



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CIVIL APPEAL NO. 10 OF 2017**

**THE CLERK OF THE NATIONAL ASSEMBLY**

**THE PARLIAMENTARY SERVICE COMMISSION.....APPELLANTS**

**VERSUS**

**KAUNDA ROBERT KEARI.....1<sup>ST</sup> RESPONDENT**

**HON. RICHARD NYAGAKA.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The appellant has filed an application dated the 8<sup>th</sup> November 2019. The application is brought under Article 159(2) (b) and (d) of the Constitution; Section 1A, 1B and 3A of the Civil Procedure Act; Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant seeks the following orders;

i. Spent

ii. *That pending the hearing of the application inter-partes, the Court be pleased to issue orders of stay of proceedings of order the arrest of the Ruling in Kisii Chief Magistrate in Kisii Chief Magistrate's Court Civil Suit No. 483 of 2015 Kaunda Robert Kears Vs. Hon Richard N.Tongoi, The Clerk of the National Assembly, The Parliamentary Service Commission and the The Hon. Attorney General slated to be delivered on the 13<sup>th</sup> November 2019, the Chief Magistrate Hon. N. S. Lutta.*

iii. *That pending the hearing of the application inter-partes, the Hon. Court be pleased to issue orders of stay of proceedings of order the arrest of the Ruling in Kisii Chief Magistrate in Kisii Chief Magistrate's Court Civil Suit No. 483 of 2015 Kaunda Robert Kears Vs. Hon Richard N.Tongoi, The Clerk of the National Assembly, The Parliamentary Service Commission and the The Hon. Attorney General slated to be delivered on the 13<sup>th</sup> November 2019, the Chief Magistrate Hon. N. S. Lutta, and or, any other further proceedings thereof.*

iv. *That the Honourable Court be pleased to clarify its judgment and decree by Lady Justice R.E. OUGO at Kisii high Court on Wednesday 27<sup>th</sup> February 2019, with regards to the period of occupation of the suit premise.*

v. *That the costs of the application be costs in cause.*

2. The application was opposed by the Respondent. The application is supported by the affidavit of Sheriffsam Mwendwa dated the 8<sup>th</sup> November 2019 and grounds on the face of the application. He is an advocate and the deputy director, directorate of litigation and compliance services at Parliamentary Service Commission. In his affidavit he gives a background of the Notice of Motion dated the 8<sup>th</sup> of November 2019. According to him an appeal was filed from Kisii Chief Magistrate, Civil Suit No.483 of 2015 Kaunda Robert Kears vs. Hon Richard N. Tongoi, The Clerk of the National Assembly, The Parliamentary Service Commission and the Hon. Attorney General. That on hearing the appeal this court set aside the judgment and decree of the lower court and ordered the appellant to pay the 1<sup>st</sup> Respondent accrued rent in the sum of Kshs.35, 000/- per month for the period in which there was occupation. That thereafter the appellant forwarded a draft decree of the High court judgment to the appellant for approval and it was amended and sent to the respondent. The amendment were in relation to the period in occupation. That whilst waiting for the approval of the decree as amended the appellants were served with the application dated the 17<sup>th</sup> June 2019 in Kisii CMCC no. 483 of 2015 seeking a release of the funds to the 1<sup>st</sup> Respondent (Plaintiff in Civil Suit No. 483 of 2015). That the appellants filed a notice of objection to the application filed by the 1<sup>st</sup> Respondent in Kisii CMCC No. 483 of

2015 on the grounds that the 1<sup>st</sup> Respondent had not followed the requisite procedure in extracting and seeking to execute the decree. That as the decree was being extracted the Deputy Registrar (DR) directed that the appellant's legal clerk to amend the draft decree which had indicated the specific period of occupation to align it with the High Court Judgment and the said decree was served upon the advocate of the 1<sup>st</sup> Respondent. That the parties appeared before Hon. Lutta on the 6<sup>th</sup> August 2019 who directed that the parties file their responses and submissions both on the preliminary objection and the application. That on the 30<sup>th</sup> of September 2019 when the parties appeared before Hon. Lutta to confirm compliance he noted that the 1<sup>st</sup> Respondent had purported to extract another set of the High Court decree dated the 9<sup>th</sup> May 2010 from the High Court file signed by the same DR. The decree extracted indicates the period of occupation of the suit premises to be from April 2014 to September 2017 instead of 25<sup>th</sup> May 2014 to 15<sup>th</sup> March 2016, that this according to the letter of termination of the 1<sup>st</sup> Respondent leased dated the 15<sup>th</sup> February 2015. That this court should clarify its judgment as the period of occupation of the suit premises and that the ruling pending on the 13<sup>th</sup> November 2019 be stayed and arrested, as there is danger that if the ruling is not stayed then the 1<sup>st</sup> Respondent will proceed with execution and access more money than he deserves.

3. The application was opposed. The 1<sup>st</sup> respondent filed a replying affidavit dated the 27<sup>th</sup> of November 2019. He depones the court delivered its considered judgment on the 27<sup>th</sup> February 2019 giving its reasoning settling the appeal on terms clearly set. That court in its reasoning considered part V of the constituency offices regulation 2006, which provides, 'The commission shall pay all expenses including rent, telephone, power and lightning, water and other incidentals cost relating to a constituency office for one month after the member vacates his seat'.

4. That the Member of Parliament vacated office in August 2017 and therefore one month after vacating office would mean September 2017. That the judgment of 27<sup>th</sup> February 2019 is clear on the period the rent due to the 1<sup>st</sup> respondent is payable and that the plaintiff cannot set its own terms on payment. That the DR prepared and signed a decree in terms of the judgment delivered by this court, but the applicant exerted pressure on the DR and obtained another decree which is not clear on the period for which the rent is payable in terms of the Court's judgment made on the 27<sup>th</sup> February 2019. That the court having pronounced itself on appeal vide its judgment the court is *functus officio*, and that there is nothing for the court to adjudicate upon and more so the period of occupation. That the application before the court dated the 8<sup>th</sup> November 2019 is within the special powers of the DR of the Court in terms of the provisions of order 49 rule 7 of the Civil Procedures Rules and that the application should not be entertained by this court. That this court can only exercise its appellate jurisdiction over the power of the Registrar upon an appeal to the decision of the Registrar being filed in strict compliance with the provisions of order 49 rule 7(3) of the civil procedure rules and not the application before the court. That no appeal has been filed against the decision of the DR to sign the decree in terms of the provisions of order 42 of rule 33 of the civil procedure code which is the subject of this application. That the court has no jurisdiction to make the orders prayed for in the application dated the 8<sup>th</sup> November 2019.

5. In addition Counsels made oral submissions. The applicant reiterated the contents of the applicant's supporting affidavit. Counsel sought to have the court clarify its judgment. Reliance was made on CA No. 165 of 2008 to support this request. In response the respondent too reiterated the contents of its affidavit maintaining the judgment was clear on the period of occupation. Counsel distinguished the cases cited by the applicant. It was further submitted that the court is not being asked to review its judgment or stay its judgment or stay of the proceedings as the application is brought under Article 159 of the Constitution.

6. In response it was submitted that the Deputy Registrar has no powers to expound on this court's judgment and can only lift the terms of the judgment into a decree, as happened. That the Deputy Registrar expounded on the judgment and issued the decree on the 30<sup>th</sup> July 2019, subsequent to the decree she issued on the 9/5/2019. That it is the reason they are before this court. That under order 21 rule (8) (4) when there is a disagreement on the terms of the decree the matter is listed before the court for resolution and on that basis they are asking the court to rectify the record.

#### **ANALYSIS AND DETERMINATION**

7. Having considered the submissions made the issue between the parties is the 2 decrees which were drawn by the DR dated the 9/5/2019 and 30/7/2019. The applicant seeks to have this court clarify its judgment on the period of occupation. It has been correctly submitted that when there is a dispute on the draft decree then the provisions of order 12 (8) (4) of the civil procedure must be adhered to. Order 21 rule (8) (4) provides as follows;

***“On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties”.***

This process has not been followed by the applicant. It is quite obvious that the parties ought to have gone before the Deputy Registrar who would then list the matter in chambers before the judge. I note that the matter which the Deputy Registrar was to refer to this court is the subject of the application before me. A proper decree will only be drawn once I clarify what the applicant states was misinterpreted by the 1<sup>st</sup> respondent. Though a process has been skipped I find that no prejudice will be caused to any of the parties if I clarify what the orders in my judgment. The respondent at most shall be entitled to costs of the application.

8. In my judgment dated the 17<sup>th</sup> February 2019, I held that the rent was Kshs. 35,000/- . I set aside the judgment of rent at Kshs. 51,000/- and entered judgment for 1<sup>st</sup> respondent for rent in the sum of Kshs.35, 000/- per month for accrued rent for the period the appellant/applicants were in occupation. This court held that the magistrate did not err by finding that there was a lease between the 1<sup>st</sup> and 2<sup>nd</sup> respondent. The plaint filed by the 1<sup>st</sup> respondent sought damages against the applicants for accrued rent for years **2013-2014, 2014-2015 and 2015-2016** at the scale of 51,000/- per month. In my view this was the period the 1<sup>st</sup> respondent sought damages for and not any period beyond that, it was the period the applicants were in occupation. The court's judgment is that the rent accrued rent to be paid was at Kshs. 35,000/- per month the period the applicants were in occupation. The judgment did not state that it was from April 2014 to one month after the expiry of the 1<sup>st</sup> respondent's term of office September 2017. This is a misinterpretation of the judgment. This ruling now clarifies the

period to be indicated in the decree to be drawn. On costs I award the 1<sup>st</sup> respondent costs for reasons that the applicant failed to follow the procedure set out in order 21 rules (8) (4) of the Civil Procedure Code. The orders on stay of proceedings is set aside. This Ruling shall be served on the Deputy Registrar.

**Dated, signed and delivered at KISII this 20<sup>th</sup> day of February 2020.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Mohammed                      For the Applicant**

**Mr. Begi                                For the Respondents**

**Ms. Rael                                Court Assistant**