REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 427 OF 1992

PATRICK OKELLO OBILO……..……..PLAINTIFF

VERSUS

SOUTH NYANZA SUGAR COMPANY LIMITED ……....DEFENDANT

RULING

Background

1. On 29th October 1992, the plaintiff/Respondent herein sued the defendant/applicant seeking inter-alia, the return of his property that had been allegedly seized by the applicant. The respondent's said suit was heard and was judgment entered in his favour for the return of the confiscated goods and the payment of Kshs. 300,000/= general damages.

2. The applicant then paid the sum of Kshs. 300,000/= general damages to the respondent but did not return the seized property thereby prompting the respondent to institute contempt of court proceedings and vide a ruling delivered on 7th July 2008, the court found that the applicant was guilty of contempt whereupon the respondent was granted an order for sequestration to attach the respondent's property in order to defray the damages of Kshs. 974,100/= occasioned by the said disobedience of court order. The respondent was also granted costs of the application which was eventually assessed by consent at Kshs. 68,059/=.

3. The applicant was aggrieved by the said ruling of 7th July 2008 and filed an appeal before the Court of Appeal at Kisumu being C.A. No. 18 of 2009.

4. Through an application dated 15th July 2008, the applicant herein sought orders for stay of execution pending appeal, however, in a ruling delivered on 29th July 2009, the said application for stay of execution was dismissed with costs, and in a bid to avoid the execution of the decree through auction of its properties, the applicant on 7th August 2009 paid to the respondent, through his advocates M/s Oguttu Mboya & Co, the sum of Kshs. 974,000/= and costs of Kshs. 68,059/=.

5. It turns out that the Court of Appeal, upon hearing the applicant's said appeal No. 18 of 2009, on 24th May, 2013 made a decision in favour of the applicant thereby overturning/reversing the High Court's decision of 7th July 2008 that had granted the respondent the sum of Kshs. 974,000/= together with costs.

6. The Court of Appeal also granted the applicant the costs of the appeal. It is the said outcome of the applicant's appeal before the Court of Appeal that has now precipitated the instant notice of motion dated 16th April 2015 that is the subject of this ruling.

Application

7. The application dated 16th April, 2015 is brought under **Section 34 (1) of the Civil Procedure Act** and **Order 51 Rules of the Civil Procedure Rules.** The applicant seeks the following orders:

> **a) The Respondent, Patrick Okelo Obilo and or his lawyers Joseph Oguttu Mboya T/A Oguttu Mboya & Company Advocates do make restitution and refund to the applicant, the sum of Kshs. 974,100/= together with interest at court rates of 14% per annum from the date of payment until payment in full, being monies obtained by them from the Applicant pursuant to a ruling and order of the High Court dated 16th May 2008, but delivered on 7th July 2008 on an application dated 10th April 2006 issued in these proceedings.**
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> **b) The Respondent and or his lawyers, Joseph Oguttu Mboya T/A Oguttu Mboya & Company Advocates do make restitution and refund to the Applicant the sum of Kshs. 68,059/= together with interest at court rates of 14% per annum from the date of payment until payment in full, being monies which was paid to them in respect of costs of the application dated 10th April 2006 which application was dismissed by the Court of Appeal and costs thereof ordered to be payable to the Applicant.**
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> **c) The said restitution and/or payments be made within thirty (30) days.**
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> **d) Costs of this Application.**

8. The application is supported by the affidavit of Gabriel Ouma Otiende the applicant's Legal Service Manager in which he avers that in view of the fact that the Court of Appeal had on 24th May 2014 reversed the order of the High Court made in ruling delivered on 7th July 2008 that granted the respondent the sum of Kshs. 974,000/= plus costs and taking into account that the applicant had already paid the full sum of Kshs. 974,000/= together with costs of Kshs. 68,059/= the applicant was entitled to a refund of all the monies it had paid to the respondent by way of restitution.

9. The respondent opposed the application through the grounds of opposition and replying affidavit of Joseph Mboya Oguttu dated 6th July 2015. Mr. Oguttu avers that the applicant was obliged to seek the refund of monies forming the basis of this application before the Court of Appeal. He insists that it is only the Court of Appeal that is seized with the jurisdiction to decree and/or order the refund of the money in question. He therefore states that the claim for refund is *res judicata* in view of the fact that the applicant had forfeited its right to raise and canvass the issue before the Court of Appeal. He also challenges the applicants claim for interest on the amount claimed for refund on the basis that the issue of interest ought to have been raised before the Court of Appeal.

10. He contends that the firm of M/s Oguttu Mboya Advocates was not a party of the suit and have not been enjoined in the proceedings as they merely acted as advocates for the respondent who upon receiving the decreetal sum, remitted it to their client and thus, the advocates cannot be called upon to make a refund of the claimed sums of money.

11. It was the respondent's case that allowing the instant application would be tantamount to rewriting, varying, reviewing and/or overruling the decision of the Court of Appeal.

12. When the application came up for hearing before me on 22nd September 2015, parties agreed to canvass it by way of written submissions which I have perused.

Analysis and determination

13. Upon considering the instant application, the respondent's grounds of opposition together with the replying affidavit and the parties respective written submissions, I discern the issues for determination to be:

a) Whether this court has jurisdiction to hear and determine the application.

b) Whether the application is *res judicata*.

c) Whether the firm of M/s Oguttu Mboya have been improperly enjoined in the application.

d) Whether the applicant is entitled to the orders sought.

14. Before delving into the issues for determination in this ruling, I wish to point out that the facts outlined in the background of this case at the beginning of the ruling are not disputed. In effect, the respondent does not dispute that he was paid the sum of Kshs. 974,000/= and Kshs. 68,059/= as costs following this court's ruling delivered on 7th July 2008. It is also not disputed that the Court of Appeal, sitting at Kisumu in CA case No. 18 of 2009, on 24th May 2013 allowed the applicant's said appeal thereby overturning this court's impugned orders of 7th July 2008. What has been disputed, as can be seen in the issues for determination are; the jurisdiction of this court to determine the matter, the merit of the application, the joinder/misjoinder of the respondent's advocate to the case and the issue of the case being *res judicata*.

15. On jurisdiction, the respondent submitted that this court lacks jurisdiction to hear the issue of refund as it ought to have been ventilated before the Court of Appeal. The respondent submitted that having failed to pursue the refund as one of the prayers before the appeal court, it meant that the applicant had forfeited his right to make the claim for refund and that pursuing the claim before this court would be tantamount to asking this court to review, vary, rewrite or overrule the decision of the Court of Appeal.

16. It is however not lost to this court that the matter at hand is an application for restitution or refund of the sum of money paid in respect of a decree that has been reversed. The application was brought under **Section 34 (1) and 91 (1) of the Civil Procedure Act** which stipulates as follows:

> **"Section 34 (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."**
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> **"Section 91 (1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and *mesne* profits, which are properly consequential on such variation or reversal."**

17. A reading of the above sections of the Civil Procedure Act clearly shows that the correct court of handle the application for restitution is the court of first instance in this case, the High Court that passed the decree that is the subject of application for the refund. It is therefore my finding that this is the court of first instance and therefore the proper court to handle the instant application and not the Court of Appeal as had been suggested by the respondent. I further find that there is no mandatory legal requirement that the claim for refund be made before the Court of Appeal.

18. In any event restitution as a remedy that automatically flows from the reversal or variation of a decree and therefore, there was no way the applicant could have sought the restitution of the monies paid at the Court of Appeal before knowing the outcome of the said appeal.

19. In the instant case, the applicant paid the decretal sum to the respondent to avoid an impending execution after its application for stay of execution pending appeal was dismissed by this court. Upon succeeding on appeal, it is only fair and just that the respondent refunds the sums of money that he had received in respect to court orders that had been overturned by the Court of Appeal. In essence therefore, the respondent has no basis for continuing to withhold monies that should not have been paid to him in

the first place. The applicant sought to be taken back to the position that it was in before the impugned orders that were the subject of the appeal, were made.

20. In the case of **Westmont Power (Kenya) Limited vs Kenya Oil Company Ltd Nairobi C.A No. 254 of 2013**, the Court of Appeal held:

> ***"…we find it unconscionable, unfair and unjust after the foregoing omissions that he respondent still holds onto the money it was paid in the decree that was reversed by this court on 1st April, 2011. There is no justification to do this. It amounts to detriment to the Applicant."***

21. Similarly in the instant case, the respondent has not stated that he is justified in continuing to withhold sums of money that were paid to him following a decree that had been reversed/set aside. The ideal situation should have been for the respondent to take immediate steps to refund the claimed sums of money to the applicant the moment it became aware of the Court of Appeal's decision. Instead, the respondent sat pretty and did not make good the applicant's claim only to raise issues of jurisdiction and *res judicata* in a bid to place road blocks on the applicant's path to justice.

22. My bottom-line is that the respondent is continuing to unlawfully withhold monies belonging to the applicant and in this regard, I find that the applicant is entitled to claim interest on the claimed amount of refund from the date of the delivery of the Appellate Court's judgment being 24th May 2013.

23. Turning to the issue of *res judicata*, the respondent argued that the Court of Appeal constructively declined to order for the refund and therefore, the applicant was precluded from making the instant application. Res judicata is defined

24. In the instant case, with due respect to the respondent's counsel's submissions on *res judicata*, I find that the said doctrine is not applicable to this case because the issue before the Court of Appeal was an appeal challenging the decision/ruling of this court delivered on 7th July 2008 which granted the respondent an order of sequestration allowing the respondent to attach the applicant's property in order to recover the sum of damages assessed at Kshs. 974,000/=. Clearly therefore, the issue of refund of the amount paid to the respondent arose after the Court of Appeal's decision and was not the subject of the appeal so as to qualify to fall under the doctrine of *res-judicata*.

25. Turning to the issue of joinder of the respondent's advocates to the application, the respondent submitted that the advocates merely acted as agents of the respondent and therefore, were not liable to make any refund directly to the applicant in view of the fact that they merely received the payment on behalf of their client, which money they had already remitted to the respondent. The respondent's advocates did not however furnish this court with any proof that they had indeed remitted the said monies to their client. Be that as it may, I find that there was no basis for the applicant to make a claim directly against the respondent's advocates as the said advocates are not parties to this case.

26. The respondent argued that the application is omnibus and not severable to the extent that it seeks orders as against both the respondent and his advocates on record and therefore the court could not dismantle the application and grant orders on one limb. According to the respondent, the instant application either succeeds as presented or is dismissed in its entirety. While I agree with the respondent's argument that the advocates were wrongly added to the application, I find the contention that the application is omnibus and must either succeed or fail in its entirety to be misconceived.

27. The applicant does not, in his application, seek orders against the respondent and his lawyers as a unit- rather, the wording of the application is that **"the respondent and/or his lawyers… do make restitution and refund to the applicant the sum of Kshs. 974,100/=… and Kshs. 68,059"**

28. My understanding of the application is that the applicant seeks a refund from the respondent and his lawyers either jointly or severally and this gives this court the latitude to make a decision against both jointly as a unit or against either of them.

29. Even assuming that the orders were sought against the two jointly, nothing stops this court from, in the wider interest of justice and in the line with the provisions of Article 159 (2)(d) of the Constitution, issuing appropriate orders to ensure that substantive justice is done to the applicant so that he can get a refund of its money.

30. Having found that this court has jurisdiction to hear and determine the instant application and having found that the said application is properly presented before this court and further, that the applicant is entitled to a refund of all the monies that it had paid to the respondent, I hereby allow the applicant's application dated 16th April 2015 in the following terms:

a) The Respondent, Patrick Okelo Obilo do make restitution and refund to the applicant, the sum of Kshs. 974,100/= together with interest at court rates of 14% per annum from the date of the judgment of the Court of Appeal being 24th May, 2013 until payment in full, being monies obtained by them from the Applicant pursuant to a ruling and order of the High Court dated 16th May 2008, but delivered on 7th July 2008 on an application dated 10th April 2006 issued in these proceedings.

b) The Respondent do make restitution and refund to the Applicant the sum of Kshs. 68,059/= together with interest at court rates of 14% per annum from the date of the judgment of the Court of Appeal being 24th May, 2013 until payment in full, being monies which was paid to them in respect of costs of the application dated 10th April 2006 which application was dismissed by the Court of Appeal and costs thereof ordered to be payable to the Applicant.

c) The said restitution and/or payments be made within thirty (30) days.

d) Costs of this Application.

Dated, signed and delivered in open court this 5th day of April, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

Mr. Nyamweya for Mr. Oguttu…… for the plaintiff/Respondent

N/A for Okongo Wandago.……for Defendant/Applicant

Omwoyo: court clerk