

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. E53 OF 2023**

**DARIMA PROPERTIES LTD ..... 1<sup>ST</sup>**

**APPELLANT**

**PATRICK MWENDA ..... 2<sup>ND</sup>**

**APPELALNT**

**VERSUS**

**MERU CENTRAL COFFEE CO-OPERATIVE UNION LTD....**

**.....RESPONDENT**

*(Being an appeal from the Meru CMCC No. 217 of 2019 formerly Meru HCCC No. 13 of 2014 pursuant to leave granted on 6/4/2023 in Meru HC. Misc. Civil Application 49 of 2022)*

**JUDGMENT**

**Introduction:**

1. This is not an ordinary appeal as we know appeals them to be as it emanates from an order that appeared to be of no major consequence but ended up with a result that was quite the opposite.

**Background:**

2. Vide a plaint dated 6/4/2014 the respondent moved the court seeking the following orders:

- a. Kshs.11,000,000/= being the agreed liquidated damages
  - b. Costs of the suit
  - c. Interest on(a) and (b) above from the date of filing suit.
3. The respondent's claim was that the appellant and another party entered into a sale agreement for the sale of land parcel No. Abothoguchi/Katheri/3822 for a consideration of Kshs.5,980,000/=. The respondent paid Kshs.3,000,000/= to the appellant on the agreement that the balance would be paid upon the land being transferred to the respondent. That upon receipt of the Kshs.3,000,000/=: the appellant and the other party took no further action to conclude the sale and claimed to have been defrauded by a 3<sup>rd</sup> party. The respondent thus moved the court seeking payment of the stated amount, relying on the contract between the parties.
4. The appellant filed defence denying liability.
5. The suit was subsequently transferred to the chief magistrates' court for determination. The proceedings of the court for 11/6/2019 indicated that the following orders were also issued by Hon. Justice A. Mabeya:

- i. The matter is hereby adjourned at the instance of the defendant.
  - ii. The defendants to pay today's costs of the plaintiff assessed at Kshs.20,000/= within 30 days in default execution to issue.
  - iii. The defendants to pay today's court adjournment fees at Kshs.1,000/= within 30 days in default their defence to stand struck out.
  - iv. After paying the court adjournment fees, this file to be transferred to Meru Chief Magistrates court for hearing and determination.
6. Upon transfer, of the suit to the Chief Magistrate's Court, the respondent filed an application dated 8/11/2020 where it sought the following orders:
  - i. The defence be deemed to have been struck out on 12/7/2019 upon the lapse of 30 days from the date of the High court order dated 11/6/2019.
  - ii. Judgment be entered for the plaintiff against the defendants jointly and severally for

Kshs.11,000,000/= plus costs and interest as prayed in the plaint.

iii. Costs be provided for.

7. The application was heard by the lower court and in a ruling delivered on 27/8/2021 the court issued the following orders:
  - i. The notice of motion dated 8/12/2020 is allowed in terms of prayers 1 and 2.
  - ii. Interest on prayer number 2 of the motion is allowed at 10%
  - iii. Each party to bear their own costs of the Notice of Motion.
8. Aggrieved by the said ruling, the appellants filed a Memorandum of Appeal dated 17/4/2023 pursuant to leave granted by this court on 6/4/2023.
9. The Memorandum of Appeal set forth the following grounds:
  - i. The learned magistrate erred in law and in fact in striking out the defence when there was no logical or legal reasons for doing so.

- ii. The learned magistrate erred in law and fact in striking out the defence when the adjournment fee had been paid.
- iii. The learned magistrate erred in law and fact in failing to actualize Article 159 of the Constitution of Kenya by failing to allow the appellant to be heard on merit.
- iv. The learned magistrate erred in law and fact in allowing the respondent to execute an illegal and irregular decree which was not reflected in the ruling.
- v. The learned magistrate erred in law and fact in failing to involve or consider the 3<sup>rd</sup> party before arriving at the conclusion he did in the ruling.
- vi. The learned magistrate erred in law and in fact in deciding the whole case against the weight of evidence and law.

10. The appellant prayed that the lower court ruling be set aside, with costs.

11. The parties filed their respective submissions which I will not rehash. It suffices to state that I have considered them and will refer to them where necessary.

### **Analysis and determination**

12. The duty of this court is to analyse the arguments and the material presented before the lower court and arrive at its own conclusion. (see **Selle vs Associated Motor Boat Co. Ltd (1973) EA 123**).

13. I have already set out a brief history of the matter.

14. The issue for determination is whether the orders of the trial court allowing the application by the respondent dated 8/12/2020 ought to be set aside.

15. The appellant's case is that these orders were drastic and fly in the face of Article 159 of the Constitution.

16. For the respondent, its position that the orders issued by Hon. Justice Mabeya on 11/6/2019 were self-executing and there being no application to enlarge time, the trial court was right to issue the orders that it did.

17. Looking at the orders issued, the same were clearly worded. The defence stood struck out in case the court adjournment fees were not paid within 30 days. The appellants do confirm that the fees were allegedly paid on 16/7/2019 which was outside the timeline set by the Judge.
18. When the matter was transferred to the Chief Magistrates Court, the trial court took charge of the trial process. If moved accordingly, it had powers to enlarge time under section 95 of the Civil Procedure Act or under order 50 Rule 6 of the Civil Procedure Rules provides.
19. The appellants did not seek to enlarge time. Being self-executing orders, the trial magistrate was correct in upholding the orders that the defence would be struck out. The natural consequence was for judgment to be entered in favour of the respondent.
20. Self-executing orders do not require any further interrogation by the court, although in this case the trial court did a substantive ruling on the issue. Such orders take effect when the act in question is not executed within the stipulated time.

This position was explained in the case of **Re Jokai Tea Holdings (1993) 1 ALL ER 630** where it was held:

**“Where the Court has to decide what consequences should follow from non-compliance with an order that a pleading be struck out unless further and better particulars are served within a specified time, the relevant question is whether such failure to comply with the “unless” order is intentional and contumacious...The court should not be astute to find excuses for such failure since obedience to such peremptory orders is the foundation of its authority, but if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not be treated as contumacious and ought not to disentitle him to the rights which he would otherwise have enjoyed.”**

21. In cases of such orders it is for the party in default to move the court for appropriate relief.
22. The trial court duly noted that it had the discretion to vary or enlarge the time set but found that the appellants had deliberately sought to delay the course of justice as explained in the case of **Shah vs Mbogo (1967) E.A 166** and **Patel E.A Cargo Handling Services Ltd (1974) E.A 75**.
23. The question for the court to answer is whether the trial court's discretion was improperly exercised so as to warrant its setting aside.
24. As I had stated, the appellant did not move the trial court to extend time to comply with the orders in question but the court did consider the same and confirmed that the fees were paid five days later.
25. In the circumstances, I find that the appellant failed to invoke the inherent jurisdiction of the court and specifically allow the court adjournment fees to be deemed as duly paid. The self- executing orders had already taken effect.

26. I find no reason to depart from the findings by the trial magistrate.

27. The appeal is hereby dismissed with costs to the respondent.

**Dated, signed & delivered at Meru this 12<sup>th</sup> day of March, 2026.**

**H.M. NYAGA**

**JUDGE**