



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIAGE, M'INOTI & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 61 OF 2019**

**BETWEEN**

**TELKOM KENYA LIMITED.....APPLICANT**

**AND**

**NYAMODI OCHIENG NYAMOGO.....RESPONDENT**

*(Application to review and correct errors arising in the ruling and order of the Court of Appeal (Mwilu, Kiage & M'Inoti, J.J.A) dated 29th November 2013*

**in**

**CA No. Nai. 144 of 2013)**

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**RULING OF THE COURT**

By a Motion on Notice dated 10th March 2017, **the applicant, Telkom Kenya Ltd (Telkom)** seeks only one substantive order, namely, review of an order of this Court. The prayer is worded as follows:

*“That the ruling and order of this Court made on 29.11.2013 in Civil Application No. Nai. 144 of 2013 (UR 97 of 2013) be reviewed and the same be corrected by deleting or clarifying what was meant by the order that ‘The applicant’s application dated 1st July 2013 be and is hereby allowed.’ ”*

The order that Telkom seeks to be corrected or clarified upon review seems to us so clear as to justify any correction or clarification. This is because all that the Court did in the ruling in question was to allow an application by **the respondent, Nyamodi Ochieng Nyamogo (Nyamogo)**, to deem a notice of appeal lodged by Telkom and dated 5th July 2012, withdrawn.

Apparently, Telkom wishes the Court to make further orders on matters that were never before it, which we must decline to be dragged into.

The short background to the application is as follows. On 22nd June 2012, Nyamogo obtained a judgment in the High Court against Telkom. Telkom, desirous of appealing to this Court, lodged a notice of appeal dated 5th July 2012. Back in the High Court, Telkom obtained an order of stay of execution of the decree on condition that it deposits in the High Court Kshs 37,000,000, **pending the hearing and determination** of its intended appeal in this Court.

Telkom duly deposited the money, but did not file its record of appeal as required by **rule 82(1)** of the

Court of Appeal Rules, and on 1st July 2013, Nyamogo applied to this Court to deem Telkom's notice of appeal as withdrawn. Nyamogo also sought further orders to vacate the stay of execution granted in the High Court and to direct that court to release the deposited sums of money.

Telkom did not respond to the application and did not appear at the hearing, even though its advocates were duly served with the hearing notice. After considering the application, the Court allowed Nyamogo's application and deemed Telkom's notice of appeal as withdrawn. The Court also awarded him the costs of the application. The consequence was that there was no longer an intended appeal pending before this Court. The question of the stay of execution granted by the High Court and release of the deposit held there were clearly issues for the High Court, and therefore this Court deliberately refused to be dragged into those matters.

Subsequently Nyamogo went to the High Court which released the deposit to him. It is apparent that the parties are now in a dispute regarding interest on the deposit, whether the deposit satisfied the decree, or whether Nyamogo was overpaid. It does not require rocket science to see that this Court has absolutely nothing to do with those disputes.

In his affidavit in support of the application now before us, **Mr Robert Irungu**, Telkom's learned counsel, claims that failure to delve into the issues of stay of execution and release of the deposit was a slip on the part of this Court. He contends further that when Telkom tried to recover excess payment from Nyamogo, he raised an objection, which the High Court agreed with, to the effect that this Court allowed Nyamogo to receive the deposit, and therefore the High Court had no jurisdiction to inquire into the matter.

A ruling by the High Court, (**Odunga, J.**), dated 15th

December 2016 states in the pertinent part as follows:

*“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 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.”*

Nyamogo opposes the application vide a replying affidavit sworn on 21st November 2017 in which he avers that the application before us is *res judicata* and an abuse of the process

of court because Telkom participated in the proceedings in the High Court leading to the release of the deposit to him. He further contends that the issues now raised by Telkom were never litigated in this Court, and therefore it is for the High Court to determine them.

As we have already stated, the only issue that was validly before us in the ruling dated 29th November 2013 was whether or not to deem Telkom's notice of appeal as withdrawn. We allowed the application and deemed the notice of appeal withdrawn. The effect of that ruling was that there was no appeal or intended appeal by Telkom pending in this Court. It was therefore for the High Court to deal with all the issues on release of the deposit and the amount that Nyamogo was entitled to. Those issues were never before this Court and we could not determine them in an application to deem a notice of appeal withdrawn. We advisedly and deliberately eschewed those issues.

With respect, Nyamogo is being mischievous and double-faced in the positions he took in the High and in this Court. In the High Court he contended that it had no jurisdiction. Yet before us, he claimed that only the High Court has jurisdiction, because the issues in contention were never before us!

There is absolutely no merit in this application. There is nothing to review, correct or clarify in our ruling. The issues raised by the parties are squarely for the High Court to address as there is no pending appeal in this Court. The basis upon which the High Court granted Telkom a stay of execution was Telkom's intended appeal in this Court, which the ruling of 29th November 2013 confirmed no longer exists. The ball has, since that ruling, been placed squarely back in the High Court. There is nothing left for this Court to clarify.

The application stands dismissed. However, to deprecate Nyamogo's mischief, we decline to award him costs, which he would otherwise have been entitled to. It is so ordered.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**