

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 195 of 2008

MATUNDA ESTATE LIMITED.....PLAINTIFF

VERSUS

EVG-THREE D CONSTRUCTIONS SYSTEMS LIMITED.....1ST DEFENDANT

DEVELOPMENT BANK OF KENYA LIMITED.....2ND DEFENDANT

RULING

Notice of motion dated 12.08.08 under Section 3A Cap 21 order XX Rule 6 91) and 7 of Civil Procedure Code seeking order to set aside court order made by this court on 22.07.08 and all steps and actions done under the provisions of that order in respect of LR. 12610/04 (ir43769) or otherwise on the grounds that the order does not accord with the ruling of the court made on 21.07.2008 and it is contrary to provisions of Order XX Rule 6 (1) Civil Procedure Code and that the said order was extracted by first or second Defendants without the knowledge or approval of the Plaintiff and in contrary to order XX Rule 7. He said the order is a nullity and should be set aside.

The application is opposed by first Defendant who has filed a Replying affidavit sworn by Robert Keter. The Respondent cited the Court of Appeal decision in ***Civil Appeal No. 9 of 1994 between Sherbbir Esmail –vs- Kenya complex***. The court said that unless a party is prejudiced by non compliance of order 20 Rule 7 and the issue that it is mandatory to comply does not arise. On the other hand, the Applicant has cited authorities; ***Highway Furniture Mart Ltd –vs- Permanent Secretary Office of the President and Attorney General***. In that appeal, the court said regarding Order XX Rule 6 (1) a decree should agree with the judgment and Order XX Rule 7 in case of dispute the decree is settled by Judge. A decree that is not in conformity with judgment is liable to be reversed and set aside for a party to suit cannot suffer because of errors committed by court. The court would otherwise be ***functus officio*** if the decree was conforming to the judgment.

In this matter no appeal has been filed against the Ruling of this Court. It is said that the extracted order does not conform with the Ruling and it is a nullity and should be set aside.

The provisions of order XX 6 (1) and 7 Civil Procedure Code were not followed. In the circumstances I set aside the order extracted and order that an order in conformity with the Ruling of the court be prepared and extracted following the laid out procedure provided under order XX Civil Procedure Code.

Costs shall be in the cause.

DATED this 4th day of November 2008.

JOYCE N. KHAMINWA

JUDGE