



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 9 OF 2011

1. MOMBASA BRICKS & TILES LIMITED
2. SOJPAL JETHA LIMITED
3. DINESH KUMAR ZAVERCHAND JETHA
4. THE ESTATE OF ZAVERCHAND JETHA
5. ATEET DINESH JETHA
6. ZAVERCHAND SOJPAL JETHA HOLDING LTD.....PLAINTIFFS

VERSUS

1. ARVIND SHAH
2. HASHABEN SHA
3. GOSRANI HOLDINGS LIMITED
4. COAST PROPERTIES LTD
5. COAST CLAY WORKS LTD
6. COAST MAIZE MILLER LTD
7. SPA MILLERS NAIROBI LTD
8. HIGHWAY CENTRE LTD.....DEFENDANT

BY COUNTER-CLAIM

1. ARVIND SHAH
2. GOSRANI HOLDINGS LIMITED
3. COAST PROPERTIES LTD
4. COAST CLAY WORKS LTD.....PLAINTIFFS

VS

1. ATEET DINESH JETHA

2. EXON INVESTMENTS LTD

3. EXON PLASTICS LTD

4. DINESH ZAVERCHAND JETHA.....DEFENDANTS

RULING

1. There is before court for determination a Notice of Motion filed by the Defendant/Counterclaimants on 8/3/2018 and dated the same day.
2. That application is unique in the number of prayers it initially sought and the fashion of drafting. That observation notwithstanding, the Application seeks:-
 - a. *spent*
 - b. *Withdrawn before court on 20/6/2018.*
 - c. **The court be pleased to summon Mr. Ateet Dinesh Jetha to Court to show cause why he has disobeyed the Decree to release the Share Certificates of Arvind Shah and Gosrani Holdings Limited in Coast Properties Limited, Coast Clay Works Limited, Coast Maize Millers Limited and Spa Millers Nairobi Limited by 5/1/2018 and in default he be arrested and imprisoned at the Shimo La Tewa for a term not exceeding 6 months for contempt of Court.**
3. That application was opposed by the plaintiff/judgment debtor by Notice of preliminary objection filed on 5/4/2018 therefore purely on matter of law only.
4. Those grounds are to the effect that the court upon delivery of the judgment in the suit and counter claim has become *functus officio* and that the application for review was most unmerited and should be dismissed.
5. However, when the parties attended court to urge the application Mr. Kinyua for the Applicant/Decree holder opted to withdraw prayer (b) of the application which was then done by consent thereby leaving only prayers c & d for consideration by the court.
6. Prior to the withdrawal of the prayer, parties had filed written submissions with decided cases cited to court to support the rival positions. The Decree-holder/Applicant's submissions are dated 4/6/2018 and filed in court on 5/6/2018 while those by the judgment-debtor/Respondent are dated 5/4/2018 and filed on 6/4/2018.
7. At the hearing the counsel essentially adopted the said submissions with necessary adaptations considering the withdrawn prayer. It is those written and oral submissions and the record of the application and response thereto the court must examine to come to the conclusion whether the application is merited or not. Having examined such materials, the only issue for determination now is one, in both prayers, if one leaves the issue of costs. It can be framed in the following words:
8. Should one, Mr. Ateet Dinesh Jetha, be summoned to show cause why he should not release the share certificates as decreed by the court and if the earlier application for committal to jail for contempt of court dated 5/2/2013 should be certified urgent for hearing on priority basis.
9. Essentially the Application seeks an order that the 1st defendant to the counter claim be compelled to show cause why he cannot release the share certificates to the decree holder to the counter-claim and in default be committed to prison for a period of up to six (6) months.
10. The Application is grounded on four affidavits of Arvind Velji Shah, Paul Odingo Okanga, Henry Okuyoyi and Alfayo Otieno and on grounds that to date the order directing the delivery of share certificates remains disregarded and further that years after the Application was filed the 1st defendant to the counter-claim continues with his disobedience hence the need to have the previous application heard and determined.
11. It is to be noted that most of the contents of the grounds and affidavit were in support of the prayer for review, now withdrawn, hence very little remain to support the outstanding prayers.

Analysis and determination

12. By its judgment dated 22/12/2018, the court found for the Counter-claimants with regard to share certificates and ordered that the share certificates held by the defendants be released to the 1st and 2nd counterclaimants forthwith and not later than the 5/01/2018. It is not denied that date has since passed and no compliance has been made. In fact the judgment debtors do not deny that there has been no-compliance. It is not even offered that the same could be released on a future date and no explanation has been tendered on why there can never be compliance.
13. The resistance offered against the application and that prayer is that the court has become *functus officio* and that there has not been extracted a decree capable of being enforced.

Has the court become *functus officio* with regard to the prayer that the share certificate be released?

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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

20. If one was to accede 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.

Is the application intended to execute the decree otherwise by the law provided.

21. The judgment-debtors while conceding that there is a portion of the judgment it was bound to satisfy by the 5/01/2018, contends that it is not so bound because no decree has been extracted. The answer to that position is to be found in Section 94 of the Act which provides:-

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.

22. As in eminent, it is at the discretion of the court to direct whether a judgment may be executed or enforced before conclusive processes like taxation of costs and settlement of a decree be concluded.

23. In this matter one of the consideration the court took in reaching its decision is that the parties voluntarily put their efforts together to do business and such relationship need to be amended and nurtured. The court took the view that a healing process would begin by letting all the shareholders of the disputed and disputing companies participate at decision making on the strength of their determined shareholding. One way of ensuring that was by giving to the 1st and 2nd counterclaimant their due paper possessions in the share certificates. The court still holds the same view and maintains that it behooves Mr. Ateet Dinesh Jetha to comply with court orders. For that reason and before he is called upon to show cause why he should not be punished for the failure to hand over the certificates, the court invokes its powers under Section 3A and 95, Civil Procedure Act, extends the time in the judgment for compliance by 7 days from the date of this decision for the share certificates to be handed over to the counter-claimants or their advocates.

24. In coming to this determination, having considered the submission by the judgment debtors that the decree holder is trying to execute the decree otherwise than as provided under the rules, I do not agree with that submission because not every judgment must be enforced only by

compliance with the Rules made under 22. Parties and counsel being bound to assist the court to meet the overriding objectives cannot be candid to say that they can only comply with a judgment of the court seeking delivery of documents like share certificates only after all the procedural technicalities are complied with. Such are the situations the Kenyan people consider to uplift the purpose of procedural rules beyond being handmaids of justice and making the rule the masters of justice. The Constitution discourages worship of undue regard to technicalities. I consider that I would fall prey to the worship of procedural technicalities to hold that share certificates cannot be delivered before a decree is drawn. That would not be justice in the circumstances here

25. The foregoing decisions leave me with the prayer d which I am minded to think was not necessary at all in the circumstances of this case. It is to me an act against the overriding objectives of the court to file an application to certify an earlier application urgent to be heard on priority basis.

26. Granted that the court stalled interlocutory application to fast-track the determination of the suit, nothing has stood on the way of the counter-claimants to just walk to the registry and fix that application for hearing. In this registry, I can say, without fear of being contradicted, that application can be heard within 60 days wherever parties step out to have their dispute heard and determined. For that reason, I decline to make any orders here regarding the notice of motion date 1/5/2013. Let that application be dealt with on its own.

27. The upshot is that I do allow the application dated 18/1/2018 in terms of prayer (c) and on conditions set out above. I order that the costs of the application and specific to that prayer be to the counter-claimants/decreed-holders to be borne by the plaintiffs/judgment-debtors.

Dated and delivered at Mombasa this 20th day of July 2018.

P.J.O. OTIENO

JUDGE