



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO 145 OF 2018**

**MIDGELEY MARK GOGO.....APPLICANT**

**VERSUS**

**CFC STANBIC BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**PAUL MBOYA OKETCH**

**T/A PAMBO AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before me is that dated 29 April 2020. It principally seeks orders for release of money deposited into an escrow account at M/s Co-operative Bank of Kenya Limited, Kisii branch vide Account Number 011xxxxxxxxx00 jointly held in the names of counsel for the applicant and respondent. The money was deposited as security pending the determination of this appeal.
2. A brief background to the application is that the applicant had sought a loan facility from the 1<sup>st</sup> respondent with a view of financing the purchase of Motor Vehicle Mitsubishi FH 215 Canter. The 1<sup>st</sup> respondent granted the financial facility. When the applicant failed to make the requisite monthly installment towards repayment of the loan the 2<sup>nd</sup> respondent on instructions of the 1<sup>st</sup> respondent repossessed the motor vehicle and at the time of repossession the vehicle was carrying 400 (6Kg) Gas cylinders worth Kshs 900,000/-. The applicant lost all the gas cylinders when the vehicle was repossessed thus claimed for the amount of goods lost as well as deprivation of use the motor vehicle. The respondents denied the claim. The trial court in its judgment awarded the applicant general damages in the sum of Kshs 2,543,480/- prompting an appeal by the respondents to this court. The appeal was heard and this court set aside the award of damages by the subordinate court and substituted it with an award of Kshs 900,000/-.
3. Through this application, the applicant now seeks an order to have the money in the account released to him. It was averred that party & party costs was already assessed and certified in the sum Kshs 430,043/- in favour of the applicant and a certificate of costs issued. According to the applicant the monies deposited ought to be released and paid out to the applicant in so far as the same constitutes a decretal sum awarded by this court.
4. The respondent opposed the application and contends that the application is misconceived and devoid of merit since the issue of the amount of decretal sum is outstanding. It was averred that the demand for costs of Kshs 430,043/- was unlawful as the said cost relate to the decree for Kshs 2,543,480/- which would not apply in the view of the new judgment on appeal where the decretal sum is Kshs 900,0000/-. The respondent is also contesting an item on the certificate of cost on applications assessed at Kshs 223,996/- which they claim was erroneous and exorbitant. The respondent argued the applicant had filed an application before the subordinate court and the court in its ruling dated 18<sup>th</sup> March 2016 ordered that each party to bear its cost.
5. The respondent also claims that the judgment of this court did not address the issue of the cost of the appeal as well as the cost before the subordinate court. The respondent advanced that since they were largely successful they were entitled to costs of the appeal.
6. The applicant filed its submissions on 25<sup>th</sup> September 2020. They submitted that where a party is aggrieved by an assessment of costs, such an aggrieved party is obligated to file an objection to assessment setting out items which are challenged. Such a notice of objection must be filed and served within 14 days of the impugned Certificate of Costs. They argued that the respondent cannot use the backdoor to contest costs where the mode of challenging a certificate of cost have been statutorily been circumscribed. On the issue of costs the applicant advanced that this court was *functus officio* on the issue of the costs of the appeal. It was further submitted that upon the determination of the appeal the order of stay ceased to exist and the monies deposited became available for release to the decree holder.
7. The respondent in its submissions argued that if at all the applicant was entitled to the costs before the subordinate court then the same would be reassessed by the subordinate court in view of the judgment on appeal or the parties would reach an agreement as to costs. They also submitted that the issue of whether or not the certificate of cost was challenged by way of reference under **rule 11 of the Advocates**

**Remuneration Order** does not arise. They argued that the order of stay of the subordinate court was first issued on 6<sup>th</sup> March 2019 well within the 14 days for raising objection to the certificate of costs issued on 26<sup>th</sup> February 2019, making any such objection unnecessary and subjecting the issue of such costs to the outcome of the appeal. They advance that the claim for costs by the applicant would have to be based on a fresh assessment of costs. They advanced that this court's judgment is silent on the matter of costs. The court under **section 99 and 100 of the Civil Procedure Act** can make amendments to its judgments, decrees, orders as well as proceedings. They urged this court to revisit the issue of costs.

#### ANALYSIS AND DETERMINATION

8. Having considered the application and the submission by parties two issues arise;

a) *Whether the certificate of costs vide KISII CMCC No28 of 2016 where party to party costs were assessed in the sum of Kshs 430,043/- should be re-assessed.*

b) *Whether this court has jurisdiction to consider and award the respondents cost of the appeal.*

9. On the first issue, this court did not interfere with the award of costs awarded the applicant before the lower court.

10. However, costs of the subordinate court is usually calculated based on the court's decree. This is not disputed as the applicant in his submission advanced that they were willing to have the instruction fees chargeable in the subordinate court be levied against the revised decretal sum. They argued that the instruction fees would be should thus be subject to variation.

11. In the circumstances, the application was thus prematurely filed before this court and I hereby direct that the file be returned back to the lower court for reassessment of costs awarded by the trial court and due to the applicant.

12. I now turn to whether this court can award cost after judgment has been rendered. In the case of **Kenya Airport Authority vs Mitu-Bell Welfare Society and 2 Others (2016), eKLR** the court stated;

*“A judgment has the effect of terminating the jurisdiction of the court that delivered the judgment. Save as expressly provided for by law (for example in revisionary jurisdiction or under the slip rule) a judgment makes the court functus officio and transfers jurisdiction to an appellate court if appeal is allowed. It marks the end of litigation before the court that pronounced the judgment. When used in relation to a court, functus officio means that once a court has passed a judgment after a lawful hearing, it cannot reopen the case. 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.”*

13. In the appeal before this court, none of the parties were awarded the cost of appeal and I will refrain from making any further pronouncement on the matter.

14. Accordingly, I find no merit in this application. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF MARCH, 2021.**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Applicant            Absent**

**Mr. Mose            For the Respondents**

**Ms Rael            Court Clerk**