REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CAUSE NO. 462 OF 2008

JOHNSON KAGO MWAURA …………………………………. CLAIMANT

AND

ROSE NDUTA GITHUA …………………....……… 1ST RESPONDENT

BIA BORA DISTRIBUTORS LIMITED …..………… 2ND RESPONDENT

R U L I N G

1. The Plaintiff/Claimant herein brought a Notice of Motion dated 2nd October 2013 ostensibly under the provisions of **sections 3A, 1A, 1B and 38** of the *Civil Procedure Act*. He sought the following rather lengthy Orders from this Court:

> **"1. This Application be certified as urgent and accordingly, service thereof be dispensed with and the same be heard exparte in the first instance.**
>
> **2. The Court file in this matter have been determined to be missing and untraceable, be reconstructed.**
>
> **3. Pending the inter partes hearing and determination of this Application, the Respondents, being in default of the Consent Order recorded herein, embodied in the letter dated 28th September 2012 and filed in Court on 30th November 2012, be restrained and/or barred from disposing in any way or manner or selling off any of their attachable assets including land and buildings, motor vehicles, furniture and fittings, computers and electronics and including, but not limited, to the property L.R. No. 209/1418/33 situated along Chamber Road, off Muranga Road, Ngara Area, Nairobi L.R. No. 5989/53 situated at Kigwwa Area, Nairobi and any asset or property therein and the Motor Vehicle Registration Nos. KAK 301L, KAK 995X, KAK 318L, KAK 302L, KAP 387T, KBB O72G, KAR 782E, KBB 688G and KAN 136K, among others or to withdraw or transfer any money, funds or amounts from any of the Respondents' Bank Accounts including but not limited to the Account No. 0102018539400 held at Standard Chartered Bank, Muthaiga Branch, Nairobi.**
>
> **4. Pending the inter partes hearing and determination of this Application, the Respondents, being in default of the Consent Order recorded herein, embodied in the letter dated 28th September 2012 and filed in Court on 30th November 2012, be ordered to deposit or furnish security for the liquidation and/or payment of the sum**

of not less than <u>Kshs. 3,433,593.20</u> being the outstanding balance of the Decree amount arising from the Arbitration Award dated 5th August 2011, delivered by the Arbitrator, <u>Mr. S. Gatembu Kairu</u> and adopted by this Court on 13th July 2012.

5. The Respondents, being in default of the Consent Order recorded herein, embodied in the letter dated 28th September 2012 and filed in Court on 30th November 2012, be restrained and/or barred from disposing in any way or manner or selling off any of their attachable assets including land and buildings, motor vehicles, furniture and fittings, computers and electronics and including but not limited to the property L.R. No. 209/1418/33 situated along Chamber Road, off Muranga Road, Ngara Area, Nairobi, L.R. No. 5989/53 situated at Kigwa Area, Nairobi and any property or asset therein and the <u>Motor Vehicle Registration Nos. KAK 301L, KAK 995X, KAK 318L, KAK 302L, KAP 387T, KBB O72G, KAR 782E, KBB 688G and KAN 136K, among others or to withdraw or transfer any money, funds or amounts from any of the Respondent's Bank Accounts</u> including but not limited to the Account No. *[particulars withheld]* held at Standard Chartered Bank, Muthaiga Branch, Nairobi, until the full and final payment of the Decree amount arising from the Arbitraiton Award dated 5th August 2011, delivered by the Arbitrator, <u>Mr. S. Gatembu Kairu</u> and adopted by this Court on 13th July 2012.

6. The Respondents being in default of the Consent Order recorded herein and embodied in the Consent letter dated 28th September 2012 and filed in Court on 30th November 2012, <u>there be a Declaraiton that the default clause therof, namely Clause (vii) has come into effect</u>.

7. The Respondents, being in default of the Consent Order recorded herein, embodied in the letter dated 28th September 2012 and filed in Court on 30th November 2012, <u>the Claimant be allowed, or be declared to be at liberty, to execute and/or enforce the Decree</u> arising from the Arbitraiton Award dated 5th August 2011, delivered by the Arbitrator, <u>Mr. S. Gatembu Kairu</u> and adopted by this Court on 13th July 2012.

8. *<u>Alternatively</u>*, the Respondents being in default of the Consent Order recorded herein, embodied in the letter dated 28th September 2012 and filed in Court on 30th November 2012, <u>be ordered to deposit or furnish security for the liquidation and/or payment of the balance of the Decree amount</u> arising from the Arbitration Award dated 5th August 2011, delivered by the Arbitrator, Mr. S. Gatembu Kairu and adopted by this Court on 13th July 2012.

9. The costs of this application be borne by the Respondents".

2. The Plaintiff/Claimant's said Application was brought on the following grounds:

"(a) By formal communication from the Court, it has been confirmed that the Court file in this matter is "missing" and untraceable and as a result, the Claimant is unable to take any steps in the suit until the Court file is reconstructed.

(b) The Respondents are yet to liquidate the balance of the payment of the Arbitration Award made in this matter and it has now come to the Claimant's attention that the Respondents are experiencing serious financial constraints, have even closed down their business and are in the process of disposing or selling off their assets.

(c) The Claimant is therefore apprehensive that the Respondents shall not have the

ability to liquidate the Decree in the installments manner agreed upon in the Consent settlement filed in Court.

(d) The parties negotiated a settlement of payments to be liquidated by monthly installments and which settlement was embodied in the letter dated 28th September 2012 and filed in Court on 30th November 2012.

(e) The Respondents have however consistently flouted the payment timelines agreed upon in the said settlement and further, are now in default of four (4) installments.

(f) By reason of the said defaults and breaches, the default clause provided for in the Consent, namely Clause (vii) has come into effect and the Claimant is now entitled to enforce or execute the Decree arising from the said Award.

(g) In view of the Respondents' weak financial status as described or their unwillingness or inability to make the installment payments in time, it is just and fair that the Claimant be allowed to execute or enforce the Decree or alternatively, the Respondent be ordered to deposit security for performance of the Decree".

3. The Plaintiff/Claimant's said Application was supported by his Affidavit sworn on 2nd October 2013. To a large extent the Supporting Affidavit added flesh to the bones of the Grounds in support of the Application. The Plaintiff/Claimant also annexed thereto the documents which he considered relevant in relation to prayer No. 2 as above as regards the reconstruction of the Court file which had gone missing. In the event, the Respondents herein filed a Preliminary Objection as regards the Plaintiff/Claimant's said Application primarily detailing that this Court or lacked the jurisdiction to determine the issues raised as it was *functus officio* pursuant to the Orders of this Court made on 13th July 2012 and 28th September 2012. In the view of the Respondents, the Application was fatally defective and sought to commence a fresh suit against the Respondents, contrary to relevant laws and established principles as well as tenets of practice.
4. The Respondents' Submissions as regards their said Preliminary Objection were filed herein on 21st November 2013. They set out the history and background of the dispute noting that after an unsuccessful application to set aside the Award, which was dated 24th August 2011, the Applicant/Claimant had sought orders for registration and enforcement of the Award pursuant to which an Order of this Court was made on 13th July 2012. Subsequent to this, the parties negotiated an amount payable along with a payment plan arriving at a consent order with regard thereto filed in Court on 18th December 2012. In the Respondents' view, the Court's Orders of 13th July 2012 and 18th December 2012 reflected the final determination of these matters by this Court. According to the Respondents, the issue was now whether the Court had jurisdiction to reopen the said Orders of the 13th July and 18th December 2012 pursuant to the doctrine of *functus officio*.
5. The Respondents referred to the authoritative case as regards jurisdiction being the **"Owners of the motor vessel 'Lilian S' v Caltex Oil (K) Ltd** as well as the case of **Supreme Court Petition No. 5 of 2013 Raila Odinga v The Independent Electoral and Boundaries Commission & 3 Ors** wherein the Supreme Court considered the doctrine of *functus officio* with reference to **Daniel Malan Pretorius'** volume **'The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law'** explaining that:

> **"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 adjudicative 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."**

6. The Respondents referred to the further finding by the Supreme Court referring to the finding in **<u>Jersey Evening Post Ltd v. A1 Thani</u> (2002) JLR 542** in which it was held that:

   > **"A court is *functus* 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 if a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus* when its judgement or order has been perfected. The purpose of the doctrine is to provide *finality*. <u>Once proceedings are finally concluded, the court cannot review or alter its decision</u>; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.** [emphasis supplied]**"**.

   The Respondents submitted that this case before Court has been finalised and perfected. They maintained that the issues raised in the current Application emanated from the substantive facts raised during the arbitration and in the proceedings for the enforcement of the Award. Quoting from the **<u>Lillian S</u>** case the Respondents observed – **"the Court must down its tools"**.

7. Before concluding their submissions, the Respondents maintained that the Application before Court was a nullity in law. The Notice of Motion filed by the Applicant/Claimant dated 2nd October 2013 was not premised on any Kenyan law. The provisions cited in the heading thereof were irrelevant in so far as the circumstances of this case are concerned. The overriding objective of the Court as per **sections 1A, 1B and 3A** of the *Civil Procedure Act*, was not a panacea to cover all issues. In their view, the Application sought to commence and found a fresh cause of action outside the ambit of the Award. In the Respondents' view the Application was a nullity which ought not to be allowed to be argued. In support of their submissions, the Respondents cited the case of **<u>Macfoy v United Africa Co Ltd</u> (1961) PC** in which **Lord Denning** had this to say as regards matters being put before Court whether void or voidable:

   > **"The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregular. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceedings which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".**

8. The Applicant/Claimant opened its submissions by stating that he failed to comprehend the "very strange argument" raised by the Respondents as, in his view, the Motion before Court dealt with namely the execution thereof and was premised on the default clause (vii) of the Consent letter dated 28th September 2012 and filed by the parties in Court on 30th November 2012. The Applicant/Claimant queried as to whether the Respondents were serious in maintaining that the Court was *functus officio* and had no powers to deal with the execution of its own Decree. Was the Respondent submitting that the Court had no power to act where a party breaches a consent settlement Order? Thereafter the Applicant/Claimant went into details of the proceedings before the Court herein including the negotiated settlement. The Applicant/claimant made the following points with regard to the salient matters expressed in the Consent Order:

- **"Clause (i) – It was acknowledged by the parties that by the Award, the Arbitrator awarded to the Claimant, a gross amount of Kshs. 8,334,261.00.**

- **Clause (ii) – That however, the Defendants will pay to the Plaintiff the amount of Kshs. 7,145,870.00.**

- **Clause (iii) – That in addition to the said amount of Kshs. 7,145,870.00, the Defendants will**

also pay to the Plaintiff a figure equal to ¾ of the interest thereon computed at 12% per annum from the date of the Award until the date of the first payment by the Defendants.

- **Clause (vii) – That in the event of default of any one installment, full interest will immediately become payable on the whole gross amount of Kshs. 8,334,261.00, computed at 12% per annum and backdated from the date of the first payment, in addition to payment of the said net amount of Kshs. 7,145,870.00.**

Under the said Clause (vii) therefore, in the event of default, the Plaintiff was at liberty to enforce and/or execute the Decree. Despite the clear terms of the said Consent, the Defendants consistently flouted the payment timelines agreed upon in the said settlement and defaulted in payment of the installments.

By reason of such defaults and breaches, the said default Clause (vii) has therefore come into effect and we have simply come to Court praying that we be allowed to enforce or execute the Decree as a result of the breach of the Consent Order.

As at the time of filing the Application, the Defendants had only paid a told sum of Kshs. 5,500,000.00 and in light of the said default clause having come into effect, the balance still payable as at 22nd September 2013 was Kshs. 3,433,593.20 made up as computed at paragraph 16 of the Supporting Affidavit:"

9. The Applicant/Claimant maintained that it was not his remedy to review the consent Orders entered into or have the same set aside upon appeal. The Applicant/Claimant recognised the Consent Order and was merely seeking its enforcement. As a result, he maintained that the authorities cited by the Respondents being the **Lilian S** and **Raila Odinga** cases had been taken out of context and had no application whatsoever to the matter before Court. In response to the Respondents' contention that the Application was not premised on any law in Kenya, the Applicant/Claimant pointed to section 38 of the Civil Procedure Act upon which his Application was premised. That section dealt with the application of a Decree Holder in relation to obtaining execution of the Decree. In his view, the Court should not be seen to be assisting a defaulting party to defeat or to avoid its obligations voluntarily assumed under a Decree of Court. This was particularly so where the Decree was made pursuant to a Consent Order as between the parties. The Applicant/Claimant concluded by requesting the Court to dismiss the Preliminary Objection and order that the Application do proceed to hearing.
10. I have carefully perused the Notice of Motion dated 2nd October 2013 and the Supporting Affidavit thereto together with its annexures more particularly the copies of the letter dated 28th September 2012 addressed to the Deputy Registrar of this Court and signed by the advocates for both parties, which was lodged at the Registry on 30th November 2012. Arising out of that Consent Order a formal Order was extracted by the Court dated 18th December 2012. It is that Order, as well as the Order of adopting the Award of the Arbitrator made by **Mutava J.** on 13th July 2012, that the Respondents now claim to be the final Orders of this Court rendering it *functus officio*. The Respondents also maintained that those Orders cannot be disturbed unless on appeal or by review. Respectfully, I cannot agree with the position taken by the Respondents in this regard. Paragraph (vii) of the Order of 18th of December 2012 reads as follows:

"However, in the event of default of any one instalment, all interest shall immediately become payable on the whole gross amount of Kshs 8,334,261.00 computed at 12% per annum and backdated from the date of the first payment stipulated in Clause (v) (a) hereinabove in addition to payment of the said net amount of Kshs 7,145,870.00."

11. It is quite apparent from the correspondence passing between the parties' advocates exhibited as "JKM 4" to the Supporting Affidavit ending with the Respondents' advocates' letter to the Applicant/ Claimant's advocates dated 3rd September, 2013, that the Respondents have not settled the decretal amount in full. Even the Respondents' advocates in their said letter admit that there is a balance due of Shs. 1,645,870/=. Such sum appears not to have been paid, together with interest,

to date. Faced with this position, what was the Applicant/Claimant going to do to get his money? To my mind, he had no alternative but to file the present Application dated 2nd October 2013 seeking execution and retention of the *status quo* as between the parties. However, I am of the view that this Court is not *functus officio*. Further, in my view, the provisions of **section 38** of the *Civil Procedure Act* are perfectly clear as to the powers of this Court to enforce execution. It is this section which the Applicant/Claimant has based his Application before Court. It might have been clearer if the Applicant/Claimant had also included the provisions of **Order 22** in the preamble to his Application rather than citing **sections 3A, 1A and 1B** of the Act which incorporate the overriding principles and are not sections under which applications as the one before this Court should be brought/grounded. In view of the above, I have no hesitation in dismissing the Preliminary Objection accordingly with costs.

12. As a result, the Applicant/Claimant may now set down his Notice of Motion dated 2nd October 2013 for hearing by taking an appropriate date at the Registry.

DATED and delivered at Nairobi this 15th day of May, 2014.

J. B. HAVELOCK

JUDGE