REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MISCELLANEOUS CIVIL APPL. NO. 272 OF 2017

DINESH CONSTRUCTION COMPANY LIMITED.....APPLICANT

V E R S U S

KENYA SUGAR RESEARCH FOUNDATION.....RESPONDENT

RULING

1. Before this Court is the Notice of Preliminary Objection dated **8th July 2020** filed by **DINESH CONSTRUCTION COMPANY LIMITED** the Respondent / Decree Holder challenging the Notice of Motion dated **6th July 2020** filed by the Applicant/Judgment Debtor. The Preliminary Objection is premised on grounds that:-

> **"1. The application herein is Res Judicata the issues therein having been decided on merit in the Ruling made by Olga Sewe J. on 2nd March 2018 and a similar oral application for stay having been denied by the same Judge on the day of delivery of the Ruling, that is to say 2nd March 2018, the Ruling made by Maureen Odero J on 15th April, 2020 and the consent order dated 27th July, 2018.**
>
> **2) This Honourable Court has no jurisdiction to entertain the application dated 6th July 2020 as it has become funtus officio having fully discharged its duty in the matter.**
>
> **3) The application is hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith, even suo motu.**

2. **KENYA SUGAR RESEARCH FOUNDATION**, the Applicant Judgment/Debtor filed Grounds of Opposition dated **16th July 2020**. The Preliminary Objection was canvassed by way of written submissions. The Applicant filed its written submissions dated **10th September 2020** whilst the Respondent filed written submissions which were undated.

BACKGROUND

3. The genesis of this matter is the contract dated **17th August 2007** between the Applicant and the Respondent. Subsequent to a dispute between the parties the matter was referred to arbitration. Vide an Award published on **19th September 2016** as well as an Addendum dated **3rd October 2016** the Arbitrator awarded the Respondent the sum of **Kshs. 123,000,000/-**

4. Thereafter the Respondent filed an application dated **3rd June 2019** seeking an order nisi to attach monies in the Applicants account in order to satisfy the decretal amount. This Court having considered the application ruled on **15th April 2020** that the Applicant was truly indebted to the Respondent, and allowed the application for Garnishee orders absolute.

5. The parties thereafter entered into a consent dated **27th July 2018** which consent provided as follows:-

> **"THAT by consent.**
>
> **i. The decretal sum herein of Kenya Shillings One Hundred and Sixty-Four Million (Kshs. 164,000,000.00) be and is hereby liquidated in four (4) quarterly instalments as hereunder;**

a) Kenya Shillings Forty-One Million (Kshs. 41,000,000.00) on or before 31st July 2018.

b) Kenya Shillings Forty-One Million (Kshs. 41,000,000.00) on or before 31st October, 2018.

c) Kenya Shillings Forty-One Million (Kshs. 41,000,000.00) on or before 31st January, 2019.

d) Kenya Shillings Forty-One Million (Kshs. 41,000,000.00) on or before 31st April, 2019.

e) Any interest accrued after the last calculation by the Court and until payment is made in full shall be calculated on reducing balance and paid together with the 4th instalment or on before 30th April, 2019.

ii. Costs of the Court proceedings and the auctioneers to be agreed or taxed."

6. The Applicant breached the terms of the consent after making only two (2) payments and the Respondent moved to execute its judgment. At that point the Applicant filed the application dated **6th July 2020.**

ANALYSIS AND DETERMINATION

7. The Respondent submits that the sole objective of the application dated **6th July 2020** is merely to delay and/or scuttle the process of execution thereby denying the Respondent the fruits of its Judgment. The Respondent contends that this matter is **'Res Judicata'** given that the issues raised in the application had been adjudicated upon and determined by **Hon. Lady Justice Olga Sewe** vide her Ruling delivered on **2nd March 2018.**

8. It is further contended that the matter was determined by the Ruling of this Court dated **15th April 2020** issuing Garnishee Orders against the Applicant. The Respondent states that the Applicants have engaged the Court in a plethora of applications in an attempt to escape their obligation to pay the decretal sum. That the application dated **6th July 2020** is nothing but a continuation of the same.

9. The Respondent also submits that this Court having rendered a decision on the issues vide its Ruling dated **15th April 2020** is now **'functus officio'** and lacks jurisdiction to entertain the application dated **6th July 2020**.

10. On its part the Applicant opposes the Preliminary Objection. The Respondent submits that the Preliminary Objection is not sustainable and does not raise a pure point of law for determination. That the application dated **6th July 2020** cannot be deemed to be Res Judicata as the same raises new issues for determination. Finally the Applicants submit that this Court is not functus officio in the matter.

11. **Black's Law Dictionary, 10th Edition** defines a Preliminary Objection in the following terms:-

"… in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary."

12. The definition of what constitutes a Preliminary Objection was given in the celebrated case of **MUKISA BISCUIT MANUFACTURING COMPANY –VS- WEST END DISTRIBUTORS LIMITED [1969]EA** where it was held as follows:-

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court on a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

13. Therefore in order to qualify a Preliminary Objection must raise a pure point of law. Where there exist contested facts requiring determination, a Preliminary Objection cannot be upheld. The tests to determine whether a matter raises a true Preliminary Objection was summarized in the case of **DAVID KAROBIA KIIRU –VS- CHARLES NDERITU GITOI & ANOTHER [2008]eKLR** as follows:-

"For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit."

14. Two main issues arise for determination as follows:-

(i) Is the application dated 6th July 2020 Res Judicata.

(ii) Is this Court functus officio.

RESJUDICATA

15. Section 7 of the **Civil Procedure Act Cap 21 Laws of Kenya** defines the doctrine of Res Judicata in the following terms:-

> **"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."**

16. This doctrine was expounded by the Court of Appeal of Kenya in the case of **IEBC –VS- MAINA KIAI & 5 OTHERS [2017]eKLR** where it was held thus:-

> **"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disinjunctive but conjunctive terms;**
>
> **(i) The suit or issue was directly and substantially in issue in the former suit.**
>
> **(ii) That former suit was between the same parties or parties under whom they or any of them claim.**
>
> **(iii) Those parties were litigating under the same title.**
>
> **(iv) The issue was heard and finally determined in the former suit.**
>
> **(v) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."**

17. It is common ground that the parties in this matter entered into the consent dated **27th July 2018** which consent detailed the manner in which the decretal sum was to be paid out. The Applicant does not deny that it defaulted in execution of the consent after making only two (2) payments. The Respondent then moved to Court vide the Notice of Motion dated **3rd June 2016** seeking Garnishee Orders against accounts held by the Applicant. This Court in its Ruling delivered on **15th April 2020** allowed the application and issued Garnishee orders absolute in respect of the accounts in question.

18. In the Notice of Motion dated **6th July 2020** the Applicant is seeking to stay execution proceedings pending a joint confirmation of the amount due. In other words the Applicant is challenging the amount which is due and owing to the Respondent. In my view this is an issue which has already been determined by the Courts. The present Court in its Ruling of **15th April 2020** found and confirmed that the sum of **Kshs. 126,949,593.52** was due and owing to the Respondent. Further in entering into the consent dated **27th July 2018** the Applicant itself conceded to owing the Respondent the sum of **Kshs. 164,000,000/-.** A consent entered into is binding upon the parties. No application has been made to set aside the consent dated **27th July 2018**. In the premises I am of the view that the issues raised in the application dated **6th July 2020** are indeed Res Judicata.

19. The Applicants in arguing that his application is **not** Res Judicata submit that the Notice of Motion dated **6th July 2020** raises the following new issues:-

> **(i) Whether the sum of Kshs. 93,051,478.90 out of the Judgment/award of Kshs. 122,917,423 has been paid.**
>
> **(ii) Whether the impugned warrants stated interest sum of the Kshs. 47,186,856/- is valid bearing in mind that the outstanding award balance is Kshs. 93,051,478.90/-.**
>
> **(iii) Whether the impugned warrants stated Taxed Costs of the sum of Kshs. 14,600,000/- is valid considering that no costs have ever been assessed either in this Court or at the tribunal.**
>
> **(iv) If the answers to the framed issues in (ii) and (iii) are that the impugned warrant figures are invalid and fictious, what then is the consequence of the impugned warrants and the commenced execution?**

20. According to the Applicant the above are new issues raised in their application which are distinct from the issues raised in previous applications. However what the Applicant is doing is merely splitting hairs. Having conceded to owing the amount set out in the consent dated **27th July 2018** and having made two payments based upon the terms of that consent the Applicant cannot now turn around and claim that the amount due requires to be computed. These are issues which the Applicant ought to have been addressed **before** it entered into the consent dated **27th July 2018**. It is too late to raise these issues now. In any event the consent was clear that in event of any default execution was to follow. The Applicant cannot now seek to run away from that clause.

21. I do agree with the Respondent that the applicant is merely engaging in filing numerous frivolous applications with the sole intent of evading the payment of the decretal sum. The Court will not allow itself to be used as a pawn in such games. Litigation it is said must come to an end. In the case of **WILLIAM KOROSS –VS- HEZEKIAH KIIPTOO KOMEN & 4 OTHERES [2015]eKLR** the Court held as follows:-

> **"The philosophy behind the principle of res judicata is that there has to be finality, litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for**

endless litigation and agitation that does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go." [own emphasis]

FUNCTUS OFFICIO

22. The doctrine of **'Functus Officio'** was stated by the Court of Appeal in the case of **TELCOM KENYA LTD –VS- JOHN OCHANDA [2014]eKLR** as follows:-

> **"Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon-**
>
> > **The general rule that final decision of a Court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division."**

23. Similarly in **RAILA ODINGA –VS- IEBC & 3 OTHERS Petition No. 5 of 2013** the Supreme Court of Kenya cited with approval the following passage from **"The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law"** by **Daniel Malan Pretorious**:-

> **..."The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."**

In addition the Supreme court also referred to the case of **JERSEY EVENING POST LIMITED –VS- A. THANI [2002]JLR 542** at pg. 550 where the Court stated:-

> **"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available." [own emphasis]**

24. This Court having in its Ruling of **15th April 2020** determined that the Applicant was truly indebted to the Respondent and having adopted the consent dated **27th July 2018** as an order of the Court is now functus officio in the matter. To hold otherwise would amount to reviewing the consent which has not been prayed for.

25. For the above reasons I find merit in the Preliminary Objection dated **8th July 2020**. Accordingly the Notice of Motion dated **6th July 2020** is hereby truck out. Costs are awarded to the Respondent/Decree Holder.

Dated in Nairobi this 5TH day of FEBRUARY, 2021.

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MAUREEN A. ODERO

JUDGE