



REPUBLIC OF KENYA



**Landmark Holding Limited v Kinyua (Civil Appeal E113 of 2021)  
[2023] KEHC 25991 (KLR) (Civ) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25991 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E113 OF 2021**

**DAS MAJANJA, J  
NOVEMBER 30, 2023**

**BETWEEN**

**LANDMARK HOLDING LIMITED ..... APPELLANT**

**AND**

**ROBERT MACAHRIA KINYUA ..... RESPONDENT**

*(Being an Appeal from the Ruling and Order of the Hon. G.A. Mmasi, SPM dated 29th May 2020 at the Magistrates Court Nairobi, Milimani in CMCC No. 4055 of 2015)*

**JUDGMENT**

1. This is an Appeal against the Ruling and Order of the Subordinate Court dated 29.05.2020 where the Court dismissed the Appellant's application dated 23.01.2020 seeking the following orders:
  - a. This application be certified urgent and it be heard *ex-parte*, at this first instance.
  - b. There be interim stay of execution of the judgment and decree in this suit, pending the hearing and determination of this application, inter-parties.
  - c. The applicant be granted leave of the court to file and effect Notice of Change of Advocates in this suit in terms of the Notice of Motion dated 23<sup>rd</sup> January 2020 filed herein which should be validated.
  - d. The Court be pleased to order and declare that the defendant, as at 5<sup>th</sup> July 2019, having paid to the plaintiff a total of Ksh. 1,484,095/= as compensation against a decretal debt of Ksh. 1,387,569/=, the decretal debt be deemed to have been settled and satisfied and be discharged from any obligation to make further payments under the decree herein.



- e. In addition to and in the alternative and without prejudice to prayer d) above, the Court be pleased to take into account the sum of Ksh. 1,484,095/= so far paid to the plaintiff and to thereafter determine with exactitude any outstanding sum on the decretal debt in this suit consequent upon the decree dated 1<sup>st</sup> November 2017, the costs of the suit and interest thereon and in the event of a shortfall, the defendant, be given thirty days within which to settle the same if any.
- f. The costs of this application be provided for.
2. The grounds of the application were that despite the Subordinate Court having entered Judgment in favour of the Respondent in Milimani CMCC No. 4055 of 2015 which judgment was affirmed by the High Court in Nairobi HCCA No. 656 of 2017, the Respondent had been paid Kshs. 815,465.00.00 under the Work Injury Benefits Act which was never disclosed to the Court and which ought to be taken into account. That the Appellant's insurer, APA Insurance Co., Ltd paid the Respondent Kshs. 1,484,095.00 as against a decretal debt of Kshs. 1,387,569.00 as at 05.07.2019.
  3. In response to that application through the replying affidavit of his advocate, Tom Omao, sworn on 29.01.2020, the Respondent urged the Court to dismiss the application on the ground that the matter had been resolved by a Judgment and Decree hence the Appeal was an abuse of the court process.
  4. In the Ruling, the trial magistrate agreed with the Respondent that the trial Court could not amend or alter the Decree as the matter was already determined at the Appeal stage. Further, that the firm of Okong'o Wandago & Co., Advocates lacks capacity to file the application as leave to come on record ought to have been sought and granted first.
  5. The thrust of the Appellant's appeal as contained in the Memorandum of Appeal dated 08.03.2021 is that the trial magistrate failed to substantially deal with prayers (d) and (e) of the application which resulted in an injustice. The parties filed written submissions which I have considered.
  6. Before I deal with the substantive issues raised in the application, I propose to dispose of the issue whether Okong'o Wandago & Co. Advocates were properly on record. Order 9 rule 9 of the Civil Procedure Rules makes it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. In this case, the application for leave was in fact filed. The application was served on Wangari Muchemi & Co. Advocates who did not oppose it. It was therefore within the power of the trial magistrate to grant leave and deem the application as duly filed.
  7. It must be recalled that the purpose of such an application is to protect the interests of the previous advocates on record and if that advocate does not oppose the application, no prejudice is occasioned to the Respondent (see S. K. Tarwadi v Veronica Meuhlmann [2019] eKLR). I therefore hold that the trial magistrate erred by striking out the application without considering dealing with application for leave.
  8. On the substantive issues, it is not in doubt that the Judgment of the trial court was affirmed by the High Court on 14.06.2019. The issue as I understand is not the amendment of the decree but to ascertain whether the Appellant has paid the judgment debt or whether it has overpaid the Respondent. In other words, the Appellant seeks reconciliation of payment made which is a matter within the jurisdiction of the trial court.
  9. For the reasons I have set out above, I allow the Appeal on the following terms:



- a. I grant leave to the firm of Okong’o and Wandago and Company Advocates to come on record for the Appellant in place of Wangari Muchemi & Co. Advocates and the application dated 23.01.2020 be deemed as duly and properly filed and served.
- b. The application dated 23.01.2020 is remanded back to the Subordinate Court to determine the amount due to the Respondent.
- c. Each party shall bear its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**D. S. MAJANJA**

**JUDGE**

Mr Odhiambo instructed by Okong’o Wandago and Company Advocates for the Appellant.

Ms Mwangi instructed by Omao Omosa and Company Advocates for the Respondent.

