



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 156 OF 2004

TITUS KORIR KOMENPLAINTIFF

VERSUS

LAKE BASIN DEVELOPMENT AUTHORITYDEFENDANT

RULING

There is on record an application dated 16th December 2010 and filed on 5th January 2011 it is brought by the appellant by way of Notice of Motion and or Section 1A, 1B and 38 (f) of the Civil Procedure Act and other enabling provisions of the law. Three reliefs are sought namely:-

- (i) Spent .
- (ii) The amount due and or receivable on the basis of the decree be computed by the Deputy Registrar based on the documents produced in court as exhibits on the part of the plaintiff /applicant .
- (iii) The costs of this application be provided for.

The application is supported by grounds in the body of the application and a summary of the same is as follows:-

- (a) That the decree does not specify any sums of money as being payable from the defendant to the plaintiff as it simply states that the defendant do comply with the guidelines for retrenchment in the Civil Service on the basis of which the plaintiff is to be paid all sum of money found due.
- (b) Parties are not in agreement as to the formula to be used in computation based on the guidelines.
- (c) The defendant does not agree with the amount as computed and calculated by the plaintiff / applicant
- (d) That it is necessary that the decree herein be operationalized for purposes of having the same executable
- (e) That the orders sought is in furtherance of the overriding objectives of the court.
- (f) That neither party will suffer prejudice.

The supporting affidavit is deponed by the plaintiff / applicant and a perusal of the same reveals that it is a reiteration of the grounds in the body of the application and then the following have been stressed:-

- **There is a judgment in place which is to the effect that the defendant should comply with guidelines for retrenchment in the Civil service contained in a letter dated 24/6/2000.**
- **That a decree to that effect has been issued.**
- **That efforts to have the amount due to him as per the decree worked court has not established fruits.**
- **That him on his own has computed the amount he believes to be due to him which has come to the tune of 6,002,000.00**
- **That in pursue once thereof ,he had obtained a decree but the same was set aside.**
- **It is his assertion that for purposes of bringing the suit to a close it is necessary to have the amount for the decree capable of enforcement being worked out in furtherance of the overriding objectives of the court.**
- **That the exercise sought to be carried out will not prejudice any party as both are desirous of having the matter resolved.**

The replying affidavit to the application has been deponed by one Polycap Kuchio Tindi on the 18th day of March 2011 and filed the same date. The salient features of the same are as follows:-

- **That the plaintiff had obtained a decree herein.**
- **That the defendant /respondent was not in agreement of the same and the presented an application dated 29/9/2008 seeking to have the said decree set aside.**
- **That the said application was successful vide a ruling of this court dated 8/10/2010 allowing the setting aside of the decree and the resultant of the sums which had been paid by the defendant / respondent to the plaintiff / applicant in pursuance to the execution of the faulted decree.**
- **That todate the plaintiff / applicant has not complied with the said orders and as such he is in contempt of this court's order.**
- **Vide paragraph 7 that the judgment of Warsame J only amounted to an interim decree and for this reason it should be the onus of the court to and not the Deputy Registrar to make an award by calculating the sums payable and not the Deputy Registrar.**

Parties elected to file written submissions. Those of the applicant are dated 25th March 2011, and filed on the 26th day of May 2011. A perusal of the same reveals that the following have been stressed:-

- **The applicants application seeks to particularize a decree for purposes of enforcement.**
- **Article 159 (2) (d) of the Constitution of Kenya states that in exercising judicial authority, the courts and tribunals are to be guided by the following principles:-**
 - (i) **Justice should be administered without undue regard to procedural technicalities**
 - (ii) **Section 1A (i) of the Civil Procedure Act (2010) provides “ That the overriding objective of**

this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by this Act

(iii) That order 51 Rule 10 (2) Civil Procedure Rules (2010) states that “No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

- Contends that from the wording of the application, it is clear that there is no specific rule which deals with the specific situation in relation to the sets of facts displayed herein.

- That all that the applicant is seeking is simply to have the Deputy Registrar of this court exercise his/her ministerial powers and carry out an administrative function of computing the amount payable using the exhibits produced in court necessitated by the parties disagreements on the formula to be used.

- Contends that the application does not require the judgment to be reviewed set aside or varied but given effect.

- The court is invited to rely on the case law submitted to court by the applicant and not those of the respondent.

- The court is invited to note that the Respondent is simply relying on technicalities which have no place under the current constitutional dispensation.

- That substantive justice in the instant case demands that the decree of this court be actualized and given effect.

The Respondent’s submissions are dated 23rd day of May 2011 and filed on the 23rd day of May 2011 and the following points have been stressed by them:-

- Concedes that it is trite law that the courts in the resolution of Civil Disputes shall seek to uphold the overriding objective

- There is no justification for a litigant to cite the provisions cited since it is assumed that the court will take judicial Notice of the same any way.

- The overriding objective principle only applies when the law does not provide directions. It operates to fill in gaps left by the legislation.

- It has no application to the scenario herein because the situation can be catered for under Order 21 Rule 16 Civil Procedure Rules.

- That there is a decree issued herein but no preliminary any decree was ordered issued prior to the issuance of the final decree setting out the amount as required by law.

- Concedes the plaintiff and the defendant have disagreed on the formula to be applied to work out the final decree.

- That when a final decree is issued ,it is a formal expression of an adjudication which conclusively determines the rights of the partes in respect of any matters in controversy in the suit. The courts cannot therefore attempt to alter its decision once it has been made.

- It is their stand that the plaintiff cannot therefore seek to have the court grant any other decree after the final decree has been issued and for this reason the application of 16/12/2010 is resjudicata and it should be struck out.

- **If the plaintiff /applicant is aggrieved then the only option open to him is to appeal or apply for review.**

On case law the applicant referred the court to the ruling by Waweru J delivered on the 9th day of June 2005. It related to issues of Settlement of a decree in Order XX Rule 7 (4) Civil Procedure Rules in the case of **Arthur K. Igeria t/a Igeria & Co Advocate =vs= Ernest Kahiro Kimani & Another Nairobi HCC No. 4 of 2003 Commercial Division, Milimani.** In this case, the learned Judge gave directions to the plaintiff to draw out the decree and give it to the defendant for approval failure of which the Deputy Registrar to work it out and if need be the matter could be placed before a judge for directions.

The respondent on the other hand referred the court to the case of **Jitegemee Sacco Ltd =vs= Municipal Council of Mombasa, Mombasa HCC No. 526 of 2000** decided by Maraga J on the 18th day of February 2004. It considered irregular payment of a decretal sum entered into by consent.. The learned Judge upheld the preliminary objection.

This court has given due consideration to the aforeset out rival depositions as well as arguments and the same considered in the light of the case law cited to court for guidance and the court proceeds to make the following findings on the same:-

(1) That the plaintiff /applicant indeed took out litigation by way of suit against the defendant / respondent vide the proceedings herein.

(2) That the reliefs sought by him vide a plaint dated 29th day of October 2004 and filed on 2nd November 2004 were as follows:-

(i) A declaration that the defendants' purported identification of the plaintiff for early retirement/retrenchment was in breach of the said guidelines and amounted to a breach of contract and the plaintiff is entitled to damages.

(b) An order that the defendant complies with the guidelines for retrenchment in the civil service (aforesaid) and the plaintiff be paid all money due and owing to him under the said guidelines and that the plaintiff be compensated for the period for which he would have worked for the defendant in terms of salaries and allowances.

(c) Costs of this suit

(d) Interest on (a) (b) and (c) above.

(3) The defendant defended the claims.

(4) It is clear that the plaintiff did not quantify his claims in the relief

(5) Warsame J delivered a judgment on the 4th day of May 2006 along the following lines:- “ In view of the above I am satisfied that the retrenchment of the plaintiff and computation of his benefits were not done in accordance with the set instructions and guidelines for implementing staff retrenchment in the civil service, as required specifically on the letter dated 23rd June 2000. The defendant was as a matter of procedure required to undertake an implementation taken in accordance with the circular of the permanent secretary office of the president. And by failing to follow the guidelines, the defendant contravened the desired goal for retrenchment. The procedure adopted by the defendant was a significant and fundamental departure from what was contained in the circular for retrenchment. In the premises I grant prayers (b) and (c) of the plaint.

(6) Neither party appealed against the said judgment which stands to the present day.

(7) A plain reading of the conclusion reveals clearly that indeed the plaintiff was found to have

had a genuine complaint against the defendant who was found not to have followed the correct procedure in retrenching the plaintiff /applicant from his employment.

(8) The defendant /respondent appears to have appreciated the genuineness of the plaintiff / applicants complaint and that is why he did not appeal.

(9) There was no direction given by the court of the parties reverting back to court for formal orders for purposes of execution.

(10) It is common ground that parties have disagreed on the mode of procedure to be followed or used to work out the plaintiffs entitlement from the defendant /respondent under the proper guidelines for retrenchment.

(11) The plaintiff /applicant has submitted that to break the stalemate this court should treat the decree issued here as being preliminary and therefore order the Deputy Registrar of this court to work out the amount payable using the evidence that was adduced in court for purposes of giving effect to the decree and for purposes of enforcement.

(12) It is on record that the plaintiff after failing to get co-operation from the defence, drew out his own decree on what he had calculated as being the sum payable to him and had it executed but the defendant applied to have it set aside and indeed it was set aside by Aroni J in a ruling delivered on the 8th day of October 201 because it was at variance with the judgment.

(13) Apparently the plaintiff appears to have been paid certain sums under the said decree which is being counter manded by the defendant / respondent and for which a preliminary objection had been taken that the plaintiff should not be heard until he returns the sums he had been paid under the decree which had been faulted by Aroni J.

(14) The plaintiff /applicant now seeks the courts intervention under the overriding objective provision so that the judgment which was given in favour of the plaintiff / applicant is given effect for purposes enforcement

(15) The stand of the defendant /respondent is that these provisions are not available to the plaintiffs' and for this reason the matter appears to be fore closed in so far as the plaintiff claim is concerned.

(16) The control therein the overriding objective principle is that there is emphasis on theme in the observance of just determination of disputes between litigants.

(17) The defendant has suggested that the proper procedure to be followed by the plaintiff / applicant should have been an application for accounts under Order 21 Rule 14 Civil Procedure Rules.

(18) The plaintiff has further urged the court to be guided by the provision in Section 38 (f) of the Civil Procedure Act which mandates the court to enforce the judgment by way of execution. Otherwise than as provided for under the said provisions.

This court has taken into consideration the aforeset out own drawn out common grounds set out in number 1 -18 above the following questions arise for determination by this court in the disposal of this matter:-

1. What is the legitimate expectation of the parties herein when they set out to litigate against each other?.

2. What is the legitimate expectation of Judge Warsame when the learned Judge pronounced his judgment on the 4th day of May 2006?.

3. From the content of the paper work for and against the plaintiff /applicant's application dated 16th December 2010 and filed on 5th January 2011 have the above legitimate expectations in number 1 and 2 above been met?"

4. If the answer to own framed question 3 above is in the negative which is the way forward herein in order for the legitimate expectations in number 1 and 2 above to be met?.

In response generally to the above own framed questions, the legitimate expectations of the litigants when they set out to litigate against each other in these proceedings was that they were seeking the courts intervention to assist them resolve the dispute that was existing between them as an employer and employee. This courts construction of Judge Warsame's Judgment is that the dispute between the parties was that the employee who is the plaintiff/ applicant alleged that the employer who is the defendant / respondent had not followed the correct guidelines in retrenching the plaintiff / applicant from his employment. The court after due hearing of the parties and assessing the documentary exhibits relied upon arrived at the conclusion that the plaintiff had a legitimate complaint which needed vindication by the court which vindication was given by directing the employer to follow the proper guidelines in retrenching the plaintiff / applicant. The assumption was that the parties would simply comply and then have the matter settled .

What the learned Judge failed to fore see and make provisions for in the judgment was the action to be taken to bring the litigation to an end in the event parties failed to agree on the modalities when following the guidelines for retrenchment just as it had happened in the first instance, forcing the plaintiff to seek the intervention of the court. In other words the learned Judge failed to make provisions firstly that the judgment delivered provided only a preliminary decree to enable the parties follow proper guidelines on retrenchment and after that is done, come back to court for the final decree in order to conclude the dispute and bring it to a rest . This could easily have been done by making provisions for liberty to apply. This liberty to apply would have enabled the parties to bring on board the final result of the compliance for purposes of enforcement on the one hand and on the other had it would have enabled the court to interfere in the event of a disagreement arising in the manner displayed herein.

As mentioned earlier, it is conceded that neither party appealed against the said judgment which means that the plaintiff is entitles to benefit from the said judgment and that the court was prepared to ensure that its judgment is given effect.

It is the mode of giving effect to this judgment in order to benefit the victorious party who is the plaintiff which has not been agreed upon outside the court and also within. It is this desire to give effect to the judgment which has prompted the plaintiff / applicant to seek the intervention of the court in the manner sought which move has been opposed by the defendant / respondent for the reasons given. The question to be paused now is whether the court is remedy loss “.

In this court's opinion this court is not remedies, because:-

1. It has a duty as a dispute resolution court to ensure that its orders and or judgments are given effect to.
2. The very law which has conferred jurisdiction on it to resolve disputes, also makes provision for tools to make the courts resolution of the dispute effective. These two are within the same provisions of the law. This is demonstrated by the existence of provisions for settling of the terms of the decree before the same judge or a judge of concurrent jurisdiction if the judge who made the orders is out of the jurisdiction of the local limits of the court, where the case was heard like in the instant case. This court has judicial notice of the provisions relating to the settlement of the terms of the decree that this exercise arises where parties cannot agree on what should and or should not be included in the decree and that is why they go back to the court for the court to assist them comprehend what it meant by the content of the judgment.
3. This court also has judicial notice of the fact that the law anticipates resistance to enforcement of judgments by the loosing parties and that is why it put in place mechanisms for enforcement of the judgment in order to make its work effective.

4. The same law makes provisions for the involution of the inherent jurisdiction of the court enshrined in Section 3A of the Civil Procedure Act. It reads:- **“Section 3A Nothing in this Act shall limit otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”**. This reservoir of the court’s inherent powers can be invoked procedurally or on the courts own motion. When applied to the scenario herein, it is clear that ends of justice will be defeated if the court which pronounced the judgment does not put in place mechanism to give effect to that judgment to enable the victorious party enjoy the fruits of his judgment .

5. There is also in place provision of Sections 1A, 1B of the Civil Procedure Act Cap 21 laws of Kenya which introduced the overriding objective principle as an additional tool to enable the court bring litigation to an end. This courts construction of this provision is that it can be invoked procedurally in the manner done herein or it can be invoked on the court’s own motion where the situation warrants the same to be applied in the particular case. Applying the same to the scenario herein, it is clear that of the decree pronounced herein is not given effect to then the proceedings will be prolonged or left in an embarrassing position and the victory given to the plaintiff /applicant will be rendered nugatory.

6. An additional tool comes from Article 2 (5) (6) of the current constitution which makes provisions that **“Article (5) the general rules of international law shall form part of the laws of Kenya. Article 2 (6) Any Treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution”** Applying this to the scenario herein, this court has judicial notice of the fact that Kenya is party to the international covenant on civil and political rights and the African Charter on Human and Peoples’ Rights both of which make provision that a litigant is entitled to an effective By an effective remedy is one which is capable of giving effect to an enforceable right. The enforceable right herein had been adjudicated in favour of the plaintiff / applicant that he be retrenched by the defendant / respondent in accordance with the relevant guidelines. If the plaintiff /applicant is not retrenched in accordance with those guidelines, then his right to an effective remedy would not have been realized

7. There is also in place **”Article 22 (3) (d) to the effect that “the court while observing the rules of natural justice shall not be unreasonably restricted by procedural technicality and**

Article 159 (2) (d), that justice shall be administered without un due regard to procedural technicalities.....” When these constitutional provisions are applied to the scenario herein first it is clear that the fact that the judgment of Warsame J of 4/5/06 did not state that it was a preliminary judgment does not prevent this court from deeming it to be a preliminary decree in so far as it gave directions for other modalities to be under taken outside the court room to bring the dispute to an end.

Secondly, the fact that it did not give liberty to apply to either party does not rule out the inference of this court that liberty to apply was its existence and it could be resorted to by either party in the event of any disagreement arising on the modalities to be taken to bring the dispute to a close. This is no doubt the reason as to why both sides have sought intervention of the court and benefited from these orders.

Thirdly, the vehicle of seeking the courts intervention in the wake of a stalemate even if not procedural does not outweigh the need of the court to do justice to the litigants by giving effect to the result of the adjudication.

Fourthly, the fact that a party asks for one mode of resolution does not fetter the courts’ discretion to substitute that mode with the only caveat being that the said discretion has to be exercised judiciously and with a reason.

For the reasons given in the assessment, the court is inclined to allow the plaintiff / applicant’s application dated 16/12/2010 and filed on 5/1/2011 for the following reasons:-

(i) The construction of Warsame J judgment of 4/5/2006 shows clearly that it was a preliminary judgment in so far as it required the defendant / respondent to comply with the guidelines on retrenchment.

- (ii) It was preliminary in so far as it could not be enforced in that state. It was the resultant compliance which was to be subsequently enforced.
- (iii) It matters not that the learned Judge did not pronounce that it was such a preliminary judgment:- This court being a court of concurrent jurisdiction has jurisdiction after construing the said judgment to deem it to have been preliminary
- (2) The judgment having been preliminary in nature by construction of its content it was necessary to make provisions for liberty to apply to either side in the event of any disagreement
- (ii) The learned judges' failure to pronounce that there was liberty to apply does not prevent the inference of the same by reason of the judgment being pronounced being preliminary in nature.
- (iii) There having been deemed to have been in existence liberty to apply to either party in the event of any disagreement arising inferred in the judgment the plaintiff / applicant's application under review is properly before this court.
- (3) The plaintiff / applicant's request to give effect to the judgment is legitimate in view of the fact that the resultant judgment is in capable of enforcement unless and until the fruits of the same are incorporated in the judgment for enforcement
- (ii) The defendant / respondent conceded that this situation prevails and needs to be remedied but says that the remedy should be by way of an application for accounts under Order 21 Rule 14 Civil Procedure Rules.
- (iii) Whereas the plaintiff / applicant who also concedes that a situation of stalemate exists, states that the best avenue of resolving the issue is to have the Deputy Registrar to be mandated to work out the figures.
- (4) In this court's opinion proceedings under Order 21 Rule 14 Civil Procedure Rules is not applicable as the employer was not to render accounts to the plaintiff / applicant but to comply with guidelines on retrenchment whereas the mode suggested by the plaintiff / applicant is not appropriate as the judgment of Warsame J of 4/5/2006 did not mandate the Deputy Registrar to work out the details of compliance. The best forum for this is the court itself.
- (5) For the reasons given number 4 above the judgment of 4/5/2006 by Warsame J be and is hereby declared reopened.
- (ii) The disagreement on the mode of compliance with the guidelines on the Retrenchment is deemed to be a disagreement on the terms of the decree.
- (iii) Parties are directed to appear before a judge of concurrent jurisdiction to work out the terms of settlement of the decree for purposes of giving effect to the judgment on a date convenient to the parties.
- (6) Upon compliance with number 5 above, the parties will be at liberty to set in motion mechanism for execution of the decree and there by bring litigation to a close
- (7) No prejudice will be suffered by the defendant / respondent since they did not appeal against the judgment on 4/5/2006 and are also in agreement that the judgment should be given effect and are also in agreement that there is disagreement on the modalities to be used to work out compliance as directed by the court.
- (8) Since the plaintiff / applicant has a genuine complaint costs will be in the course.

Delivered, dated and Signed at Kisumu this 29th day of September 2011.

R. N. NAMBUYE
J U D G E

RNN/aao