REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 183 OF 1998

JOHN PATRICK MACHIRA T/A MACHIRA & CO ADVOCATES
……PLAINTIFF/RESPONDENT

VERSUS

A.J. ODERA T/A A.J. ODERA & ASSOCIATES …….....
DEFENDANT/APPLICANT

R U L I N G

By an application dated 13th October 2014, the defendant/applicant seeks from this court orders that:

1) …

2) That the plaintiff John Patrick Machira be and is hereby ordered to refund to the defendant Abok James Odera through the defendant's advocates M/s T.O. K'Opera & Co Advocates the sum of Ksh. 5,686,349.30 together with interest thereon at court rated (12% p.a.) from 11th June 2001 until 11th October 2013 amounting to Ksh. 8,415,798.80 and thereafter further interest at commercial rates (18% p.a.) from 11th October 2013 until the date of full payment/refund.

3) That the costs of this application be paid by the plaintiff to the defendant in any event.

The application is predicated on 12 grounds on the face of the application and further supported by the affidavit of Abok James Odera, the defendant herein, sworn on 13th October 2014.

The application is opposed by the plaintiff/respondent who swore an affidavit in reply on 30th October 2014 and filed in court on 31st October 2014, denying the plaintiff's claim and seeking for its dismissal with costs.

When the application came up for hearing before me on 4th October 2014, Mr. K'Opere advocate appeared for the applicant/defendant, whereas Mr. Wachira advocate represented the plaintiff/respondent on behalf of Mr. Kimondo advocate.

Mr. K'Opere advocate submitted, reiterating the grounds in support of the application and the supporting affidavit that in this case which was determined in favour of the plaintiff vide summary judgment made on 30th July 1998 by **Hon. E.O. O'Kubasu J** (as he then was), the defendant immediately applied for stay of execution pending appeal to the Court of Appeal, which stay was granted conditional upon the defendant depositing a sum of Sh. 10 million in a joint deposit interest earning account of the advocates for the parties which sums were deposited with Standard Chartered Bank.

The appeal No. 176/98 was subsequently struck out on a technicality and refiled afresh vide Civil Appeal 161 of 1999.

Upon the appeal No. 176/98 being struck out, the plaintiff herein timely asked for release of the monies deposited in the joint interest account of both advocates and **Kuloba J** did on 24th May 2001 order for the release of the said funds to him. When the defendant attempted to stay that order of release of the funds, their application both before **Kuloba J** and the Court of Appeal were dismissed.

The Court of Appeal held that the plaintiff was a wealthy advocate and he would be in a position to refund the money should the appeal by the defendant succeed. This was on 6th July 2001. A copy of the ruling of the Court of Appeal Per **Gicheru, Tunoi & Shah JJA** in CA 166/01 is annexed to the defendant's supporting affidavit. The monies were therefore released to Mr. Machira advocate together with all the accrued interest.

The Civil Appeal was finally determined on 11th October 2013 by a judgment pronounced by **Githinji, Nambuye & Koome JJA** after a period of 12 years.

The Judges of Appeal set aside the summary judgment entered against the defendant herein by **O'Kubasu J**, for a sum of Sh. 19,681,581.35 on 30th July 1998 and substituted it with a judgment for Sh. 8,156,477/05 less 4,000,000/- paid earlier by the defendant to the plaintiff, leaving a balance of Sh. 4,156,477.05, and not the Sh. 19,681,581.35 awarded by **O'Kubasu J** (as he then was). The above awards were of course made with interest, at court rates from date of filing suit in this court, until payment in full.

However, as the security of Sh. 10,000,000/- had been released to the plaintiff on 10th November 1998 following the Court of Appeal's order declining to grant stay pending the appeal, the defendant argues that it is therefore only this court which can order the plaintiff to refund the excess money paid out to the plaintiff. Further, that it is only in this court where execution can take place, even if it was the plaintiff seeking such execution.

Mr. K'Opere maintains that a refund thereof must include interest earned on the excess money as the plaintiff insisted on taking the money from the bank where it was earning interest hence he must pay back with interest, even if it is at court rates as ordered by the Court Appeal on page 39 of the bundle containing this application as filed on 13th October 2014, and not commercial rates as prayed for by the defendant, from date of filing suit on 28th January 1998.

The defendant also annexed evidence of release of the said monies to the plaintiff as annexture AJO-1. He avers that he has made attempts to recover the said excess money from the plaintiff from 10th November 2013 when the Court of Appeal fully determined the dispute but the plaintiff has refused to compute what is due to the defendant and or even bothered to respond to requests for refund, thereby prompting the defendant filing this application, seeking the court's intervention. That even after this application being filed and served in October 2013, the plaintiff only served upon the defendant with a response three days prior to the hearing of this application.

The defendant therefore prayed for orders of refund with interest at court rates and costs of this application.

Mr. Wachira advocate for the plaintiff/respondent opposed the application by the defendant. He

submitted relying on the affidavit sworn by the plaintiff on 30th October 2014. Grounds of opposition filed on 30th October 2014 and the preliminary objection notice together with a list of authorities filed and served upon the defendant on 31st October 2014.

According to Mr. Wachira, the court herein became functus officio once the court passed a decree against the defendant. He relied on the case of **Telecom (K) Ltd – Vs – John Ochanga & Others (2013) eKLR**. Further, he accused the defendant of attempting to adduce new evidence by way of affidavit.

He maintained that this court has no jurisdiction to hear and determine a matter determined by another Judge of parallel jurisdiction. He relied on Order 21 Rule 3 (3) that there can be no alteration or addition to a judgment and regretted that this court was being asked to alter, amend the judgment which it cannot, for want of jurisdiction.

The plaintiff further charged that the defendant was asking for interest at 12% p.a. on 5,686,349.30 contrary to the judgment of the Court of Appeal which does not make reference to either 12% court rate of 18% commercial rates.

Mr. Wachira further submitted that this court is bound by the doctrine of precedence as set out in the cases of **Peter Nganga Muiruri – Vs – Credit Bank Ltd & 2 Others (2008) eKLR, National Bank of Kenya – Vs – Wilson Ndolo Aya (2009) eKLR** and **Abuchiaba Mohammed – Vs – Mohammed Bwana Bakari & 2 Others (2005) eKLR**.

The respondent/plaintiff also contended that this application is res judicata as this matter ought to have been canvassed at the Court of Appeal and not by way of fresh proceedings herein which claim was not part of their defence and neither did they counterclaim in their defence.

He opined that the defendant can only bring a fresh suit to recover their money being claimed, not by way of counterclaim since matters of interest are serious and can only be litigated in a fresh suit.

Further, that the orders sought were not in tandem with the judgment of the Court of Appeal as the applicant in his ground 9 purports to compute imaginary figures which are not part of the judgment of the Court of Appeal.

The plaintiff further submitted that the notices of intention to execute sent by the defendant were baseless as he had no decree in his favour. Further, that Section 63 of the Civil Procedure Act and the inherent jurisdiction of this curt are not available to the applicant as this court has no jurisdiction to reopen proceedings between parties when such proceedings are determined. He maintained that these are not supplemental proceedings as the suit has been determined and this court cannot take accounts of what the applicant is entitled to. He prayed for dismissal of the application with costs.

In response, Mr. K'Opere advocate submitted maintaining that his client/the defendant was entitled to the orders sought as the amount sought is below what the Court of Appeal computed and ordered in favour of the plaintiff hence the remainder must be refunded through these proceedings wherein the plaintiff was paid the decretal sum pursuant to the summary judgment. Further, that the interest at commercial rates is in the discretion of this court. In addition, Mr. K'Opere submitted that this suit is not functus officio and neither is the application res judicata as it is in the same court wherein the defendant sought release of the money by notice of motion, not by way of a fresh suit.

He maintained that the plaintiff is holding the excess monies illegally and hence he should pay further interest from date of judgment in the Court of Appeal.

He emphasized that they were not asking the court to alter the judgment of the Court of Appeal hence the authorities relied on by the plaintiff were all irrelevant. He clarified that supplemental proceedings under Section 63 of the Civil Procedure Act are proceedings within the same suit. In his view, what they were asking of this court is not to alter what the Court of Appeal had declared, but to follow or implement the judgment of the Court of Appeal.

He submitted that it was not possible to file a fresh suit as that would amount to res judicata this suit and that the respondent does not state what happens to the excess money paid to him since the Court of Appeal pronounced that he was a wealthy lawyer capable of refunding the money if the appeal succeeded in favour of the defendant.

Mr. K'Opere further maintained that the preliminary objection did not meet the threshold set in the case of Mukisa Biscuits.

I have carefully considered the application as filed, the replying affidavit, grounds of opposition, preliminary objection and the able rival submissions by both counsels for the parties to this suit and application.

What flows from the above are 7 issues for my determination. These are:

1. Whether this court is functus officio?

2. Whether this application is res judicata?

3. Whether this court has jurisdiction to hear this application?

4. Whether the applicant should have instituted a fresh suit for refund if any of the excess money?

5. Whether the defendant is entitled to a refund of excess money in accordance with the Court of Appeal decision?

6. Whether the applicant is entitled to interest on excess if any and if so, at what rates and from what date(s)?

7. What orders should this court make?

8. Who should be condemned to pay costs of this application?

On issue No. 1 whether this court is functus officio, it is submitted by the respondent that this court having adjudicated over the dispute which was finally determined by the Court of Appeal, it cannot reopen the suit.

The concept of functus officion was considered by the Supreme Court of Kenya in the case of **Raila Odinga & 5 Others – Vs – IEBC & 3 Others (2013) eKLR, SC Petitions No. 3, 4 and 5 of 2013** and cited with approval by **Havelock J (**as he then was), in **HCC 505/2008 in Muiri Coffee Estate Ltd – Vs – KCB & 3 Others:-**

> ***"We, therefore, have to consider the concept of "functus officio" as understood in law. Daniel Malan Pretorious in the "The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law", (2005) 122 SALJ E has thus explicated this concept:***
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> ***"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 adjudication 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 Ltd – Vs – Al Thani (2002) JLR 542 at 550**

"A court is functus officio 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 fully 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."

Examining the above dictum and holding, and applying it to the instant case, it is my humble view that this court is not functus officio, as far as the application by the defendant is concerned. In this case, summary judgment was entered in favour of the plaintiff for a specific sum of money. The defendant appealed and succeeded in having those sums of money reduced. By the time the appeal in the Court of Appeal was determined, the defendant herein had already paid out to the plaintiff the whole sum as decreed by this court. This was after the defendant unsuccessfully sought stay of execution of decree pending appeal. Furthermore, the Court of Appeal in declining to grant stay was categorical that the plaintiff herein was a wealthy lawyer capable of refunding the money paid to him pursuant to the decree, should the said appeal be successful. That being the case, and this being the court of origin where the decree was passed and decretal sums paid out from, it is the only court that has the residual jurisdiction to hear and determine an application for refund of the excess money paid out to the plaintiff, following the successful appeal.

In my humble view, it would be a clear injustice if this court were to find that it is functus officio and that therefore the defendant could not return to it for the remedy which it has successfully pursued upto the Court of Appeal, considering that the said decretal sum was deposited in a joint interest earning account of the parties' advocates vide an order of this court, and was only released to the plaintiff following the striking out of the defendant's first appeal. Indeed, as posed by the defendant, what then would happen to the excess money paid to the plaintiff through the same court?

On issue No. 2 – whether the application herein is res judicata. First and foremost, a matter is res judicata when, according to Section 7 of the Civil Procedure Act, among others, and relevant to this suit/application;

1. A matter is directly and substantially in issue between the same parties,

2. The issue has been litigated upon and finally decided.

In the instant case, the question would be whether the application for refund of the excess money paid out to the plaintiff by the defendant has been in issue or been finally determined in another matter.

In his submissions, the plaintiff's advocate did not allude to any such matter in issue that was before this court or before any other competent court and was determined finally. It was in my view, therefore, a submission that had no basis as it was not proved that there been any other application or proceedings similar to the one before this court, which application or proceedings were finally determined which is one of the conditions precedent to the doctrine of res judicata in Section 7 of the Civil Procedure Act which reads as follows:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue has been directly and substantially in a former suit between the same parties, or between parties under whom they or any of their claim, litigating under the same title, in a court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The superior court having determined the merits of the appeal, and having varied the decree issued by this court by reducing the decretal sum, it was left for this court to enforce the orders thereof. I therefore find that the application herein by the defendant is not res judicata any other known matter/application/

appeal or suit as none was exhibited and or proved to exist. Thus, there was no:-

i) Previous suit in which the matter of excess decretal sum was in issue;

ii) Parties were the same or litigating under the same title

iii) A competent court heard the matter in issue and determined it finally

iv) The issue has been raised once again in a fresh suit.

I hasten to add that this is not a fresh suit, and neither would this court have expected the defendant/applicant, as was suggested by the plaintiff/respondent, that the plaintiff's remedy lay in a fresh suit. In my view, filing a fresh suit to recover the excess money paid pursuant to a decree would amount to res judicata and therefore an abuse of the process of the court.

It should be appreciated that whenever parties seek for stay of execution pending appeal like it was in this case, the courts have always granted such stay on conditions of depositing of security for the due performance of decree, and in the event that the appeal succeeds, then the amount as deposited is released by the court to the successful party.

In this case, the whole of the decretal sum as per the summary judgment was deposited in a joint interest earning account opened by both parties advocates. It was therefore expected that upon determination of the appeal, the successful party would move the court for the release of the said funds. It cannot be expected by any stretch of imagination, that had the plaintiff not received the said decretal sum before determination of the appeal, and the appeal turned out to be in his favour, he would file a fresh suit to recover the money which is already deposited in court or in the joint interest account of advocates for the parties.

The plaintiff would no doubt return to this court to execute decree or simply ask that the money held in the joint account be released to him. He however expects the defendant to file a fresh suit to recover what he (the plaintiff) was paid through the order of this court. In my view, that argument cannot hold even if it were for academic purposes and I therefore find it superfluous and reject it.

The above exposition also answers issue No. 4.

On the 5th issue of whether the defendant is entitled to a refund of the excess money, I find that the defendant having succeeded in his appeal to the extent that the Court of Appeal set aside/varied the decree for summary judgment passed by this court and substituted it with a judgment for Sh. 8,156,477.05 in favour of the plaintiff, less Sh. 4,000,000/- earlier paid, the defendant is undoubtedly entitled to a refund of the excess money paid out to the plaintiff.

On whether the defendant would be entitled to interest on the excess money and if so, from when, until when and at what rate, I find that the plaintiff having received all the decretal sum plus the excess and interest, which money had been deposited in a bank, the defendant is entitled to interest accrued on the said excess money as determined by the Court of Appeal at court rates. The said interest shall be from the date of receipt of the same by the plaintiff from the bank until payment in full.

I also find that the issue of interest on the excess is not a new matter that requires a fresh suit to recover the same. It is an issue that would have equally been relevant had the plaintiff been the one seeking to execute decree. Had he been patient, the money as deposited with the bank would have earned interest sufficient enough to pay off the excess and interest.

Furthermore, upon the Court of Appeal determining the appeal, the defendant did ask the plaintiff to refund the said excess money but the plaintiff remained non-responsive and later on asked the defendant to submit a decree.

In this case, I find that the defendant is entitled to have the decree for summary judgment varied to accord with the Court of Appeal determination which is Sh. 8,156,477.05 less Sh. 4,000,000/- earlier paid and a demand made for refund of the excess money paid, together with interest at court rates and in default, execution to issue. For avoidance of doubt, the total excess is Sh. 4,156,477.05.

On costs, I find that the plaintiff provoked the defendant into filing this application which would have been avoided to save on costs. The plaintiff chose to engage the defendant into a technical game in court. In the circumstances, I order that the plaintiff pays to the defendant the costs of this application.

Dated, signed and delivered at Nairobi this 4th day of March, 2015.

R.E. ABURILI

JUDGE