



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 656 OF 2017**

**LANDMARK HOLDINGS LTD.....APPLICANT/APPELLANT**

**VERSUS**

**ROBERT MACHARIA KINYUA (Suing as the Legal**

**representative of the estate of GRACE MWARI KIMOTHO.....RESPONDENT**

**RULING**

1. This ruling is in respect of two applications which were heard simultaneously.
2. The application dated 19<sup>th</sup> January, 2018 principally seeks orders that the Court orders issued on 17<sup>th</sup> January, 2018 dismissing the notice of motion dated 24<sup>th</sup> November, 2017 for non attendance be set aside and the application be reinstated.
3. It is stated in the grounds and the affidavit in support of the application that a new clerk at the Applicant's counsel's firm failed to diarize the matter, hence the failure to attend court and the consequent dismissal of their application dated 24<sup>th</sup> November, 2017 which sought orders of stay of execution pending appeal. A supplementary affidavit was sworn by counsel for the Applicant indicating payments of the decretal sum totaling Ksh.813,465/= before the conclusion of the suit in the Lower Court file.
4. In opposition to the application, it is stated in the replying affidavit that the application is an afterthought meant to delay the Respondent from enjoying the fruits of his judgment. That the name of the court clerk in question has not been disclosed and that the execution process has already begun.
5. The application dated 14<sup>th</sup> February, 2018 seeks orders *inter alia* that the Plaintiff either by their servants, agents, Mwose & Company Auctioneers be and are hereby restrained from proceeding with attachment of the Appellant's/Applicant's goods pending the hearing of notice of motion dated 19<sup>th</sup> January, 2018.
6. Secondly, that the Respondent be condemned to pay the auctioneers fees.
7. It is stated in the grounds and the affidavit in support of the application that the Applicant was not served with the draft decree before the execution process was commenced.
8. The application is opposed. It is stated in the replying affidavit that the Lower Court assessed the costs and issued a decree before the auctioneers were instructed. That the attachment of the Applicants goods is therefore regular. The Respondent decried the multiplicity of the Applications herein and the duplicity of the prayers sought in the application dated 14<sup>th</sup> February, 2018 and the application dated 24<sup>th</sup> November, 2018.
9. I have considered the applications, the responses to the same, the law and the submissions made by the counsels for the respective parties herein.
10. On whether to reinstate the application dated 24<sup>th</sup> November, 2017 which sought orders for stay of execution pending the hearing and determination of the appeal, the failure to attend court has been explained. The mistake is excusable and the Applicant should not suffer the fate of having the application not heard on merits. The application for reinstatement has also been made without inordinate delay. No prejudice will be suffered which cannot be compensated by way of costs.
11. Turning to the issue of the attachment of the Applicants goods by the auctioneers, the Applicants contention that they were not served

with the draft decree is not rebutted by any evidence. The Respondent has in his submissions argued that failure to serve the draft decree before commencing the execution process is not fatal. He relied on the case of **Eco Bank Ltd v Elsek (Kenya) Limited & 3 others [2015] eKLR** where it was held:

**“The Plaintiff has not denied it did not forward the draft Decree for approval as provided under the above mentioned Rules. what is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. it would only lead to the setting aside of the execution if the Decree was shown not to conform the judgment....”**

12. Order 21 rule 8 Civil Procedure Rules provides for the preparation and dating of a decree. The party who prepares the draft decree forwards it to the other party for approval before the draft is forwarded to the Deputy Registrar for purposes of signing and sealing if the decree is drawn in conformity with the judgment. There is no claim herein that the decree has not been drawn in accordance with the judgment. The Applicant has not denied that he was aware of the judgment. On the other hand the Respondent has not shown that he forwarded the draft decree to the Applicant for approval.

13. What is the import of the above scenario? The provision for the forwarding of the draft decree to the other party for approval serves a purpose. Even in the cases where the decree is correctly drawn, the preparation of the decree signals readiness of the Decree Holder to commence the execution process. The Applicant would have been alerted of the preparation of the decree and probably taken steps to secure his interests. I therefore agree with the Applicant’s counsel’s submissions that the decree was irregularly obtained without due process being followed.

14. It is noted that there is no complaint that the decree does not agree with the judgment. The setting aside of the decree will therefore serve no useful purpose. In this regard I am in agreement with the decision in **Eco Bank Limited** case (supra) that failure to forward the decree to the other party for approval should not lead to the setting aside of the execution process. The Respondent should however bear the costs occasioned by the irregularity. The Ksh.813,465/= payment made ought to be also taken account.

15. With the foregoing, I allow both applications on condition that the decretal sum less Ksh.813,469 be deposited in a joint interest earning bank account of the counsels for the parties herein or in court within 30 days from the date hereof. The costs of the two applications to the Respondent.

Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of May, 2018

**B. THURANIRA JADEN**

**JUDGE**