



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 1736 OF 1993

NYAMODI OCHIENG NYAMOGO.....PLAINTIFF

VERSUS

TELKOM KENYA LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion dated 18th July, 2016, the applicant/defendant herein, **Telkom Kenya Limited**, substantially seeks an order that this Court directs the Plaintiff herein to forthwith restitute the Defendant a sum of Kshs 6,972,442.98 paid to the Plaintiff herein which is found to be over and above the amount found by the Deputy Registrar as due.

2. According to the Defendant, it was ordered to deposit a sum of Kshs 37,000,000.00 as security in court which sum was eventually released to the Plaintiff. However by a ruling delivered by the Deputy Registrar on 9th June, 2016, the amount found to be due was Kshs 30,027,557.02 hence the amount received by the Plaintiff was more than the amount that was due.

3. Before the application could be heard the Plaintiff herein raised a preliminary objection on the ground that this Court has no jurisdiction to entertain the application. The said objection was premised on the decision of the Court of Appeal in **Civil Application No. Nai. 144 of 2013 – Nyamodi Ochieng Nyamogo vs. Telkom Kenya Limited**.

4. From the said application what was before the Court was a Motion seeking that the Respondent's (read the Defendant/Applicant herein) Notice of Appeal be deemed to have been withdrawn. Apart from that prayer the consequential reliefs sought were the vacation of the High Court orders of stay of execution granted pending the hearing and determination of the intended appeal, the release to the applicant of the decretal amount deposited in court as a condition for the said stay and costs of the application.

5. The said application was not responded to by the Respondent and on the hearing date the Respondent itself was not represented despite being served with the hearing notice. After hearing the said application, the Court on 29th November, 2013 expressed itself as hereunder:

“Accordingly, we allow the applicant’s application filed on 1st July, 2013, and order that the respondent’s notice of appeal dated 5th July, 2012, is hereby deemed to have been withdrawn.”

6. The Plaintiff contends that the Court of Appeal having allowed its application which *inter alia* sought

the release of the sum deposited to him, this Court cannot issue orders whose effect would be to reverse the said decision.

7. It is clear that the order of stay was issued by the High Court. Section 91 of the *Civil Procedure Act* provides as follows:

(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.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).

8. It may well be that an order for release of the security ordered to be deposited by the High Court for the purposes of an appeal amounts to a restitution for the purposes of the said section. That determination is however not within the scope of this ruling being as it is a decision on a preliminary objection.

9. What is however clear is that there is a divergence of opinion between the Plaintiff and the Defendant as to the effect of the decision issued by the Court of Appeal. This Court, in my respectful view, is not competent to interpret the decision of the Court of Appeal where the parties are not clear on the same and where the decision itself may be subject of more than one interpretation. Such a matter can only be dealt with by the Court and preferably the bench that dealt with the matter, if the members of that bench are still in that Court. See **Bearing House (1985) Ltd. & 4 Others vs. Reliance Bank Ltd. Civil Application No. Nai. 245 of 2000.**

10. Consequently, I am of the view and hold that unless and until the Court of Appeal clarifies its decision, this Court has no jurisdiction to entertain the instant application.

11. In the result the Notice of Motion dated 18th July, 2016 is incompetent and is struck out with costs to the Plaintiff.

Dated at Nairobi this 15th day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Nyamogo the Plaintiff/Respondent

Mr. Mungai for Mrs Mbaabu for the Plaintiff/Applicant

CA Mwangi