



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 332 OF 2013

PATRICK NYAGA.....1ST APPELLANT

RENTOKIL INITIAL KENYA LIMITED 2ND APPELLANT

-VERSUS-

SANITAM SERVICES (E.A) LIMITED.....RESPONDENT

RULING

1. On 17/2/2021 the appellants/applicants filed a notice of

motion taken out pursuant to the provisions of Section 1A 1B and 3A of the Civil Procedure Act Order 15 Rule 1 of the Civil Procedure Rules and Article 159 (2) (d) of the Constitution seeking for the following orders inter alia:

a. Spent

b. That the decretal amount of kshs.7,300,000 deposited in a joint account (A.C No. 0110312462580 at Cooperative Bank Limited) in the names of both advocates on record be released to the firm of Musyoka Wambua & Katiku Advocates on the record for the appellants/applicants together with the accrued interest.

e. That an order to give effect to order no. (b) above, the firm of R. M. Mutiso & Company advocates who act for the respondent be ordered forthwith to sign a letter of instructions to M/s Co-operative Bank of Kenya Limited for the funds to be released to the firm of Musyoka Wambua & Katiku Advocates on behalf of the applicants.

d. That costs of the application be provided for.

2. The application is based on the grounds set out on the face of the motion and on the facts deponed in the supporting affidavit of John Katiku. In the supporting affidavit it is deponed that this appeal emanated from a decision in the Chief Magistrates Civil Suit no. 6289 of 2008 where judgment was delivered in favour of the respondent on 14/5/2013.

3. The appellants/applicants being aggrieved preferred this appeal where this court granted an order for stay of execution of the decree on condition that a sum of ksh.7,300,000 be deposited into a joint interest earning account in the names of both advocates.

4. The appeal was subsequently determined vide the judgment dated 19/9/2018 in which this court adjusted to kshs. 2,000,000.

5. The applicants/appellants being aggrieved preferred a second appeal to the Court of Appeal vide C.A. no. 10 of 2019.

6. The funds deposited as security continued to be held in the joint account pending the determination of the appeal.

7. The second appeal, on 5/2/2021, was subsequently allowed setting aside the award entirely and awarding costs of the appeal to the appellants. It is the contention of the appellants that there is no basis for the decretal amount to continue being held in a joint account and is therefore seeking that it be released to the appellants/applicants.

8. The application is opposed by the respondent who filed the replying affidavit of Samson K. Nganga, director of the respondent company.

He argued that this court lacks jurisdiction to make the orders sought as there are no orders by this court for the deposit of any funds pending the determination of the appeal in the Court of Appeal.

9. The respondent also argued that if there is an error in judgment by the Court of Appeal this court lacks jurisdiction to correct it and that in any event the respondent has appealed to the Supreme Court against the Court of Appeal's judgement dated 5/2/2021. This court was beseeched to maintain status quo until the respondent has exhausted all the avenues of legal redress.

10. I have considered the application and the affidavits of the respective parties. The applicants have approached this court seeking various orders but on the other hand the respondent has argued that this court has no jurisdiction to determine the application.

11. The Supreme Court of Kenya in **Samuel Kamau Macharia & Another v. KCB Ltd & 2 others, application no. 2 of 2011** held the following on jurisdiction:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, it is not one of mere procedural technicality; it goes to the very heart of the matter; for without jurisdiction, the court cannot entertain any proceedings.”

12. The question therefore that must be answered is whether this court is in order to hear the application or it is functus officio? The doctrine of functus officio was well stated by the Court of Appeal in **Telcom Kenya Ltd vs John Ochanda (suing on is behalf and on behalf of 996 former employees of Telcom Kenya Ltd. (2014) eKLR** that

“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 Nazaire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.”

13. The doctrine therefore does not bar a court from entertaining a case it has already decided but it so barred from revisiting the matter in a merit-based re-engagement with the case once final judgment has been entered and a decree issued, meaning procedural interlocutory applications only.

14. Turning back to the application, this court by an order dated 9/7/2016 issued by Waweru J, granted the learned judge a stay of execution on condition that the appellants deposit a sum of ksh.7,300,000 in a joint interest earning account in the names of the advocates of the both parties. The account was set up and the monies deposited to which the matter was heard and determined.

15. Judgement was delivered on 18/9/2018 where this court reduced the decretal sum from ksh.7,000,000 to ksh.2,000,000. The respondents following the judgment filed a notice of motion dated 8/10/2018 seeking the release of ksh.3,554,404 being the difference in the decretal amount.

16. However, through a consent dated 16/11/2018 which was endorsed and adopted by the court on 19/11/2018 the parties agreed to stay execution of judgment by this court delivered on 19/9/2018 pending the hearing and determination of the intended appeal; that the appeal be filed within 45 days of 19/11/2018 and that the respondents withdraw their motion dated 8/10/2018.

17. The second appeal proceeded to be heard and determined by the Court of Appeal where, by its judgment delivered on 5/9/2021 found that the appeal was merited and continued to set aside this court's judgment dated 18/9/2018.

18. The consent order recorded before this court to retain decretal sum pending appeal has served its purpose. It was to subsist pending appeal. It cannot be said that this court lacks jurisdiction. The order was recorded before this court and the court has a right to determine.

19. The Court of Appeal therefore having determined the appeal, there is no reason to have the monies which had been deposited as security for the due performance of the decree continue being held as such.

20. In the end motion dated 17/02/2021 is allowed giving rise to issuance of the following orders:

i. That the amount of ksh.7,300,000 deposited in a joint account (A/S no. 0110312462580 at Cooperative Bank Limited) in the names of both advocates on record be released forthwith to the firm of Musyoka Wambua & Katiku Advocates on record for the appellants/applicants together with the accrued interest.

ii. That the firm of R. M. Mutiso & Company advocates who act for the respondent is hereby directed to sign a letter of instructions to M/S Co-operative Bank of Kenya Limited for the funds to be released to the firm of Musyoka Wambua &

Katiku Advocates on behalf of the applicants.

iii. In the circumstances of this matter, a fair order on costs is to order which I hereby do that each party bears its own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 13TH DAY OF MAY, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent