



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 163 OF 2019**

**SYSTEMEDIA TECHNOLOGIES LTD.....PLAINTIFF**

**VERSUS**

**GRACE MATHEKA .....1<sup>ST</sup> DEFENDANT**

**UPSTATE AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**MORAN AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**GREAT RIFT VALLEY AUCTIONEERS.....4<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. On 28<sup>th</sup> March 2018, the Appellant filed its Notice of Motion application seeking a stay of execution of the Ruling and orders of the Trial Magistrate Hon I. Orange (Senior Resident Magistrate) that was delivered on 2<sup>nd</sup> March 2018 and an order of injunction to restrain the Respondents from levying distress amongst other remedies.
2. It was granted an order for stay of execution on 6<sup>th</sup> April 2018, which orders, were subsequently extended until 18<sup>th</sup> June 2019 when it and the Defendants entered into a consent that was endorsed and adopted as an order of this court.
3. The terms of the consent were that the aforesaid application would be allowed in terms of Prayer No (3) therein on condition that it deposited a sum of Ksh 1,000,000/= being part of the accrued rent by 11<sup>th</sup> July 2019 failing which the order for stay of execution pending appeal would automatically lapse. It was therefore directed to file a Record of appeal.
4. The matter came up in court several times for purposes of confirming that the lower court file had been placed in the file herein. The Record of Appeal dated 17<sup>th</sup> September 2018 was duly filed on 18<sup>th</sup> September 2019. Thereafter, it filed a Supplementary Record of Appeal on 20<sup>th</sup> December 2019.
5. On 23<sup>rd</sup> January 2019, parties asked this court to give directions on the hearing of the Appeal and it gave its directions on the filing of the respective parties' Written Submissions. As both parties duly complied, the court reserved its judgment herein.
6. However, at the time of writing the Judgment, this court noted that due to an inadvertent on its part which was not pointed out by the parties, it gave directions on the filing of written submissions before the Appeal had been placed for directions before a Judge under Section 79B of the Civil Procedure Act Cap 21 (Laws of Kenya).
7. The said Section 79B of the Civil Procedure Code provides as follows:

**“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.**

8. Order 42 Rule 11 of the Civil Procedure Rules stipulates that:-

**Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under Section 79B of the Act.**

9. Order 42 Rule 13 of Civil Procedure Rules further provides as follows:-

**1. On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.**

**2. Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.**

**3. The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.**

**4. Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—**

**a. the memorandum of appeal;**

**b. the pleadings;**

**c. the notes of the trial magistrate made at the hearing;**

**d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**

**e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**

**f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**

**Provided that—**

**i. a translation into English shall be provided of any document not in that language;**

**ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).**

10. It is evident from the provisions of Section 79B of Civil Procedure Act that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in Order 42 Rule 11 of the Civil Procedure Rules that states as follows:-

11. It is therefore clear that an appeal cannot proceed for hearing and determination before the aforesaid steps have been taken.

12. This court therefore found it prudent not to write the judgment so that the correct procedure could be followed and thus regularise the position.

### **DISPOSITION**

13. For the foregoing reasons, this court hereby directs that its judgment herein be and is hereby deferred and directs that the file be placed before the Deputy Registrar, High Court of Kenya Milimani Law Court Civil Division to enable her place the file before a Judge for directions under Section 79B of the Civil Procedure Code and thereafter, the file be returned to this court so as to write its judgment herein. Matter to be mentioned on 18<sup>th</sup> December 2019 to confirm compliance and/or for further orders and/or directions.

14. It is ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of October 2019**

**J. KAMAU**

**JUDGE**