



**Wanyororo Farmers Limited v Evans Ezekiel Wafula Simiyu t/a E. Wafula & Associates  
Advocates (Civil Case 2 of 2017) [2023] KEHC 22534 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22534 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 2 OF 2017  
HM NYAGA, J  
SEPTEMBER 18, 2023**

**BETWEEN**

**WANYORORO FARMERS LIMITED ..... PLAINTIFF**

**AND**

**EVANS EZEKIEL WAFULA SIMIYU T/A E. WAFULA & ASSOCIATES  
ADVOCATES ..... DEFENDANT**

**RULING**

1. Before me is an Application dated May 4, 2023. It seeks the following orders;
  1. That for reasons to be recorded this application be certified urgent, service thereof be dispensed with and the application be heard ex parte in the first instance in respect of prayer 2 hereof;
  2. That pending the hearing and determination of the application inter partes or further orders of the Court, the Honourable Court be pleased to issue an order of stay of any further proceedings arising from the Notice to show cause dated September 7, 2022;
  3. That the Honourable Court be pleased to set aside the Notice to Show Cause dated September 7, 2022, for being irregularly incepted;
  4. That the costs of the application be borne by Respondent.
2. The application is propped by the grounds set out on the face of it and it supported by the Affidavit of Ezekiel Evans Wafula Simiyu.
3. In a nutshell, the applicant states that he was served with a Notice to Show Cause why execution should not issue against him. That the said Notice is unlawful as it seeks him to show cause over a non-existent decree. That the mandatory provisions of Order 21 Rule 8 (2) (3) (4) and (7) of the [Civil Procedure Rules](#) have not been complied with, in order to have a proper decree extracted.



4. The Applicant further states that since the Respondent did not follow the mandatory provisions, the execution proceedings against him ought to be set.
5. The Applicant filed submissions to further buttress this position, and he cited the case of *Rubo Kipngetich Arap Cheruiyot vs Peter Kiprop Rotich* [2006] eKLR.
6. Counsel extensively cited the provisions of Order 21 Rule 8 of the Civil Procedure Rules and emphasized that with the same in place, there can be no direct extraction of decrees.
7. The Applicant further cited *Ecobank Kenya Limited vs Afrikan Limited* (2017) eKLR, *Edward Kamau & Another vs Hannah Mukui Gichuki & Another* [2015] eKLR and *David Makau vs Mua Mutile Ndunde* [2017] eKLR.
8. It was also argued that the Respondent could not seek solace in Sub Rule (7) of the Order 21 since it is only applicable where there is an approval of the decree by the court at the time of delivering judgment. In this case no such approval was made by the Court.
9. In conclusion, the Applicant argues that the Notice to Show Cause is premised on an irregular decree and should be set aside.
10. The Respondent filed a Replying Affidavit sworn by Geoffrey Mutahi Ndegwa a director thereof. He states that decree was extracted on December 22, 2021. A copy of the same was annexed. It was further argued that the Applicant had preferred Civil Appeal Number E016 of 2023 in the Court of Appeal, which is against the Judgment and Decree of this court. That the present application is just another tactic employed by the Applicant to delay the Notice to Show Cause to the detriment of the Respondent herein.
11. At the time of drafting this Ruling, I did not see the Respondent's Submissions. However, I did note that when the parties were in court, Mr. Waiganjo, advocate for the Respondent had intimated that there would be no need to file submissions since the court can look at the court record to determine if court decree exists or not.
12. It is not in dispute that the Judgment was delivered in favour of the Plaintiff against the Defendants on April 30, 2020.
13. After the said Judgment, the present applicant moved the court with an Application dated May 20, 2020, it sought inter alia, a stay of execution of the Judgment and decree herein, pending an intended Appeal.
14. In a Ruling delivered on December 3, 2020, the court ordered a conditional stay of execution. The condition was that the present applicant was to deposit the decretal amount in a joint interest earning account in the names of both advocates within 45 days. The Applicant then moved the court again with another application dated January 3, 2021, which sought extension of time to comply with the earlier orders of the court. The court granted an extension of 60 days from March 5, 2021.
15. It is plain to tell that, the Applicant did not comply with the said orders. This is what prompted the Respondent to move the court with the Notice to Show Cause why execution should not issue. It is that Notice that prompted the present Application.
16. The first question to be addressed is whether there is a decree herein and if it exists, whether it was obtained regularly or not.
17. The Applicant's contention is that there is no decree and if there is one, then it was irregularly obtained and cannot be acted upon.



18. From the court record, I do confirm that indeed a decree was signed by the Deputy Registrar on December 22, 2021. It is this “decree” that has been challenged by the Applicant.
19. I did note that the present application has been filed by the firm of Echesa and Bwire Advocates LLP. Previously, the Applicant was represented by the firm of Wafula Washika and Associates. I have perused the court record and noted that there is no notice of change of advocate filed. Further, if any notice of change of advocate was to be effected then it had to comply with the provisions of order 9 Rule 9 of the *Civil Procedure Rules* provides as follows;  

“Change to be effected by order of court or consent of parties [Order 9, rule 9.]

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

  - (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
20. There is a judgment herein. Apart from the lack of the Notice of Change, there was no application for leave to come on record is a consent between the 2 firms as envisaged by the rules.
21. On this basis, I find that the Application has been filed by a stranger and it ought to be expunged or struck out completely from the proceedings.
22. Of course there is possibility that there is indeed a Notice of Change and a consent but that is upon the Applicant to prove the same.
23. If there is one, then I would also address the merits of the application. As I stated, a decree was extracted and was signed by the Deputy Registrar. What is not clear is whether the decree was extracted in the manner provided for under Order 21 rule 8. I agree with the Applicant that the said Rule is couched in mandatory terms. If parties are allowed to evade it, then it has no reason for being there in the first place.
24. Ordinarily a party wishing to extract a decree in compliance with order 21 rule 8 would also inform the court that a draft decree has been sent to the other side for approval. There is nothing to show that this procedure was adhered to prior to the signing of the decree herein. I agree with the decisions cited by the Applicant herein.
25. I would therefore find, subject to confirmation that the appropriate notice of change was duly filed, that the decree was irregularly extracted and I set it aside.
26. I direct that the Plaintiff/Respondent proceeds to extract a fresh decree in compliance with order 21 rule 8 within the next 7 days.
27. I have looked at the court record and I must state that the Applicant appears to be very determined in delaying the day of reckoning. After the Judgment herein, he has embarked on a flurry of applications, resting with the present one.
28. Even as he faults the Plaintiff/Respondent for not following procedure, the Applicant himself has not complied with the orders of the court to deposit the decretal sum. Therefore the Respondent is entitled to proceed to execute the decree. The Applicant must know that there has to be an end to litigation. It received a colossal sum of money on behalf of the Respondents and to date, retains a very huge proportion thereof with no justifiable cause. With all due respect, I have to tell him that he has reached



a dead end, the court cannot stand and watch as the Plaintiff is taken in circles while trying to recover what it is rightfully entitled to.

29. Therefore, I make further orders that the Applicant shall within 7 days of service of the draft decree either endorse their approval or otherwise. Thereafter the plaintiff/respondent is at liberty to take further steps as set down by the Rules to have the decree extracted.
30. There shall be no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF SEPTEMBER, 2023.**

**HESTON M. NYAGA**

**JUDGE**

**In the presence of;**

C/A Jeniffer

Ms Wangari for Plaintiff/Respondent

Mr. Bwire for Defendant/Applicant

