



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 656 OF 2017

LANDMARK HOLDINGS LIMITED.....APPELLANT

-VERSUS-

ROBERT MACHARIA KINYUA (suing as legal

representative of the Estate of Grace Mwari Kamotho (deceased).....RESPONDENT

RULING

1) This ruling is the outcome of two applications taken out by the appellant. The first application is the motion dated 26th June 2019 in which the appellant/applicant sought for the following orders:

- a) THAT this application be certified urgent and be heard ex-parte in the first instance.*
- b) THAT there be an interim stay of execution of the decree herein pending the hearing and determination of this application interpartes.*
- c) THAT the honourable court do review its orders made on 14th June 2019 dismissing the appeal without including decretal sum due to the respondent.*
- d) THAT the honourable judge do find that a sum of kshs. Eight Hundred and Thirteen thousand, four hundred and sixty five (KSh.813,465/=) was already paid to the respondent by the applicant through WIBA and should be deducted from the decretal sum payable.*
- e) THAT failure to take into account of the sum already paid will amount to double compensation.*
- f) THAT cost of this application be provided for.*

2) The motion is supported by the affidavit of Agnes Wangare Gichohi and a further affidavit of Perminder Singh Sethi. The respondent filed the replying affidavit of Tom Omao to oppose the motion.

3) The second application is the motion dated 10th July 2019 in which the appellant sought for the following orders:

- a) THAT this application be certified urgent and be heard ex-parte in the first instance.*
- b) THAT the plaintiff either by their servants, agents, Transfield Auctioneers be and are hereby restrained from proceeding with attachment of the appellants/applicants proclaimed goods pending the hearing of notice of motion dated 26th June, 2019 in which is scheduled for hearing on 25th July, 2019.*
- c) THAT the respondent be condemned to pay auctioneers fees.*
- d) THAT costs of this application be provided for.*

4) The motion is also supported by the affidavit of Agnes Wangari Gichohi. It is apparent that the respondent did not file a response to the second motion. A close look at the second application will reveal that the main order

sought therein is to last until the motion dated 26.6.2019 is heard and determined. Learned counsels appearing in this matter recorded a consent order to have the two applications disposed of by written submissions.

5) I think it is prudent to begin by considering the motion dated 26th June 2019. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support and against the application. I have further considered the rival written submissions.

6) The main prayer being sought by the appellant/applicant is for review of this court's order issued on 14th June 2019 dismissing this appeal. It is argued that a sum of ksh.813,465/= had already been paid to the respondent by the applicant which amount was not deducted from the decretal sum payable. It is said failure to deduct the aforesaid sum would amount to double compensation.

7) The appellant attached to the affidavit of Agnes Wangari Gichohi copies of two cheques one for ksh.500,000/= dated 16.10.2013 and the other for ksh.313,465/= dated 9.10.2012 both drawn in favour of Robert Macharia Kinyua. The respondent did not deny having received the aforesaid cheques. The respondent urged this court to dismiss the motion on the basis that this court having delivered its judgment on appeal on 4.6.2019 is functus officio and therefore has no jurisdiction to review orders granted by the trial court.

8) It is apparent from the material placed before this court that the estate of Grace Mwari Kimotho, deceased was paid the aforesaid sum under the Work Injury Benefits Act (WIBA) prior to the trial court and the appellate court proceedings.

9) It is pointed out that the aforesaid payments were made before the issuance of the trial court's decree and this court's decree hence it was the respondent's duty all along to bring that to the attention of the court. The appellant stated that it only came to know of those payments during interlocutory proceedings in this court and that this court noted so in its ruling of 24.5.2018.

10) It is not in dispute that the decision of the trial court was delivered on 1st November, 2017 and that of this court on appeal was delivered on 14th June 2019. The appeal came up for hearing on 13th March 2019. It is apparent from the written submissions that the issue touching on the aforesaid payments was never raised as a ground on appeal since it was not an issue raised before the trial court.

11) The appellant knew about the aforesaid payments before the appeal was fixed for hearing. This is shown in the ruling delivered by Lady Justice Thurairaja on 24.5.2018. It cannot therefore be said that the appellant did not have the information before the appeal.

12) The other preliminary issue is whether this is an application this court should entertain on appeal. This court delivered its judgment on 14.6.2019 whereof the appellant's appeal was dismissed and the trial court's decision was affirmed. It is therefore clear that the order for review relates to decree issued by the trial court and that being my view, I find that the appellant has approached the wrong forum. An application for review of an order or decree ought to be directed to the court which issued the order or decree sought to be reviewed.

13) In the end, I find the motion dated 26th June 2019 to be without merit and to be incompetently before this court. The same is ordered struck out and dismissed with costs to the respondent. The motion dated 10th July 2019 is dependent on the outcome of the motion dated 26.6.2019. Since the aforesaid motion was dismissed, the motion dated 10th July 2019 suffers the same fate. The same is too dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 13th day of November, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent