



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 1736 OF 1993**

**NYAMONDI OCHIENG NYAMOGO ..... APPELLANT**

**VERSUS**

**TELKOM KENYA LIMITED ..... RESPONDENT**

**RULING**

1. *Nyamondi Ochieng Nyamogo*, the decree holder/applicant moved this court through a Notice of Motion dated 5<sup>th</sup> July 2019 seeking the following substantive orders:

- i. *That the respondent be ordered and compelled to settle the decree arising from the judgment of the court dated 22<sup>nd</sup> June 2012.*
- ii. *That the defendant do pay to the plaintiff the amount of KShs.106,510,392.11 without any further delay.*
- iii. *That the direction of the court in the ruling of 20<sup>th</sup> December 2012 by Justice Odunga be adhered to in total.*
- iv. *That this honourable court do issue an order directing the judgment debtor to pay future monthly pension as and when they fall due.*
- v. *Costs of this application be provided for.*

2. The application is expressed to be made under *Section 3A* of the *Civil Procedure Act* and *Order 21 Rule 8 (4)* of the *Civil Procedure Rules*. It is supported by the grounds stated on its face and the depositions made in the supporting and further affidavit sworn by the applicant on 5<sup>th</sup> July 2019 and 14<sup>th</sup> October 2019 respectively.

3. In the supporting affidavit, the applicant replicated the grounds anchoring the motion and averred that he was seeking settlement of a decree issued in his favour arising from the judgment delivered on 22<sup>nd</sup> June 2012 by *Hon. R.N. Nambuye, J (as she then was)* which has not been fully satisfied to date; that the respondent has failed to make payments as and when they fall due as directed by *Hon. Justice Odunga* in his ruling dated 19<sup>th</sup> May 2015 with the result that the said payments have fallen into arrears; that the amount owing as of 31<sup>st</sup> July 2019 according to an accountant's report annexed to the supporting affidavit is KShs.106,510,392.11 which is the amount the respondent should be compelled to pay.

4. The applicant admitted to having received a sum of KShs.37,000,000 in the year 2015 but claimed that he was not notified what part of the judgment the amount was supposed to offset since the judgment had five awards in his favour.

5. In response to the motion, the respondent filed grounds of opposition dated 17<sup>th</sup> July 2019 and a replying affidavit sworn by *Nelson Mogaka*, the respondent's internal legal counsel. The main points taken in opposition to the motion are that the application was frivolous, vexatious, misconceived, bad in law and amounted to an abuse of the court process in that:

- i. It contradicted the mandatory provisions of *Order 9 Rules 5 and 9* of the *Civil Procedure Rules*;
- ii. That pursuant to orders of the court, the Deputy Registrar ascertained the sum due under the decree and advised the parties on 9<sup>th</sup> June 2016 that the amount as at 15<sup>th</sup> March 2016 was KShs.30,027,557.02 which was in excess of the amount that had already been received by the respondent in the sum of KShs.37,000,000;

iii. That *Order 21 Rule 8 (4)* of the *Civil Procedure Rules* is not available to the applicant as there is a decree in place issued on 23<sup>rd</sup> September 2015 pursuant to court orders issued on 14<sup>th</sup> July 2015;

iv. That the applicant has no basis to invoke the inherent powers of the court and that the application was unknown in law; and, that the applicant was after unjust enrichment.

6. In his replying affidavit, *Mr. Mogaka* deponed *inter alia* that there was a valid decree issued by the court on 23<sup>rd</sup> September 2015 showing the amount payable to the applicant which decree has to date not been set aside; that on 14<sup>th</sup> July 2015, *Odunga J* directed the Deputy Registrar to ascertain the sums due under the decree which she did and found that the amount payable as of 15<sup>th</sup> March 2016 was KShs.30,027,557.02 which included monthly pension amounting to KShs.17,681,151.51.

7. The respondent denied the applicant's claim that it had defaulted in the payment of monthly pension of KShs.20,004.75 ordered by the court and asserted that on 11<sup>th</sup> April 2017, the applicant through Recovery Concept Auctioneers was paid KShs.1,283,295; that the applicant is a member of Telposta Pension Scheme whose sponsor is the respondent and that between February and August 2019, the applicant received KShs.20,004.75 being monthly pension from the scheme and that thereafter, the scheme computed pension increases payable to the applicant and paid him KShs.379,250 on 1<sup>st</sup> February 2019 and KShs.1,970,484 on 21<sup>st</sup> August 2019; that the increases led to adjustment of the applicant's monthly pension to KShs.36,777 with effect from September 2019 which the applicant has been paid every month. The respondent annexed a statement from Telposta Pension Scheme for the period between July 1999 to October 2019 to substantiate its claims.

8. By consent of the parties, the application was canvassed through written submissions which both parties exchanged and duly filed.

9. I have given due consideration to the application, the affidavits on record together with their numerous annexures, the respondent's grounds of opposition as well as the parties' rival submissions. I have also carefully read the lengthy court record.

10. In my view, there is no dispute regarding the awards that were made in favour of the applicant against the respondent in the judgment delivered by this court on 22<sup>nd</sup> June 2012 and that out of the money accruing to the applicant in the said awards, he has already received a sum of KShs.37,000,000. What is in dispute is whether the payment of KShs.37,000,000 fully satisfied the decretal amount or whether there is still more money outstanding under the decree which the respondent should be compelled to pay the applicant as sought in the application.

11. The applicant contends that there is an amount of KShs.106, 510,392.11 which remains unpaid as per the date of filing the application. The respondent on the other hand has maintained that the applicant has in fact been paid in excess of what he was entitled to under the decree including all monthly pensions.

12. A reading of the judgment delivered by the court on 22<sup>nd</sup> June 2012 reveals that the applicant had sued the respondent for an assortment of reliefs including general and special damages for unlawful termination of his employment with the respondent. The applicant succeeded in his suit and was granted, *inter alia* the following reliefs:

i. Damages for loss of salary and increment for 117 months in the total sum of KShs.3,433,100. The amount was to attract interest at court rates from date of judgment till payment in full;

ii. Exemplary or punitive damages in the sum of KShs.850,000. The amount was to attract interest from date of judgment until payment in full;

iii. A refund of KShs.100,000 wrongfully deducted from the applicant's salary. The award was to earn interest from date of filing suit till payment in full;

iv. Gratuity and pension in the sum of KShs.1,651,716 and monthly pension in the sum of KShs.20,004.75 which was to earn interest from the date of exhibit a, that is, from 9<sup>th</sup> June 1995 until payment in full;

v. The applicant was also awarded costs of the suit.

13. It is worth noting that though the court specified the rate of interest that was to accrue on the award of damages for loss of salary and increments for 117 months, the rate of interest applicable to the rest of the awards was not stated.

14. It is apparent from the court record that after pronouncement of the judgment, a dispute arose regarding a decree that had been extracted which dispute was resolved by *Odunga J* in his ruling dated 20<sup>th</sup> December 2012 and directions issued on 6<sup>th</sup> February 2013. In a nutshell, *Justice Odunga* directed the Deputy Registrar to extract a decree in the usual manner but leaving out particulars of interest accruing on the different awards and recurring or periodical payments such as monthly pensions which were to be dealt with in the warrants of attachment given that unlike decrees, warrants of attachment can easily be amended to reflect the amount payable at the time of execution.

15. Following *Justice Odunga's* directions, an amended decree dated 14<sup>th</sup> July 2015 was issued on 23<sup>rd</sup> September 2015 whose validity is apparently uncontested.

16. The record also reveals that the respondent had moved the court through a notice of motion dated 5<sup>th</sup> February 2014 in which it sought *inter alia*, orders of stay of execution and a declaration regarding the exact amount of money that was payable to the applicant pursuant to the judgment of the court.

17. In his ruling dated 14<sup>th</sup> July 2015, *Odunga J* directed the Deputy Registrar of the Civil Division to ascertain the sums due to the applicant before warrants for execution were issued. This is what led to the computation of the sum of KShs.30,027,557.02 as per 15<sup>th</sup> March 2016. There is no indication from the court record that prior to filing the instant application, the applicant had in any way challenged this computation.

18. As noted earlier, the respondent has contended in its replying affidavit that all sums due to the applicant under the decree have been settled and nothing is outstanding because besides receiving KShs.37,000,000, the applicant has been paid monthly pension ordered by the court as and when it fell due including increments accruing on his pension entitlement.

19. It is important to note that the applicant in his further affidavit did not specifically deny the aforesaid claims by the respondent. He only vaguely asserted that the computation made by the Deputy Registrar was not conclusive as it did not include continuous monthly pension ordered by the court.

20. I have looked at the detailed computation made by the Deputy Registrar. I note that the same included monthly pension from 9<sup>th</sup> June 1995 to 15<sup>th</sup> March 2016 which together with interest amounted to KShs.17,681,151.51. Since the applicant has admitted receipt of KShs.37,000,000 which was money deposited in court by the respondent as security on the basis of the computation made by the Deputy Registrar, it follows that he has conceded to having received pension payments from 9<sup>th</sup> June 1999 to 15<sup>th</sup> March 2016 together with interest.

21. The payment advice and statement from the respondent's pension scheme annexed to the replying affidavit confirms the respondent's claim that on 1<sup>st</sup> February 2019, the applicant was paid KShs.379,250 and KShs.1,970,484 on 21<sup>st</sup> August 2019. A closer scrutiny of the statement however reveals that between April 2016 and January 2019, the applicant was paid monthly pension in sums ranging from KShs.6,401 to KShs.6,995 which were far below the amount awarded by the court save for the payment of KShs.20,373 made in the month of June 2018. The respondent appears to have effected the pension payments ordered by the court from February to August 2019 when its scheme paid the applicant KShs.20,005 which was increased to KShs.36,777 in September 2019. The increased amount was also paid in October 2019 which is the last entry reflected in the statement.

22. None of the parties clarified to the court what the lumpsum pension payments in the sum of KShs.379,250 and KShs.1,970,484 stood for. What is clear however is that the payments were made after the period in which the applicant had received from the pension scheme amounts that fell below the monthly pension payments ordered by the court. Whether the amounts were meant to cover the deficit of what had been paid *vis-à-vis* what was ordered by the court is hard to tell in the absence of any explanation by the parties. All I can say from the above analysis is that am unable to make any finding of fact regarding whether there are any monies outstanding in the form of monthly pension payments given the sums already received by the applicant.

23. The applicant contends that the respondent owes him a total sum of KShs.106,510,392.11 in unpaid pension. The allegation is based on an accountant's report annexed to the supporting affidavit whose authenticity is doubtful given that it is neither dated nor signed by the alleged accountant. The criteria used in the calculations made therein is also not clear. The report was not made pursuant to any court order and in my view, it lacks any legal foundation and is unworthy of any consideration by this court.

24. In view of the foregoing, I am persuaded to find that the applicant has failed to prove his claim that the respondent owes him KShs.106,510,392 under the decree issued in this suit. It is thus my finding that the Notice of Motion dated 5<sup>th</sup> July 2019 is devoid of any merit and it is accordingly dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 14<sup>th</sup> day of May 2020.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Mbaabu for the respondent

No appearance for the applicant

Ms Carol: Court Assistant