



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
(CORAM: KOOME, MWERA & GATEMBU, JJA)
CIVIL APPLICATION NO.NAI 254 OF 2013

BETWEEN

WESTMONT POWER (KENYA) LIMITED.....APPLICANT

AND

KENYA OIL COMPANY LIMITED.....RESPONDENT

(An application pursuant to the judgment of the Court of Appeal at Nairobi (Bosire, Waki & visram, JJA) dated 1st April, 2011

in

CIVIL APPEAL NO.154 OF 3003)

RULING OF THE COURT

The applicant company filed the notice of motion dated 20th September, 2013 under Section 91 of the Civil Procedure Act, Sections 3(2), 3(3), 3A, 3B of the Appellate Jurisdiction Act as well as Rule 57(2) of the Court of Appeal Rules with two substantive prayers:

- (i) ***that the respondent make restitution of all sums obtained by it from the applicant by a decree in HCCC 106/2002;***
- (ii) ***that the sums aforesaid be paid with interest at Court rates with effect from 1st May, 2003 until payment.***

The grounds in the body of the motion and the deposition in the supporting affidavit were presented by **Mr. A. Wandabwa**, learned counsel for the applicant while **Mr. A. A. K. Esmail**, learned counsel for the respondent opposed the application relying on the replying affidavit filed here on 5th June, 2014.

Mr. Wandabwa told us that the respondent/plaintiff in the HCCC 106/2002, got an *ex parte* judgment against the applicant, who had failed to file a defence, in the sum of Sh.33.9 million. Together with interest, the total came to Sh.38.2 million. The applicant applied to have that judgment set aside and or stay its execution so that the parties could go for arbitration. **Ombija, J** declined to grant the orders and the applicant appealed to this Court in Civil Appeal 154/2003, having so far paid Sh.36.6m of the decretal sum. On 1st April, 2011 the Court set aside the *ex parte* judgment and

ordered that:

“...the appellant’s application under section 6(1) of the Arbitration Act dated 13th March, 2002 be set down for hearing in the superior court...”

As for the prayer for the refund of the decretal sum paid to the respondent, the Court directed:

“...that the decretal sum paid to the respondent be deposited in an interest earning account in the joint names of the two advocates on record...within the next 21 days. If that cannot be accomplished for any reason within the timeframe stipulated herein, we order that the funds be deposited in court.”

In short **Mr. Wandabwa** argued that since the respondent had neither deposited the subject sum of money in the joint account of the advocates, nor deposited it in court and had also not moved to arbitration of their dispute, it should have paid it back to the applicant. Counsel added that in any event any arbitral proceedings had since been timebarred and therefore only a refund of the decretal sum was the viable option.

Mr. Esmail on his part started off by positing that Rule 57(2) of the Rules of this Court was inapplicable, because the direction of this Court to deposit the decretal sum was not an order of restitution as stated in the application but an order to deposit the sum pending the arbitration process. However, **Mr. Esmail** told us that even as the applicant was invoking the powers donated by Section 91 of the Civil Procedure Act here, it had done so earlier in an application heard by **Havelock, J.** who on 19th June 2013 declined to order restitution, finding that this Court on 1st April, 2011 had not ordered restitution but had simply directed that the respondent do deposit the subject sums as earlier noted.

Counsel added that earlier on **Kimondo, J.** had heard applicant’s application dated 12th March, 2002, and ordered that the proceedings in the suit be stayed so that the parties could refer their dispute to arbitration. This was quite clearly in line with this Court’s order/direction of 1st April, 2011 (above).

In sum **Mr. Esmail’s** position was that the Court having directed that the decretal sum be deposited and not that it should be refunded to the applicant, and, moreover, **Havelock, J.** also having found that restitution was not open to the applicant, the course the applicant should have taken, rather than file the present application, is to seek to execute this Court’s orders requiring the respondent to deposit and, probably thereafter the applicant could apply for payment out to itself.

On its part, so we heard, the respondent was considering to apply for a review of **Kimondo, J’s** order to go to arbitration so that the same could be set aside because arbitration proceedings had since been timebarred. **Mr. Esmail** did not think that the prayers sought here were merited.

Mr. Wandabwa responded that justice would be done if we varied/rescinded the order of 1st April, 2011, directing the respondent to deposit the decretal sum and instead ordered those sums to be refunded to his client. It would be unnecessary to execute the decree to deposit so that when the respondent does so, the applicant is obliged to go to court and seek orders to pay out. The respondent should not continue to benefit from the decretal sum which this Court directed that it should not keep or hold on. The sum should be refunded with interest. It is warranted and deserved in the circumstances, as stated in **Mulla’s Code of Civil Procedure, 16th Edition Page 13251333.**

In our view Rule 57(2) of the Court of Appeal Rules and Section 91 of the Civil Procedure Act do not directly answer the dispute before us, even if the two provisions have a bearing. Whereas Rule 57(2) of our rules essentially appears to lay focus on an order made by a single judge falling to be varied or even rescinded by that judge, or any other Judge of the Court, section 91 of Civil Procedure Act says that:

“91. (1) Where and in so far as a decree is varied or reversed, the court of the first

instance shall, on 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 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 reserval.

(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)."

It was under this Section 91 of the CPA among other provisions, that the applicant sought orders from Havelock, J for restitution in its application dated 11th May, 2012. As stated earlier, the learned Judge declined to grant restitution pointing out that this Court, in reversing the decision of the High Court, limited itself to ordering the respondent to deposit the decretal sum and accordingly no more could be read into that decision, including the relief of restitution.

In determining this matter we do not think that it will serve the interests of justice to direct, as Mr. Esmail argued, that the applicant should instead seek to execute this Court's decision of 1st April, 2011 directing the respondent to deposit the decretal sum and thereafter apply to have the deposited sums restituted to it. Neither are we of the opinion that the belated proposal/intention that the respondent is considering to apply to the High Court for setting aside ***Kimondo, J's*** orders for the parties to go to arbitration will serve any purpose. The latter course to seek setting aside ***Kimondo, J's*** orders, appears an exercise in futility since we were told that the arbitral process had been timebarred while the former to seek to execute this Court's orders to deposit, will unnecessarily consume time and other resources on the part of the parties, leading to the end result that the applicant will get restitution of the decretal sum. Accordingly, the path we take and which we believe will lead to the ends of justice in this matter is to allow the prayers laid, by varying our orders of 1st April, 2011 in the terms that the decretal sum be restituted to the applicant.

This we say, aware of the fact that the respondent did not comply with the Court's orders to deposit the said sum and has given absolutely no reason for that failure. It has also not explained why it did not proceed to arbitration, some two years down the line, to save the process from being timebarred. And finally we find it unconscionable, unfair and unjust after all the foregoing omissions that the respondent still holds onto the money it was paid in the decree that was reversed by this Court on 1st April, 2011. There is no justification to do this. It amounts to detriment to the applicant.

As regards payment of interest, we grant orders that the same be paid on the decretal sum to be restituted at court rates with effect from

1st May, 2003 as prayed.

Mulla (supra) says of restitution under Section 144 of the Indian

Civil Procedure Act, in similar wording as our Section 91, that:

"The restitution to be made must be such as will, so far as may be, place the parties in the position which they would have occupied but for the decree appealed from or such part thereof as has been varied or reversed."

And further that:

"Interest is part of normal relief given in restitution."

Finally we have arrived at the above decision cognizant of the well practised powers conferred on this Court in Sections 3(2), 3(3), 3A, 3B and 4 of the Appellate Jurisdiction Act.

In sum we make the following orders:

- (i) *that the respondent do make restitution of all sums obtained by it from the applicant pursuant to the decree in HCCC 106/2002 within the next thirty (30) days in default execution to issue; and*
- (ii) *the sums payable in (i) above, be subject to court rates of interest with effect from 1st May, 2003 until payment in full.*
- (iii) *Costs herein shall be paid by the respondent to the applicant.*

Dated and delivered at Nairobi this 11th day of July, 2014

M. K. KOOME

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR