



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 313 of 2004

MAE PROPERTIES LIMITED .....PLAINTIFF

VERSUS

DAVIDSON NGINI .....DEFENDANT

RULING

The Background of this matter is that by the court's ruling dated 6<sup>th</sup> December, 2005 the court found the summons hereof had expired in terms of Order V Rule 1(1) of the Civil Procedure Rules. As a result of that finding on that day this court struck out the Plaintiff's suit with costs to the Defendant. The Defendant forwarded to the Plaintiff a draft decree for confirmation whether it needed amendment. The Plaintiff returned that decree with suggested amendments one of which was regarding the title where the Plaintiff substituted the title of DECREE for the title of ORDER. The Plaintiff by its letter dated 4<sup>th</sup> January, 2006 requested for a mention before a judge for settlement of the decree since the suggested amendments were not acceptable to the Defendant. A mention date was fixed for 7<sup>th</sup> February, 2006. It does seem that even though that mention date was given, the Deputy Registrar on 23<sup>rd</sup> January, 2006 proceeded to approve and sign the Decree submitted by the Defendant. The present application is by Notice of Motion brought under Order XX Rule 6 and 7 of the Civil Procedure Rules. The same is filed by the Plaintiff, who seeks that the Decree issued on 23<sup>rd</sup> January, 2006 be set aside and that this court will direct that an Order be issued in respect of the ruling of 6<sup>th</sup> December, 2005. In support of that application the Plaintiff's advocate argued that the act of the Deputy Registrar in approving and signing a Decree that had not been approved by the Plaintiff was without jurisdiction. For that reason he argued that the Decree now on record is null and void. The Plaintiff relied on the case of **Rono Ltd v Caltex Oil Kenya Ltd. HCCC No.1388 of 1992 (unreported)**. This case found that wherever there is a disagreement on the Decree that disagreement ought to be placed before the judge who heard the matter or any other judge for the judge to be able to determine the terms of the decree. The Plaintiff stated that the Defendant having not filed a replying affidavit in a position to the present application the facts as stated by the Plaintiff ought to be accepted as being correct. That is that the draft Decree was sent to the Plaintiff, the Plaintiff amended that Decree and that amendment was not acceptable to the Defendant which led the Plaintiff to seek a mention date for the approval of the Order by the court. Plaintiff counsel further submitted that what ought to have issued after the ruling of 6<sup>th</sup> December, 2005 was an order because the court in striking out the Plaintiff by that ruling did not decide the suit on merit. He referred to the definition of a Decree in Section 2 of the Civil Procedure Act. He submitted that the definition thereof clearly showed that a Decree will only issue once the court has gone into the merits of the case. When the court does not decide the case on merits, what ought to issue is an Order. He stated that it is the desire of the Plaintiff to file a fresh suit subject to limitation and that in the court's ruling of the 6<sup>th</sup> December, 2005 the court could not have intended to deprive the Plaintiff the right to file a fresh suit. In this regard the Plaintiff relied on the case of **Shah v Investments and Mortgages Ltd & others [2001] LLR 422 (CAK)**. This case he stated that the Court of Appeal made a finding that in situation where a Plaintiff has not been signed the consequence may lead to striking out of a Plaintiff. Plaintiff also relied on the case of **Andrew Kimani Ngumba & another v Zakaria Muigai Gakibe, Civil Appeal No.199 of 1996 (unreported)**. In this case the Court of Appeal considered the definition of decree in section 2 of the Civil Procedure Act. The court had the following to say:-

**“the “decree” in section 2 of the Act should be given a limited construction and must relate to the rights of the parties which are not decided by decisions which have the effect, as in the instant case, only of regulating procedure and the nature of evidence and not deciding the rights of the parties. A decree, in our judgement, must completely dispose of the suit and the definition limits the point of decision to matters which determine the rights of the parties”.**

The Plaintiff’s counsel concluded by saying that if the court holds that a decree should issue in this matter it would lead to disaster for the Plaintiff. The Defendant opposed the Plaintiff’s application and in so opposing relied on the grounds of opposition filed and in oral submission the Defendant’s counsel submitted that under Order XX Rule 7 (2) the wording thereof rendered the requirement to be permissive and not mandatory. That is even where a draft decree is submitted for approval to the opposite party, it ought to be returned amended or not amended within 7 days as per Order XX Rule 7(3) of the Civil Procedure Rules. The Defendant’s counsel stated that the Plaintiff failed to return the draft decree within the time period provided. He further stated that it is not true that the decree drawn was irregular for it was open for the Plaintiff to draft a decree and file the same in court to enable the Deputy Registrar to list the matter before a Judge for consideration of that decree. The Plaintiff here, defence counsel stated had failed to submit a draft decree to the Deputy Registrar. He concluded by say that by draft decree was in keeping the ruling of this court dated 6<sup>th</sup> December, 2005. This he stated was in keeping with the definition of a decree under section 2 of the Civil Procedure Act. Defence counsel was of the view that the finding that the summons were invalid was a substantive determination.

I have considered the opposing submissions and the law submitted before me. It is clear by Order XX rule 7 that where there is a disagreement over a decree the matter ought to be set down before the Judge who heard the matter and if not available before any judge for determination of the decree. The argument presented by the defendant that the Plaintiff returned the draft decree beyond the 7 days provided, is rejected by the court in that such failure does not lead to the Plaintiff being shut out from disputing the draft decree particularly where in this case the Plaintiff had informed the Deputy Registrar of such disagreement and he had indeed obtained a mention date for settlement of that decree by the time the Deputy Registrar approved and signed the decree. It was indeed by a letter dated 11<sup>th</sup> January, 2006 that the Plaintiff obtained a mention date before a judge for the 7<sup>th</sup> February, 2006. The Deputy Registrar approved and signed the decree on 23<sup>rd</sup> January, 2006. I do not also accept the Defendant’s argument that the determination regarding the validity of the summons was a substantive determination of this matter. The decision of this court made on 6<sup>th</sup> December, 2005 related to procedure and not to the core rights of the parties in accordance with the pleadings. I am therefore, in agreement with the Plaintiff that what ought to have issued after the ruling of the 6<sup>th</sup> December, 2005 ought to have been an order and not a decree. This would be in tune with the finding of the case of **Andrew Kimani Ngumba & another v Zakaria Muigai Gakibe, Civil Appeal No.199 of 1996 (unreported)** where the court made the following finding in regard to the definition of a decree under Section 2 of the Civil Procedure Act:-

**“As can be readily seen, this definition limits the point of decision to matters which determine the rights of the parties. The decision in a case must be arrived at after the whole hearing of the case (Section 25 of the Act) except when it can be reached on a preliminary question of law: Order XIV Rule 2. the “rights” in the definition section must, in our judgment, mean substantial rights i.e. rights with regard to which relief is sought. If this was not so, then every decision upon such points as limitation and jurisdiction can give rise to a preliminary decree. A finding which does not determine any of the substantial rights which a court is asked to give or withhold cannot, in our judgment, give rise to a decree as defined and is not final”.**

This court’s finding, therefore, is that the decision of this court of 6<sup>th</sup> December, 2005 did not determine any of the parties’ rights in this action and the ruling therefore could only give a rise to an order and not a decree. The Plaintiff therefore, would succeed in order that it seeks. The orders of this court are:-

1. That the decree issued on 23<sup>rd</sup> January, 2006 in this suit be and is hereby set aside.
2. That an ORDER do issue following the ruling delivered by this court on 6<sup>th</sup> December, 2005.

**3. That the Plaintiff's costs of the Notice of Motion dated 27<sup>th</sup> February, 2006 be borne by the Defendant.**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 3<sup>rd</sup> day of November, 2006.

**MARY KASANGO**

**JUDGE**