



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NUMBER 892 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 30<sup>th</sup> April, 2019)**

**DAVID MUTEMI NGUMI.....CLAIMANT**

**VERSUS**

**KAMILI PACKERS LIMITED.....RESPONDENT**

**RULING**

1. The Application before this Honourable Court is the one dated 17<sup>th</sup> December 2018 brought pursuant to Order 22 Rule 22 and Order 21 Rule 8 of the Civil Procedure Rules and all other enabling provisions of law. The Applicant seeks the following orders:

**1. Spent.**

**2. THAT this Honourable Court be pleased to order for a stay of execution of the judgment and decree arising from the judgment delivered on 13<sup>th</sup> June 2018 pending the hearing and determination of the present application.**

**3. THAT this Honourable Court be pleased to lift the warrants dated 10<sup>th</sup> December 2018 and the proclamation of the Defendant's goods dated 11<sup>th</sup> December 2018 and declare the same to be a nullity.**

**4. THAT the costs of this Application be provided for.**

2. The Application is based on the following grounds:-

**1. Once judgment was entered for the Claimant of 13<sup>th</sup> June 2018 for the sum of KShs. 197,398.00, he lodged a Bill of Costs for taxation which was assessed at KShs. 138,630.00. Thereafter, his advocates extracted a decree without adhering to the procedure set out in Order 21 Rule 8 of the Civil Procedure Rules by failing to submit a draft decree to the Respondent its approval. As such, the purported attachment and proclamation of the Respondent's goods is unlawful, null and void ab initio.**

**2. The Applicant avers that it has paid the total amount awarded as costs together with the costs. As such, it will suffer prejudice and irreparable loss if the orders sought are not granted.**

**3. The Applicant concludes that it is in the interest of justice that the orders sought be granted.**

3. The Application is supported by the Affidavit of Faith David sworn on 17<sup>th</sup> December 2018 and is based on the grounds on the face of the Application.

4. The Claimant opposed the Application vide the Replying Affidavit of Daudi Ngumi Mutevu sworn on 21<sup>st</sup> January 2019. The Claimant avers that the Applicant being an active party in the proceedings, knew that judgment had been entered in his favour which was followed by ascertainment of costs.

5. However, the Applicant failed to settle the decretal sum and the Claimant instructed his advocates to proceed with the execution of the decree. Consequently, they instructed auctioneers who obtained warrants of attachment and sale. On 11<sup>th</sup> December 2018 at 9:30 pm, they proceeded to proclaim the Respondent's movable goods and gave the Applicant 7 days to settle the decretal sum and auctioneers' fees.

6. On the same day at 4:30pm, his advocates received an even dated letter forwarding the decretal sum of KShs. 336,028.00. on 14<sup>th</sup> December 2014, the Claimant's advocates wrote to the Applicant acknowledging receipt of the decretal sum but further requesting for the

auctioneers' costs and fees. The Applicant opted to file this Application instead of settling the same.

7. It is the Claimant's position that the decretal sum was settled because the execution process had been commenced. As such, the Application lacks merit, is an abuse of court process aimed to deny the auctioneers their lawful fees.

8. The Applicant filed a rejoinder in response to the Claimant's Replying Affidavit vide the Supporting Affidavit of Faith David sworn on 6<sup>th</sup> February 2019. The Applicant contends that the auctioneers came to its premises at 2:30pm and annexed the gate pass marked FDIA to prove the same. The Applicant maintains that the Claimant received payment on time but failed to recall the instructions that they had issued. The Applicant noted that the Claimant did not respond to its assertion that he had failed to comply with the provisions of Order 21 rule 8.

#### **Submissions by the Parties**

9. In its submissions dated 15<sup>th</sup> February 2019, the Applicant submits that the proper procedure as laid out in order 21 rule 8 was not followed because the Claimant failed to avail a draft copy of the decree for approval. The Applicant has urged this Honourable Court to take judicial notice that before a party can extract a decree, they are required to show to the registry that the other party was given an opportunity to approve it with or without amendments. The Applicant further urges this Court to interrogate the circumstances under which the decree was extracted without meeting this requirement.

10. The Applicant relies on the cases of **Ecobank Kenya Limited vs. Afrikon Limited [2017] eKLR**, **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR** and **David Makau vs. Maua Mutie Ndunda [2017] eKLR** where all these courts were in consensus that a decree should be prepared in accordance with Order 21 rule 8. The courts were clear that the Rules should not be circumvented.

11. It is the Applicant's position that the proclamation was done so that the auctioneers could generate their fees. As such, this demonstrates that the auctioneers visited its premises after the cheque had been disbursed. The Applicant maintains that the auctioneers' actions were not as a result miscommunication as they have clearly demonstrated that they were driven by greed. It is their opinion that once the cheque was received, the Claimant ought to have recalled the auctioneers.

12. The Applicant submits that since the proclamation is based on an illegal process, the Applicant should not be compelled to pay their costs and fees. As such, the Application should be allowed. The Applicant relies on the cases hereinabove and further relies on the case of **Nyamodi Ochieng Nyamogo vs. Telkom Kenya Limited [2016] eKLR** where the Court held that the appropriate remedy in such a case was to set aside the execution process entirely.

13. In his submissions dated 20<sup>th</sup> February 2019, the Claimant submits that the provision requiring a party to submit a draft decree is not couched in mandatory terms. Failure to submit a decree to the other party for approval does not render the decree invalid. The Claimant also relies on the case of **Nyamodi Ochieng Nyamogo vs. Telkom Kenya Limited [SUPRA]** where the Court stated that:

***“In extracting the decree, even where the parties consent to the draft, the Deputy Registrar is not bound by the draft submitted by the parties since order 21 rule 8 (3) of the Civil Procedure Rules requires the Deputy Registrar to be satisfied that the decree reflect the correct amounts.”***

14. The Claimant further submits that the Applicant is only challenging the procedure for obtaining the decree. The amounts specified in the decree are not challenged neither has its correctness been challenged. It is the Claimant's position that Article 159 (2) (d) of the Constitution requires justice must be administered without undue regard to procedural technicality.

15. The Claimant submits that the extracted decree reflects the delivered judgment. He relies on the case of **Erad Suppliers and General Contractors vs. National Cereals and Produce Board [2012] eKLR** where the Court stated as follows:-

***“...The rationale for this elaborate procedure, in my view, is to ensure that the decree reflects the terms of the judgment itself. In fact the main consideration is not the approval by the parties per se but the reflection of the judgment since the Deputy Registrar is not bound to sign and seal the draft approved and submitted by both parties if in his opinion the same is not drawn in accordance with the judgment”.***

16. The Claimant submits that the auctioneers proclaimed the Applicant's goods on 11<sup>th</sup> December 2018 at 9:00am. This prompted the Applicant to pay the decretal sum. The Claimant poses the question of why the Applicant did not show the auctioneers proof of payment when they supposedly arrived to proclaim the goods at 2:30pm. It is his position that the Applicant's advocates could have also opted to contact the Claimant's advocates that a cheque had been drawn in payment of the decretal sum.

17. It is the Claimant's submissions that an auctioneer's fee become payable upon instructions to pursue attachment. He further submits that it was necessary to instruct auctioneers since the Applicant had not settled the decretal amount as at 10<sup>th</sup> December 2018, yet the judgment had been delivered in June. As such the proclamation was necessary.

18. The Claimant concludes by submitting that the Application should be dismissed with costs as it is devoid of merit and is ploy to deny the auctioneers the fruits of their labour.

19. I have examined all the averments of the Parties. The main contention by the Applicant is that the decree relied upon by the Respondent/Claimant to levy execution was not signed by the Respondent as approving it and therefore it was signed by Deputy Registrar without proper procedure.

20. Order 21 rule 8 of the Civil Procedure Rules states as follows:-

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 file the draft decree marked as “for settlement” and the registrar shall 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.*

5. *The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.*

6. *Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.*

7. *Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.*

21. My reading of Order 21 rule 8(1) above shows that this rule is not couched in mandatory terms. Rule 8(7) above also show that the fact that the Court is not precluded from approving a draft order even if the procedure laid down in the rule is not adhered to.

22. I believe the main purpose of the rule is to ensure that the decree corresponds to the judgement of the Court and in this case the main duty of the Deputy Registrar is to confirm as such. The Deputy Registrar is also not bound with what is in draft decree even if the parties have approved it.

23. In my view then, the failure by the Claimant to share his draft decree with the Respondent/Applicant herein does not render the executive process illegal or null and void as submitted by the Applicant.

24. In the Nyamogo vs Telkom Kenya Limited (supra) and Erad Suppliers General Contractors vs National Cereals & Produce Board (2012) eKLR, the Learned Judges seen to agree with proposition that the main consideration is not the approval of the Parties but the confirmation by the Deputy Registrar and what is paramount is to ensure that the approved decree is in accordance with the Judgement.

25. In the current case, the decree was indeed signed by the Deputy Registrar and I have no reason to doubt that it was in conformity with the judgement. The Claimant proceeded to levy execution and this is why the proclamation proceeded. There is no indication that the cheque was issued before the proclamation because the copy would have been served upon the Auctioneer at the time of proclamation. The Auctioneer had already been instructed to proclaim before the Respondent issued their cheque.

26. In the circumstances, I decline to lift the warrants and order that the issue of the Auctioneer’s costs and any fees pending be resolved either by the Parties or by the Deputy Registrar.

27. Costs to the Respondents.

**Dated and delivered in open Court this 30<sup>th</sup> day of April, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

No appearance for Parties