



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 20 OF 2013

KERICHO TECHNICAL INSTITUTE.....PLAINTIFF/RESPONDENT

VERSUS

FINMAX COMMUNITY

BASED GROUP.....1ST DEFENDANT/APPLICANT

CHAIRMAN.....2ND DEFENDANT/APPLICANT

TREASURER.....3RD DEFENDANT/APPLICANT

SECRETARY.....4TH DEFENDANT/APPLICANT

AND

HEGEONS AUCTIONEERS.....INTERESTED PARTY

RULING

1. The plaintiff filed the present matter by way of plaint dated 26th September 2013 in which it claimed a sum of Khs.11,261,901.28/- being the amount of fees due from the defendant for educational services rendered to its sponsored students by the plaintiff. It also sought compound interest at the rate of 12% from the date of filing suit, as well as costs of the suit. Judgment was entered in favour of the plaintiff on 24th March 2015 for the sum of Kshs 15,000,000. The judgment was subsequently amended on 22nd April 2015, and a decree extracted by the Deputy Registrar of this Court, ostensibly in line with the amended judgment, on 24th April 2015.

2. On 24th March 2015 (the date of judgment), the parties had entered into a consent for stay of execution for a period of 30 days. A further order of stay of execution was granted by the court on 28th April 2015. In a ruling dated 16th June 2015, the court found that the defendants/applicants had met the necessary requirements for grant of stay of execution pending appeal as provided under Order 42 Rule 6 (2) of the Civil Procedure Rules. The court therefore granted an order of stay pending appeal, subject to the defendants depositing Kshs.5 Million in court within 30 days. The court further ordered the defendants to deposit a bank guarantee for the balance of the decretal sum from a reputable bank within 7 days.

3. It appears that the defendants issued a notice of appeal to the Court of Appeal. However, in a ruling dated 24th June 2015, the Court of Appeal struck out the defendants' notice of appeal, noting that it had not been served within 7 days as required under Rule 77 of the Court of Appeal Rules. The plaintiff

therefore commenced execution in accordance with the decree extracted on 24th April 2015. It is this decree that is at the centre of the two applications now before me.

4. The two applications relate to the manner of extraction of the decree, and the execution levied against the defendants/applicants. The applicants allege that the decree was not drawn in accordance with the provisions of Order 21 Rule (8) (3) and was therefore irregularly obtained. In their application dated 29th July 2016, they seek the following orders:

(1) (spent)

(2) THAT this Honourable Court do issue a stay of execution of the decree dated at Kericho on 24th April 2016 and issued on 24th April 2016 pending the hearing and determination of this application.

(3) That an order do issue against the plaintiff/respondent/interested party or their respective agents and/or servants restraining them from executing the warrants of attachment issued on 6th July 2016 and from attaching or repossessing items listed in Proclamation dated 11th July 2016 pending the hearing and determination of this Application.

(4) THAT an order do issue against the plaintiff/respondent restraining them from releasing and or utilizing Kshs. 10,000,000 transferred to their accounts in respect to the Standard Chartered Bank guarantee dated 1st July 2015 issued by Standard Chartered Bank pending the hearing and determination of this application.

(5) THAT an order do issue against the firm of Mitey and Associates restraining them from releasing or utilizing Kshs. 5,000,000/- released to them by the High Court of Kenya pending the hearing and determination of this application

(6) THAT this Honourable Court do reverse and set aside the decree dated at Kericho on 24th April 2016.

(7) THAT an order do direct the firm of Mitey & Associates to deposit to this court Kshs.5,000,000 transferred to them.

(8) THAT the matter be referred back to the Deputy Registrar for the commencement of the process for the extraction of the Decree.

(9) Any other orders that this Honourable Court shall deem fit to meet the ends of Justice.

(10) THAT costs be provided for.

5. The application is premised on the following grounds:

(a) That the Judgment in respect to this matter was delivered by the Honourable Justice Sergon on 24th March 2015 and was later amended on 22nd April 2015.

(b) That a stay of execution was granted pending appeal in respect to this matter. However, the plaintiff/respondent soon filed an application before the Court of Appeal to strike out the Notice of Appeal, which application was allowed on 24th June 2016.

(c) That the plaintiff/respondent thereafter commenced execution by proclaiming against the defendant/applicant, which execution was grounded on a decree dated 24th April 2015 and irregularly issued on the same date.

(d) That the Decree was issued 2 days after the amended judgment was delivered contrary to established legal principles and procedure leading the defendants/applicants to have reason to believe that the same was irregularly issued. That the irregularly issued decree denied the Defendants /Respondents their right to be heard in respect to the decree and therefore unable to raise any dispute that arises from the same.

(e) That the respondents/plaintiff is currently demanding for Kshs. 639,565.65 being the balance of the decretal amount and his auctioneer is demanding Kshs. 677,800 as his costs, both amounts which we believe erroneously reached based on the fatally flawed decree.

(f) That the plaintiff/respondent has instructed the Interested Party to proceed and attach the Applicant's goods with a view of settling the alleged balance, which while is disputed, can only be challenged now before this Court.

(g) That the plaintiff/respondent applied ex-parte for the release of Kshs. 5,000,000/- deposited by the defendants/respondents which application was allowed by the Deputy Registrar of the High Court of Kericho and which decision was made without the knowledge and participation of the defendants/respondent.

6. The application was supported by the affidavit of Evalyne Ngeno Koko. It was placed before Odero J sitting in Nakuru. Upon considering the application, Odero J issued the following orders:-

(a) That the application be certified as urgent.

(b) That a temporary stay of execution be and is hereby granted pending appeal in line with prayer 2 of the Notice of Motion.

(c) That the plaintiff/respondent/interested party or their respective agents and all servants are hereby restrained from executing the warrants of attachment issued on 6th July 2016 and from attaching or repossessing items listed in the Proclamation dated 11th July 2016.

(d) That the plaintiff/respondent is restrained from releasing and/or utilizing Kshs.10,000,000/- transferred to their accounts in respect to the Standard Chartered Bank Guarantee dated 1st July 2015 issued by the Standard Chartered Bank pending the hearing and determination of this Application.

(e) That the firm of Mitey and Associates is hereby restrained from releasing and/or utilizing Kshs. 5,000,000/- released to them by the High Court of Kenya pending the hearing and determination of this Application.

7. However, according to the applicants, despite the said orders, the plaintiff/respondent proceeded to attach motor vehicle registration number KBB 678G prompting the filing of the second application by the defendant /applicant. This application, which is dated 29th August 2016 and is also supported by an affidavit sworn by Evalyne Ngeno Koko, seeks the following orders:

(1) THAT this application be certified as urgent and service of the same be dispensed with in the first instance.

(2) THAT the honourable court be pleased to restrain the auctioneers from auctioning and/or selling the applicant's motor vehicle registration number KBB 678 G pending the hearing and determination of this application inter partes.

(3) THAT the Honourable court be pleased to order/direct that the applicant's illegally attached motor vehicle registration No. KBB 678 G be released to the applicant unconditionally.

(4) THAT in the alternative and without prejudice to paragraph 2 above the honourable court be pleased to direct that the applicant's illegally attached motor vehicles be released to the applicant upon such terms as the court may determine.

(5) THAT the costs of this application be provided for.

8. The grounds on which the application is based are:

(1) That the applicant's motor vehicle registration No. KBB 678G has actually been attached and is in the hands of auctioneers and there being no injunctive orders prohibiting its sale, the auctioneers may auction and/or sell the said motor vehicle any time now.

(2) That there is a valid court order issued on 3rd August 2016 restraining the plaintiff/respondent/interested party from executing the warrants of attachment issued on 6th July 2016 and from attaching or repossessing items listed in the proclamation dated 11th July 20-16 which order was duly served upon the interested party and counsel for the plaintiff/respondent.

(3) That in spite of the existence of a valid court order as aforesaid, the auctioneers/interested party proceeded to attach the applicant's motor vehicle and took possession of the same despite being served with a court order thus making the whole process illegal.

(4) That the auctioneers/Interested party is at liberty and may proceed to auction and/or sell the said motor vehicle any time now.

(5) That in the premises it is only fair and just that the honourable court grants the prayers sought herein.

The Response

9. The plaintiff/respondent opposed both applications by way of an affidavit sworn on 3rd October 2016 by Mr. Mitey. In the said affidavit, he states that the decree being challenged is a money decree that was properly issued by the Deputy Registrar of the court. He deposes further that no application has been made to the Deputy Registrar to rectify the decree as the issuance of decrees is the purview of the Deputy Registrar and not this court.

10. Mr. Mitey deposes further that the application is being made 15 months after the delivery of judgment and after the defendant's bid to appeal to the Court of Appeal has failed. The applicant has not indicated the nature of the decree it would be satisfied with to enable this court make a just determination of the applications. He terms the application dated 29th July 2016, which he alleges has not been served on his firm, as an attempt by the defendant to lay a basis for a belated appeal.

11. With respect to the monies in contention, Mr. Mitey deposes that the Deputy Registrar transferred Kshs 5 million to his account on 10th July 2016. On the instructions of Mr. Samwel Sang, the proprietor of the Plaintiff, Mr. Mitey transferred Kshs 4,650,000/- to the account of Peter Kiplangat Rono, (Mr. Sang's son) on 11th July 2016. Kshs 10 Million was transferred to the plaintiff's account by Standard Chartered Bank on the instructions of the defendants.

12. With respect to the motor vehicle that was to be impounded, it had been transferred to one Eric Rotich, thereby contravening Rule 14 of the Auctioneers Rules which is punishable under Rule 54 of the Rules. Mr. Mitey urged the court to dismiss the two applications, which are an abuse of the court process, with costs.

The Submissions

13. In their submissions dated 30th November 2017 in respect of both applications, the applicants contend that the decree was issued irregularly. They cite Order 21 Rule 8(2) which provides that a party may draw up a draft decree and submit it for approval to other parties in a suit, which was not done in this case. If there is no approval, Order 21 Rule 8 (3) provides that the Deputy Registrar, on receiving the notice, shall within 7 days draw up a decree.

14. The applicants submit that the parties had initially agreed on Kshs 15 Million as the amount due to the plaintiff. However, upon execution, the amount exceeded by Kshs.693,565/- together with the costs demanded by the auctioneer, which adds up to Kshs.1,200,000/-. Their submission is that this is a colossal amount which has resulted from failure by the respondents to follow the laid down procedure and has greatly prejudiced the applicants. In their view, the decree is *void ab initio* and everything consequential to it is void.

15. With respect to the application dated 29th August 2016, the applicants submit that the order dated 3rd August was served on the auctioneers /interested party on 5th August 2016 and on Mitey Advocates on 8th August 2016. The interested party however, attached motor vehicle registration number KBB 678G on 15th August 2016, 10 days after being served with the order, which was in blatant disregard, disrespect and disobedience of a court order. The applicants urge the court to summon Mr. H.G. Onsongo trading as Hegeons Auctioneers to show cause why he should not be committed to civil jail for flouting court orders. They submit that the interested party produced a search certificate to show that the motor vehicle is in another person's name in order to sanitize his action.

16. It is their submission that the responses filed by the respondent have not demonstrated whether the amounts disbursed to the respondent have been preserved in accordance with order number 4 of 3rd August 2016. They submit further that all the actions taken by the respondent's agents were carried out in bad faith and with unclean hands, and the court should find that the decree is null and void, the attached motor vehicle be surrendered to the applicant unconditionally, and the parties commence the process of extraction of the decree afresh. The applicants further pray that the amounts disbursed to the respondent be taken into consideration and the balance be refunded to the applicants.

17. The response from the plaintiff in its submissions is that the applications before the court were filed almost a year after the date the decree was issued, after the applicants' notice of appeal was struck out, and after the said decree had been partly complied with by the applicants.

18. It is its submission further that the applicants are misleading the court with respect to the factual position of the matter. Its submission is that the judgment in the matter was delivered on 24th March 2015 and amended on 22nd April 2015. The decree was issued on 24th April 2015, one month after delivery of the judgment. It was executed as there were no orders staying its execution after the applicants' notice of appeal was struck out.

19. The respondent further submits that this was a money decree which was issued regularly by the Deputy Registrar a month after the delivery of judgment in accordance with the judgment and with order 21 Rule 8 (3). It notes that the applicants are not disputing the contents of the decree but rather challenging it on the basis of technicalities, which technicalities are merely speculative and unsubstantiated. It further submits that the bank guarantee was released on instruction from the applicants to the bank, and the applicant is only attempting to hoodwink the court that the guarantee was released under duress.

20. The respondent further contends that at the time of service of the order dated 3rd August 2016, it had been overtaken by events as warrants of attachment had already been executed. Its submission is that the two applications are an afterthought and aimed at frustrating the respondent from enjoying the fruits of its judgment. Its prayer is that the two applications be dismissed with costs and the respondent be at liberty to execute the entire decree.

Determination

21. I have considered the applications in this matter and the respective submissions of the parties. The two issues that arise for determination are whether the decree in this matter was properly extracted and secondly, what orders are appropriate in the circumstances of this case.

22. At the core of the dispute is an amount of Kshs. 639,565.65 being the balance of the decretal amount and auctioneer's charges amounting to Kshs. 677,800, making a total of Kshs.1,317,365.65/ I note that the parties had, according to the applicants, agreed that the amount due to the plaintiff/respondent from the applicants was Kshs.15,000,000. Kshs.5,000,000 had been deposited in court, and a guarantee for the balance of Kshs.10,000,000 had been issued, as directed by Ong'udi J, by Standard Chartered Bank. The amount deposited in court was released, according to the applicants, to Counsel for the respondent. The amount under the bank guarantee was released, again according to the respondent, to the respondent on the instructions of the applicants. I have not heard the applicants to dispute this contention.

23. The applicants now want the court to set aside the decree issued on 24th April 2015. Their applications are dated 26th July 2016 and 29th August 2016. This is some 15 or so months after the decree they wish to set aside was issued. It appears that they did not challenge the decree after it was issued on 24th April 2015. They now argue that despite receiving the Kshs.15,000,000/- agreed on, the plaintiff's advocates insists that there is a balance of Kshs.639,565.65 together with the auctioneers fees of Kshs.677,800/-. They argue that they are at risk of losing further by being attached or forced to pay a disputed amount unless this Court finds that the decree was issued irregularly and set it aside.

24. The respondent asserts that the decree, which was issued some 15 months prior to the applications now before the court, which is a money decree, was regularly issued a month after the delivery of judgment and drawn in accordance with the judgment. The respondent contends that the Deputy Registrar acted in accordance with Order 21 rule 8 sub-rule 3.

25. Order 21 Rules 7 and 8 deal with the contents and process of preparation of decrees in the following terms:

7. (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state by whom or out of what property or in what proportion the costs incurred in the suit are to be paid.

(3) The court may direct that the costs payable to one party by the other shall be set-off against any sum which is admitted or found to be due from the former to the latter.

...

8. (1) A decree shall bear the date of the day on which the judgment was delivered.

(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(4) On any disagreement with the draft decree any party may thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge,

and shall give notice thereof to the parties.

26. In considering an application where it was contended that the decree was not proper, Tuiyott J in the case of **Ecobank Kenya Limited vs Afrikon Limited [2017] eKLR** stated as follows:-

“8. The rationale for the above provisions cannot be difficult to surmise. A Decree is often at a tail-end of proceedings and would usually set out the rights and obligations of the parties that the Judgment would have declared or ordered. A Decree must accurately and faithfully reflect the Orders or Judgement of the Court. The provisions of order 21 Rule 8 offers an opportunity for parties to settle the terms of the Decree so that they are satisfied that it is a true and faithful reflection of the Judgment. But Parties may sometimes disagree as to whether a draft decree prepared by one of them is in accordance with the judgement and in that event it is submitted to a Judge for resolution(order 21 Rule 8 (4)). The provisions of order 21 Rule 8 are important and no party can be permitted to circumvent them.”

27. However, in her decision in **Republic vs Resident Magistrates Court Mks & Stephen Maundu Muia[2004] eKL**, Wendoh J took the view that the provisions requiring exchange of the draft decree between the parties is not mandatory:

“The main reason for seeking this amendment is that order XX R 7 (2) was not complied with. I have seen a decree on the file. Order XX Rule 7 (2) is not a mandatory provision. It is discretionary. A party may prepare a draft decree and submit for approval to the other party. Failure to submit a decree for approval by the other party cannot be fatal to an execution unless the counsel is complaining that the decree was not properly drafted which is not the case here. The applicant has not explained that the contents of the decree are improper or that figures are wrong. The court will not make orders in vain,. There would be no reason for allowing amendment of the chamber summons as it stands and the application is therefore refused and dismissed with costs to respondent.” (Emphasis added)

28. In this case, it appears that the draft decree was not sent to the applicants for approval. This, in itself, in my view, is not sufficient to render the decree null and void as prayed by the applicants. More so in view of the fact that the parties had agreed on the amount due to the plaintiff/respondent, and for fifteen months or more, the applicant did not seek to challenge the decree before the court, as they had a right to, under Order 21 Rule 8(4). Further, the applicants have not indicated in what manner the decree was defective. Bearing in mind the fact that the court is required to deal with matters of substantive justice and not procedural technicalities, I am unable in this case to find that the decree should be set aside, three years after its extraction and payment of the decretal sum, only because a draft was not sent to the applicants. It is rather late in the day for the applicants to do what they ought to have done under Order 21 Rule 8(4) seven days after the extraction of the decree.

29. Having said that, however, I find that the respondent in this matter has not conducted itself in a manner that inspires confidence that it has respect for the rule of law and orders of the court. It has not disputed that the parties had agreed on the amount due to it from the applicants pursuant to the judgment of 24th April 2015. It has not denied that it received the total amount of Kshs 15,000,000. It received the orders issued by Odera J on 26th July 2016, but still sought to proceed with the execution against the applicants. Such execution, in the face of a valid order of the court that has not been set aside, cannot be allowed to stand. Accordingly, I allow the application dated 29th August 2016 to the extent that I find that the execution against the applicants is irregular and the applicants’ motor vehicle the subject of the execution shall be released to the applicants forthwith. Given that the attachment was carried out in defiance of the order of the court, no costs are payable to the auctioneer for such attachment.

30. With regard to the alleged costs due to the respondent, I direct that a bill of costs be filed for taxation by the Deputy Registrar of this court.

31. In closing on this matter, I must express my misgivings about the conduct of both parties in this matter. Both parties have not been quite upfront with the court with regard to their dealings. It is, for

instance, not clear why the parties took two years to prosecute the present applications, or what the current status of the vehicle the subject of the application is.

32. In the event, I direct that each party bears its own costs of this application.

Dated Delivered and Signed at Kericho this 1st day of November 2018

MUMBI NGUGI

JUDGE