



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 2 OF 2017

PRIME ROCK COMPANY.....APPELLANT/APPLICANT

VERSUS

JOSEPH MWANGI NDEGWA.....RESPONDENT

RULING

1. The application is a Notice of Motion dated the 26th April, 2019 and was brought under the provisions of Sections 1A, 3, 3A, 63 and 96 of the Civil Procedure Act and Order 42 Rule 2 and 51 of the Civil Procedure Rules and all other enabling provisions of the Law; the applicant seeks the following orders;

- (i) That the applicant be provided with a certified decree without payment of further court fees;
- (ii) That the costs of this application be borne by the respondent.

2. The applicant places reliance on the grounds on the face of the application and on the Supporting Affidavit made on the same date by **DUNCAN WAWERU** who deposes that he is the counsel on record and competent to swear the affidavit;

3. At the hearing of the application the applicant was represented by learned counsel Mr. Duncan Macharia whereas the respondent was represented by learned counsel Mr. Ombongi; both counsel made oral submissions; hereunder are the parties rival submissions;

APPLICANTS CASE

4. The applicant argues that the respondent amended its claim in the lower court which then attracted further court filing fees; the fees was not paid and hence the decree cannot be extracted; consequently the appellants Record of Appeal remains incomplete; that on the 25/01/2019 this court ruled that the onus of payment of the further fees was upon the respondent; the applicant contends that the respondent appears not to be keen on paying and is thus causing a delay in the disposal of the instant appeal;

5. The applicant prays that it be allowed to extract the decree without payment of court fees;

RESPONDENTS CASE

6. In response counsel submitted that the application is not supported by any provision of law; that he was unable to pay the further court fees because the appellant has failed to satisfy the lower courts award made to the respondent in the sum of Kshs.879,043/-;

7. The respondent prayed that the appeal be dismissed for inaction on the part of the appellant/applicant.

ISSUES FOR DETERMINATION

8. After hearing the respective submissions this court has framed only one issue for determination; which is whether to allow the applicant to extract the decree without payment of further court fees;

ANALYSIS

Whether to allow the applicant to extract the decree without payment of further court fees

9. Upon perusal of the court record it is noted that the trial court allowed the respondent to amend its claim which then attracted further court filing fees; the court in exercise of its discretion proceeded to dispose of the case without the payment of the further fees; the assumption was

that the further court fees would eventually be recouped through the means of withholding of the extraction of the decree, as is the case herein;

10. On the 25th January, 2019 there is a ruling on which party should pay the court fees so as to make the decree available; the Hon. Lady Justice Matheka held that the respondent was the party obligated to pay the further court fees as he was the party that had lodged the claim; and that he could not enjoy the fruits of his judgment without first having paying the court fees; but also stated that the applicant herein ***“still has a window, to await this to happen. Obviously the record of appeal is not complete without the decree and the appellant herein would not be able to pursue the appeal. It can only sit and wait or be philanthropic.”***

11. In light of the above extract from the Honorable Judge’s ruling; the question that arises is whether this court should entertain such an application which is technically ***“res judicata”***;

12. The instant application is on the same subject matter which was for the determination on the whether the respondent should pay the further court filing fees; the parties to the dispute are also the same and there is a determination made by a court of competent and concurrent jurisdiction;

13. Even if the applicant were seeking for the review of the order made on the 25/01/2019 this court has to take into consideration the applicable provisions of the law found at Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Code; under these provisions of law this court has restricted and fettered powers of review;

14. The question that then arises would be whether the applicants has grounds that meet the threshold for review; after hearing submissions made by counsel for the applicant this court finds no substance in the grounds argued to warrant an order for the review of the order made on the 25/01/2019;

15. This court is satisfied that the trial court exercised its discretion under the provisions of Section 96 of the Civil Procedure Act on the strength that the further court fees would be recovered upon the extraction of the decree; even at this appellate stage the same court fees can only be recoverable upon the extraction of the same decree;

16. The instant application is found to be misplaced; and this court finds no good reason to order for the extraction of the decree without the payment of the further court fees; this court can only reiterate the observations made by the Honorable Judge Matheka in the ruling that the applicant ***“...can only sit and wait or be philanthropic.”***

FINDINGS AND DETERMINATION

17. In the light of the foregoing this court makes the following findings and determinations;

(i) The application is found lacking in merit and it is hereby dismissed.

(ii) Each party shall bear its/his own costs of this application.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 24th day of July, 2020.

HON. A. MSHILA

JUDGE