Stanbic Bank Kenya Ltd v Kipsigis Stores Limited & 2 others (Civil Case 3B of 2017) [2022] KEHC 3027 (KLR) (22 June 2022) (Ruling)

Neutral citation: [2022] KEHC 3027 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL CASE 3B OF 2017

RL KORIR, J

JUNE 22, 2022

BETWEEN

STANBIC BANK KENYA LTD ..... PLAINTIFF

AND

KIPSIGIS STORES LIMITED ..... 1ST DEFENDANT

ALFRED KIPKORIR MUTAI ..... 2ND DEFENDANT

SAMWEL CHERUIYOT MUTAI ..... 3RD DEFENDANT

RULING

1. On 7th June 2018, Muya J ordered the 1st Defendant herein to deliver the assets, the subject matter of this application to the Plaintiff within 45 days of the Ruling or in the alternative deposit the sum of Kshs 69,444,104. The assets in reference are Trailers ZE 6541, ZE 6542, ZE 6543, ZE 6544 and ZE 6545, Prime Movers Registration Number KBY 900Y, KBY 400Z, KBY 500Z, KBZ 900B and KBZ 600B and Nissan Navara Pick up Registration Number KBY 800J.

2. The Defendants did not comply with the aforementioned Order and consequently, Warrants of arrest were issued against them on 24th September 2018.

3. In a Ruling on the Application dated 20th April 2021, this Court ruled that the Orders of arrest and detention against the 2nd and 3rd Defendants be stayed as they were deemed a violation of the law. The Warrants of Arrest in the hands of the CID officers were recalled as they were null and void.

4. This court further ordered that the 2nd and 3rd Defendants attend court to show cause why they should not be committed to civil jail. This is the subject of this Ruling.

3RD DEFENDANT'S REPLYING AFFIDAVIT AND SUBMISSIONS.

5. In a Replying Affidavit dated 5th October 2021, the 3rd Defendant stated that he was neither informed nor involved in the proceedings as his brother, the 2nd Defendant handled the case herein and excluded him.

6. The 3rd Defendant stated that an Interlocutory Judgment in default of Defence was entered in favour of the Plaintiff on 6th July 2018. It was his further case that no Notice had been served upon him.

7. The 3rd Defendant stated that the Interlocutory Judgment was made after the Notice to Show Cause was issued. He further stated that the Interlocutory Judgment superseded the Notice to Show Cause and that the Notice had been overtaken by events since the Judgment had been passed and the Plaintiff had not enforced it.

8. It was the 3rd Defendant's case that the Defendants' Application dated 10th December 2018 which sought to set aside the Interlocutory Judgment remained unheard.

9. The 3rd Defendant urged this court to set aside the Notice to Show Cause until the Interlocutory Judgment being challenged is either set aside or confirmed.

10. The 3rd Defendant submitted that the Plaintiff should choose the course to follow as they cannot have an Interlocutory Judgment and Preservation Orders at the same time.

11. It was the 3rd Defendant's submission that pursuing the Notice to Show Cause was unfair and unlawful.

The Plaintiff's Submissions.

12. It was the Plaintiff's submission that the 2nd and 3rd Defendants had been served several proceedings. That the 3rd Defendant had been sued in his capacity as a director. It was the Plaintiff's further submission that the 3rd Defendant had executed several documents.

13. The Plaintiff submitted that this was not an execution of the Interlocutory Judgment but execution of the Orders of the Judge.

14 The Plaintiff submitted that the Ruling dated 7th June 2018 had never been set aside and that the Orders remain alive to date.

15. The Plaintiff submitted that although an Interlocutory Judgment existed, the preservation of the subject matter was necessary. That it would suffer prejudice because there was no compliance by the Defendants.

16. The Plaintiff submitted that the 3rd Defendant failed to show how he had complied or given an indication as to where the subject vehicles were. It was the Plaintiff's further submission that the 3rd Defendant had not taken the Orders seriously and that the authority of the court should not be eroded.

17. The Plaintiff submitted that there was no substantive objection to the Notice to Show Cause.

18. It was the Plaintiff's submission that the Order had not been complied with and that the orders of arrest ought to be reinstated. The Plaintiff further submitted that the 2nd Defendant had not shown up in court.

The Official Receiver's Submissions.

19. In oral submissions before the court, the Official Receiver stated that their interest was to assist the court in identifying the assets. They fully associated themselves with the Plaintiff's submissions.

20. The Official Receiver submitted that they had not received the assets of the company.

Analysis and Determination.

21. The 3rd Defendant stated that he was not informed and served the Notice to Show Cause issued on 5th February 2018 and that his brother, the 2nd Defendant herein dealt with this matter to his exclusion. There were two Notices to Show Cause on record, i.e. one issued on 5th February 2018 and the other one was issued on 15th February 2018 and both were addressed to the directors of the 1st Defendant. The 2nd Defendant responded via a Replying Affidavit dated 13th February 2018. There was no response on record from the 3rd Defendant. There was also no Affidavit of Service on record to indicate that the 3rd Defendant had been served. It is my finding that the 3rd Defendant was not served the aforementioned Notices to Show Cause.

22. In a Ruling to the Notices to Show Cause dated 7th June 2018, Muya J ruled that:

> "That the first Respondent to deliver the assets, the subject matter of this application to the bank within 45 days from today and in the alternative to deposit the sum of Kshs 69,444,104.56 being the sum outstanding as at 14th July 2017 pending the hearing and determination of this suit".

23. The Plaintiff thereafter filed a Request for Interlocutory Judgment dated 5th July 2018. The same was brought under Orders 10 Rule 6 and 10 of the Civil Procedure Rules. Interlocutory Judgment was entered on 6th July 2018 in terms of prayers a, b, c, d and e of the Plaint. From the record, it is clear that the matter never proceeded to formal proof hearing.

24. On 21st September 2018, Muya J issued Warrants of Arrest against the 2nd and 3rd Defendants. He stated that there was no evidence of compliance of his Order dated 7th June 2018. For clarity, the Order required the Defendants to deliver the assets to the Plaintiff or in the alternative, deposit the sum of Kshs 69,444,104.56 pending the hearing and determination of the suit.

25. The 2nd and 3rd Defendants filed a Notice of Motion Application dated 10th December 2018 that sought the following Orders:

    I. Spent.

    II. Thatthe Honourable Court be pleased to grant a stay of execution of the Judgment entered against the 2nd and 3rd Defendants on 6th July 2018 and all subsequent Orders made thereto pending the interparties hearing and/or determination of this application.

    III. Thatpending the interparties hearing and/or determination of this application there be a stay of the Warrant of Arrest issued against the 2nd and 3rd Defendants on 21st September 2018.

    IV. That the Honourable Court be pleased to set aside the default Judgment entered against the 2nd and 3rd Defendants on 6th July 2018 together with all subsequent proceedings and Orders made thereto.

    V. That the 2nd and 3rd Defendants to be granted leave to file their Defence out of time.

VI. Thatthis Honourable Court do extend and/or enlarge time for the filing of an application for leave to appeal against the Ruling and Order made on 7th June 2018 and this application be deemed as duly filed within time.

VII. Thatthis Honourable Court be pleased to grant leave to the 2nd and 3rd Defendants to appeal against the Order made on 7th June 2018.

VIII. Thatthis Honourable Court do extend time for the filing and service of Notice of Appeal against the Ruling and Order made on 7th June 2018 and the Notice of Appeal filed in court on 19th June 2018 and served on 5th July 2018 be deemed as duly filed and served within time.

IX. Thatthe warrants of arrest issued against the 2nd and 3rd Defendants on 21st September 2018 be set aside or annulled.

X. Thatthe costs of this application be provided for.

26. From the record, the aforementioned Application has never been set down for hearing.

27. In this matter I had earlier noted in a Ruling dated 7th May 2021 that:

> " It is salient to note that this was not arrest and detention as a mode of execution of a Decree. I have noted that there is no Decree extracted. A Decree is defined in the *Civil Procedure Act* as the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may either be preliminary or final. An Order on the other hand is defined as the formal expression of any decision of a court which is not a decree and includes a rule nisi.
>
> In addition, I observe from the record that there is no application for execution of a Decree for payment of money by arrest and detention of the judgment debtor. Such an application would then trigger the sections that counsel submitted upon being Sections 38, 40 and 42 of the *Civil Procedure Act*".

28. It was clear from the record that the Warrants that are subject to this Ruling arose from the disobedience of the Ruling of Muya J that was delivered on 7th June 2018. It was also clear from the record that the Plaintiff obtained an Interlocutory Judgment on 6th July 2018, which was a month later.

29. Procedurally, if a party has an Interlocutory Judgment, it would trigger one to have the matter set down for formal proof hearing and upon conclusion, extract a Decree which would then enable one to commence execution with the goal of recovering a debt.

30. The word Interlocutory is defined in the *Black's Law Dictionary,* 10th Edition as:

> " Interim or temporary, not constituting a final resolution of the whole controversy".

31. There is no evidence on record to show that the matter was set down for formal proof hearing and as such the matter remains undetermined. An Interlocutory Judgment is not final and the matter being the whole suit is therefore undetermined.

32. In the case of *Braeburn Limited v Gachoka & another* [2007] eKLR it was held:

> " A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal."

I am also persuaded by the case of *Solomon Muriithi Gitandu & Another V Jared Maingi Mburu* (2017) eKLR, where Gitari J held that:

> " It has been held severally that no person should be sent to prison for inability to pay a debt. In *Zippora Wambui Muthara* – Milimani B C Cause 19/2010 (unreported) Justice Koome (as she then was) observed as follows:
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> "There are several methods of enforcing a civil debt such as attachment of property. The respondent's claim that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the international covenant on civil and political rights that guarantees parties' basic freedoms of movement and of pursuing economic cultural development"
>
> It is incumbent on the party seeking to execute a civil debt by way of committal to civil prison to adhere to the legislative safeguards before a party can be committed to civil jail. In the case of Braeburn supra and *Jane Wangui Gachoka v Kenya Commercial Bank* Petition 51/2010 it was held that Section 38 and 40 of the *Civil Procedure Act* are neither inconsistent with the provisions of the relevant provisions of *the Constitution* and International Bills of Human Rights. I am persuaded to agree with the findings. However, for a judgment debtor to be committed to prison, the Court must ensure that the conditions for committal to prison on account of a money decree are strictly followed. A judgment debtor will not be committed to prison for inability to pay or to fulfil contractual obligation. There must be additional reasons and the court being satisfied after the debtor has been given notice to show cause and give reasons in writing as provided under Section 38 of *Civil Procedure Act* and Order 22 rule 31 (1) *Civil Procedure Rules*".

33. It is my view that committing the 2nd and 3rd Defendants to civil jail on account of failure to pay a debt without adherence to the available legislative safeguards under Sections 38 and 40 of the Civil Procedure Rules would be unlawful. No prejudice suffered by the Plaintiff if the 2nd and 3rd Defendants are not committed to civil jail.

34. The 3rd Defendant had demonstrated that there was a pending Application dated 10th December 2018. Prayer 4 of the application sought to set aside the Interlocutory Judgment of 6th July 2018. As earlier stated, the matter is undetermined as it has not gone through formal proof hearing and hence it is not ripe for execution. Therefore, denying the 2nd and 3rd Defendants a chance to ventilate and/or prosecute their Application would be driving them away from the seat of justice.

35. It is my finding that the interlocutory Judgment and the defendant's pending application provide reasonable circumstances why the 2nd and 3rd Defendants should not be arrested and detained pending the hearing and determination of their Application dated 10th December,2018.

36. I direct that the Notice of Motion Application dated 10th December 2018 be set down for directions.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 22ND DAY OF JUNE, 2022

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Kurgat for the 3rd defendant, Mr. Maondo for Plaintiff and Kiprotich (Court Assistant**):** and in the absence of Mr. Korir for the Official Receiver.