



**Ernie Campell & Co. Limited v Automobile Association of Kenya (Civil Suit 324 of 2006)
[2022] KEHC 14181 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 324 OF 2006
A MABEYA, J
OCTOBER 21, 2022**

BETWEEN

ERNIE CAMPELL & CO. LIMITED PLAINTIFF

AND

AUTOMOBILE ASSOCIATION OF KENYA DEFENDANT

RULING

1. This is a ruling on the defendant's notice of motion dated September 5, 2022 brought under section 3A of the *Civil Procedure Act* and order 22 rule 18 of the *Civil Procedure Rules 2010*.
2. The defendant sought a raft of prayers some of which are spent. The remaining ones were; an order to strike out the warrants of attachment of moveable property in execution of decree for money issued on the August 17, 2022 and the warrants of sale of property in execution of decree for money issued on August 17, 2022; an order to annul the processes undertaken by Fisra Auctioneers in execution of the irregular warrants of sale of property in execution for money decree issued on August 17, 2022 and an order to have the said auctioneers unconditionally release the motor vehicle Rescue track ISUZU NQR registration number KCX XXXX to the defendant.
3. The grounds therefor were that judgment in this matter was delivered by Martha Koome J (as she then was) on November 11, 2010. That as of August 17, 2022 when the plaintiff acquired the impugned warrants of attachment and sale, the judgment and decree in this matter were 11 years and 8 months old. That a notice must be served upon the person against whom execution is applied requiring him to show cause why the decree should not be executed against him. That the defendant failed to take out such a notice or to serve the defendant with any.
4. That the plaintiff's failure to follow the well laid down procedure for acquiring warrants for judgments and decrees that are over 1 year old renders the warrants in his possession irregular and illegal.



5. That therefore the warrants ought to be set aside “*ex debito justitiae*” and that the applicant is likely to suffer irreparably as the plaintiff is in the process of selling the defendant’s motor vehicle.
6. The plaintiff opposed the application *vide* grounds of opposition dated September 22, 2022 and a replying affidavit of Gopal Vagjiani sworn on the same date.
7. In the grounds of opposition, the plaintiff contended that the defendant’s application had been overtaken by events as by the time it was being filed, the plaintiff and defendant had held a meeting on September 1, 2022 where a binding settlement agreement on the issues raised in the application was reached.
8. That in compliance with the terms of the said agreement, the principal sum of the decretal sum had already been paid. That remained was for the plaintiff to recover the balance of the decretal sum in terms of the aforementioned agreement.
9. The plaintiff contended that the application was made in bad faith, was an afterthought and was only intended to waste time for recovery so that the decree lapses on December 8, 2022 leaving the plaintiff with no power to carry out execution.
10. The plaintiff further contended that the warrants of attachment were lawfully applied for and issued by the deputy registrar. That the auctioneers had lawfully proclaimed the office equipment and motor vehicle of the defendant on August 19, 2022. That the proclamation dated August 19, 2022 served as notice to the defendant of an intention to execute the decree.
11. That after the payment of the principal sum, the plaintiff instructed the auctioneer to release the motor vehicle but the auctioneer insisted the same was to be subject to payment of his charges.
12. That the notice to show cause was overtaken by events following the meeting and agreement of the parties of September 1, 2022 and the partial remittance decretal sum and/or of the principal sum by the defendant.
13. In a lengthy rebuttal, the defendant lodged a further affidavit sworn on October 12, 2022. It was averred that the plaintiff, its advocates and its auctioneers irregularly took out warrants of attachment over a debt that was already paid. That a sum of Kshs 501,718/- and another sum of Ksh 165,000/- had been received by the plaintiff. That the actual debt had been paid in 2008.
14. The plaintiff filed a supplementary affidavit sworn on October 13, 2022 by Mr Gopal. It was contended that the defendant was reading the judgment of December 8, 2010 selectively. That judgment found that the plaintiff was still owed Kshs 501,718.50.
15. The court has considered the entire record including the affidavits, annexures and submissions in this matter. The first issue for determination is whether the warrants of attachment and sale issued on August 17, 2022 were illegal and irregular.
16. On December 8, 2010, a judgment was entered against the defendant in favour of the plaintiff for Kshs 501,718.50 with interest from August 30, 1999 plus costs.
17. The decree thereto was issued on July 21, 2022, almost 12 years since the judgment was entered. Warrants of attachment of movable property and warrants for the sale of property in execution of the decree were issued on August 17, 2022 by the deputy registrar of this court. On August 19, 2022 the auctioneer proclaimed the office equipment and subsequently seized the defendants motor vehicle.
18. There is no dispute that there was no notice to show cause that was issued to the defendant. This was mandatory by virtue of the provisions of order 22 rule 18(1) of the *Civil Procedure Rules*. That rule



provides that where an application for execution is made more than one year after the date of the decree, 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.

19. On the other hand, order 22 rule 18(2) provides that: -

Nothing in subrule (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.”

20. From the foregoing, it is clear that a notice to show cause ought to be issued where an application for execution is made more than one year after the date of the decree. However, for good reason which have to be recorded, the court may proceed with the execution process without such notice if it considers that such notice would cause delay or would defeat the ends of justice.

21. The plaintiff’s advocates wrote to this court on August 3, 2022 seeking to have warrants of attachment of movable property issued noting that it only had until December 8, 2022 to execute the decree herein as judgment was delivered in 2010 and a decree can only be executed within 12 years from the date of the judgment.

22. On record is a letter dated August 3, 2022 by the plaintiff’s advocates setting out the urgency for the issuance of the warrants. On August 5, 2022, the deputy registrar endorsed the said reasons before the warrants were issued. In view thereof, I believe that the provisions of order 22 rule 18(2) of the [Civil Procedure Rules](#) were complied with and therefore applies. It had been nearly 12 years and the notice to show cause would have delayed the process of execution by the plaintiff who had only until December 8, 2022 to do so.

23. Accordingly, I do find that the warrants were issued regularly and in accordance with the law.

24. The second issue is whether the application had been overtaken by events.

25. The plaintiff submitted that the terms of agreement between the plaintiff and defendant had already crystallised and what the defendant is now seeking through the application was to overturn an agreement of parties that was entered into on the initiation and invitation of the defendant.

26. The annexures “GV1” “GV2” and “GV3” in the plaintiff’s replying affidavit indicate that the parties held a meeting to reach a settlement on the payment of the decree. It was agreed that the defendant would have 14 days to go through its bank statements to establish whether the cheques settling the decretal sum were actually cleared in favour of the decree holder. That the defendant would deposit the sum of Kshs 501,718.50 with the plaintiff’s advocate to be held pending completion of the exercise of verification of the defendant’s bank statement within 14 days.

27. If the defendant was unable to establish that it had paid the decretal sum, then the sum of Ksh 501,718.50 would be forwarded to the plaintiff as part payment of the decree amount.

28. Pursuant to the agreement above, the defendant forwarded the said sum to the plaintiff’s advocate. From the minutes and correspondence, there is no evidence of coercion, fraud or undue influence as alleged by the defendant. It is clear that the defendant entered into the agreement freely.

29. The defendant pleaded that the decretal sum had been fully paid but did not provide an *iota* of evidence to prove this. The only money that the defendant proved to have been paid was the principal sum of Kshs 501,718/-.



30. It is clear that the present application was made as an afterthought after a binding agreement had been entered and partially executed. The application was made in bad faith, is unmeritorious and is dismissed with costs to the plaintiff.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

A. MABEYA, FCIArb

JUDGE

