



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 279 OF 2004 (O.S)**

**LEISURE LODGES LIMITED.....PLAINTIFF**

**VERSUS**

**1. JAPHET S. ASIGE**

**2. S.O. ANYANZE T/A ASIGE KEVERENGA &**

**ANYANZWA ADVOCATES.....DEFENDANTS**

**R U L I N G**

1. This court is called upon to determine the Notice of Motion dated 12/4/2018 by the plaintiff/decreeholder. The application seeks orders that:-

**“THAT the Defendants/Respondents be ordered to pay to the plaintiff/applicant the amount of Kshs.5,000,000/= deposited and paid to them, together with interests thereon from February 2001 forthwith”.**

2. The grounds disclosed on the face of the application are that despite the court's judgment dated 23/6/2017 ordering the defendant/respondent to render accounts to the plaintiff for the sum of Kshs.5,000,000 within 30 days and to pay the sum found to be due to the plaintiff within 30 days of the accounts being rendered, the defendant failed to render such accounts but opted to file an Affidavit which Affidavit did not render any accounts. It is equally a ground that the letter exhibited and alleging that the judgment debtor paid to the interim liquidators the sum of Kshs.4,440,000.00 and retained Kshs.560,000.00 fees and disbursement was a fabrication and of no consequence as it was dated 23/8/2018, well after the judgment herein and refers to a telephone conversation of 20/2/2001 a date after the Court of Appeal had removed the said interim liquidators from the control of the affairs of the decree-holder a fact that was well known to the judgment herein as Mr. Asige acted for the said liquidators in the said appeal. To the decree-holder the judgment debtor has never rendered accounts and should be ordered to pay the sum of Kshs.5,000,000/= with interests as decreed in the judgment.

3. The application was supported by an Affidavit sworn by Mr. John K. Mutua, the executed director of the decree holder which essentially reiterates the grounds above and exhibits the Court of Appeal judgment that discharged the interim liquidators and a series of letters from the said liquidators to creditors of the decreeholder and informing such creditors of the removal of liquidators pursuant to the judgment by the Court of Appeal.

4. The application was opposed by the Replying Affidavit of Mr. Japheth Asige sworn and filed in court on the 8/6/2018. In it the judgment-debtor offers an explanation that the delay to file the Affidavit was occasioned by his inability to trace the file with a view to getting a copy of the judgment and denies that the letter by the former interim liquidators was a fabrication but genuine an unequivocal explanation on how the money was spent. He however denies having authored the letters marked JKM 3.

5. The Affidavit further admit that the counsel acted for the interim liquidators in the appeal but denies that there having instructions to the judgment debtor by the decree holder on how to spend the money and terms such assertion erroneous and wholly mistaken. The judgment-debtor then reiterates that it was the interim liquidators who made the payment to his firm and not the decree-holder and that the judgment debtor did act in accordance with instructions of the said liquidators. The judgement debtor then averred that this is a suit for vendetta by the decreeholders' advocate and cited two suits in the High Court in which he had been sued in one and in another where an application was made to bar him from acting for a party for reasons that he had acted for the decree holder here as an advocate in matters leading to the said suit. For those reasons the judgment debtor prayed that the application be dismissed from lacking in merits.

6. It was then on 16/4/2018 directed by the court that the parties file written submissions pursuant to which order, the decree holders filed submissions on the 19/6/2018 while the judgment debtor did so on 18/6/2018.

7. In their submissions, the plaintiff has taken the view and position that by the judgment of the court, the defendant as judgment debtor, was obligated to render accounts within 30 days of the judgment and thereafter pay the sum found to be due and owing together with interest within another 30 days. To the decree holder the judgment debtor did not render any accounts but filed an affidavit with a letter alleged to have been fabricated which could not be relied upon by the court because the said letter was written long after the authors had ceased control of the decree-holder. To the decree-holder after the interim liquidators were removed only the decree-holder could give instructions on the money to the defendant which was never done.

8. For the judgment-debtor the submissions were offered on two broad fronts:- That the Notice of Motion was untenable because the originating summons having been determined the court had become *functus officio* without any jurisdiction to hear nor issue the orders sought and that he had not been paid any money by the plaintiff but the interim liquidators.

9. The position taken by the judgment debtor is that the originating summons having sought mere declarations which orders were given by the judgment, the court's jurisdiction is spent and non-existent to determine or grant orders in the Notice of Motion now under consideration. To the judgment debtor if the decree holder was content in enforcing the judgment his remedy was in filing a fresh substantive suit but not revising the concluded matter. It was submitted that the judgment issued herein cannot yield execution proceedings by any means including the Notice Motion. On the basis that there is a final judgment which is albeit incapable of execution the judgment debtor contends that the court lacks jurisdiction in the matter for having become *functus officio*. Mr. Asige then cited to court the decision in ***Kcb vs Osebe [1982] KLR and Kibutiri vs Kibutiri [1983] KLR*** on the scope of originating summons. I have had a chance to read the two decisions and I have found nothing in them to support the judgment debtor's position that declaratory orders issued on an originating summons are inexecutable.

### **Issues and determination**

10.. Having considered the record of the Application, the Affidavit filed prior thereto and those filed in opposition thereto, the only question that begs the court's determination is whether or this court ought to effectuate its judgment dated 23/6/2017 by issuing the orders sought. In seeking to determine that issue this court will have to address the defendant's position that there is no jurisdiction in the court to deal with the application after judgment on the basis that the orders issued by the court are incapable of enforcement and on the basis that the court has become *functus officio*.

11. I purpose to deal with the objections raised on lack of jurisdiction and only after that determination and if there shall exist a need, proceed to consider the merits of the application.

### **Is there jurisdiction on a court issuing a decree on an originating summons to enforce the same?**

12. It is well established principle of law that litigation must be brought to an end to earn respect to the court process and to enable the decree holder realize the fruits of its litigation. It is equally an established principle of law which existed before the promulgation of the overriding objectives of the court that courts' time as a resource must be employed efficiently hence to file a suit over a finally adjudged matter is an abuse of the court process<sup>[1]</sup>.

13. The statutory underpinning of this principle is to be found at section 34 Civil Procedure Act which provides:

#### **Questions to be determined by court executing decree**

**(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.**

**(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.**

**(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.**

***Explanation.*—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.**

14. Now in this matter the defendant has argued forcefully but very strangely that there is no jurisdiction in a court to enforce a judgment entered upon an originating summons especially if it be declaratory in nature. That submission, with respect to the counsel of many years standing, cannot stand the challenge by the clear provisions of the law at sections 28, 29, 30, 34 and 38 of the Civil Procedure Act as read with Order 52 Rule 4. The summary of those provisions is that a court passing a decree has the power to execute it, that it is prohibited to bring a fresh suit concerning execution or enforcement of a decree and lastly that a decree may be enforced by delivery of the property decreed <sup>[2]</sup> to be delivered or by such other manner as the nature of the relief granted may require<sup>[3]</sup>.

15. In this matter, by the judgment of the court dated 23/7/2017 this court ordered that:-

**“When the three questions framed in the originating sums are put in perspective, all amount to one question, whose money was it and for what reason was it deposited with the defendant.**

**If one finds, as I have found that the money belonged to the plaintiff as a client, then it follows that when the said client**

**therefore asks for accounts, such accounts are due and must be rendered.**

**I have said enough to underscore the ultimate decision that the plaintiff is entitled to cash accounts and for payment of any sum that such accounts shall reveal to be due to the client from the advocate.**

**The Defendant as such an advocates are bound in law to render an account on how the money has been applied or employed from the date of deposit to date. The advocate as defendant herein shall render such accounts within 30 days from today and any sum, if at all, found to be due be paid to the plaintiff within 30 days thereafter”.**

16. It may not be denied that there was no specific sum ordered to be paid to the judgment creditor by the judgment –debtor but there is an order that accounts be taken and sums found due out of the Kshs.5,000,000/=, plus interest be paid to the defendant.
17. That judgment as worded, pending rendering of accounts, was a preliminary judgment and not a final one. The final judgment regarding the sum payable would only be reached or arrived at after account are taken. The judgment delivered herein envisaged further proceedings. That is the more reason Mr. Asige’s submissions cannot be upheld.
18. The judgment debtor did not provide cash accounts but filed two affidavits. On the 20/6/2018 the court ordered that taking of accounts would be subsumed in the hearing of the application by the decree holder now under consideration.
19. In giving those directions the court took regard of the fact that there were filed affidavits by Mr. Asige (in particular affidavit sworn on 2/8/2017 exhibiting a letter dated 23/8/2017 by which an attempt was made to show how the money was disbursed or rather expounded. This ruling therefore would not have achieved its purpose without addressing the question of whether or not accounts have been shown.
20. Even though the decree-holder takes it strongly that the affidavit showing the utilization was filed out of time, this court has seen and read that affidavit and cannot justly ignore it. I have taken the averment that money was directed to be used in the manner asserted in that letter. However, this court has posed for itself the questions whether the judgment debtor had the right to deal with the money in the manner directed by the time interim liquidators
21. In answering that question sight must not be lost to the fact that the said interim liquidators were removed by an order by the Court of Appeal on the 16/2/2001. It is admitted by both sides that Mr. Japheth Asige acted for the said liquidators in the appeal and was therefore aware of the outcome.
22. The outcome was that the two were discharged forthwith with effect from the date of that judgment. Having been so discharged they ceased to have any right to deal with any assets of the plaintiff including the sums of money held by the advocates who dated for them when they were such liquidators and who received such monies from them qua such liquidators. Moreover the letter asserts that the instructions were given on phone on 20/2/2001. That was four days after they had been discharged for the control of the company and they obviously had no right to purport to instruct the counsel. The counsel being aware of the court’s decision, had no colour of right to purport to take or execute instruction given in violation of the court order. If he ever did, his action would amount to nothing because an action taken in violation of a court order would be null and void and avails no right to anybody. I do find that the letter is not a true and genuine explanation how the money, this court has found belonged to the plaintiff was applied. I decline to take it as true account of how the money was spent. To the contrary it cannot escape the accusation by the judgment creditor that it is a makeup manufactured too late in the day. Made too late in the day because this suit was filed in court on the 24/12/2014 and therefore if the instructions were given on 20/2/2001, why was it not possible to bring that fact to the attention of the court for a period of more than 13 years? Why was it not revealed to court before the judgment to enable the court take it into account?
23. It must be remembered that the judgment debtor has all along held, even after the judgment which declared on what capacity the money was paid to the judgment debtor, that the money did not belong to the plaintiff but to the interim liquidators. That assertion is no longer tenable here because the court has delivered itself in the regard. The money belonged to plaintiff.
24. I do find that there has not been shown authentic and credible account that the money was ever disbursed with the instructions of the plaintiff and the money, Kshs.5,000,000/= remains held by the judgment debtor. Being so held by it and there being a judgment that the judgment debtor delivers/pays the money found to be due, this court has a duty to bring this litigation to a close by directing that the money be delivered to the plaintiff/decreed holder within 30 days from the date of this judgment and in default the said decreed holder be at liberty to execute provided the legal ad procedural prerequisite of executing a money decree shall have been met.
25. 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*:-

**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.**

**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.**

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 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”.

26. What is before me in this matter does not seek to re-open the decided dispute for rehearsing rather it seeks to move the suit towards closure by delivery of the property adjudged to belong to the decree holder.

27. The long and short of the foregoing reasons and findings is that the Notice of Motion dated 12/4/2018 succeeds and is allowed with costs to the plaintiff/judgment creditor.

**Dated and delivered at Mombasa this 12th day of October 2018.**

**P.J.O. OTIENO**

**JUDGE**

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[1] KCB VS Benjo Amalganated Ltd [2017] eKL, Section 34, Civil Procedure Act

[2] Section 38(a)

[3] Section 3(f)