



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 524 OF 2013**

**BEVERLY TECHNOLOGIES LIMITED.....APPELLANT/APPLICANT**

**- V E R S U S -**

**FIDELITY COMMERCIAL BANK LIMITED.....RESPONDENT**

**RULING**

1) Fidelity Commercial Bank Limited, the respondent/applicant Herein, took out the motion dated 6<sup>th</sup> June 2017 in which it applied for the following orders:

***1. THAT the court be pleased to set aside the orders of Lady Justice R. Ougo made herein on 6<sup>th</sup> March 2014.***

***2. THAT deposit paid into court being part of the decretal sum be released to the respondents advocates.***

***3. THAT costs be provided for.***

2) The motion is supported by the affidavit of James Oyuke. When served Beverly technologies Ltd, filed the replying affidavit of John Muthuro Mucheni to oppose the same.

3) When the motion came up for interpartes hearing, the appellant/respondent did not turn up hence the motion proceeded for hearing exparte. However despite the absence of the appellant/respondent, this court is enjoined by law and practice to consider the replying affidavit filed on its behalf.

4) It is the submission of the respondent/applicant that the appellant/ respondent has not taken steps to have its application dated 4<sup>th</sup> March 2014 prosecuted thus denying the respondent/ applicant the fruits of its decree. This court was urged to set aside the stay orders to enable the respondent/applicant proceed to execute the decree.

5) In the replying affidavit of John Muthuro Mucheni, it is deponed that the appellant/respondent has not ignored the respondent's claim but it is still following up the issue of getting compensation from Amaco. The respondent further argued that the respondent is the beneficiary of the compensation expected from Amaco. This court was urged not dismiss the motion and instead maintain the appeal.

6) It is not in dispute that the motion dated 4/3/2014 has not been fixed for hearing interpartes. The appellant/respondent has not given any reasons for its failure to have the motion fixed for interpartes hearing. With respect, I agree with the respondent/applicant that it is abundantly clear that the appellant/respondent has lost interest in pursuing the application. I therefore find the motion meritorious. It is allowed in terms of prayer 1. I however find it inappropriate to grant prayer 2 of the motion, therefore I decline the request. Costs of the motion is given to the respondent.

**Dated, Signed and Delivered in open court this 17<sup>th</sup> day of November, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent