



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 308 of 2006

MBIGI NJUGUNA & CO ADVOCATES.....APPLICANT

VERSUS

THE TOWN COUNCIL, CITY COUNCIL OF NAIROBI...RESPONDENT

RULING

On 20th December 2012, I delivered a ruling in this matter in which I expressed myself, *inter alia*, as follows:

“With respect to the prayer for stay pending taxation, the applicant has not shown that if the sum deposited in Court is released to the respondent, it will not be able to get the said sum. What the applicant has said is that it will face difficulties in having the same refunded as happened in the past. In my view mere difficulties in securing refund of money cannot be equated with substantial loss or negation of the outcome of the application, appeal or even intended taxation as is the case in this matter. Whereas the conditions for grant of stay under Order 22 rule 25 under which this application is brought may not necessarily be the same as under Order 42 rule 6 of the Civil Procedure Rules, it is my view that the conditions under the latter provision offer useful guideline to the exercise of discretion under the former.”

Section 91 of the Civil Procedure Act provides as follows:

(1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).

Whereas the foregoing provision deals with restitution where a decree has been reversed, it is my considered view that the same provision applies *mutatis mutandi* in circumstances in which an order has been set aside. Therefore where an order is set aside the Court has power not only under this provision but also in the exercise of its inherent jurisdiction to cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such order or such part thereof as has been varied or reversed.

I therefore find that this Court has jurisdiction to make the orders for the release of the sum deposited in Court herein following the ruling the subject of this oral application.

It has, however, been contended that the applicant in this oral application ought to make a formal application. As already indicated herein above this Court found that “the applicant has not shown that if the sum deposited in Court is released to the respondent, it will not be able to get the said sum”. In other words the Court saw no impediment disclosed by the respondent in this oral application which would justifiably stand in the way of the applicant in accessing the sum deposited in court.

In Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010 the Court of Appeal dealing with the overriding objective stipulated in section 1A and 1B of the Civil Procedure Act stated *inter alia* as follows:

“The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.”

Similarly, in Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009 the Court of Appeal expressed itself thus:

“The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow”.

In my view in light of the decision made herein to direct the applicant in this oral application to make a formal application will have the effect of applying provisions and rules which are likely to hinder the court’s operation and therefore prevent it from acting justly now and not tomorrow.

In the premises, I overrule the objection raised by the respondent in this oral application and allow the oral application made with the result that it is hereby ordered that the sum of Kshs. 244,627.70 deposited herein be released to the applicant in the present application. There will be no order as to costs in respect of the objection.

Dated at Nairobi this 29th day of April 2013

**G V ODUNGA
JUDGE**

Delivered in the presence Mr Achoki for Mr Njengo for the applicant and Miss Kenyani for Mr Omogeni for the Respondent