at variance with the Judgement of this Court as well as what was pleaded in the chamber summons in which leave was sought, the statement accompanying the said application and the order for leave. Apart from that the said amended order indicated that this matter was before this Court on 8th April 2014 which was incorrect. According to him the order was purportedly amended pursuant to a letter dated 5th May 2014 and therefore wondered how the Court could have amended the order on the said date when the letter seeking amendment was dated 5th May, 2014.
5. According to learned counsel, there is a clear procedure for amendment of orders of the Court and settlement of terms thereof which procedure was never followed. He therefore submitted that this is one of the instance where the Court ought to take stringent measures to ensure that its dignity is upheld since the matter touches on the dignity of the judicial process.
6. He informed the Court that they found it incumbent to bring these issues to the attention of the Court and prayed that the said order be expunged from the record.
7. On his part **Mr. Ngatia**, learned counsel for the interested party supported the Respondents' position and submitted that pursuant to a letter dated 5th May 2014 the applicant's advocate requested the matter to be placed before the Court to correct an error in the order which was prepared immediately the judgement was pronounced and was issued on 9th April, 2014.
8. According to him, he had no idea whether the file was placed before this Court. However on 8th May, 2014 an amended order was issued and what was desired to be corrected was the reference by the Court to section 6 of Cap 258 Laws of Kenya as opposed to section 6 of the NSSF Act No. 45 of 2013. In his view such an amendment cannot be done in such a casual manner by way of a letter without engaging counsel.
9. According to him, in the application for leave the order for mandamus, the leave granted and the substantive Motion all made reference to Cap 258 Laws of Kenya which had been repealed. According to him the parties were engaged based on that understanding and the subsequent judgement also made reference to the said section 6 of Cap 258. In his view if there was a need to amend then the amendment would have included the pleadings as well as the judgement and that could not be done by way of a letter.

10. Learned Counsel urged the Court to order that the order which was irregularly extracted be expunged from the record since the Deputy Registrar cannot amend the judgement. He submitted that the earlier order had been acted upon as there are proceedings pending in the Court of Appeal in which the correct order is the subject.
11. On her part, **Mrs Guserwa**, learned counsel for the Applicant submitted that she was not surprised at the turn of events since the Respondents had not opposed the application and were now claiming that the order was not proper. At the hearing, she submitted extensive arguments were made and it was clear that reference was being made to Act No. 45 of 2013 which was previously Cap 258 of the Laws of Kenya.
12. The issue of Act No. 45 of 2013 was properly captured save that the Court referred to the repealed Act and not the one referred to. According to her the error was not attributable to the applicant and had an application been made to amend the applicant would have explained the circumstances. Accordingly, by a letter dated 5th May 2014 she requested for a correction of the error and was subsequently furnished with an amended order. On the issue whether the earlier order has been acted upon learned counsel submitted that she was unaware of any proceedings in the Court of Appeal as she had not been served with any record.
13. It was however submitted that even if the said letter had not been written the Court if it noticed the error would have corrected the same. Therefore there was no ill-motive on the part of the applicant as the letter was copied to the Respondents. In her view the Respondents ought to have been courteous to apply for setting aside the amended order. It was submitted that in invoking the provisions of Article 159 of the Constitution one ought not to make a formal application since the Court can make such orders as are necessary to dispense justice and it was the duty of the applicant to bring the issue to the attention of the Court.
14. The Court was urged to look at the pleadings filed and once this was done the Court would find that the amendment does not prejudice the Respondents and ought not to be persuaded by the Respondents' arguments.
15. The Court was further urged not to make orders on a mention date.
16. In a rejoinder, **Mr Bitta** submitted that this is a Court of record and the Court cannot issue two orders with respect to the judgement. He submitted that the State defended the suit and that the judgement was in consonance with the pleadings and the order for leave. The amendment, it was submitted was meant to steal a match and hence the Court ought to invoke Article 159 of the Constitution to make the record straight.
17. I have considered the foregoing submissions.
18. In this case, it is contended that this Court ought not to make the orders sought by the Respondents on a mention date. It is trite that the Court ought not to make substantive orders on a mention date. In **Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332,** the Court of Appeal held that when a matter is fixed for mention it cannot be heard unless by consent of the parties. Similarly in **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998,** the same Court held that when a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties.
19. Therefore the only question that falls for determination is whether the parties consented to the determination of the matter. In this case the objection to the hearing was taken by **Mrs Guserwa** at the tail end of her submissions after the Respondents and the interested party had submitted and after the learned counsel had responded to the submissions made by learned counsel for the Respondent and the interested party. Apart from that the Respondent and the interested party submitted that the Deputy Registrar had no jurisdiction to amend the order that had earlier on been extracted. It is trite that an action taken without jurisdiction is void *ab initio* and if an act is void, then it is in law a nullity and it is not only bad, but incurably bad. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there, as it will collapse. See **Macfoy vs. United Africa Co Ltd [1961] 3 All ER 1169 at 1172.**
20. Therefore where an issue of jurisdiction is raised the Court has to deal with it the only consideration being that the parties ought to be given an opportunity of being heard. In fact issues

of jurisdiction may even be raised by the Court on its own motion. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1**the Court of Appeal held that:

"Jurisdiction is everything and 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. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

21. In light of the foregoing and taking into account the provisions of Article 159(2)(b) of the Constitution which provides that in exercising judicial authority, the courts and tribunals shall be guided by inter alia the principles that justice shall not be delayed, I will proceed to consider the issues raised herein.
22. That this Court has the powers both under section 99 of the ***Civil Procedure Act*** and its inherent jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, at any time by the court either of its own motion or on the application of any of the parties is not in doubt. As was held by **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 he 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."

23. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the ***Civil Procedure Act*** is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.
24. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.
25. It follows that though the provisions of section 3A and 99 of the ***Civil Procedure Act*** may not

necessarily apply to judicial review applications, the Court is not barred from invoking its inherent jurisdiction to make orders necessary for the ends of justice and to enable the Court maintain its character as a court of justice.

26. However the Courts have set out guidelines which govern the circumstances under which the exercise of the jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission are to be exercised. In **Vallabhdas Karsandas Raniga vs. Mansukhlal Jivraj and Others [1965] EA 780,** the East African Court of Appeal held:

"Section 3(2) of the Appellate Jurisdiction Act confers on the Court of Appeal the same jurisdiction to amend judgements, decrees and orders that the High Court has under section 99 of the Civil Procedure Act, making it unnecessary to look to the inherent powers of the court. The words "at any time" in section 99 clearly allow the power of amendment to be exercised after the issue of a formal order…."Slip orders" are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.…..A court will only apply the slip rules where it is fully satisfied that it is giving effect to the intention of the court at the time when judgement was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In the present case, if the facts had been before the court when judgement was given on appeal, the court would, on application or indeed of its own motion, have made the order for refund, now sought, which was necessarily consequential on the decision on the main issues."

27. In this case, it is clear that the order was not amended by this Court. The same was in fact amended on the strength of a letter addressed to the Deputy Registrar. What then is the procedure where it is sought that a judgement, order or decree is to be amended? In **Raichand Lakhamshi and Anor vs. Assanand and Sons Civil Appeal No. 55 of 1956 [1957] EA 82,** the East African Court of Appeal expressed itself as follows:

"It is important to remember that, in the ordinary way, the recall of an imperfected order results in a re-hearing at which all parties can present such further arguments as they may be advised having regard to the matter, whatever it may be, which is sought to cast doubt on the correctness of the order as orally pronounced.....It is evident that the power to recall is one of the inherent powers of a court and in Kenya as regards both the Supreme Court and the subordinate courts, inherent powers are saved by section 97 of the Civil Procedure Code [now section 3A of the Civil Procedure Act].....If the courts in Kenya can exercise the discretion to recall judicially and ensure that all parties affected are given an opportunity to be heard, it is unlikely that any injustice or hardship will be caused."

28. It is therefore my view that where correction of a judgement, order or decree is sought at the instance of a party as opposed to the court acting on its own motion, the Court ought to hear the parties before making an appropriate order.

29. The issue of the stage at which the order can be amended was dealt with by the Kenyan Court of Appeal in the case of **Sapra Studio vs. Kenya National Properties Ltd (2) [1985] KLR 1011; [1986-1989] EA 519** where it was held that the words "at any time" in section 99 of the ***Civil Procedure Act***, which also appear in rule 35 allows the court the power of amendment, even after the issue of the formal order and that under rule 35 of the ***Court of Appeal Rules***, a clerical or arithmetical mistake or any error arising from an accidental slip or omission may be corrected by the court before or after the judgement has been embodied in an order.

30. That leads me to the issue whether the power to correct a judgement, order or decree is exercisable by the Deputy Registrar. The powers of the Registrar are circumscribed in Order 49 of the ***Civil Procedure Rules***. Nowhere is it provided under the said Order that the Registrar's special powers include the power to amend the judgement, order or decree.

31. In my view, the power to amend the judgement, order or decree can only be exercised by the

Judge where the matter is a High Court matter and not by the Deputy Registrar. Accordingly I have no hesitation in finding that the Deputy Registrar has no power to amend a judgement, order or decree of the High Court.

32. In this case there is no evidence on record that the amended order was sanctioned by the Judge. It follows that the said amended order was made without jurisdiction and is therefore null and void. The same is accordingly ordered to be expunged from the record.
33. On costs, it is clear that this objection ought to have been raised formerly. **Mr Ngatia** submitted that both the Applicant and the Respondent were in error. I am however unable to place any blame on the Applicant as there is no evidence that the Applicant apart from requesting that the matter be placed before the Judge for correction of the error played the role in the preparation and execution of the amended order.
34. In the premises each party will bear own costs.

Dated at Nairobi this 19th day of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Guserwa for the Applicant

Ms Sirai for Mr Bitta for the Respondent