Gatumuta v Kenya Power & Lighting Co Ltd (Civil Appeal 19 of 2017) [2023] KEHC 249 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEHC 249 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL 19 OF 2017

LM NJUGUNA, J

JANUARY 25, 2023

BETWEEN

JUSTIN GATUMUTA ..... APPELLANT

AND

KENYA POWER & LIGHTING CO LTD ..... RESPONDENT

RULING

1. Before me is a notice of motion dated September 16, 2022 and filed under certificate of urgency and wherein the applicant seeks for orders that :

    i. Spent

    ii. Spent.

    iii. The warrants of attachment and sale issued to Quickline Auctioneers in Embu HCCA 19 of 2017 be set aside and or be cancelled/quashed and the applicant's movable goods be released forthwith.

    iv. Costs of this application be provided for.

2. The respondent via a replying affidavit sworn on October 21, 2022 deponed that the reasons proffered by the applicant in support of the application are not supported by any evidence. That the decree was issued on July 28, 2022 and the certificate of costs on July 28, 2022; and whereas the period of one year had not lapsed since the issuance of decree as required under Order 22 Rule 18 of *Civil Procedure Rules*, 2010, the respondent made an application for execution noting that judgment in the matter was rendered on September 24, 2018; warrants of sale of property in execution issued to Quickline Auctioneers on September 6, 2022 were obtained without any procedural defect and that during proclamation, the appellant was served with warrants of sale of property in execution as required under *Civil Procedure Rules* , 2010. It was deposed that the applicant herein has not demonstrated

good faith by paying any amount in fulfilment of the decree and that the application herein is geared towards denying the respondent its fruits of judgment. This court was thus called upon to dismiss the application with costs.

3. The court directed that the application be canvassed by way of written submissions and both parties complied with the directions.

4. The applicant in his submissions formed two issues for determination to wit: whether the decree ought to be extracted before execution process could commence and whether the respondent moved the court to be issued with a certificate of taxation and have the same converted into judgment as per the requirement of the law.

5. On whether the decree should be extracted before execution process could commence, it was submitted that at the time of execution by Quickline Auctioneers, no decree and certificate of costs were extracted by the respondent. That in execution of a decree for costs, a certificate of taxation and a decree must first be regularly and procedurally obtained and served upon the judgment debtor before any execution can issue. It was submitted that its noteworthy that neither the respondent nor his advocates ever served the said documents to the applicant herein. That had the respondent extracted decree and certificate of stated costs, the execution process would have commenced since there was no stay and given that in the execution proceedings, the procedure that ought to be adopted is that which is established in the *Civil Procedure Rules* and not any other. The applicant in support of his case relied on the case of *Rubo Kimngetich arap Cheruiyot v Peter Kiprop Rotich* [2006] eKLR.

6. On whether the respondent moved the court to have the certificate of taxation converted into judgment as per the law, it was the applicant's case that Section 51(2) of the *Advocates Act* stipulates that once a certificate of costs has been issued, the court has the discretion to make any order it deems fit including entering judgment for the amount in the certificate of costs as long as the same has not been altered or set aside and the retainer is not disputed. Reliance was placed on the case of *Ochieng, Onyango, Kibet and Another v Adopt a Light* [2007] eKLR and *Francis Kimani Kiige v National Hospital Insurance Fund* [2017] eKLR.

7. That a party and party Bill of costs was taxed on November 8, 2019 by the taxing master to the tune of Kshs 61,219/=; and that after taxation, it was only prudent for the respondent to move the court to convert its certificate of costs into judgment to enable the respondent execute against the applicant. That in the instant case, the same was not done and as such, it was contended that the warrants of attachment and sale issued to Quickline Auctioneers ought be cancelled or quashed and or set aside for the reason that they are illegal, invalid and irregular.

8. The respondent on the other hand submitted that the burden of proof rests with the party making the allegations and that it annexed the copy of decree issued on July 28, 2022; certificate of costs issued on July 28, 2022 and warrants of attachment and warrants of sale issued on September 6, 2022 and that the same showed the chronology of execution against the applicant. That from the above, it is correct to submit that at the point when the warrants were issued, the court was satisfied that the decree and certificate of costs showing the amount claimed in the warrants had already been issued. The respondent submitted that the law does not require that the applicant be served with the decree or certificate of costs after it has been issued. That the applicant herein was duly served with the warrants and proclamation on September 12, 2022 as seen in the respondent's annexures. In the end, it was prayed that this court do allow the respondent to proceed with the sale of the proclaimed property to realize cots legally awarded by the court.

9. I have considered the application herein, the response thereto and the rival submissions by the parties and it is my view that the issue for determination is whether the prayers sought herein can be allowed.

10. It is not disputed that this Court delivered its judgment on September 24, 2018. Thereafter, the respondent drew a decree therefrom and executed it. It is that decree that the Applicant has challenged that the same was executed unprocedurally. There is no point at which the Applicant challenged the contents of the decree or raised an error that it was wrong or at variance with the judgment of the Court. It appears that the decree extracted herein agreed with Order 21 Rule 7 of the *Civil Procedure Rules* which requires that the decree must agree with the judgment. What he has faulted was the procedure of extraction in that the same was not served upon the applicant or his advocate on record.

11. The applicant stated that the procedure which the respondent applied in applying and executing the decree was improper. The applicant has challenged the fact that on September 12, 2022, Quickline Auctioneers proclaimed his movable goods through irregular and unprocedurally obtained warrants in the absence of a decree which must be regularly and procedurally obtained and served upon the judgment debtor before any execution can issue.

12. Order 21 Rule 8 of the *Civil Procedure Rules* deals with preparation and dating of decrees and orders and it provides;

> (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.
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> (3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registry, 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.
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> (4) On any agreement 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.

13. From the reading of the above provisions, it is clear that a party in a suit in the High Court is at liberty to prepare a draft decree and submit to the other party/parties for approval with or without amendments or reject it. Subsections (3) and (4) are provisions on what should happen if the other party/parties fails to approve or disagrees with the draft decree.

14. It is my view, therefore, that the decree holder has no monopoly in the preparation of a decree. The provision does not allow a decree holder to prepare the decree without involving the judgment debtor such that the judgment debtor become aware of the decree when his property is proclaimed because that was not the intention of the drafters of the *Civil Procedure Act* and the *Rules* made thereunder.

15. On the issue of certificate of taxation, Section 51(2) of the *Advocates' Act*, is a good guide and it provides;

> " The certificate of a taxing officer by whom it has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed an order that judgment be entered for the sum certified to be due with costs".

16. As Musyoka J. stated in the case of *Wambua and Wambua Advocates Vs Rustan Hira Advocate* (2006) eKLR;

> " Section 51 of the *Advocates Act* makes general provisions as to taxation; as the marginal rule indicates. One of these provisions is that the court has discretion to enter judgment on a certificate of taxation which has not been set aside or altered, where there is no dispute as to retainer. This, in my view, is a mode of recovery of taxed costs provided by law in addition to filing of suit...".

17. Similarly in *Ochieng, Onyango, Kibet & Another Vs Adopt A Light Limited* [2007] eKLR the court held;

> " In my view, where an advocate has fulfilled the conditions set out under Section 51(2) of the Advocates' Act, the court has no discretion but an obligation to enter judgment as prayed.

18. My considered view is that the judgment creditor, ought to have moved the court to enter judgment in his favour following the taxation of his costs and issuance of a certificate of costs by the registrar before proceeding to execute. He did not do so. This, therefore, means that there is no judgment to execute.

19. In the end, I find that the application has merits and I do allow the same in terms of prayer (3). However, the judgment creditor reserves the right to apply for fresh warrants upon compliance with the procedure set out in the *Civil Procedure Rules*.

20. The applicant is hereby awarded the costs of the application.

21. It is so ordered.

Delivered, dated and **signed** at **Embu** this **25th** day of **January, 2023.**

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent