Case Number:	Civil Appeal 130 of 2019
Date Delivered:	18 Dec 2020
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Rose Edwina Atieno Ougo
Citation:	Lawrence Ong’eni Mokaya v Alice Onserio [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon. S.N. Makila - SRM
County:	Kisii
Docket Number:	-
History Docket Number:	CMCC No. 238 of 2015
Case Outcome:	Appeal dismissed
History County:	Kisii
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 130 OF 2019

LAWRENCE ONG'ENI MOKAYA.....APPELLANT

VERSUS

ALICE ONSERIO.....RESPONDENT

(Being an appeal from the ruling and order of Hon. S.N. Makila (S.R.M.) delivered on 15th November 2019 at the Chief Magistrates Court at Kisii in CMCC No. 238 of 2015)

JUDGMENT

INTRODUCTION

1. Before me is an appeal against a ruling delivered on 15th November 2019 in CMCC No. 238 of 2015. The genesis of the appeal is an application dated 17th July 2019 which was filed by the respondent on 18th July 2019. The respondent had sought leave, through her application, to substitute the mode of execution of the decree in the suit before the trial court, from attachment of the appellant's salary, to a Notice to Show Cause why the appellant should not be committed to civil jail or any other form of execution she deemed necessary. The application was supported by the grounds on the face thereof and the affidavit of Mr. Fredrick Muyeya, learned counsel for the respondent.

2. Counsel averred that on 17th March 2016,a judgment in favour of the respondent was entered for the sum of Kshs. 450,000/=, together with costs and interest thereon at a rate of 14% from 10th November 2011 until payment in full. He averred that in a bid to execute the decree, the respondent applied for a Notice to Show Cause why a third of the appellant's salary should not be attached in execution of the decree. The court then ordered that a third of the appellant's monthly salary which amounted to Kshs. 6,407/= be attached in execution of the decree until payment in full. The appellant's salary was however not attached or paid directly from his employer as the appellant promised to pay the decretal sum in installments. The appellant paid a sum of Kshs. 200,000/= in cash and made several verbal promises to raise money and settle the decretal sum.

3. Counsel deposed that the respondent had had the matter mentioned in court severally to enable the appellant pay the balance of the decretal sum but he failed to do so. He claimed that as at the time he was swearing his affidavit, the decretal sum stood at an excess of Kshs. 1,500,000/=. He averred that from the record, the appellant had mortgaged his salary to other loans amounting to almost Kshs. 5,000,000/= which was, in his view, an indication that the appellant was a man of means but was unwilling to settle the decree in the suit.

4. He further deposed that based on investigations commenced by the respondent, it was discovered that the appellant had other movable and immovable properties which if liquidated were capable of settling the decretal sum at one go. He stated that he had also been informed by the respondent that the appellant had since been promoted to a much higher salary scale and was thus capable of settling the entire decretal sum. Counsel argued that it would be in the best interest of justice for the respondent to be allowed to change her mode of execution of the decree to enable her realize the fruits of her judgment.

5. In response to the application, the appellant swore an affidavit on 14th October 2019 and filed grounds of opposition dated 3rd September 2019. In the affidavit, the appellant deposed that he had paid a sum of Kshs. 200,000/= as well as other substantial payments made directly to the respondent and this demonstrated that he was willing to pay the decretal sum. He also stated that the respondent was aware that he had a loan when the judgment was delivered and at the time she applied for the attachment of his salary; hence, it would only be fair that he continue to pay Kshs. 6,407/= being a third of his salary as directed by the court, and pay more when he found the money elsewhere. The assertion that the unpaid decretal sum had accrued to Kshs. 1,500,000/= was dismissed by the appellant as being incredulous and without justification. The appellant also averred that the application was unmerited and thus fit for dismissal.

6. The appellant's grounds of opposition to the application dated 17th July 2019 were that the application was frivolous, vexations and otherwise an abuse of court machinery; was lacking in merit; was bad in law and was *res judicata*.

7. The trial court considered the parties' averments on the application and held that the respondent was right in her complaint that her right to enjoy the fruits of her judgment was being delayed since the appellant had not yet paid the full decretal sum, three years after the decree had been issued on 5thAugust 2016. Since execution by way of civil jail should be the last option the court directed the appellant to make a fresh, agreeable proposal on settlement of the decretal sum within thirty days of the ruling failure to which the respondent would be at liberty to seek a Notice to Show Cause why the appellant should not be committed to civil jail.

PARTIES' SUBMISSIONS

8. The appeal against the foregoing decision of the trial court was canvassed by way of written submissions which were highlighted by the parties' counsels orally.

9. The appellant's learned counsel submitted that the trial court erred by failing to hold that the respondent had not shown that she had exhausted all other means to secure payment and that the only option available was incarceration. It was argued that imprisonment as a way of recovering a civil debt went against Article 11 of the International Covenant on Civil and Political Rights and the court should have opted for alternative modes to execute the decree.

10. The appellant's counsel also argued that the decision of the trial court offended the doctrine of *res judicata* since the trial court had already made orders for execution of the decree. Counsel further urged that when the trial court ordered that a third of the appellant's salary be attached, the court became *functus officio*. It was therefore wrong for the court to make a subsequent order committing the appellant to civil jail which was tantamount to it sitting in appeal of its own orders.

11. He added that it was clear from the appellant's pay-slip that he had a loan and when he cleared it the one third of his salary would increase.

12. The respondent's learned counsel countered that the court had given the appellant adequate time to make a proposal on payment of the decretal sum but he had failed to do so. He accused the appellant of being evasive and failing to honor his promises to settle the decretal sum which stood at well over Kshs. 1,400,000/= at that time.

13. Regarding the appellant's contention that the application dated 17th July 2019 was *res judicata*, counsel submitted that the court was empowered to make such orders as would assist a decree holder to satisfy a decree including powers to extend, vary or change the mode of execution of the decree.

14. It was his submissions that the trial court was not *functus officio* since the law presupposed that once a court passed a decree it would do all that is necessary to assist the decree holder to lawfully execute the decree. He also submitted that the court that passes a decree is obligated to hear all matters pertaining to execution under section 29,30,31,33,34 and 38 of the Civil Procedure Act and that in this case the trial court had properly applied sections 34(1) and 38 of the Civil Procedure Act. He urged that it was only just that the respondent be allowed to substitute the mode of execution to enable her realize the fruits of her judgment.

15. The respondent's counsel added that after the court made the order to attach the appellant's salary, the appellant's counsel sought to vary those orders. The appellant paid Kshs.200,000/= but did not honor his promise to pay Kshs. 200,000/= per year. The appellant was therefore estopped from saying that he wanted to pay Kshs. 6,407/= since there were fresh terms of payment which had been partly done. He argued that the court's work only ended after the decretal sum was fully satisfied by the decree holder.

ISSUES, ANALYSIS AND DETERMINATION

16. Having regard to the material before this court, including the memorandum of appeal, the record of appeal and the parties' submissions, I find that the issues arising for determination are;

a. Whether the trial court erred in law and in fact in holding that the appellant provide an alternative mode of execution within 21 days of its ruling;

b. Whether the learned magistrate erred by failing to hold that the respondent had not shown that she had exhausted all other means to secure payment and that she had not demonstrated all the elements necessary for the arrest and committal of the appellant/judgment-debtor to civil jail;

c. Whether the respondent's application was *res judicata*;

d. Whether the learned magistrate erred by failing to find that she was *functus officio*.

17. From the issues I have enumerated above, there are two issues of preliminary significance which should be disposed of at the outset. The first is whether the application dated 17th July 2019 was *res judicata*.

18. The principle of *res judicata* is set out in **Section 7** of the **Civil Procedure Act** thus;

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 subsequently raised, and has been heard and finally decided by such court.

19. It will be necessary to set out the sequence of events following the delivery of the judgment by the court on 17th March 2016, in order to determine whether the respondent's application was *res judicata*.

20. The respondent herein had sued the appellant for a refund of Kshs. 450,000/= loaned to him vide an agreement dated 10th November 2011. The trial court found the suit against the appellant merited and ordered him to refund the respondent the sum of Kshs. 450,000/= together with costs and interest at court rates of 14% from 10th November 2011 until payment in full.

21. Subsequently, the respondent filed a Notice to Show Cause why a third of the appellant's salary should not be attached. When the appellant failed to respond to the Notice to Show Cause, the court directed the Teachers Service Commission to deduct a third of the appellant's salary and the same be forwarded to the respondent's advocate. Soon thereafter, the appellant's counsel filed an application dated 25th April 2017 seeking to vary those orders. The appellant asked to be allowed to pay Kshs. 6,407/= being a third of his salary directly to the respondent instead of having the same remitted by his employer. The appellant's counsel also indicated that the appellant was proposing to pay a sum of Kshs. 200,000/= each year but that proposal was not agreeable to the respondent's counsel.

22. In a mention before the court on 17th January 2018 the appellant's counsel informed the court that the appellant had paid a lump sum of Kshs. 200,000/= and urged the court to allow the application dated 25th April, 2017. In reply, the respondent's counsel argued that the application dated 25th April 2017 had been compromised upon the payment of Kshs. 200,000/= by the appellant. The court allowed either party to make the necessary application to conclude the matter.

23. On 26th March 2018, the appellant filed an application seeking to vary the judgment of the court on the interest rate payable. That application was dismissed by the court with costs to the respondent. It is at this point that the respondent caused the first Notice to Show Cause why the appellant should not be committed to civil jail to be issued. In a ruling dated 24th September 2018, the trial court found that it had endorsed the appellant's application to execute the decretal sum by attaching a third of the appellant's salary and no formal application had been made to substitute that mode of execution. It declined to proceed with the Notice to Show Cause before it until the proper procedure was followed. Following that ruling, the respondent moved the court through the impugned application.

24. The appellant argues that the application dated 17th July 2019 was *res judicata* since the court had already made orders for attachment of a third of the appellant's salary.

25. In the case of ***Uhuru Highway Development Limited v Central Bank of Kenya & 2 others Civil Appeal No. 36 of 1996[1996] eKLR***, the Court of Appeal held that the doctrine of *res judicata* applies in a similar manner to applications and there had to be an end to applications otherwise courts would be would be inundated by new applications filed after the original one was dismissed.

26. In this case however, I find that the issues raised by the respondent in his application dated 17th July 2019 were not substantially

or directly in issue before the court in the earlier application for execution of the decree and the application by the respondent was therefore not *res judicata*. The respondent raised new issues including the fact that the mode of execution that was in place at the time had become ineffective as the interest was accruing at a rate that would make it impossible for the appellant to settle the decretal sum in time. The respondent also argued that the appellant had been promoted to a higher scale and had other properties capable of settling the decretal sum.

27. Closely related to the issue of *res judicata* was the second preliminary issue which is whether, upon directing the appellant to remit a third of his salary to the respondent in satisfaction of the decretal sum, the court became *functus officio*.

28. The appellant referred this court to the following excerpt from the case of ***Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR*** where the Court of Appeal held as follows;

"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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

"The general rule that a 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. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,

2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"

29. The Appellate court went on to hold as follows;

"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

30. The persuasive authority of ***Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others Civil Suit No. 9 of 2011[2018] eKLR***, also offers useful insight on this issue;

"I understand the doctrine, like its sister, the res judicata rule to seek to achieve finality in litigation.

It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.

As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.

I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment -debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become functus officio. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before.

The following are just but examples:-

· Application for stay

· Application to correct the decree

· Application for accounts

· Application for execution including garnishee applications

· Applications for review

· Application under section 34 of the Act

If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed".

31. In the impugned application, the respondent sought to substitute the mode of execution of the decree from attachment of the appellant's salary to committal to civil jail or any other form of execution for the reason *inter alia* that the mode of execution obtaining at the time was not effective.

32. Execution proceedings are aimed at enforcing decrees issued by courts of law. The procedures applicable for execution of decrees are outlined in Order 22 of the Civil Procedure Rules. Under **Order 22 Rule 7 (2) (f)** thereof, the Civil Procedure Rules provide that when an application for execution of a decree is made, the applicant is required to state whether previous applications for execution of the decree were made and their results. This implies that more than one application for execution may sought if previous modes of execution do not lead to a satisfaction of a decree.

33. As held in the immediate foregoing authorities, the doctrine of *functus officio* does not a bar a court from handling consequent, complementary, supplementary and necessary facilitative processes to perfect its orders. The trial court was the court executing the decree in this case. It had a duty to hear and determine all questions pertaining to execution of a decree, as provided under **Section 34 (1)** of the **Civil Procedure Act.** It could hear an application to vary the mode of execution and was therefore not *functus officio* as argued by the appellant.

34. The appellant also faulted the trial court for directing him to provide an alternative mode of execution within 21 days failure to which the respondent would be at liberty to pursue a Notice to Show Cause why he should not be committed to civil jail. He argued that the respondent had not shown that she had exhausted all other means to secure payment and that she had not demonstrated all the elements necessary for his arrest and committal to civil jail.

35. **Section 38** of the **Civil Procedure Act** provides that execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree—

(i) is likely to abscond or leave the local limits of the jurisdiction of the court; or

(ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, *but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or*

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account. [Emphasis added]

36. The respondent, in her application dated 17thJuly 2019, claimed that the appellant had been promoted to a higher salary scale but had failed to present his latest pay slip to court in an attempt to defeat the execution of the decree. It was also averred that investigations had revealed that the appellant had movable and immovable property which if liquidated were capable of settling the decretal sum at a go. These averments brought the application to substitute the mode of execution to a committal to civil jail under *proviso* (b) of section 38 above.

37. The appellant was directed to pay a third of his salary to the respondent in satisfaction of the decretal sum. He did not refute the claim that he had been promoted to a higher scale nor did he dispute the averment that he had other movable and immovable property which could be liquidated in settlement of the decretal sum.

38. In its ruling, the trial court noted that the respondent was opposed to payment of the balance of the decretal sum in monthly installments of Kshs. 6,407/= as it would prolonger enjoyment of the fruits of the judgment. The court did however acknowledge that execution of a civil debt by committal to civil jail is mode of execution that should be resorted to as a last option. From the appellant's submissions, it would appear that the trial court issued a warrant for his arrest which was not the case.

39. The court offered the appellant an opportunity to come up with an agreeable proposal to settle the decretal sum failure to which the respondent could pursue a Notice to Show Cause why he should not be committed to civil jail. Since the judgment was delivered by the court on 17th March 2016, the decretal sum continues to accrue interest. The trial court's orders that the appellant comes up with a fresh, agreeable proposal on settlement of the decretal sum was aimed at expediting the conclusion of the matter. In my view, the court's directive was not only reasonable but was also in line with the overriding principles which call for expeditious and timely disposal of suits.

40. I therefore find no merit in the appeal. It is hereby dismissed with costs to the respondent.

Dated, signed and delivered via Teams at Kisii this 18th day of December 2020.

R.E.OUGO

JUDGE

In the presence of;

Applicant Absent

Respondent Absent

Ms. Rael Court Assistant