REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 165 OF 2012 (O.S)

HENRY SIMIYU MURWA.....PLAINTIFF

VERSUS

1. TIMOTHY VITALIS OKWARO t/a TIM OKWARO & COMPANY ADVOCATES

2. INGRID YVONNE DE WAERN.....DEFENDANTS

R U L I N G

1. The 1st defendant as a judgement-debtor pursuant to the ruling delivered herein on the 19/3/2015 has approached the court vide the notice of motion dated 23rd October 2018 and sought orders that:-

i. "Spent.

ii. THAT this Honourable Court be pleased to review the Decree given and issued herein by this Honourable Court on the 14/6/2018 and issued on the 14th day of June 2018 by removing or setting aside or vacating the item of interest of Ksh.1,633,337/= as at 28/2/2018 or any interest at all.

iii. THAT this Honourable Court be pleased to review the Ruling of this Honourable Court (Hon. Justice M. Kasango) dated and delivered on 19/03/2015 in the matter of Item No. 14 (C) namely ordering the 1st Defendant/Applicant to pay costs to the 2nd Defendant/Respondent on her Notice of motion dated 12/11/2013.

iv. THAT this Honourable Court be pleased to review the Notification of Sale given herein on 13/9/2018 in so far as it states that it is in satisfaction of a Decree in a Mortage Suit.

v. THAT this Honourable Court be pleased to order a Stay of Execution of the questioned Decree herein and more specifically the intended auction or sale of the property LR No. SAMIA/WAKHUNGU-ODIADO/1052 in Samia sub-county of Busia County, Kenya, pending the interpartes hearing and final determination of this application for Review.

vi. THAT the costs of this application be provided for."

2. Essentially the application seeks orders of review of not only the decree but also a notification of sale said to be dated 13/9/2018. The review sought on the decree concerns the element of interest calculated at Kshs.1,633,337 as at 28/2/2018 as well as the order on costs of the notice motion dated 12/11/2013.

3. The application is supported by the Affidavit of the 1st defendant/Applicant which reiterates the grounds on the face of the motion, to the effect that; the ruling did not award interests to be part of the judgment and therefore interest was thus included on the decree by error; the notice of motion dated 12/11/2013 did not pray for interest on the principle sum nor costs hence there are errors apparent on the face of the record meriting review as the applicant had not preferred an appeal. It was added that it would be in the interests of justice to grant the application and that the delay has been occasioned by the applicant's ill-health since 2015 having been diagnosed with diabetes and kidney failure in 2016.

4. The Affidavit then exhibited the ruling by Kasango dated 19/3/2015, my ruling of 18/12/2015, the notice of motion yielding the ruling of 19/3/2015; the extracted decree dated 11/12/2017 and issued on 14/6/2018, various copies of the notification of sale, medical notes as well as the copies of the title to the attached property.

5. The application was opposed by the grounds of opposition dated 13/12/2018 whose gist was that the application was incapable of grant because the subject property was sold on 30/11/2018; that the court had become *functus officio* and that the application was *res judicata*

Mombasa High Court Petition No. 252 of 2018. It was added that there was no error apparent on the face of the record to merit review; that the Applicant failed to comply with court orders of 18/12/2015 and lastly that the application was actuated by malice and abuse of the process of court by the applicant seeking to employ court process to vex the 2nd defendant.

6. There was also filed an affidavit dubbed a supporting affidavit by one, Peter Muhuri, a clerk in the Applicant's law firm, whose purpose was to show that the staged auction did not attract acceptable bids and was called off without a sale being concluded. There was equally a document I consider strange to my knowledge of and understanding of how applications are argued. That document is by the applicant and called reply to Grounds of opposition.

7. I considered the two document to be strange and unknown to law, added were filed without requisite leave, no value towards determination of the dispute ordered same expunged hence I will disregard the same in my endeavors to determine the issues in the application.

8. When parties attended court to argue the application, the 2nd defendant/decree holder had filed a list of three authorities while the applicant choose to argue the application without recourse to any decided case or any law being cited.

9. Having read the application, the reply thereto and the oral submissions offered and being cognizant of the law applicable under Section 80 read with Order 45 Rule 1, as interpreted and applied by the courts, I do consider that the only issue for determination is whether or not the applicant has made out a case for review. The yardstick on when a court would review its orders is now well defined and a well-trodden path. The applicant has to establish that;

> i. There has emerged a discovery of a new and important matter or evidence which after due diligence was not within the applicants knowledge or could not be produced by him at the time the decree was passed or
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> ii. A mistake or error apparent on the face of the record: The mistake or error apparent on the face of the record must be an error of fact and not a mis-appreciation or incorrect exposition of the law leading to an erroneous conclusion of the law.
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> iii. Any other sufficient reason, and
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> iv. The decision sought to be reviewed did not attract an appeal or is one from which no appeal lies.

10. Put in the context of the matter before me, the applicant seeks review on the basis that the judgment entered for the 2 nd defendant did not include an element of interests and that the application giving rise to the ruling did not pray for interest yet the court awarded interest.

11. The law on interest is that an award of interest is at the discretion of the court. I also understand the law on interpreting a judgment to be that a judgment is self-speaking as to what it grants to the parties. What is not granted even when prayed for is deemed dis-allowed.[1].

12. Consequently when a judgment is silent on a discretional issue like interest it must be deemed that no interest was awarded. When no interest is awarded there is no room to impose it on the judgment debtor at the time the decree gets drawn because a decree must agree fully with the judgment[2]. Where a decree differs with the judgment, it cannot be upheld because then it is something other than the decision of the court. For the reason that the decree incorporates interests contrary to the decision of the court it presents and obvious and apparent error on the face of the record committed by the person who drew the decree and the judicial officer who had the same executed.

13. That presents a clear case for review and it matters not that a notice of appeal was filed against the judgment which itself is not sought to be reviewed. Even if there had been an appeal filed and pursued, this is a case in which the decree extracted is infact a nullity[3] for being at variance with the judgment by including in it a matter not decided by the court. It is in such situations the court may have to overlook the rules and go for substantive justice, while invoking its overriding objective to do justice and to prevent abuse of the process of the court. I am in no doubt that to amend a decision of the court at the time of drawing the decree is not only an abuse of the court but also a usurpation of the judicial authority of the court otherwise than by law provided. In the **Highway Furniture case (supra)** the Court of Appeal said:

> **"*The decree in this case was, in our view a nullity as it included a large claim, which was not awarded in the judgment*"**.

14. Being so convinced, the decree shown to have been given on 11/12/2017 and issued on 14/6/2018 is not only subject to being review but it is set aside entirely *ex-debito justitiae*. Set aside on the additional ground that the dates given therein do not agree with the date of judgment as is mandatory under Order 21 Rule 8(1). More worrying is the fact that a perusal of the record of the file reveal that there was an earlier decree dated 25/1/2017 which equally failed to comply with Order 21 Rule 8(1). Both decrees do not show to have been drawn with the participation of both parties as mandated by Order 21 Rule 8(2)(3) & (4). That may as well explain why there is the inclusion of an award not made by the trial court. Such are the acts that must be frowned upon by a court of law and it may help that the Deputy Registrars and Executive officers (in respect of lower court decrees) be reminded that it not permissible for a party to unilaterally extract a decree to the exclusion of the adversary. It matters not that the other side may be procrastinating or just unwilling to participate so as to earn some underserved holiday from meeting its judgment debt. The rules set adequate measures to be taken to prevent such ill designs.

15. To this court, a decree being what it is, a burden to the judgment debtor, his participation at its settlement is part of the right to be heard. He must get the chance to say a thing and only when the judgment debtor opts not to participate after full compliance with the rules can a decree be drawn and settled without his participation.

16. How about the costs of the suit or application? Is it that a party must pray for cost for the court to award same? Section 27 of the Civil Procedure Act provides:-

"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".(Emphasis provide)

17. Clearly costs are at the discretion of the court with the overriding dictate that costs follow the event unless the court has special reasons to be recorded justifying departure from that statutory dictate that costs follow the events. In ***Stanley Kiunga Nkarichia vs TSC [2016] eKLR*** the court laid the position of law that:-

> ***"A successful party can only be deprived of his costs when it is shown that his conduct either prior or during the course of the suit has led to litigation, which but for his own conduct might have been averted"***. **(**See also **Devram Daltani vs Harldes K Danda [1994] 16 EACA 55)**".

18. To me a party need not pray for costs for the court to award the same. To the contrary it would be abdication of duty for a court to deny a successful party the costs of the litigation without a valid and reasoned cause. To the extent that in the ruling of 19/3/2015 the judge expressly awarded the costs of the Notice of Motion to the 2nd defendant/decree-holder, those costs were properly and legal awarded. If the 1st defendant/applicant entertained the view as is disclosed in this application, that the judge proceeded or an erroneous exposition of the law, his remedy rested in an appeal and not review. This is what the Court of Appeal underscored in ***National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR*** when it said:-

> ***"It will not be a sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Mis-construing a statute or other provision of the law cannot be a ground for review"***

19. I decline to set aside or review the decision by **Kasango J** awarding the costs of the application to the Respondent/Decree holder. Having come to the foregoing conclusion particularly on the decree being set aside, I do not deem it necessary to consider whether or not the notification of sale should be set aside. I hold the view that when the decree is ultimately drawn in accordance with the law the rest of the issues will just fall in their rightful places.

20. However, there were two a contentious by the decree holder/Respondent that need just but a mention as I conclude. Those two contentions are that the issues here are res-judicata for having been decided in petition no. 252 of 2018 and that the court is *functus officio*.

21. The common position that has not been controverted by the respondent is that the petition was struck out on the basis of a preliminary objection filed by the current respondent. If the matter was struck out then it was never heard and determined on the merits and therefore the res-judicata rule cannot be properly invoked.

22. On the court being *functus officio* on the basis that a final judgment has been rendered, I do not take that to be a properly taken position. I consider it a misconception because a court of law only becomes *functus officio* when it has delivered itself on a matter finally and the matter rested on a particular issue. The rule is a prohibition against a court re-opening a matter it has conclusively dealt with. In this matter the court has never dealt with the question concerning the propriety of the decree or the award of costs. In any event it cannot be logically said that there cannot be an application for review after a decision of the court. To the contrary a review by own nature can only be considered post a decision. It cannot come prior to a decision. This court took similar view [4] when it said:-

> **"On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act. In Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR, this court said of the doctrine of functus officio:-**
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> ***I understand the doctrine, like its sister, the res judicata rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.***
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> ***It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.***
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> ***As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.***

Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.

I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment -debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become functus officio. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before.

The following are just but examples:-

- ***Application for stay***
- ***Application to correct the decree***
- ***Application for accounts***
- ***Application for execution including garnishee applications***
- ***Applications for review***
- ***Application under section 34 of the Act***

If one was to acceede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed".

23. This court has not changed its views on the point and reiterates that here it has become *functus officio* as far as application for review is concerned. In any event a Court of Law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a judgment. To do that would be an abdication of duty and a licence for parties to the unimaginable and short from rooftops that the court is *functus officio* because there is a final judgment.

Rendition

24. In the end, I do allow the application in so far as the decree issued on 14/6/2018 is concerned by setting aside that decree and directing that a decree be drawn in strict compliance with the rules, and in full agreement with the decision of Kasango J dated 19/3/2015.

25. On costs even though the judgment debtor has succeeded, I order that each party bears own costs because the decision that the applicant judgment debtor pays to the Respondent/2nd defendant the sum of Kshs.4,000,000/= has not been challenged since 2015. Had the applicant opted to pay that sum there would have been no need for his application, I have been called upon to determine. It is his conduct of failing to settle the judgment of the court that has birthed the need to draw the decree and have it executed. I do find that it would be unjust to award to the applicant the costs of the application even though he has succeed in upsetting the improper decree.

Dated and delivered at Mombasa this 15th day of February 2019.

P.J.O. OTIENO

JUDGE

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[1] Section 7 explanation 5

[2] Order 21 Rule 8

[3] Highway Furniture Mart Ltd vs Permanent Secretary Office of the presient [2006] eKLR

[4] Leisure Lodges Ltd vs Japhethsi Asige & Another [2018] eKLR