REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 204 OF 2004

CENTRAL BANK OF KENYA.....PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK LIMITED.....1ST DEFENDANT

JIGNESH DESAI.....2ND DEFENDANT

ALEX REBIRO NGUGI (alias Aba Mpesha

T/a Mpesha Enterprises).....3rd DEFENDANT

JOHMAT DISTRIBUTORS LIMITED.....4TH DEFENDANT

RULING

1. On 18th December, 2019, I delivered judgement in this suit in which I found that as for the case against the 4th Defendant apart from mere suspicion and the 2nd Defendant's inadmissible evidence against the 4th defendant in these proceedings, none of the witnesses called in this case has testified as to the evidence directly linking him to the loss of the proceeds of the said Treasury Bonds and that he satisfactorily explained the sources of his money deposited with the 1st Defendant. The court was therefore satisfied that on a balance of probability the Plaintiff's case against him did not meet the threshold required to prove a case in civil proceedings and the case against it was dismissed.

2. Accordingly, the court proceeded to make the following orders:

> **(a) I declare that the 2nd and 3rd Defendants are liable for the loss suffered by the Plaintiff.**
>
> **(b) I enter judgement jointly and severally against the 2nd and 3rd Defendants in the sum of Kshs. 205 million for their separate involvement in the fraudulent acquisition and transfer of the proceeds from Treasury Bonds rightfully belonging to the Plaintiff. It follows that the 2nd Defendant's counterclaim fails and is dismissed.**
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> **(c) I award the plaintiff interest at bank rates from the date of payment of the said amount until payment in full.**
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> **(d) I also award the Plaintiff the costs of the suit.**

3. This court found that in its counterclaim, the 4th Defendant only claimed general damages, aggravated damage and loss of interest on the deposit from 22nd July, 2003. However, it was the court's finding that the said claim was not proved and the counterclaim was dismissed.

4. The 4th Defendant has now moved this court by way of an application dated 15th January, 2020, expressed to be brought under sections 3A and 99 of the ***Civil Procedure Act*** seeking the following orders:

> **a. THAT this Honourable Court be pleased to certify this application as urgent and the same be heard ex-parte in the first instance and an inter parties date be given on a priority basis.**
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> **b. THAT upon hearing of this case inter parties this Honourable Court be please to recall the judgment delivered on 18th December 2019 and pronounce itself on the issue of the release of the monies seized by the Plaintiff to wit Kshs. 14,000,000/-**

and also on the issue of costs in respect of the 4th Defendant which was inadvertently omitted in the said judgment.

c. THAT costs of this application be provided for.

5. In the supporting affidavit, it was deposed that there was an inadvertent omission in respect of the issue of the release of the sum of Kshs 14,000,000.00 which was seized from the 1st Defendant to the 4th Defendant's account (sic) by the Plaintiff and is still in custody of the Plaintiff.

6. According to the 4th Defendant, this court pronounced itself in the judgement that the money seized was not part of the money in question and there is therefore no justification for the Plaintiff to continue holding the said monies hence an order ought to issue for the release of the same to the 4th Defendant.

7. It was further deposed that the issue of costs in respect of the 4th Defendant was not addressed in light of the fact that the suit against the 4th Defendant was dismissed. It was therefore sought that the court recalls its judgement so as to give effect to its intention had there not been an omission in relation to this issue.

8. The plaintiff filed grounds of opposition and submitted that Court has no jurisdiction under section 99 of the ***Civil Procedure Act*** to recall a judgment. In support of this submission the Plaintiff relied on the decision in the case of **Republic vs. Attorney General & 15 Others, Ex-Parte Kenya Seed Company Limited & 5 Others [2010] eKLR**.

9. It was further submitted that the issue of costs is a discretionary order, and a dissatisfied party can only appeal an order relating to the said costs. In any event, the 4th Defendant's counterclaim was dismissed. In this regard reliance was placed on the case of **UAP Insurance Company v Toiyoi Investment Limited [2020] eKLR**.

10. In the present case, it was submitted that although the Plaintiff's suit against the 4th Defendant was dismissed, the 4th Defendant's counterclaim was unsuccessful and was also dismissed. This therefore means that the principle that costs follow the event cannot apply to the 4th Defendant seeing that it was unsuccessful in the prosecution of its counterclaim.

11. With regard to the issue of the Kshs. 14 million, it was submitted that the Mareva injunction granted by this Court relating to Kshs. 14 million was pending hearing and determination of this suit and is therefore self-executing. The Court does not need to pronounce itself on the issue of the release of the Kshs. 14 million. Further, there no material was placed before court as to where the money is held. Therefore, no order can be given on the release of the Kshs. 14 million until further material is placed before the Court.

12. It was further submitted that the 4th Defendant in his counterclaim did not have a specific prayer for the release of the Kshs. 14 million therefore this Court could not make a determination on an issue and grant a prayer not sought by the Plaintiff. It was submitted that it is trite law that parties are bound by their pleadings and reliance was placed on the case of **Galaxy Paints Company Ltd vs Falcon Guards Ltd (2000) eKLR**, **North Kisii Central Farmers Limited vs Jeremiah Mayaka Ombui & 4 Others (2014) eKLR**, **Independent Electoral and Boundaries Commission & Anor vs Stephen Mutinda Mule & 3 Others (2014) eKLR**, **Antony Francis Wareham T/A AF Wareham & 2 Others vs Kenya Post Office Savings Bank (2004) eKLR**.

13. It was further submitted that the 4th Defendant having filed a notice of appeal expressing the intention to partially appeal against the judgment, it is not open to it to engage the court in a parallel process.

14. It was therefore submitted that the 4th Defendant/Applicant's Application is unmeritorious, misconceived, lacks merit, is frivolous and an abuse of the process of court and ought to be dismissed with costs.

Determination

15. I have considered the issues raised in this application. As this court noted in the judgement, in its counterclaim, the 4th Defendant only claimed general damages, aggravated damage and loss of interest on the deposit from 22nd July, 2003. It is clear that there was no relief in the counterclaim seeking the release of the said Kshs 14,000,000.00. In **Nairobi City Council vs. Thabiti Enterprises Ltd. Civil Appeal No. 264 of 1996 [1995-1998] 2 EA 231,** the Court of Appeal held that a Court should not grant a counterclaim unless pleaded and that strange results would follow if a Judge were free to determine issues not properly before him. According to the court, the granting of a relief not sought in the plaint but mentioned in the affidavit is a fundamental breach of the rules of pleadings and that the plaint should specify the relief sought by the plaintiff either simply or in the alternative as the plaintiff is not entitled to a relief not sought. The reason for this was given as being that since pleadings inform the parties of the real issues in dispute, a Judge has no powers or jurisdiction to decree an issue not raised before him.

16. That was the same position in **Evans Gundo vs. Naftali Sule Civil Appeal No. 234 of 1999 where the same Court** allowed the appeal, set aside the decree of the High Court and remitted the matter back for hearing de novo on the ground that the lower Court granted relief and gave judgement on the basis of a pleading which did not pray for the same hence its decisions amounted to no judgement.

17. The East African Court of Appeal, on its part dealt with the issue in Dhanji Ramji vs. Rambhai & Co. (Uganda) Ltd. **[1970] EA 515** where, citing with approval the case of **Gandy vs. Caspair Air Charters Ltd [1956] 23 EACA 139** held that the object of pleadings is to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent and that as a rule relief not founded on the pleadings will not be give.

18. As regards the importance of pleadings, the Court of Appeal in **Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited [2015] eKLR** rendered itself as follows:-

> **"A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-**
>
> **'The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.'"**

19. Therefore, the function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (See **Esso Petroleum Co. Ltd vs. Southport Corporation [1956] AC 218 at 238.)**

20. In **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others; Civil Appeal No. 219 of 2013 (2014) eKLR**, **G. B. M. Kariuki J**, **P. O. Kiage J** and **K. M'inoti J** after making reference to authorities cited by Counsel held as follows:-

> **"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."**

21. The Court of Appeal in **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR** while quoting with approval an excerpt from an article by **Sir Jack Jacob** entitled ***"The Present Importance of Pleadings"*** restated that:-

> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."**

22. The same position was adopted by the Malawi Supreme Court of Appeal in **Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3.**

23. In **M N M vs. D N M K & 13 Others [2017] eKLR** it was held that:

> **"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in *Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182,* the Court held that:**
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> **'Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.'**
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> **Later in Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:**
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> **'It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.'**
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> **A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v. Mubea [1970] EA 476)*. However that was clearly not the case in this appeal."**

24. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Adereji, JSC** expressed himself thus on the importance and place of pleadings: -

> ***"…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."***

25. The death knell for parties who wander away from their pleadings was sounded by the Supreme Court in **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR where it expressed itself as follows: -**

> ***"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…"***

26. It therefore follows that this court will only determine this suit based on the pleaded issues.

27. Since the issue of the refund of Kshs 14,000,000.00 was not placed before this court, it is not a matter that can properly be cured under section 99 of the ***Civil Procedure Act***. As rightly stated in the case of **Republic vs. Attorney General & 15 Others, Ex-Parte Kenya Seed Company Limited & 5 Others [2010] eKLR**, the said section is:

> **"…a codification of the common law doctrine dubbed 'the Slip Rule', the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.**
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> **The Australian Civil Procedure has provisions in pari materia with section 99. As was stated in the case of Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc [2007] 70 NSWLR 411, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the court intended. Nearer home the predecessor of this Court in Lakhamshi Brothers Ltd v R. Raja & Sons [1966] EA 313 endorsed that application of the rule, that is, to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. Spry JA in Raniga Case (supra) also stated as follows: -**
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> **A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment 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.**
>
> **What is certainly not permissible in the application of section 99, is to ask the court to sit on appeal on its own decision, or to redo the case or application, or where the amendment requires the exercise of independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order."**

28. In this case since the issue of refund of Kshs 14,000,000.00 was not before me to purport to deal with it under the slip rule would amount to redoing the case and as the whereabouts of the said sum is not within the knowledge of the court, its determination would require argument and deliberation and in effect dealing with the substance of the decision. While the 4th Defendant may well be entitled to the said sum, it is my finding that section 99 of the ***Civil Procedure Act*** is not the appropriate provision under which the issue ought to be dealt with.

29. As regards the issue of costs, the Plaintiff's suit against the 4th Defendant was dismissed but no order was made as to the costs. Similarly, the 4th Defendant's counterclaim was dismissed, again with no order as to costs being made. The general rule as to costs is provided for in **section 27** of the ***Civil Procedure Act*** which provides as follows:

> ***Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***
>
> ***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good***

reason otherwise order.

30. This provision has been the subject of several judicial pronouncements. In the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006** the Court of Appeal expressed itself thus:

> **"Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded."**

31. In the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR,** the Supreme Court of Kenya held:

> **"Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant."**

32. Therefore since the decision whether or not to award costs is discretionary, in ***Halsbury's Laws of England,*** 4th ed Re-Issue (2010), Vol. 10, para. 16 it is stated:

> **"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."**

33. **Justice Kuloba's** (as he then was) work, ***Judicial Hints on Civil Procedure*** 2nd edition cited in **Morgan Air Cargo Limited vs. Evrest Enterprises Limited [2014] eKLR**, as follows:

> **"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word 'event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it."**

34. In the case before me, the Plaintiff lost as against the 4th Defendant in respect of its claim and the 4th Defendant also lost in respect of its claim against the Plaintiff. As both of them lost, it did not make sense to award them costs, which would eventually cancel out.

35. Having considered the "events" in this suit, I it is my view that there is no error contemplated under section 99 of the ***Civil Procedure Act***, which can be corrected. If the 4th Respondent is aggrieved by the denial of costs, that can only be a subject of an appeal.

36. The application dated 15th January, 2020 therefore fails and is dismissed with no order as to costs.

Judgement read, signed and delivered in open Court at Machakos this 1st day of March, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Kwaka for Mr Chacha Odera for the Plaintiff

CA Geoffrey