David Onyango Mwai t/a Lak Motorcycles & Assesories & another v GOO (Minor suing as the personal representative of IOO) (Civil Appeal 58 of 2017) [2022] KEHC 12739 (KLR) (26 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12739 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 58 OF 2017

FA OCHIENG, J

AUGUST 26, 2022

BETWEEN

DAVID ONYANGO MWAI T/A LAK MOTORCYCLES & ASSESORIES ..... 1ST APPLICANT

PAUL ODHIAMBO RAGOT ..... 2ND APPLICANT

AND

GOO (MINOR SUING AS THE PERSONAL REPRESENTATIVE OF IOO) ..... RESPONDENT

(Being an appeal from the judgment of Hon E N Maina-J delivered on July 19, 2018 in Kisumu HCCA No 58 of 2017)

RULING

1. The Appellant's application dated October 19, 2021 sought to have the execution proceedings which were commenced by the Respondent on October 18, 2021, declared unlawful and illegal.
    1. The Appellant was of the view that the said proceedings were null and void for all intents and purposes. Therefore, it was requested that the execution be lifted and annulled.
    2. In particular, the Appellant asked the Court to recall, cancel and anull the Warrants of Attachment dated October 18, 2021 as well as the Proclamation which was served on the Appellant on October 18, 2021.
3. It is common ground that;
    a. On July 26, 2017, the trial court delivered judgment in favour of the respondent.
    b. The said judgment was for General Damages amounting to Kshs 792,476/=.

c. The learned trial magistrate also awarded costs of the suit and interest.

d. The Appellants challenged the decision through an appeal at the High Court.

e. On March 19, 2018, the High Court dismissed the appeal, with costs to the respondent.

f. The appellants filed an appeal at the Court of Appeal. On June 18, 2021 the Court of Appeal dismissed the appeal.

g. Whilst the appeal was still pending, the parties recorded a consent order, staying execution on July 5, 2019.

As a pre-condition for the stay of execution, the appellant deposited the decretal amount together with the costs of the suit, into a joint account, which was in the names of the advocates for the parties herein.

4. According to the Appellant, the Respondent had no reason to take out execution proceedings when he was well aware that the decretal amount was available in the joint account.

5. The Respondent blamed the advocate for the Appellant for failing to immediately release the decretal amount after the appeal was dismissed.

6. The Respondent also pointed out that the money which was in the joint account did not include the costs awarded by the High Court. He explained thus;

> " 9. The only amount that was being pursued, however, though based on a decree that was issued on July 19, 2018, was not deposited in a joint interest earning account. The amount was Kenya Shilings One Hundred Thirty Five Thousand Three Hundred (Kshs 135,300) only."

7. The first point of note in that submission is the fact that the decree which was being executed was issued on July 19, 2018.

8. Therefore, as the Respondent readily conceded, pursuant to Order 22 Rule 18 of the *Civil Procedure Rules* a Notice to Show Cause has to issue where a decree was more than a year old.

9. But because there had been a stay of execution, the Respondent submitted that the said Order had the effect of stopping time from running.

10. I appreciate that when there was an Order for stay of execution, a party who took steps to carry out execution would be in contempt of Court.

11. The Respondent's position was that the presence of an Order for stay of execution stopped time from running. The said understanding was derived from the following words, in *Koinange Investment And Development Company Limited Vs Ian Kahiu Ngethe & 3 Others*(2019) eKLR.

> " Where a party is prevented from executing a lawful decree by a court order pending hearing and determination of an appeal against the decree, it would be unjust to hold that time still runs against the decree holder over the period when the appeal remains undetermined, and until the stay order is vacated."

12. It is important to put that decision in context. That case involved the question as to whether or not the judgment which had been delivered more than 12 years before, could be executed. The question

stemmed from the provisions of Section 4 (4) of the *Limitation of Actions Act* which provides as follows;

> " An action may not be brought upon a judgment after the end of twelve years from the date on which the judgement was delivered, or (where the judgement or a subsequent order directs any payment of money or delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question ....."

13. That provision makes it clear that if the judgment was not enforced within the stipulated period, the rights of the decree holder were extinguished.

14. It was the decision of the Court that the time stipulated in the *Limitation of Actions Act* stopped running for the period when there was an Order for stay of execution. I fully appreciate the rationale behind that decision, as it serves to safeguard the rights of a decree holder whose hands were tied by an Order of the Court, when execution was stayed. As it is the Order of the Court which precluded him from taking steps to execute the decree, it was only fair and just that the period when the Order was in place be excluded when computing the 12 years period, from the date when the judgment was delivered.

15. In my considered opinion, that case is distinguishable from the case before me. I say so because in this case there is no issue touching on the Limitation of Acts Act.

16. The Applicant has not asserted that the rights of the Respondent had been extinguished.

17. And the Respondent has, in his submissions, noted as follows;

> " 10. Indeed order 22 rule 18 requires that a notice to show cause has to issue where a decree is more than a year old and indeed the presence of an order for stay of execution has not been listed as one of the exceptions to the aforementioned rule."

18. In my considered opinion, that statement accurately captures the scope of the Order 22 rule 18 of the Civil Procedure Rules.

19. I note that the Respondent went on to submit that;

> " However, this scenario is an special one where there was a stay of execution order in place right before even the opportunity to proceed to execution could commence."

20. As the execution process had not previously commenced, it follows that, when the Respondent decided to take steps to execute the decree after the Court of Appeal had dismissed the appeal, the process of execution was starting from scratch.

21. The Respondent acknowledged that the impugned process was the first. I say so because, at paragraph 15 of the submissions, he said;

> " Prior to the commencement of the execution process, through his advocate, wrote to the appellant's advocate requesting to have the amount of Kenya Shillings One Million, Five Hundred Ninety-One Thousand Three Hundred Seventy- Nine (Kshs 1,591,379.00) only released to the respondent, since the aforementioned Court of Appeal case had been determined."

22. In other words, there was no process of execution which had been commenced earlier; and which was then put on hold by a stay order.

23. As the Respondent was commencing the process of executing after the lapse of more than a year, from the date when the decree was issued, it was imperative that the said process should have commenced by way of a Notice to Show Cause.

24. Meanwhile, as can be seen from the submission cited above, the Respondent wrote to the Applicant, demanding payment of Kshs 1,591,379/=.

25. Yet, as the Respondent said (at paragraph 9 of his submissions);

> " The only amount that was being pursued, however, though based on a decree that was issued on July 19, 2018, was not deposited in a joint interest-earning account.
>
> The amount was Kenya Shillings One Hundred and Thirty-Five Thousand Three Hundred (Kshs 135,300/=) only."

26. If the only amount being pursued by the Respondent was Kshs 135,300/=, there is no justification whatsoever why the Respondent had demanded for Kshs 1,591,300/=. There is also no justification why the application for execution contained the following details;

> " Decretal amount 909,381.00 Less paid on account NIL Interest on decretal amount 136,300.00 Further Costs 37,884.00 Collection Fee 1,500.00 total 74,684.00"

27. Those figures do not add up at all. For, if there had been nil payment towards the decretal amount of Kshs 909,381/=; if interest, costs and collection fees were added to that sum, the balance could not be Kshs 174,684/=.

28. I therefore find that the execution process was irregular, from that perspective.

29. And because the said process was instituted in a manner that was not in keeping with Order 22 Rule 18 of the Civil Procedure Rules, I find that the process was a nullity.

30. In the result, the application dated 19th October 2021 is allowed. The Warrants of attachment issued on 18th October 2021 are lifted and recalled.

31. The auctioneer's charges, if any, arising from the execution process, shall be borne by the Respondent.

32. The Respondent will also pay to the Applicant, the costs of the application.

33. It is so ordered because there is no grounds upon which the Court can deviate from the provisions of Section 27 of the *Civil Procedure Act*, which stipulates that costs shall follow the event unless the Court shall, for good reason, otherwise order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF AUGUST 2022

FRED A OCHIENG

JUDGE