



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC SUIT NO. 66 OF 2017**

**JOSHUA MUNYWOKI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**PATRICK MUKONZA NZIOKI.....DEFENDANT/APPLICANT**

**R U L I N G**

1. The application before this court for ruling is the one dated 21<sup>st</sup> May, 2018 and filed in court on 22<sup>nd</sup> May, 2018. It is expressed to be brought under Order 10 Rule 11, Order 51 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act and any enabling provisions of the law for orders:-

**1) Spent**

**2) THAT the Honourable court be pleased to stay the execution of the judgement passed in this suit and the subsequent decree herein passed on or about 18<sup>th</sup> December 2017 pending the determination of this Application.**

**3) THAT the Honourable Court be pleased to set aside the judgement entered on or about the 18<sup>th</sup> December 2017 against the Defendant/Applicant.**

**4) THAT costs of this application be provided for.**

2. The application is predicated on the grounds on its face and is supported by the affidavit of Patrick Mukonza Nzioki, the Defendant/Applicant herein, sworn at Machakos on the 21<sup>st</sup> May, 2018. It is opposed by the Plaintiff/Respondent vide the replying affidavit of Alphonse Muema Mbindyo who is his advocate.

3. On the 14<sup>th</sup> June, 2018 directions were issued to the effect that the application be disposed off by way of written submissions.

4. In his submissions the Counsel for the Defendant/Applicant cited **Order 21 Rule 8(2) of the Civil Procedure Rules** which provides as follows:-

*“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 judgement, shall sign and seal the decree accordingly.”*

5. The Defendant's/Applicant's Counsel opined that once a party opts to prepare a draft decree then it shall submit the said draft decree to the other parties for approval or rejection. Suffice it to say the Counsel was of the view that the rule is couched in mandatory terms and that the Plaintiff/Respondent did not comply with the law.

6. The Defendant's/Applicant's Counsel relies on the case of **Ngurumani Ltd. vs. Jan Bonde Nielsen 2 others CA No.77 of 2012** where the Court of Appeal stated as follows on irreparable injury or damage:-

*“on the second factor, that the Applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with*

*reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”*

The Counsel submitted that the Defendant/Applicant who has shown that he is the registered owner of land parcel number No.Kiteta/Ngiluni/2154 will suffer irreparable harm if he is not given an opportunity to be heard.

7. The Counsel further cited Section 3A of the Civil Procedure Act, Articles 50(1) and 159(2)(d) of the Constitution as well as the case of **Njangi Kanyunguti alias Karingi Kanyunguti & 4 others vs. Daniel Njeru Njogu – Court of Appeal CA No.181 of 1994** in which it held, inter alia, on the basis of **Shah vs. Mbogo & Another [1967] EA 116** that:-

*“it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgement in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or errors, and will not assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”*

The Counsel concluded by submitting that it is clear that the court has prerequisite inherent jurisdiction to allow both parties a chance to present their case.

8. On the other hand, the Counsel for the Plaintiff/Respondent submitted that the Defendant/Applicant relies on failure to be served with draft decree as one of the reasons to have the judgement set aside. The Counsel pointed out nowhere in the application has the Defendant/Applicant challenged the decree taken out and approved by the Deputy Registrar nor is there a statement to the effect that the decree does not agree with the judgement. The Counsel was of the view that in the absence of variance between the decree and the judgement, there would be no basis to challenge the former and nor would setting aside of the decree serve any purpose.

9. In addition, the Counsel submitted that under Order 21 Rule 8(2) of the Civil Procedure Rules, preparation and service of draft decree to other parties for approval is not mandatory but optional since the word used therein is, “may”.

10. The Counsel further submitted that it cannot be said that the Defendant/Applicant was condemned unheard since the equitable remedy that he seeks is available to persons who due to no fault of their part ought not to suffer loss. The Counsel pointed out that the Defendant/Applicant failed to exercise caution and invited the court to look at the record to see how reckless and unconcerned the Applicant has been. The Counsel went on to submit that the reason for the failure by the Defendant's/Applicant's Counsel to attend court is stated in the copy of the hearing notice dated 07<sup>th</sup> November, 2017 as lack of instructions and not otherwise and thus the Defendant/Applicant cannot now turn around and seek to introduce issues of distance. The Counsel further submitted that the Defendant/Applicant was not required to be served after service of 07<sup>th</sup> November, 2017 and after they failed to participate in the hearing despite service.

11. The Counsel submitted that the application is brought under Order 10 Rule 10 of the Civil Procedure Rules which applies to a party who upon being served with summons to enter appearance fails to do so and also to file his defence and pointed out that a party is bound by his pleadings and thus the application as filed cannot be granted. He relies on the cases of **Landmark Holding Ltd vs. Robert Macharia Kinyua [2018] eKLR** where it was held that:-

*“There is no complaint that the decree does not agree with the judgement. The setting aside of the decree will therefore serve no useful purpose. In this regard I am in agreement with the decision in Eco Bank Limited case (supra) that the failure to forward the decree to the other party for approval should not lead to setting aside of the execution process.”*

The Plaintiff's/Respondent's Counsel further cited the case of **Eco Bank Limited vs. Elsek & Elsek (Kenya) Limited & Others [2015] eKLR** where it was held that,

*“...failure cannot lead to the setting aside of execution. It would only lead to the setting aside of the execution if the decree was shown not to conform to the judgement.”*

12. Lastly, the Plaintiff's/Respondent's Counsel cited the persuasive Ugandan case of **Philip Ongom Capt vs. Catherine Nyero Owota [2003] UGSC 16** where it was held that;

*“a litigant ought not to bear the consequences of the Advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give to the advocate due instructions.”*

13. The Counsel was of the view that based on the latter case, a litigant has a duty to instruct an advocate and to seek to know the position of his case and that in this case the Defendant/Applicant was privy to the default of his advocate.

14. Having read the application together with the supporting affidavit and the replying affidavit and having read the submission that were filed by the Counsel on record for both parties, it seems to me that the only issue for determination is whether or not the Plaintiff/Respondent failed to forward draft decree to the Defendant/Applicant for approval. There were no submissions on why the judgement should be set aside.

15. It is not in doubt that the Defendant/Applicant was served with a hearing notice on 7<sup>th</sup> November, 2017 through his advocate on record. The hearing date of 10<sup>th</sup> November, 2017 was fixed on 04<sup>th</sup> October, 2017. The Defendant's/Applicant's Counsel acknowledged service with remarks that they did “not have instructions in the matter, we asked Plaintiff's advocate to serve the Defendant personally.”

The Applicant/Defendant has not questioned the short notice to the hearing date. The Defendant's/Applicant's Counsel had a duty to attend the hearing of 10<sup>th</sup> November, 2017 since he was still on record and if he was unable to do so, it was his obligation to instruct a colleague to hold his brief and apply for adjournment. No explanation has been given as to why the Defendant's/Applicant's Counsel chose not to attend court on the day of the hearing.

In the case of **Shah vs. Mbogo & Another [1967] EA 166** it was held:-

*“applying the principle that the court’s discretion to set aside an experts judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake ‘or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be dismissed.”*

16. It seems to me that the Defendant/Applicant is out to obstruct or delay the cause of justice for the reasons that I have enumerated hereinabove.

17. In addition whereas I agree that a party should not be punished for the mistakes of his Counsel, I see no reason why I should exercise the court's discretion in favour of the Defendant/Applicant. The setting aside of the decree will not tamper with the judgement which the Applicant has not bothered to have set aside.

18. As for the non-service of draft decree to the Defendant for approval, Kasango J, had this to say in the case of **EcoBank Ltd vs. Elsek & Elsek (Kenya) Ltd & 4 others [2015] eKLR**:-

*“Order 21 Rule 8(2) (3) and (4) of the Civil Procedure Rules sets out steps to be followed when a decree is drawn. Under sub-rule (2) of the Order, it requires a draft decree be sent to the opposite party for approval. If it is approved and the registrar of the High Court is satisfied that it is drawn up in accordance with the court’s judgement, the registrar shall sign and seal the decree. Sub rule (3) provides that where the opposing party fails to approve the draft decree within seven days of delivery, the registrar on being notified of that failure shall sign and seal it once he confirms that it conforms to the judgement.”*

Kasango, J went on to add,

*“The Plaintiff has not denied it did not forward the draft decree for approval as provided under the above mentioned Rules. What is the effect to that failure? In my view that failure cannot lead to setting aside of execution. It would only lead to the setting aside of the execution if the decree was shown not to conform to the judgement.”*

19. I am persuaded by the above authority and I do note that the Defendant/Applicant herein has not shown that the decree does not conform to the judgement and as such, there is no reason for setting aside the execution.

20. The upshot of the foregoing is that the application lacks merit and same is dismissed with costs to the Plaintiff/Respondent.

**Signed, dated and delivered at Makueni this 30<sup>th</sup> day of July, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Hassan holding brief for Mr. Mbindyo for the Respondent

Mr. Masaku holding brief for Mr. Mutua Makau for the Applicant

Ms. C. Nzioka – Court Assistant

**MBOGO C. G. (JUDGE),**

**30/07/2019.**