



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 1223 OF 2001

DR. JOSIAH M. KINAMA.....1ST PLAINTIFF/RESPONDENT

DR. LAWRENCE M. MUSAU.....2ND PLAINTIFF/RESPONDENT

VERSUS

MILKA WANZA KITUNDU, JOHN MUTHUI KITUNDU

& SOLOMON NDUNGA KITUNDU (Being the Personal

Representatives/Administrators of the Estate of SOLOMON

KITUNDU MUNYWOKI (Deceased).....DEFENDANTS/APPLICANTS

RULING

1. The application dated 29th August, 2017 seeks orders that:

“1. That the decree issued by the honourable court on the 23rd September, 2015 be recalled and cancelled.

2. The Honourable court be pleased to issue a decree that is in accordance with the judgments of the honourable court of 19th December, 2011 and 31st October, 2014.

3. That the costs of this application be borne by the Plaintiffs.”

2. It is stated in the grounds and the two affidavits in support of the application that the decree issued on 25th September, 2015 does not agree with the preliminary consent judgment passed on 19th December, 2011 and the final judgment of 31st October, 2014 and this violates Order 21 rule 7 Civil Procedure Rules. The Applicants' contention is that there ought to have been a separate preliminary decree in terms of the consent order and a final decree in terms of the final judgment.

3. The application is opposed. It is stated in the replying affidavit that the decree was extracted, sealed and signed in accordance with the Civil Procedure Rules. It is further stated that there is no requirement for issuance of two separate decrees as contended by the Applicants.

4. The application was disposed of by way of written submissions. I have considered the said submissions.

5. On 19th December, 2011 the parties recorded a consent judgment as follows:

“1. Judgment be and is hereby entered for the Plaintiffs against the Defendants in the sum of Ksh.650,000/=.

2. The sum of Ksh.650,000.00 deposited in court by the Defendant on 10th May, 2011 shall be forthwith released to the Plaintiffs through the Advocates on record.

3. It is hereby agreed that the following are the outstanding issues for trial.

(i) Interest on the principal sum.

(ii) Damages for breach of contract

(iii) Costs of the suit.”

6. On 31st October, 2014 judgment was entered dismissing the Plaintiff’s claim for special interest and damages. The court awarded half of the costs of the suit to the Plaintiff.

7. I have considered both the drafts of the preliminary decree and the final decree attached to the affidavit in support. I find the same are unsigned drafts and have no bearing to the instant application. The signed decree in the file dated 25th September, 2015 reflects a different position from the judgment of the court in that it reflects that the judgment for the sum of Ksh.650,000/= was entered on 31st October, 2014 upon hearing and fails to reflect the consent judgement of the 19th December,2011.

8. The Applicant’s argument is that the Plaintiff ought to have drawn two decrees. The court was referred to the following provisions of the law:

Section 2 Civil Procedure Act which provides:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final;

Section 25 Civil Procedure Act which provides:

The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow:

9. I have not seen any requirement under the said provisions that in drawing the final decree that the same be in two. I am fortified in so holding by the definition of a decree as rendered by the Court of Appeal in **William James Baker v Joseph Peter Rush (1964) EA**, thus

“To decide the point it is necessary to examine the definition itself. It seems to us that to constitute a decree there must be the following essential element:

(a) there must be an adjudication;

(b) the adjudication must have been given in a suit;

(c) it must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;

(d) such determination must be a conclusive determination.

10. Although the Deputy Registrar can sign and seal the decree after the other party has failed to approve the same within seven days, the decree must be drawn in accordance with the judgment of the court. As stated above the decree dated 25th September, 2015 does not accord with the judgment as provided for under Order 21 rule 7 Civil Procedure Rules.

11. With the foregoing, I allow the application with costs.

Dated, signed and delivered at Nairobi this 27th day of Nov., 2018

B.THURANIRA JADEN

JUDGE