



**Somaia v Rotich & 2 others (Civil Case 542 of 2007)  
[2023] KEHC 2632 (KLR) (Commercial and Tax) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2632 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 542 OF 2007  
JWW MONG'ARE, J  
MARCH 27, 2023**

**BETWEEN**

**PANKAJ VRAJLAL SOMAIA ..... PLAINTIFF**

**AND**

**BILL KIPSANG ROTICH ..... 1<sup>ST</sup> DEFENDANT**

**FLORENCE ROTICH ..... 2<sup>ND</sup> DEFENDANT**

**METRO PETROLEUM LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated 23<sup>rd</sup> September 2022 brought by the Defendants/Judgment-debtors under the provisions of order 22 Rule 7(2), 8, 18(1)(a) and 22, Order 45 Rule 1 and Order 51, Rule 1 of the *Civil Procedure Rules*, 2010, Section 1A,1B,3A and 63(e) of the *Civil Procedure Act*, (Cap 21 Laws of Kenya) and the inherent powers of the court and all other enabling provisions of the law against the plaintiff/Decree Holder.
2. The Applicant seeks the following orders:-
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to recall, cancel and set aside , the warrants of Attachment dated 17<sup>th</sup> August 2022 and proclamation thereon by Messrs. Betabase Auctioneers dated 19<sup>th</sup> September 2022 against the movable assets of the 3<sup>rd</sup> defendant held at Kenya Pipeline Company Limited Depot



- d. That Costs of the application and any associated costs of the auctioneers be borne by the Plaintiff/Judgment Creditor.
3. The application is supported by the various grounds enumerated in the said Notice of Motion and the Supporting Affidavit of Bill Kipsang Rotich and sworn on the 23rd September 2022 and a Further Affidavit sworn by the said Bill Kipsang Rotich on 21<sup>st</sup> October 2022.
4. The Plaintiff/Judgement-Creditor opposed the application and filed a Replying Affidavit Sworn by Pankaj VraJlal Somaia.
5. Subsequently both parties filed written submissions and a list of authorities and also appeared before me to highlight their written submissions.
6. Having read through the application and the supporting documents by the Defendants/Applicants and the Plaintiff/Respondent and having heard the oral submissions of both parties I have identified only one issue for determination to wit;

“Whether order 22 rule 18(1) (a) of the *Civil Procedure Rules* is a mandatory requirement in execution proceedings of judgment.”

7. For the record, Order 22 rule 18.(1)(a) provides as follows;

Where an application for execution is made—

- (a) more than one year after the date of the decree;
- (b) against the legal representative of a party to the decree; or
- (c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.

8. It is not disputed that on 10<sup>th</sup> November 2020 the Honourable Court made the following orders:-
  - a. Judgment is entered in favour of the plaintiff against the defendants in the sum of Kshs. 93,000,000 together with interest at court rates from 1<sup>st</sup> January 2015
  - b. Costs of the suit be and are hereby awarded to the plaintiff.



9. It is also not in dispute that the defendants moved to the court of Appeal under Civil Application No. E400 of 2020 dated 14<sup>th</sup> December 2020 and the Court Appeal gave the following orders as a condition precedent for stay pending appeal:-
  - a. That the Defendants to pay Kshs. 10,000,000
  - b. The Defendants give a bank guarantee of Ksh. 20,000,000
  - c. That all of the above was to be done within 30 days subsequently within which the conditional stay was to lapse.
10. It is also not disputed that On 16<sup>th</sup> September 2022 the court gave a prohibitory order issued against Kenya Pipeline Company Limited for 552,000 litres PMS fuel and 249,000 litres of Jet A-1 fuel stored at Kenya Pipeline Depot in the name of the 3<sup>rd</sup> defendant, Metro Petroleum Limited.
11. Further On 6<sup>th</sup> October, 2022 the Honourable Court further ordered that the fuel held by Kenya Pipeline Company Limited 550,000 litres PMS fuel and 249,000 Jet A-1 fuel be sold and the proceeds therefrom be held in an interest earning Account of the Advocates of the parties on record.
12. The court notes that despite the spirited effort by the plaintiff to unlock the judgment through various court orders, none has been complied with to date.
13. The Defendants/Applicants have argued that the effective date of Judgment for purpose of execution is the date when the Judgment was issued being the 10<sup>th</sup> November 2020 and in their view, the Judgment Creditor or Decree Holder cannot move to execute without first complying with the requirements of Order 18 Rule 1(a) which require that one must give notice if the decree being executed was issued for a period of more than one year.
14. The Judgment Creditor on the other hand argues that while it is true that Judgment was issued on 10<sup>th</sup> November 2020, the process of execution could not start before costs were taxed and a decree issued by the court.
15. The defendants do not dispute that on the 29<sup>th</sup> day of June 2022, the plaintiff's Bill of Costs was taxed as at between party and party and allowed at the sum of kshs. 2,400,073.00 paving way for the execution of the decree arising from the Judgment herein.
16. I note that it is only after the taxation of costs occurred that the Decree-Holder moved to have execution proceedings commence against the Judgment-Debtors and he did so on 15<sup>th</sup> August 2022.
17. I also note that despite many attempts to have the petroleum products held by Kenya Pipeline sold to satisfy the judgment herein, the defendants continue to frustrate the process by making numerous other applications and subsequently ignoring or failing to comply with court orders therein.
18. Order 22 Rule 18(2) further enjoins the court to do the following;
  - (2) ) Nothing in sub-rule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.



19. Similarly the *Constitution* of Kenya has urged the courts to focus on substantive justice and not to be tied down by technicalities in its discharge of justice. Article 159 (2)(d) states as follows:-

“(1) ..... (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) .....

(b) .....

(c) ..... (d) Justice shall be administered without undue regard to procedural technicalities; and

20. In my considered opinion, execution of a decree is a technical process and therefore Order 22 Rule 18(2) (a) comes in to provide the technical procedure for execution of decrees if a substantial period of time has lapsed before any action has been taken by the successful party.

21. The same though is couched in mandatory terms and its purpose is to remind a Judgment-Debtor that now that the matter has come to an end, the successful party is moving to claim its rightful judgment and offer the judgment-debtor an opportunity to settle without resulting to other modes of execution including attachment of both movable and immovable properties to satisfy a decree.

22. To my mind this is necessary where it is possible that the judgment-debtor has, because of lapse of time, forgotten its obligations in the matter or has made partial payment which may not be reflected in the execution warrants.

23. In the present case, in my view, this is not so. Parties herein have been actively engaged before the courts in various modes including having an appeal filed before the Court of Appeal by the Defendants/Applicants to challenge the said judgment. I also note various orders of this court to have the petroleum products held by Kenya Pipeline to be sold and held in joint account by both parties have not borne any fruits,

24. Further, I note that the Judgement-Debtors have not made any effort towards settling the judgement debt as per the judgment herein. Instead they have made numerous efforts to deny the plaintiff the fruits of his judgement.

25. The plaintiff moved to commence execution on 15th August 2022 and this was almost immediately after the taxation process was completed by the courts. The process of execution in my view can only happen where the decree has been issued by the courts which usually happens after taxation of costs, in cases where the court also awarded costs, like in this case, to the successful party. In calculating time to see if the decree is one that fall under the requirements set out under Order 22 Rule 18(1) (a), one must also be cognizant that a decree cannot be issued if the courts have not finalized with the taxation for costs. Order 22 Rule 8(2) cited above provides exceptions where the court may waive the requirements of order 22 Rule 18 (1) for expediency and in the interest of justice. I am persuaded that the present case is one where the courts can allow the execution to proceed without the requisite notice since all parties to the suit have been alive to the proceedings that have taken place post judgment in the matter.

26. I therefore find that the application to set aside the warrants of execution herein is unmerited and an attempt by the defendants to further delay the conclusion of this matter and I will dismiss the same with costs to the Plaintiff/Respondent.

27. The Plaintiff is at liberty to proceed with the execution process. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF MARCH  
2023**

**J. W. W. MONGARE**

**JUDGE**

In the presence of:-

Mukuha for Mr. Bwire for the Applicants/ defendants

Mr. Anyona holding brief Kanjama Senior Counsel the Respondent/Plaintiff

Sylvia- court Assistant

