



REPUBLIC OF KENYA



KENYA LAW
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**SFK v PLL & another (Matrimonial Cause E001 of 2021)
[2022] KEHC 16675 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MATRIMONIAL CAUSE E001 OF 2021
F GIKONYO, J
DECEMBER 20, 2022**

BETWEEN

SFK PLAINTIFF

AND

PLL DEFENDANT

AND

JLL OBJECTOR

RULING

Objection proceedings and review of foreign judgment

1. Before me are two applications. One is dated June 10, 2022. It is by objector and it seeks the following orders: -
 - i. Spent
 - ii. That pending the hearing and determination of this application (inter partes) this honourable court be pleased to invoke the provisions of Order 22 Rule 52 of the *Civil Procedure Rules* and issue an order of stay of execution of the decree in this matter.
 - iii. That the proclamation and the attachment of the objector's livestock by the Decree Holder as set out in the proclamation dated May 27, 2022 by Sanjomu Auctioneers be set aside.
 - iv. That the costs of this application be borne by the Decree Holder.
2. The application is supported by the affidavit of Joseph Lerason Lengeju sworn on the June 10, 2022.
3. The application is premised on the grounds that the objector is not a judgment debtor in this matter, and has nothing to do with these proceedings, judgment and decree; all the proclaimed livestock



- absolutely and legally belong to the objector and not any other person; thus, attachment thereof by auctioneers in execution of the decree herein is wrongful.
4. He urged further that the judgment debtor has no shares or any legal or equitable interest or even beneficial interest in the objector's livestock.
 5. The other application is by the defendant. It is dated June 15, 2022 and is expressed to be brought under section 1A, 1B, 3A CPA order 45 Rule 1, Order 21 Rule 8 CPR. It is seeking the following orders;
 - i. Spent
 - ii. That pending the hearing and determination of this application this honourable court be pleased to stay execution of the judgment and decree dated March 30, 2022.
 - iii. That the honourable court be pleased to recall and cancel the decree dated April 5, 2022 the warrant dated May 27, 2022.
 - iv. That this honourable court be pleased to review the judgment delivered on March 30, 2022 on account of any other sufficient reason and remit the order clarifying journal entry of judgment and decree of divorce (*Nunc pro Tunc*) issued on October 4, 2021 to the District Court Sedgwick County Kansas USA for modification to fit Kenyan requirements.
 - v. That in the alternative this court be pleased to stay execution of the order clarifying formal entry of judgment and decree of divorce (*Nunc pro Tunc*) issued on October 4, 2021 pending the modification by the District Court Sedgwick County, Kansas USA to fit Kenyan requirements for purposes of execution.
 - vi. That costs of the application be provided for.
 6. The application is supported by an affidavit sworn by Peter Lenai Lengeju on June 15, 2022.
 7. The application is premised on the following grounds; That this court delivered its judgment on March 30, 2020. Its effect was that the order for judgment electronically signed on October 4, 2021 is recognized and enforceable by this court.
 8. On April 5, 2022 the plaintiff extracted a decree purportedly dated April 5, 2022 without following the mandatory provisions of order 21 rule 8 of CPR on the same day the plaintiff applied for execution of the said decree. The defendant contests that the application for execution does not agree with the judgment delivered on March 30, 2022. The defendants argue that the plaintiff is executing part of the judgment which is only executable in the United States of America and should not pursue parallel modes of execution. That further the plaintiff has applied for execution of properties not owned by the Defendant to wit motor vehicle registration No JV285WGP and the undivided share in plot allotment No 11B185. He states that execution in Kenya can only be done in relation to paragraph 11 of the journal entry of judgment and decree in so far as the order conforms with Kenya's judgments. He argues that the order clarifying journal entry of judgment and decree of divorce (*Nunc Pro Tunc*) issued on October 4, 2021 is not capable of execution in Kenya because it is saved on exhibits which are not admissible in Kenyan courts. The order clarifying journal entry of judgment and decree of divorce (*Nunc Pro Tunc*) issued on October 4, 2021 ought to be remitted back to the district court Sedgwick County, Kansas USA for modification to fit Kenyan requirements or in the alternative this honourable court should stay execution of the order clarifying journal entry of judgment and decree of divorce (*Nunc pro Tunc*) issued on October 4, 2021 pending the modification by the district Court Sedgwick County, Kansas USA to fit Kenyan requirements for purposes of execution. That unless execution is stayed the defendant's stands to suffer irreparable loss and damage by reason of parallel modes of execution.



9. The plaintiff filed a replying affidavit to the application dated June 10, 2022 sworn by the plaintiff on July 13, 2022. The plaintiff deposed that the application is made in bad faith with sole purpose of defeating the execution of the court decree and rendering the judgment of the court in Kansas and this court incapable of being performed. That the court in Kansas relied on the assistant chief report which identified the animals to be attached and therefore the claim that the same animals belong to the objector is mischievous and meant to defeat the judgment. That this is third time the defendant has attempted to pass off the matrimonial property as his father's property with the aim of defeating the judgment of this court and court in Kansas. That the defendant in his affidavit admits that paragraph 11 of the journal entry of judgment and decree of divorce electronically signed on the June 26, 2020 is enforceable in Kenya. That to objector's claim is based on allegedly Maasai customs that all property acquired by children of a home before moving out of their home belong to the father is repugnant to justice and morality and no ownership claim can be founded on such allegations without infringing on my right to property. That the court in Kansas having made a finding that the animals were matrimonial property unless the said judgment is set aside by the court in Kansas it remains binding and cannot be defeated through review proceedings in Kenya. She argues that the objector does not have any source of income and he has been relying on financial resources sent to him by the plaintiff during the pendency of her marriage to the defendant's and therefore cannot or could not own and possess the animals that he now claims. That the objector was aware of the court proceedings and stock taking but did not raise any claim or interest in the animals. That there is no proof in court to contradict the assistant chief's report on ownership.
10. The defendant filed a further affidavit sworn on September 21, 2022. He deposed that the application is not misconceived. He argues that he is not seeking modification of the judgment but that the judgment as is, is incapable of being executed in Kenya. He intends to challenge the order clarifying the judgment since it was made in his absence. He further contends that the plaintiff has made it difficult for him to obtain a report from Directorate of Criminal investigation after he made a report of forgery. He averred that this court is not functus officio as it still has powers to review its judgment if proper cause is shown.

Directions Of The Court

11. This court directed that parties should file replies and submissions in respect of the applications dated June 10, 2022 and June 15, 2022. The plaintiff and the objector did not file any written submissions. The defendant did.

Defendant's Submissions.

12. The defendant submitted that the decree dated March 30, 2021 did not comply with the mandatory provisions of order 21 rule 8 of the civil procedure rules. That the plaintiff has not demonstrated how the amount due of \$ 29,605.11 was arrived at. He argues that there was no decree issued by the court on April 5, 2022. Therefore, any execution process based on that decree is a nullity as the decree itself. The decree does not bear a date which the judgment was delivered. The defendant contends that the decree dated April 5, 2022 does not agree with the judgment delivered by the court on March 30, 2022.
13. The defendant submitted that this court should remit the journal entry of judgment and decree of divorce electronically signed on June 26, 2020, the order clarifying journal entry of judgment and decree of divorce (*Nunc Pro Tunc*) signed on October 4, 2021 for purposes of modification to fit Kenyan requirements. That the affidavit which form part of the journal entry of judgment and decree of divorce electronically signed on June 26, 2020 the order clarifying journal entry of judgment and decree of divorce (*Nunc Pro Tunc*) signed on October 4, 2021 were not notarized in Kenya. There are



no affidavits at all and cannot be used in any court and in the instant case cannot be used for purposes of execution.

14. The defendant submitted that this court should stay execution pending modification by the district court Sedgwick County, Kansas USA to fit Kenyan requirements for purposes of execution. That he shall be making an application to set aside the order clarifying journal entry of judgement and decree of divorce (*Nunc Pro Tunc*) signed on October 4, 2021, which was made when he was in Kenya. That there is therefore a likelihood that the defendant will suffer double jeopardy if the execution is allowed in Kenya and the state department is also recovering amounts owing as child support in America.
15. The defendant has relied on the following authorities;
 - i. Order 21 Rule 8 of the *Civil Procedure Rule*.
 - ii. *China Wu Yi Company Limited V Belgo Holdings Limited* [2018 eKLR.
 - iii. *Landmark Holdings Limited V Robert Macharia Kinyua* [2018] eKLR
 - iv. Section 5 Of the *Oaths and Statutory Declarations Act*.
 - v. Rule 9 Of the *Oaths and Statutory Declarations Rules*
 - vi. *Gideon Sitelu Konchellah V Julius Lekakeky Ole Sunkuli & 2 2 Others* [2018 eKLR.
 - vii. *Peeraj General Trading & Contracting Company Limited Kenya & Another V Mumias Sugar Company Limited* [2016] eKLR.
 - viii. *Salim Albamed Ali & Another V EMAG AG* [2002] eKLR.

Analysis And Determination.

16. The issues for determination are;
 - i. Whether the objection proceedings are merited.
 - ii. Whether this court should review and or stay execution of the judgment delivered on March 30, 2022.
 - iii. Whether this court should recall and cancel the decree dated April 4, 2022 and the warrant dated May 27, 2022.
 - iv. Who should bear costs of the application.
17. The application dated June 10, 2020 relates to objection proceedings.
18. Order 22 Rule 51 of the *Civil Procedure Rules* provides: -

“ Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all parties to the decree-holder, of his objection to the attachment of such property”.
19. In *Stephen Kiprotich Koech v Edwin K Barchilei; Joel Sitienei (Objector)* [2019] eKLR, the court held: -

“The core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. For this purpose, he may raise an objection on the ground, *inter alia*, that he has some beneficial



interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached.”

20. Further, in *Arun C Sharma versus Ashana Raikundalia T/A A Raikundalia & Co Advocates & 4 others* [2014] eKLR, it was held: -

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. Has the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?”

21. From the foregoing, in objection to attachment proceedings, the objector must establish that, he/she has a legal or equitable interest in the goods under attachment in execution of a decree of court. The equitable or legal interest in the goods attached, must be established to exist and to vest in the objector as at the time of the attachment.
22. The objection is founded on, inter alia, that he has some beneficial interest in the attached property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached.
23. Has the objector established a legal or equitable interest in the animals attached in execution of the decree herein?
24. In the present case, the objector swore that the attached animals belonged to him. They were attached in execution of a decree and judgment pronounced by this court on March 30, 2022.
25. The plaintiff stated that the objector has no source of income and that he has been relying on the financial resources sent to him by her during the pendency of the marriage between her and the defendant.
26. Animals in question are not household items whose ownership may be deduced upon assumptions. Credible and cogent evidence is required to prove he is the equitable or beneficial or legal owner of the animals. See *Michael Kwena v Raza Properties Limited & Another* [2008] eKLR,)
27. Other than claiming that the animals belong to him, the objector has not produced any documents or evidence to prove ownership of the animals under attachment. Although his financial ability was put to question, the objector did nothing to show acquisition or that he acquired those animals. The averments in the affidavit and in the application are bare statements devoid of any factual support.
28. Accordingly, the objector has not proved he has any equitable or legal or beneficial interest in the attached animals. These animals are the subject of the matrimonial property in the foreign judgment. In the upshot, I dismiss the application with costs to the decree-holder.

Whether this court should review and or stay execution of the judgment delivered on March 30, 2022.

29. On March 30, 2022, this court delivered a judgment as follows;

“The court is satisfied that the trial abroad was by a court of competent jurisdiction, exercising jurisdiction upon regular proceedings, within a judicial system that is beyond reproach. And there is nothing to show prejudice in the court or in the system of laws under which the decree was made or fraud in procuring the judgment or any other special reason why this country should not allow its full effect. Accordingly, the journal entry of judgment and



decree of divorce electronically signed on June 26, 2020, the order clarifying journal entry of the judgment and decree of divorce (Nunc Pro Tunc) signed on October 4, 2021 in the district court Sedgwick County, Kansas USA and order for judgment electronically signed on October 4, 2021 are hereby recognized and enforceable by this court.”

30. The defendant stated that the plaintiff is executing part of the judgment is only executable in the United States of America and should not pursue parallel modes of execution. The defendant averred that the plaintiff has applied for execution on properties not owned by the defendant to wit motor vehicle registration no. jv28swgp and the undivided share of plot allotment no. 11b185. He stated that execution in Kenya can only be done in relation to paragraph 11 of the journal entry of judgment and decree in so far as the order conforms with Kenya’s requirements. Further he stated that the order clarifying journal entry of judgment and decree of divorce (*Nunc Pro Tunc*) issued on October 4, 2021 is not capable of execution in Kenya because it is based on exhibits which are inadmissible in Kenyan courts.
31. The defendant prayed that the order clarifying journal entry of judgment and decree of divorce (*Nunc Pro Tunc*) issued on October 4, 2021 ought to be remitted back to the district court Sedgwick county , Kansas USA for modification to fit Kenyan requirements or in the alternative this court should stay the execution of the order journal entry of judgment and decree of divorce (*Nunc Pro Tunc*) issued on October 4, 2021 pending the modification by the district court Sedgwick county Kansas USA to fit Kenyan requirements for purposes of execution.
32. The applicant seems to impeach the jurisdiction of this court in relation to adoption and enforcement of the foreign judgment in question. A court cannot act without jurisdiction lest it should engage in nullity. In the Kenyan context, jurisdiction is derived from either the *Constitution* or an Act of Parliament. See the case of SK Macharia, and *Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited* [1989] KLR,
33. The wider foundation of adoption and enforcement of foreign judgments is international cooperation. More specifically, adoption and enforcement of foreign judgment may be on the basis of reciprocal arrangement, or statutory enactment. For instance, amongst the statutory law in Kenya that govern adoption and enforcement of foreign judgments is The Foreign Judgment (Reciprocal Enforcement) Act. It may also be founded solely on the principle of Comity. To these categories, the Court of Appeal added: “In the absence of a reciprocal enforcement arrangement, a foreign Judgment is enforceable in Kenya as a claim in common law.” (*Jayesh Hasmukh Shah V Navin Haria & Another* (2016) eKLR)
34. Be that as it may, the overall objective of such law is to provide for the recognition and enforcement of foreign judgments and for other purposes in connection therewith in recognition of the sovereignty of the state concerned.
35. The object of such law hems the jurisdiction of the court.
36. Does the power of the court in the recognition and enforcement of foreign judgment include power to review the foreign judgment?
37. It bears repeating that the jurisdiction of the court is limited to recognition and enforcement of a foreign judgment. The jurisdiction does not extend to reviewing the foreign judgment or doing such acts as are akin to exercising of supervisory jurisdiction upon the foreign court. The request for remitting the judgment for consideration by the foreign court is an act of supervisory jurisdiction which this court does not have. Needless to state, this position is in deference to the judicial authority of foreign courts as part of recognition of the sovereignty of their states.



38. Any substantive matter such as the alleged forgery or misrepresentation of facts, should be raised directly in the foreign court from which the judgment emanates, but subject to their law, laid down procedures or requirements.
39. Accordingly, I will not waste precious judicial ink in any or any further evaluation of these substantive issues being raised on the foreign judgment. The request for review or remission of the foreign judgment therefore fails.
40. As to arguments on enforceability of the foreign judgment herein; the foreign judgment herein was formally recognized and is enforceable by this court.

Whether this court should recall and cancel the decree dated April 4, 2022 and the warrant dated May 27, 2022.
41. This court delivered its judgment on March 30, 2022. Thereafter, the Plaintiff drew a decree therefrom and executed it. The Applicant has challenged the decree; that it does not meet the mandatory provisions of order 21 rule 8 of the civil procedure rules.
42. On close examination, the decree extracted herein conforms to the requirements of Order 21 Rule 7 of the *Civil Procedure Rules*; that the decree must agree with the judgment. The challenge is non-compliance with the mandatory provisions and how the amounts were arrived at.
43. Some important considerations. Upon delivery of judgment under Order 21 of the *Civil Procedure Rules*, execution commences immediately as provided by Order 22 of the Rules.
44. The importance of the procedure in Order 21 Rule 8 of the *Civil Procedure Rules* in the preparation of a decree cannot be over-emphasized. Nevertheless, Order 21 Rule 8 (2) provides that a party in the High Court may prepare a draft decree and pass it over to the other to approve or amend as appropriate before it is given to the Court for signature if the Court is satisfied that it is in line with the judgment. Two notable things. One; the operative word used in the provision is “may”. Two; the court- the Deputy Registrar- retains the ultimate authority on the final decree.
45. Order 21 Rule 8(7) provides that a Court can approve a decree upon pronouncement of the judgment. The main idea behind the enactment of the process on preparation of decrees and orders is to avoid situations where parties extracted decrees that would be at variance with the final adjudication of the Court. But, whereas the process should be followed, I do not think it was intended to act as a hurdle to realization of the fruits of judgment by a successful party. There is not any prejudice that the omission causes the defendant. And given the circumstances of this case and the protracted tendencies deriving from the plurality of applications, it will not be in the interest of justice to elevate the omission into “a bulwark” in this case.
46. It is also my understanding that where the decree does not tally with a judgment, even if it has been approved by all the parties, the Deputy Registrar would reject it and order the parties to make the necessary rectification or submissions as to the correct version. This is not the case here.
47. In light thereof, I find no reason to interfere with the execution that has already taken place upon a valid order of the Court.
48. To the extent that stay of execution is founded on the substantive issues I have tackled above, it is not tenable in law. I refuse to stay the execution of the decree.



Conclusion and orders.

49. The objector has not proved his case to the required standard. Accordingly, the application dated June 10, 2022 is dismissed with costs to the decree-holder.
50. This court lacks the jurisdiction to review and or stay execution of the judgment delivered on March 30, 2022.
51. The application dated June 15, 2022 is without merit and the is dismissed. Given the nature of these proceedings, each party to bear own costs.
52. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 20TH DAY OF DECEMBER, 2022.

** _____ **

F. GIKONYO M.

JUDGE

In the Presence of:

1. Odhiambo for Plaintiff
2. Konosi for Respondent
3. Kasaso – C/A
4. Defendant

