REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 99 OF 1994

AFRICAN PLANNING AND

DESIGN CONSULTANTS.....PLAINTIFF/RESPONDENT

VERSUS

THE SOLOLO

OUTLETS LIMITED.....1ST DEFENDANT/RESPONDENT

BOARD OF TRUSTEES OF NATIONAL

SOCIAL SECURITY FUND.....2ND DEFENDANT/APPLICANT

RULING

1. The application dated 28th August, 2017 seeks orders that the Honourable Court be pleased to vary, review and/or set aside its judgment issued on 28th June, 2017 against the 1st and 2nd Defendants in so far as it relates to the payment of the total decretal amount with interest and costs, jointly and severally and replace it with an order that each Defendant do pay half of the decretal amount with interest and costs.

2. The application is based on the grounds stated therein and is supported by the affidavit sworn by Hellen Koech, the 2nd Defendant's/Applicant's Legal Officer. It is stated that judgment was entered herein against the Defendants jointly and severally on 28th June, 2017. That the decretal sum inclusive of interest and Value Added Tax without costs amounts to Ksh.57,310,740/=.

3. It is further asserted that the Plaintiff has chosen to execute against the 2nd Defendant only and that carrying out such execution for the total decretal sum against the 2nd Defendant is repugnant to public policy, the 2nd Defendant being a public institution whose main purpose is to invest funds collected from the public for social security.

4. The 2nd Defendant has further averred that the 1st Defendant is capable of paying half the decretal sum on demand and that the 2nd Defendant should not bear the burden alone in the first instance. It is stated that in order to show good faith, the 2nd Defendant is in the process of paying half the amount.

5. In opposition to the application, the Plaintiff filed a replying affidavit. It is stated that this court is now *functus officio* as it pronounced the final judgment herein on 28th June, 2017 and held the 1st and 2nd Defendant jointly and severally liable.

6. It is further stated that the 2nd Defendant had the opportunity during the trial to ask the court to apportion liability between the Defendants. That the 2nd Defendant if unsatisfied with this court's judgment had the liberty to appeal or apply for review within the requisite time frame. It is contended that it is not the Plaintiff's duty to apportion liability between the Defendants during execution and settlement of the decree and that it is within the Plaintiff's right to choose which Defendant to execute against.

7. The Plaintiff stated that the 2nd Defendant is a statutory body capable of being sued, entering contracts and settling court orders and is not exempted from execution of decrees. It is stated that the execution process herein is therefore not repugnant to justice and public policy.

8. The Plaintiff decried the many years it has taken to have the suit concluded and stated that it has taken him 23 years in court before getting the judgment herein and expressed the desire to enjoy the fruits of the judgment without further delay. The Plaintiff's sole proprietor, Ali Bashir, further stated in the affidavit that he is a 92 year old man and in need of finances for medical attention.

9. The 1st Defendant, Sololo Outlets Ltd did not file any response to the application.

10. The application was canvassed by way of written submissions. I have considered the application and the response to the same and the submissions filed.

11. On whether this court is *functus officio* as argued by the Plaintiff's counsel, I hold that this court has the powers to entertain the application at hand. I find support in the Supreme Court of Kenya exposition on the doctrine of *functus officio* where it was stated in **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** as follows:

> **"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... **The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary)** final and conclusive**. Such a decision cannot be revoked or varied by the decision-maker."**

This principle has been aptly summarized further in **Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550:**

> **"A court is** *functus* **when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court** *functus*, when its judgment or order has been perfected**. The purpose of the doctrine is to provide** finality**. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available"**

12. Order 45 (1) Civil Procedure Act provides:

> **"1. (1) Any person considering himself aggrieved—**
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> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
>
> **(b) by a decree or order from which no appeal is hereby allowed,**
>
> **and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

13. In **National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR** the Court of Appeal rendered itself as follows:

> **"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. 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 law. Misconstruing a statute or other provision of law cannot be ground for review. In the instant case the matters in dispute had been canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."**

14. In the case at hand, counsel for the 2nd Defendant submitted that there are sufficient reasons for this court to review the judgment herein. The court was referred to Section 1A, 1B, 3, 3A, 63 and 80 of the Civil Procedure Act; Order 45 1 & 2 Civil Procedure Rule 2010 and Article 201 (d) of the Constitution. It was proffered that it would be repugnant to justice and public policy for the Plaintiff to execute the entire decretal sum against the 2nd Defendant. The court was implored to exercise its inherent powers to do that which is fair as it would, it was argued, be unconstitutional and unconscionable to order the 2nd Defendant to pay the entire decretal sum. The Plaintiff saw no sufficient reasons to warrant review.

15. Article 201 (d) of the constitution provides that public money shall be used in a prudent and responsible way. Under Article 45 of the Constitution, the Plaintiff has a right of access to Justice. Settlement of a decree or execution thereof is in the view of this court not lack of prudence or being irresponsible but a matter of public duty.

16. In the persuasive case of **Saira Banu Gandrokhia & another v Principal Secretary Ministry of Interior and Coordination of National Government & another [2017] eKLR** it was held that:

> **"...in that case the respondents do not dispute the decree. They, in fact, acknowledge the indebtedness in terms of the decree. It therefore follows that the exparte Applicants who are the decree holders have rights which have crystallized, to enjoy the fruits of their lawful judgment and those rights must not be curtailed. That must be safeguarded and enforced by the court as espoused in Article 159 (2)(a) and (b) of the Constitution that justice shall be administered without delay, and the Applicant's right to access Justice under Article 48 of the Constitution protected...The 1st Respondent is under a public duty to settle decree of the court made in favour of the exparte applicants, in order that justice may at the end of the day be served because there is no other remedy available to the exparte applicants...In view of the foregoing, the respondents cannot be heard to say that they have no money to settles the decree..."**

17. The concept of joint and several liability is defined in Blacks law Dictionary 10th Edition as follows:

> **"liability that may be apportioned with among two or more parties or to only one or a few select members of the group at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties"**

18. In the persuasive case of **Republic v PS charge of Internal Security ex parte Joshua Mutua Paul [2013] eKLR,** the court held as follows:

> **"Clearly, therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several, the Plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the torfeasor according to their individual liability... Either he cannot recover more than the total sum decreed. However, the Defendants are entitled to reimbursement from the co-defendants in the event that the Plaintiff only opts to recover from one of them"**

19. In the case of **Kenya Airways Limited v Mwaniki Gachohi** it was stated thus;

> **"...The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree..."**

20. Turning back to the case at hand, to attempt to apportion liability between the two Defendants requires an elaborate thought process and would amount to re-looking at the evidence afresh and re-writing the judgment and probably arrive at a different decision. This, in my view, is not the object of a review application. Indeed, notwithstanding that the Plaintiff had prayed for judgment to be entered jointly and severally against 1st and 2nd Defendant, there were no efforts made during the trial to apportion liability specifically at any given percentage between the two Defendants as sought herein.

21. With the foregoing, I find no merits in the application and dismiss it with costs.

Date, signed and delivered at Nairobi this 4th day of Oct., 2018

B. THURANIRA JADEN

JUDGE