



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2207 OF 2014

PETER NGARI KARIUKI.....CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

RULING

1. The Respondent/Applicant seeks through the notice of motion application dated 3rd May 2021 and expressed to be brought under Articles 50 & 159(2)(d) of the Constitution of Kenya 2010; Sections 88 of the Kenya Railways Corporation Act; Sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya; Order 1 Rule 10(2), Order 40 Rule 1, Order 45 Rule 1 and Order 57 of the Civil Procedure Rules, 2010 & any other enabling provisions of the Law. The Respondent/Applicant in the motion filed by the firm of Nyaanga & Mugisha Advocates seeks the following orders:-

i. *Spent*

ii. The Kenya Railways Corporation be granted leave to enter appearance in this suit.

iii. Pending the *inter-partes* hearing and determination of this application, an order be and is hereby issued staying execution of the Judgment and decree herein.

iv. An order be and is hereby issued directing the judgment creditor to forthwith and unconditionally release and/or cause to be released Motor vehicle registration number KCT 983Y, the property of Kenya Railways Corporation.

v. That this Honourable Court be pleased to review, set aside and/or vacate the order made on 9th September 2020 directing that the Judgment debt be paid by Kenya Railways Corporation and all consequential orders including warrants.

vi. That the costs of this Application be provided for.

2. The Respondent/Applicant premises the motion on the grounds that:-

i. On 7th December 2018 this court awarded the Claimant damages to be paid by the Respondent.

ii. Kenya Railways Corporation was not a party in the proceedings and did not take part in the trial nor was the judgment entered against it.

iii. On Friday, 29th April 2021 an auctioneer by the name B. Oduor T/A High Class Auctioneers purported to attach motor vehicle registration no KCT 983Y Ford Double cab, the property of Kenya Railways Corporation, in an alleged execution of the decree herein.

iv. The purported warrants and attachment of Kenya Railways Corporation's property is illegal, unlawful and null and void in view of the provisions of Section 88 of the Kenya Railways Corporation Act, which provides that no execution or attachment, or process in the nature thereof, shall be issued against the Kenya Railways Corporation or against any immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings.

v. Further, and pursuant to the said Section 88 of the Kenya Railways Corporation Act, no immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings shall be seized or taken by any

person having by law power to attach or distrain property without the previous written permission of the Managing Director.

vi. Accordingly, purported warrants and attachment is an affront to express provisions of an Act of parliament.

vii. Kenya Railways Corporation is a different and distinct entity from the Respondent herein and cannot and has never taken up its liabilities.

viii. Being unlawful and illegal *ab initio*, this court has power to order immediate release of the motor vehicle to prevent wastage, damage, and/or wrongful sale.

ix. The order made on 8th September 2020 directing that the Judgment debt be paid by Kenya Railways Corporation has no basis in law and is unfounded.

x. Kenya Railways Corporation will suffer undue prejudice, substantial loss and reputational damage if the orders sought in the present application are not granted.

xi. The present application is timely and without any inordinate delay.

xii. It is in the interest of justice that the reliefs sought herein are granted.

3. The Application is further supported by the annexed affidavit of Christine Macharia who in brief depones that the Respondent that is to say, Kenya Railways Corporation is a different and distinct entity from the Respondent herein, Rift Valley Railways (Kenya) Limited and cannot and has never taken up its liabilities. She urges the unconditional release of the Respondent/Applicant's motor vehicle to prevent wastage, damage, and/or wrongful sale. She asserts that she believes that the order made on 9th September 2020 directing that the Judgment debt be paid by Kenya Railways Corporation has no basis in law and is unfounded.

4. The matter was disposed of by way of submissions. The Respondent/Applicant submitted that the issues for determination were:-

- a) Whether this Honourable Court should review and/or set aside the Order issued on 8th September 2020;
- b) Whether the Claimant should unconditionally release motor vehicle registration number KCT 983 Y to the Corporation; and
- c) Whether the Affidavit sworn by Allan Ngure Kirika on 28th May 2021 should be struck off.

The Corporation submits that it was not party to the proceedings in which judgment was entered in favour of the Claimant against the Respondent herein, nor is the Corporation liable for the debts or liabilities of the Respondent and that these constitute sufficient grounds to issues an order of review. The Respondent/Applicant further submits that the Respondent and the Respondent/Applicant are two distinct legal corporate personalities in law and as such are each liable for their own debts, obligations and liabilities, and that the Corporation did not at any point take over the debts, obligations or liabilities of the Respondent. It asserts that these facts were not brought to the court's attention when the application for substitution was made *ex parte* by the Respondent/Applicant, and the court did not have the benefit of hearing from the Corporation before substituting the Respondent with the Corporation. The Respondent/Applicant submits that the Claimant hid these material facts from this court and as such should not be allowed to benefit from deception and unclean hands.

5. The Respondent/Applicant cited the Court of Appeal decision in **Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others [1997] eKLR** where the Court held that an *ex parte* Respondent/Applicant who fails to disclose material facts cannot be allowed to benefit from such non-disclosure. The Respondent/Applicant submitted that the Court expressed itself as follows:

"It is perfectly well-settled that a person who makes an *ex parte* application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained.

6. The Corporation submits that the Claimant misled this Honourable Court on the material facts. The Respondent/Applicant submits that the Concession Agreement dated 15th July 2017 only gave provisions for the absorption of the Respondent's employees by the Corporation, not its liabilities and as such, the result of this deliberate non-disclosure of material facts by the Claimant means that the Claimant is not deserving of the benefits of the Decree substituting the Respondent with the Corporation as the Claimant has approached court with unclean hands.

7. The Respondent/Applicant submits that the motor vehicle is the property of Kenya Railways Corporation as evidence submitted before this Honourable Court shows, and it should not be attached in satisfaction of any debts or obligations owed to the Claimant by Rift Valley Railways (Kenya) Limited. It referred to the log book marked annexure "CM1" on the Corporation's Supporting Affidavit to the Application dated 3rd May 2021. It submitted that Section 88 of the Kenya Railways Act prohibits the attachment of the property of the Corporation. It cited in particular 88(b) which provides that:

88(b)"Notwithstanding anything to the contrary in any law no immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Managing Director."

8. The Respondent/Applicant submitted that even where a person has a decree against the Corporation, he/she/it cannot attach the property of the Corporation for sale to satisfy the decree as that person shall make an application to the Managing Director to have the Director pay him/her/it from the Corporation's accounts by virtue of Section 88(a). The Respondent/Applicant submitted that indeed, Section 88 is very unequivocal as provides that notwithstanding anything contrary in any law and it therefore does not matter what any other law provides, the property of the Corporation is sacrosanct and cannot be subjected whatsoever to any attachment in satisfaction of any debt.

9. The Respondent submitted that the claim that the State Corporations Act (2012) repeals the Kenya Railways Corporation Act is baseless, misconceived, misinformed and misadvised as no single provision in the State Corporations Act (2012) repeals the Kenya Railways Corporation Act and the allegations to the contrary are false and baseless. It submitted that furthermore, the fact that there is no provision in the State Corporations Act (2012) that exempts the attachment of the assets of a state corporation does not matter as the provisions of Section 88 of the Kenya Railways Corporation Act are unequivocal that it does not matter what any law says, the assets of the Corporation cannot be attached. It submits that Sections 20, 21, 22, and 23 of the Interpretations & General Provisions Act as cited in the Replying Affidavit do not apply whatsoever and are irrelevant as there is no controversy in the interpretation of any provision of the law. The Respondent/Applicant submitted that the seizure of the motor vehicle registration number KCT 983Y by the Claimant and/or his agents was a direct and clear violation of the provisions of an Act of Parliament and the act of seizure was illegal *ab initio* as the Claimant did not have the prior written permission of the Managing Director. In the Corporation's humble view the motor vehicle registration number KCT 983Y should be returned immediately to the Corporation by the Claimant and/or his agents as it was unlawfully seized.

10. By way of background, the Claimant submits that sometime in the year 2006, the Judgement Debtor which was and still is a Government of Kenya (State) corporation and that it ceded its operations under concessionary arrangements to Rift Valley Railways Kenya Limited (RVR) of South Africa whose mandate was only to provide technical and management expertise over the running of all rail operations as well as management of the Human resources of the Judgement Debtor. However, RVR did not own any of the Corporation's fixed assets which remained in the name of the Judgement Debtor. The Claimant submitted that this concession arrangement lasted for about 10 years and the State recalled it. The Judgement Debtor resumed the management operations of the rail outfit as before to date and all this is in the public domain. The Claimant submitted that on 21st October 2014 during the said concession period, his were unfairly terminated leading to the filing of the Claim herein which was litigated for about 4 years. It was submitted that on 7th December 2018, the Hon. Mr. Justice Stephen Radido entered Judgement in favour of the Decree Holder for a sum of Kshs. 1,023,626/- together with costs which were subsequently taxed at Kshs. 181,788/-. The Claimant submitted that however, in February 2020 when he attempted to proclaim against RVR, the Auctioneer found that RVR had since folded up and ceded the rail operations back to the Claimant.

11. The Claimant submitted that on 24th June 2019, on the basis of operation of law, he wrote to the Judgement Debtor and served them with copies of the Judgement, Decree and Certificate of taxed costs and requested them to honour the same but they did not respond at all. The Claimant submitted that on 26th August 2020, he moved the Honourable Court with seeking orders that the Honourable Court do substitute the name of the Judgement Debtor from RVR to Kenya Railways Corporation Limited and consequently transfer the burden of the Decree of Kshs. 1,023,626/- together with Costs of Kshs. 181,788/- from RVR to Kenya Railways Corporation Limited and that the Respondent/Applicant was properly served. The Claimant submits that the matter was listed for *inter-partes* hearing on 8th September 2020 where the Judgement Debtor - Kenya Railways Corporation Limited – despite proper service of the substitution proceedings, as directed by the Honourable court, did not make an appearance and our said Prayers were granted. It was submitted that on 21st April 2021, High Class Auctioneers who had been appointed by the Decree Holder proclaimed Motor Vehicle KCT 930Y belonging to the Respondent/Applicant for auction so as to realize the decretal sum. However, this was not to be because on 7th May 2021, the Judgement Debtor deployed heavily armed Police officers who forced their way into the premises of Leakey's Auctioneers where the said Vehicle had been stored and without lawful authority and despite protestation by the Auctioneer, took away the said Motor vehicle. The Claimant submitted that the Respondent/Applicant's Notice to Cross-Examine ought to have been made by way of Chamber Summons in terms of Order 19 Rule 9 supported by a Supporting Affidavit. The Claimant submits that in filing the instant Application, the Respondent/Applicant is merely attempting to evade settlement of the decretal sum which is the product of litigation within clearly laid down rules of the Honourable court. The Claimant submits that it properly served the Respondent/Applicant with the substitution proceedings to replace the name of RIFT VALLEY RAILWAYS KENYA LIMITED with that of KENYA RAILWAYS CORPORATION LIMITED. The Claimant submitted further that in her Supporting Affidavit dated 3rd May 2021 and in the Supplementary Affidavit dated 30th June 2021, the Claimant's Deponent has not found it necessary to explain why Kenya Railways Corporation Limited chose to ignore the aforesaid service. The Claimant submitted that given the Judgement debtor's choice (sin) of omission, they made their bed, just let them lie on it.

12. The Claimant submitted that the principle of *Res Judicata* applied to the matter Notice of Motion and the subsequent Notice to Cross-examine (however irregularly drawn and filed as explained above) are *Res Judicata* and flatly fail the test laid out at Section 7 of the Civil Procedure Rules 2010 which provides:-

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

13. The Claimant submitted that the clear message herein, which need not belaboured is that litigation has to come to an end. The Claimant cited the case of **William Koross v Hezekiah Kiiptoo Komen & 4 Others [2015] eKLR** where the Court held that:

"The philosophy behind the principle of res judicata is that there has to be finality, litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation that does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go."

14. The Claimant submitted that further, this Court is *functus officio* as this Honourable court having concluded the main trial and the substitution proceedings is it did, the court is now *functus officio* and has ceased to have any more role in the matter. The Claimant cited the doctrine of *functus officio* as stated in the Court of Appeal in the case of **Telcom Kenya Ltd v John Ochanda [2014] eKIR** thus:

"*Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon. The general rule that final decision of a Court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.*"

15. The Claimant also cited the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** where the Supreme Court of Kenya cited with approval the following passage from "**The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law**" by Daniel Malan Pretorius where it is stated:

"...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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

16. The Claimant submitted that Odero J. in the case of **Dinesh Construction Company Limited v Kenya Sugar Research Foundation [2021] eKLR** where the learned Judge found merit in the Respondent/Decree Holder's Preliminary Objection dated 8th July 2020 and accordingly struck out the Respondent/Applicant's Notice of Motion dated 6th July 2020 with costs for similar reasons as herein. The Claimant respectively submits that this Court lacks Jurisdiction to entertain the Judgement Debtor's Application in its entirety and prays that the same is struck out and dismissed with costs for also being an abuse of court process

17. As to the notice to cross-examine the Advocate who swore the Replying Affidavit dated 28th May 2021 to the Notice of Motion dated 3rd May 2021. The Claimant relied on the guidance and Ruling of the J. A. Makau dated 29th April 2019 **International Community of Women Living with HIV Registered Trustees v N.G.O. Coordination Board & 2 Others [2019] eKLR** where the Learned Judge dealing with a similar question as the case herein held that

" 9. The learned authors of Halsbury's Laws of England, 3rd Edition, paragraph 845 state as follows with regards to affidavit:

"Affidavits filed in the High Court must deal only with facts which a witness can prove of his own knowledge, except that in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the services and grounds thereof are stated..... However, under Rule 9 of the Advocates (Practice) Rules, 1966, Advocates are not permitted to swear affidavits in contentious matters."

10. Under Rule 8 of the Advocates (practice) Rules, 1966 it is provided:

"No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear."

Reading from the above and by virtue of order 19 rule 3 of the Civil Procedure Rules, it is clear that affidavits should be confined to such facts as deponent is able of his own knowledge to prove. It therefore follows that Advocates, acting on behalf of their clients, should not swear affidavit on behalf of their clients, this is because the Advocate may be liable to cross-examination to prove the deponent matters. However this may not be embarrassing or wrong where the Advocate deposes on matters confined to such facts as the deponent is able of his own knowledge to prove. This therefore means not all affidavits sworn by Advocates are necessarily defective. An affidavit that is sworn by an Advocate which is confined on facts he is able of his own knowledge to prove and which does not disclose any matter requiring his cross-examination on is not in my view defective.

12. The petitioner in opposing the application relies on the case of Kamlesh M.A. Patni v Nasir Ibrahim Ali & 2 others CA 354/2004 adopted by the learned Justice Aburili in Factory Guards Limited v Factory Guards Limited [2014] eKLR; in dismissing an application for the striking out of an affidavit sworn by an advocate the court stated:

"...There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client... In the foregoing premises, the objection on the replying affidavit sworn by the respondent's counsel in opposition to the Respondent/Applicant's application cannot be sustained and I accordingly disallow it." "

18. The Claimant submitted that contrary to any possible insinuations by the Respondent/Applicant the said Replying Affidavit sworn by the Advocate representing the Decree Holder has dwelt primarily on matters of law and in the very unlikely event that any cross-examination thereof would be called for, there is no better person to be cross-examined than the Advocate himself as opposed to the Decree Holder. It was asserted that this submission is in line with Order 19 (Rule 3) of the Civil Procedure Rules 2010, which provides that affidavits shall be confined to such facts as the deponent is able to prove. The Claimant relied on the guidance by Article 159(2)(d) of the Constitution of Kenya 2010 which provides that justice shall be administered without undue regard to procedural technicalities. It was submitted that in light of the above, there does not appear to be any legal basis or justification at all to entertain the Judgement Debtor's Application to cross-examine the Advocate who swore the Affidavit, however ill-conceived, and the same ought to be treated with the contempt it deserves.

19. The Claimant submitted that it would be remiss not to highlight the Judgement Debtor's apparent disrespect of the authority of this Honourable court and here, specifically referring to the manner in which they have worded the headline on the page(s) in all their Applications filed in this matter wherein they have deliberately misrepresented that RIFT VALLEY RAILWAYS KENYA LIMITED is still the RESPONDENT and not KENYA RAILWAYS CORPORATION LIMITED and they have mischievously omitted to define/indicate their correct party position in the matter. It was submitted that it seems difficult for them to accept the reality, but the earlier it sinks the better -

that they are on record as the Judgement Debtor!! The Claimant submitted that in his considered opinion, the above constitutes disrespect and arrogance bordering on Contempt of the Court which has rightfully condemned the Judgement Debtor as the rightful Respondent which ought to adopt/carry the burden of the decretal sum following the aforesaid Substitution Proceedings where they were properly served but chose to ignore. The Claimant submitted that in further display of the lack of respect for Court orders the Judgment debtor had forcefully removed the vehicle from the yard where it was being held. The Claimant urged the grant of the orders sought.

20. I have set out the submissions of the parties and the gravamen of the Notice of Motion in order to cast the matter in its true light. The motion before me is crafted as an application seeking the setting aside of an order by the Court yet in substance is tantamount to a review. I am being asked to review the decision of Radido J. who allowed the substitution of the Respondent Kenya Railways Corporation in place of the former Respondent Rift Valley Railways (Kenya) Limited. The matters which have been the focus of the motion before me are fit for an appeal and not a review or setting aside as there is nothing this Court can do to overturn a decision of my brother Radido J. as I am neither an appellate Court Judge nor am I superior in the hierarchy of courts over Radido J. As such the motion is untenable and is dismissed with costs. Execution may proceed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

Nzioki wa Makau

JUDGE