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 5th February, 2014, the applicant/defendant herein, **Telkom Kenya Limited**, seeks the following orders:

1. This application be certified urgent and be heard *ex parte* in the first instance and thereafter on priority basis

2. That the firm of P.K. Mbabu & Co. Advocate be granted leave to represent the defendant in place of Mohammed Muigai & Co. Advocates.

3. That there be a stay of execution and attachment of the Applicant goods, Motor vehicles, Furniture and fittings proclaimed on 3/2/2014 by Messrs S.K. Ndegwa Auctioneers pending the hearing and determination of this Application inter partes.

4. That there be stay of execution pending compliance with this Honourable Courts directions of 20/12/2012 and 6/2/2013, ascertainment and declaration of the exact amount of money, if any due to the Respondent pursuant to the judgment of this Honourable Court

5. That the correct and exact amounts payable to the Respondent pursuant to the judgement of this Honourable court delivered on 12/6/2012 be determined and declared by this Honourable Court.

6. Costs of this application be provided for.

2. According to the defendant, judgement having been entered against the Defendant on 12th June, 2012, the Defendant instructed the firm of P K Mbabu & Co. Advocates to represent it with concurrence of the firm of Mohamed Muigai & Co. Advocates.

3. It was contended that the Deputy Registrar issued a decree for Kshs 40,615,910.32 on 30th August, 2012 and a certificate of costs for Kshs 738,177.60 pursuant to rule 68(A) sub rule 2 of the ***Advocates Remuneration Order***. Being dissatisfied with the decree the defendant instructed its advocates to apply for the settlement of the decree and pursuant thereto this Court on 20th December, 2012 gave its

directions.

4. However, the defendant was served with a decree amended the same date for Kshs 35,354,362.00 and on perusal thereof found that it was not as per the Court's directions. The Defendant then moved the Court for further directions and clear and elaborate directions were given on 6th February, 2013 in which the Court set aside the extracted decree and directed that a proper decree be extracted leaving the particulars of interests and recurring or periodical payments such as pensions to be dealt with in the warrants of attachment. It was contended that this was never done.

5. In the meantime the applicant sought stay of execution pending appeal against the judgement and was ordered to deposit the sum of Kshs 37,000,000.00 in court as security which it did. However, the Respondent successfully applied and had the Notice of Appeal deemed withdrawn and applied for the release of the deposit. The Defendant however contends that it was unaware of how the said deposit was applied yet the applicant has proclaimed and demanded different sums of money without accounting for the said sum of Kshs 37,000,000.00.

6. It was therefore the Defendant's case that it is in the interest of justice that execution be stayed, the orders of this Court complied with, the exact amount due to the Plaintiff ascertained and declared by the Court otherwise there was a risk of the Plaintiff being unjustly enriched.

7. The application was opposed by the Plaintiff. According to the plaintiff, the application was incurably defective, an abuse of the due process, vexatious, scandalous, incompetent and the Court lacked the jurisdiction to entertain it.

8. According to the Defendant, the crucial issue of monthly pension was clearly granted in this Court's judgement dated 22nd June, 2012 whose terms were settled by this Court on 20th December, 2012 yet the Defendant has not complied therewith hence the Defendant is a vexatious litigant relying on technicalities to delay compliance with Court orders and is undeserving of this Court's equitable orders. It was the Plaintiff's view that the issues raised by the Defendant were nolonger in issue after the settlement of the decree.

9. It was the Plaintiff's view that as the terms of the decree had been settled and as the Court did not order the plaintiff to extract any decree, if the Defendant needed any decree extracted, it was incumbent upon it to cause the same to be extracted and cannot therefore benefit from its own inaction.

10. According to the Plaintiff the said Kshs 37,000,000.00 was taken into account hence the issues being raised by the Defendant amount to a desperate attempt to re-litigate the matters yet this Court has become *functus officio*.

11. I have considered the issues raised herein. In my ruling dated 9th May, 2015 in this same matter I dismissed the contention that this Court is *functus officio*. I accordingly do not wish to deal with the same issue.

12. On 6th February, 2013, I gave further directions with respect to the settlement of the decree herein and at the end thereof I directed that:

"…the decree extracted herein in disregard of the directions issued herein be set aside and *a proper decree be extracted in accordance with the said directions* leaving the particulars of the interests and recurring or periodical payments such as pensions to be dealt with in the warrants of attachment since warrants of attachment unlike the decree can be easily amended to reflect the amount payable at any given period in time.."

13. It is therefore clear that not only did I set aside the decree but specifically ordered that a proper decree be extracted in accordance with my directions. It would seem that no such decree was extracted. Instead fresh execution proceedings were initiated notwithstanding the fact that there was nolonger any

decree on record capable of being executed. Section 25 of the ***Civil Procedure Act*** provides that:

The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

14. Section 2 of the Act defines "decree" as "*the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit*."

15. It follows that a decree is not the same document as a judgement since the decree follows the delivery of a judgement Under Part III of the ***Civil Procedure Act***. It was as a result of that recognition that I believe **Ringera, J** (as he then was) in **Sankale Ole Kantai T/A Kantai & Co. Advocates vs. John Nganga Njenga Nairobi (Milimani) HCCC No. 102 of 2001** held that an application brought for stay of execution before the decree is extracted is premature. In other words before a decree or order is extracted there is nothing capable of being executed.

16. This Court having set aside the decree which was extracted herein, any party wishing to take steps in execution or for which the decree was required was under an obligation to extract the same. In other words there are no short cuts to the process of execution and parties and their counsel ought to heed the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220,** that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch.

17. Since it was the Plaintiff who was desirous of executing the decree it was incumbent upon him to extract the decree in accordance with the directions given by this Court.

18. It was further contended that there is a need to ascertain the sum due in the decree. In my view that is a task reserved for the Deputy Registrar to be considered when an application for execution is made. As this Court held in Nairobi High Court (Milimani Commercial and Admiralty Division) Civil Suit 815 of 2010 – **Kimani Karoki vs. Justus Gakumi Gachunga**:

"…on receipt of an application for execution, the court should make an order pursuant thereto as required under the provisions of Order 22 Rule 13(4) of the Civil Procedure Rules. In the case of Mandavia Vs. Rattan Singh Civil Appeal No. 27 of 1967 [1968] EA 146 Duffus, JA stated that:

'The words "formal order for attachment and sale of property may be made by the Registrar" in Order 48, rule 3 must mean that the Registrar has to actually consider the application before him and then make the necessary orders to effect the attachment of the sale. Formal order here does not mean that the registrar has only to prepare and issue a formal order which has in fact already been made by the judge, as for instance whether he draws and signs a decree after the judgement or as in this case an order after the judge has decided an application. In such cases, the registrar does not "make" the order, he only prepares the order already "made" by the judge. Rule 3 must empower the Registrar to consider the proceedings before him and then in his discretion himself make an order. In a sense this will usually only be a formal order as a judgement has already been obtained and, if not settled, execution against the judgement debtor's property will follow as a matter of course without dispute, and the rule goes on to make it clear that if any dispute arise, then on the objection being taken in the manner provided, the matter will be taken over and dealt with by a judge. Order 48, rule 4 provides that for the purposes of rules 2 and 3 the registrar shall be deemed a civil court, so that in effect a registrar sitting to deal with applications or proceedings under rule 3 would be the presiding officer of a civil court, and a civil court here must mean a tribunal where civil issues are settled and not just a body that is only going to put into formal phraseology an order already made on an issue tried and disposed of by a judge. Form 27 in Appendix D of the schedule to the rules sets out the form of the notification of sale under rule 61 and this does provide for the signature by "judge" but in this connection it is to be noted that judge is defined in section 2 of the Civil Procedure Act as meaning "the presiding officer of a civil court" and this would include the deputy registrar when he is acting under the provisions of Order 48 rule 3...It is clear that Order 48

rule 3 confers on the registrar not merely the power to make formal orders of attachment and sale, but also to conduct 'proceedings thereunder', at any rate until some formal objection is taken by motion on notice whereupon all further proceedings are to be before a judge. This must be the position here since the intention of this rule is to allow the registrar to conduct the necessary proceedings, and issue the appropriate directions and orders so as to carry out an execution by way of attachment and sale of property, provided that the proceedings are not contested. Therefore the expression "formal orders for attachment and sale of property" include not only the actual orders for the attachment and sale but any other consequential orders, which are necessary to effect this purpose, and this includes an order made under rule 61.'

In my view the expression Rule 13(4) of Order 22 as read with Order 49 rule 5 of the Civil Procedure Rules must empower the registrar to consider the proceedings before him and then in his discretion himself make an order. Since the registrar acts as a court in these proceedings he should judicially consider the application by either allowing it or rejecting it. He should then make a formal order authorising the execution. This was a very serious omission on the part of the registrar since it was his duty to consider and give directions as to how the execution is to be carried out. He would conclude by making a formal order before issuing warrant of attachment to the bailiff/auctioneer. The Registrar has supervisory powers over the court bailiffs/auctioneers and has to oversee execution proceedings since he is the one who issues the orders and directions. Section 48 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provides that where any Act or Decree confers on any person to do or enforce the doing of any act or thing all such powers shall be understood to be also given as reasonably necessary to enable the person to do or enforce the doing of the act or thing. Accordingly, the registrar has to act reasonably in ensuring that the directions he has given are carried out, if they are flouted, he can legitimately intervene except where the execution proceedings are themselves challenged and when this happens, the matter goes to the judge."

19. It is therefore clear that the process of execution commenced by the Plaintiff herein in the absence of an extracted decree was invalid and the Registry ought not to have issued the warrants for execution.

20. As the limb dealing with the leave to allow the firm of Mbabu & Co. Advocates come on record was not opposed I hereby grant the same.

21. I further grant stay of execution and attachment of the applicant's properties pending the extraction of the decree and an application for execution. I direct that, to avoid further litigation, the Deputy Registrar of the Civil Division to ascertain the sum due under the decree herein before suing warrants for execution.

22. The costs of the instant application to be borne by the Plaintiff.

Dated at Nairobi this 14th day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Nyamogo the Plaintiff

Mr. Siro for Mrs Mbaabu for the Defendant

Cc Miron