



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CIVIL APPLICATION NUMBER 383 OF 2011

(CONSOLIDATED WITH)

MISCELLANEOUS CIVIL APPLICATION NUMBER 384 OF 2011

RIFT VALLEY AGRICULTURAL CONTRACTORS LIMITED (RVACL).....1ST APPLICANT/ JUDGEMENT DEBTOR

BENSON THIRU KARANJA.....2ND APPLICANT/DIRECTOR/ SHAREHOLDER OF 1ST APPLICANT

VERSUS

HARI GAKINYA T/A HARI GAKINYA & COMPANY ADVOCATES.....1ST RESPONDENT/ DECREE HOLDER

GILLETTE TRADERS.....2ND RESPONDENT/ AUCTIONEERING FIRM

PHILIP MWAURA WACHIRA..... 3RD RESPONDENT/ AUCTIONEER

RULING

1. The Applicants filed similar Notices of Motion dated 31st August 2020 under **Order 40 Rules 1,2,3,4 and Order 51 Rule 1 of the Civil Procedure Rules, Section 3 (A) and 63 (c) and (e) of the Civil Procedure Act** and sought for the following orders;

a. Spent

b. Spent

c. That the Respondents their agents, servants and employees be restrained from seeking to advertise for sale, attaching, auctioning off and selling any moveable property proclaimed on 25th August 2020 pending further orders of the Court.

d. That permanent injunction be issued against the Respondents by themselves, their agents, servants, employees or whomsoever claiming through them permanently restraining them from seeking to advertise for the sale, attaching, auctioning off and selling any moveable property proclaimed on 25th August 2020.

e. A declaration that the activities of the Respondents in relation to the suit at hand was corrupt, illegal, irregular and un-procedural.

f. That the costs of this Application be provided for.

g. That the 1st Respondent does pay costs of this Application.

2. The Application in each file was supported by the same twenty (20) page Supporting Affidavit of the 2nd applicant Benson Thiru Karanja and thirty (30) annexures marked BTK 1 to BTK 30, and a further 9 page Affidavit and annexure BTK 1 to BTK 4. The motion was premised on the grounds summarized as follows; That on 14th August, 2020 the 1st respondent paid for warrants of attachment of moveable property in execution of decree for money in the sum of Kshs. 2,450/- and was issued with a payment receipt dated the same day. That on 19th August, 2020 the 1st Respondent filed an application for the execution of decree indicating the amount due and owing as Kshs. 283,999/=. That a mere glance at the payment receipts aforementioned vis a vis the filed pleadings revealed that a very particular but unidentified High Court Civil Registry staff on 19th August, 2020 and 20th August 2020, colluded with the Respondent Advocate to attempt

and defraud the Applicants' colossal sums of money through inserting deliberate and highly inflated figures despite the Court record being expressly clear of the prevailing position and secondly that the warrants of attachment of moveable property in execution of decree for money was paid for on 14th August 2020 five days prior to an Application for execution of decree which was later paid for on 19th August 2020, this was indicative of an intended express execution process in blatant disregard of the rule of law. That the Application for execution of decree filed in court on 19th August 2020 was not meant to go through due process as envisaged by law, as it was a mere formality intended to go through an express execution process as facilitated through the corrupt dealings between the registry staff and Hari Gakinya Advocate the 1st respondent herein, and upon filing the Deputy registrar on 20th August 2020 illegally, irregularly and un-procedurally issued warrant of attachment of moveable property in execution of decree for money and warrant of sale of property in execution of a decree for money. That in furtherance of the aforementioned corrupt dealings of the registry staff and the 1st respondent, the 2nd respondent through the 3rd respondent proceeded to the 2nd applicant's private residence in Bahati and illegally, irregularly and un-procedurally proclaimed numerous of his earth moving equipment's on 25th August 2020 not in any way connected to the 1st Applicant in the hope of eventually attaching and auctioning the same for profit. That upon enquiry on who instructed the 3rd respondent to attach, the 3rd stated that it was by the court and that he had picked the warrant of attachment of moveable property and the warrant of sale directly from the High Court Civil Registry from a particular staff and that he was not instructed by the first Respondent and did not even know the first Respondent. That the Nakuru High Court Civil Registry was a hot bed of corrupt dealings as such it was highly corrupt, illegal, irregular and un-procedural for this unidentified registry staff to subvert the course of justice for corrupt gains by issuing express execution orders without subjecting the Application for execution for decree dated 19th August 2020 to due process of the law, illegally issuing instructions to an auctioneering firm and/or individual when he/she was not the decree holder in the suit at hand and without notice to either the Applicants' Advocates on record or the Applicants themselves.

3. The 1st respondent filed a Replying Affidavit in opposition and averred that the application was a non-starter, lacked in facts and exposed the Applicant's ignorance of the law and procedure in an attempt to get sympathy from the Court and dictate modes of payment of the decretal sum.

4. The 1st respondent explained the circumstances of their case. That the Applicants and their Advocate exhibited ignorance of the new norm of filing documents under the Covid 19 Pandemic regulations insinuated fraud and corrupt dealings against them for no good reasons at all. That his firm scanned and sent an Application for execution on 13th August 2020 and upon receipt of the quotation of the filing fees, they paid by M-pesa on 13th August 2020. They did not receive the receipt for this payment until 14th August, 2020. The stamped copy of the Application was delivered to them via email on 19th August 2020. They immediately advised the Auctioneer to pursue the warrant in Court. That if they had any complaints against any judicial staff it was incumbent upon them to lay the complaint at the appropriate door and not to throw it at them.

5. Additionally, the Respondent averred that the Applicants and their Advocate were ignorant of the provisions of **Section 38 of the Civil Procedure Act**, and on issuance of Notice to Show Cause in that the judgement herein was entered in February, 2020 and therefore did not require a Notice to Show Cause for warrant of execution to be issued. That the judgment was entered in February, 2020 and there was no requirement for a Notice to show Cause.

6. That the judgment of *Mulwa J* indicated that the Kshs. 709,489/= would attract interest at 14% interest from 2018 and costs of Kshs. 5,000/=. That that applicants had made one payment in February 2020 and as at the time of execution there was accrued interest. The balance had also attracted interest. That indeed after proclamation the applicants had made out a bankers cheque of Kshs. 224,332/=, on 31st August, 2020 but forwarded it to the respondents without any letter explaining which file the money was for. They made the assumption it was for file Misc. 383/11, where what was due was Kshs. 189, 223/=. That the applicants still owed Kshs. 291,386/= in 384/11. The respondent gave them the credit of what was over and above what was owed in Misc. 383 of 2011 i.e. Kshs. 35,109/= leaving a balance of Kshs. 256,277/= pending payment in Misc. 384 of 11.

7. The Respondent stated that it was the Applicants' Advocate who extracted the decree and served it on the Respondents, that that applicants' advocate did their calculations and paid the Respondents as they wished not as directed by the Court; that the Respondents thus prayed that the Applicant be directed to pay their fees of Kshs. 256,277/= plus Auctioneer fees and apologize to court for the alarmist claims made without any basis on facts or the law.

8. Parties chose to rely on their pleadings and did not file any submissions.

ISSUES FOR DETERMINATION

9. Upon looking at the application, the Supporting Affidavit and the replying affidavit, the following two issues fall for determination;

1. Whether the application for execution of a decree dated 19th August 2020 followed due process of the law? And whether declaration that the activities of the Respondents in relation to the suit at hand were corrupt, illegal, irregular and un-procedural.

2. Whether the applicant should be granted the prayers sought?

ANALYSIS

Whether the application for execution of a decree dated 19th August 2020 followed due process of the law.

10. The 2nd Applicant in his Supporting Affidavit averred that he was not issued with a Notice to Show Cause and that the Application for execution for decree didn't follow the due process of the law hence the allegations of corrupt deals at the High Court Registry hence the

prayer for declaration that the activities of the Respondents in relation to the suit at hand was corrupt, illegal, irregular and un-procedural.

11. I must state at the outset that when I handled the matter under Certificate of Urgency during the vacation I was alarmed at the counsel's allegations that our High Court Registry was *a hot bed of corruption*.

12. Apart from giving the usual directions I made the following addition:

In the meantime, due to the very serious allegations of corruption made on oath by the applicant and his counsel, the Deputy Registrar is directed to immediately place this matter before the Presiding Judge for his necessary Action.

13. It was, and still is my belief and position, that if indeed the Applicant and his counsel were victims of the alleged corrupt dealings at our registry, they had the obligation to report to the investigative arm of government to deal with the issue by providing the evidence in their hands to the Director of Criminal Investigations (DCI).

14. Be that as it may:

Section 38 of the Civil Procedure Act provides for the *Powers of court to enforce execution*; it states

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale, or by sale without attachment, of any property
- (c) by attachment of debts;
- (d) by arrest and detention in prison of any person;
- (e) by appointing a receiver; or
- (f) in such other manner as the nature of the relief granted may require:

15. Where the decree is for payment of money and the mode of execution is by the arrest and detention of the Judgment Debtor in prison, then he must be given the opportunity to show because why he should not be imprisoned. On the other hand Notice to Show Cause is provided for in **Order 22 Rule 18 of the Civil Procedure Rules**.

18. Notice to show cause against execution in certain cases;

(1) 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.

(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.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

16. The applicant's position that a notice ought to have issued was based on the date of the certificate of costs which he stated was to be 7th

March 2017 as indicated in the Notice of Attachment emanating from the Auctioneers Gillette traders. Nevertheless it is evident from the record that the subject of this execution was the outcome of the Ruling given by *Mulwa J* on the 30th January, 2020.

17. So, what is the purpose of the Notice to show cause?

18. In the case of **Reuben Nyanginja Ndolo Vs Dickson Wathika Mwangi & 3 Others, Election Petition No. 11 of 2008**, *Odunga J* set out the rationale for the requirement of a Notice being issued before execution, when a decree was more than one year old. This is what the learned Judge said;

“The requirement for Notice To Show Cause serves two purposes in my view: First, it serves to give notice to the Judgement-debtor to pay the decretal sum in cases where as a result of the lapse of time, he may have forgotten about the existence of the decree altogether; secondly, the requirement for notice to show cause is also meant to put the decree holder on notice that if he delays in pursuing his rights, the process of execution will be subjected to the said notice”.

19. In the 2nd Applicant’s and /or the judgement debtor has Supporting Affidavit that he confirmed having made payments to the decree holder on the decretal sum, and in his view and that there was no money due to him. Further he also confirmed that the decree was dated 30th January, 2020 and issued on 17th February, 2020 which was less than one year before the filing of the Application for execution. The issue of this decree was well within his knowledge. There no legal requirement for a Notice to Show Cause.

20. When should a Notice to show cause issue?

21. In **Mini Bakeries (K) Ltd Vs George Ondieki Nyamanga, Civil Appeal No. 18 of 2013** (at *Kisii*) *Sitati J.* expressed the following appreciation of **Order 22 rule 18**;

“What I discern from the above provisions is that a notice to show cause is issued where an application for execution is made after more than one year after the date of the decree”.

22. The Applicants in their Supporting Affidavit confirmed that the decree was approved and endorsed on 17th February, 2020. This therefore means that the date of the decree is 17th February, 2020. The Application for execution of the decree was received in court on 19th August 2020 about six months after the date of the decree. This is not the same as the date of the Certificate of Costs. Consequently, no Notice to Show Cause was required to be issued to the judgement -debtor before execution.

23. With regard to the prayer for declaration *that the activities of the Respondents in relation to the suit at hand was corrupt, illegal, irregular and un-procedural*, the Rule of evidence is clear that *“She/He who alleges must prove”*. This maxim is grounded in **Section 107 of the Evidence Act**. The same was enunciated by *Justice Majanja* in **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** when he said that:

“...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the **Evidence Act (Chapter 80 of the Law of Kenya)**, which provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”

24. Not a single iota of evidence, documentary or otherwise was placed before me to establish the alleged fraudulent, corrupt and illegal dealings that the Applicants and their counsel alluded to. The Respondent explanation by the respondent of the new normal procedure of filing documents through email brought upon us by Covid - 19 epidemic was not challenged by the applicants. In any event this court takes judicial notice of the challenges brought by this requirement as the new procedures were still suffering from teething problems. The applicants and their counsel were completely out of turn to make accusations against the person of the Deputy Registrar who was not a party to the application and who could not have responded, and the staff at the Registry without joining the in charge. I find that this was in absolute bad faith as it was done without basis coming from an advocate of this court who ought to know better. I say this because apart from the highly inflammatory statement about the registry being a hot bed of corruption no evidence was placed in the affidavits to support the same. I am not aware any has been placed with the DCI. Such utterances made without basis do not support the cause of the proper administration of justice. No Civil Registry staff was identified by name or in any manner whatsoever. No documentary evidence was produced to support the allegation of the alleged highly inflated figures. The Applicant’s very loud allegations that the decree-holder colluded with unidentified staff remains undemonstrated and substantiated by any evidence. That prayer for that declaration is unwarranted and has no leg to stand on. It collapses on the same air it arrived in.

25. Regarding the other prayers: In the directions I gave on 1st September, 2020 I made the following observation:

If I understand the application, it is the applicant’s position that his property has been attached yet he paid the decretal sum. Judgment was given on 30th January, 2020 of decretal sum of Kshs. 209,418/= plus interest. This sum was included in the assessed sum of Kshs. 743,907/=, vide decree issued on 17th February, 2020, which the applicant paid via Bankers Cheque dated 19th February, 2020 in HC Misc. App 383 of 2011.

The warrant of attachment dated 20th August, 2020 appears to suggest that the sum was not paid and there is interest on the Kshs. 209,418/= from 1st February, 2018 to 17th August, 2020 creating an unpaid decretal sum and interest of Kshs. 291,386/= which is disputed and which is the reason for this application.

26. It is evident that the dispute as to whether the decretal sum was settled or not is at the center of these applications and forms the basis for the Applicant's further argument that the Respondent failed to comply with **Order 22 rule 2(1) and Order 22 rule 7(2) (e)** of the **Civil Procedure Rules** and being aware of the material irregularities as contained in the Application for execution filed on 19th August, 2020 failed to amend the said application for execution and deliberately sought to start off the process of execution hence effectuating unjust enrichment.

27. **Order 22 Rule 2** states as follows;

“(1) Where any money payable under a decree of any kind is paid direct to the decree-holder or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree- holder may certify such payment or adjustment to the court whose duty it is to execute the decree, and the court shall record the same accordingly.

(2)The judgment-debtor also may inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly. ”

28. **Order 22 Rule 2 (1) and (2)** obligates both parties to inform the Court about any payment or adjustment made. It is apparent that at the time the application for execution of the decree was made neither party had notified the court of the said adjustments/ payments for the court to be aware that its record had changed. Without this compliance the record still showed that the whole sum plus interest was owing. The 1st Respondent failed to certify such payment and the Applicants failed to apply to the Court to issue a notice to the decree holder to show cause why such payment should not be recorded as certified. The Court at the time of executing the decree was not aware of any payments advanced directly to the decree-holder and the Applicant did not raise any objection hence the Application for execution cannot be faulted on that ground. How then would the applicants blame the court? Surely the blame lies squarely with the parties.

29. **Order 22 Rule 7** provides for the manner of the application for execution.

“(2) Save as otherwise provided by sub rule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars—

- a. the number of the suit;
- b. the names of the parties;
- c. the date of the decree;
- d. whether any appeal has been preferred from the decree;
- e. whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;
- f. whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications, and their results;
- g. the amount with interest, if any, due upon the decree, or other relief granted thereby, together with particulars of any cross- decree, whether passed before or after the date of the decree sought to be executed;
- h. the amount of the costs, if any, awarded;
- i. the name of the person against whom execution of the decree is sought; and
- j. the mode in which the assistance of the court is required, whether—
 - (i) by the delivery of any property specifically decreed;
 - (ii) by the attachment and sale of any immovable property, or by the sale without attachment or by proclamation and sale immovable property;
 - (iii) by the arrest and detention in prison of any person;
 - (iv) by the appointment of a receiver;
 - (v) otherwise, as the nature of the relief granted may require. (3) The court to which an application is made under sub rule (2) may require the applicant to produce a certified copy of the decree.

30. **Rule 7(2) e** deals with the situation where, as in this case, there was money paid directly to the decree-holder. The Applicant in his further Supporting Affidavit confirmed that he advanced money to the decree-holder's account as shown in the attached receipts but the decree holder failed to include the same in his Application for execution. The provision states that the Applicant **must** provide particulars of any payment or adjustment that has occurred between the parties after the issuance of the decree. The 1st Respondent concedes that some money was paid but that there is an outstanding sum and that the dispute now is all about calculations. It is the duty of the parties to work out these calculations and present them to court for verification as to whether they corresponded with the decree.

31. **Order 22, rule 13** requires the court upon receiving an application for execution of decree to ascertain compliance with **rule 7** among others.

(1) On receiving an application for the execution of a decree as provided by rule 7 (2), the court shall ascertain whether such of the requirements of rules 7 to 9 as may be applicable to the case have been complied with; and, if they have not been complied with, the court may reject the application, or may allow the defect to be remedied there and then or within a time to be fixed by it.

(4) When the application is admitted, the court shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application.

32. Since money had been advanced to the decree holder as shown by the attached bankers' cheques of the Applicant but the decree holder failed to comply with **Order 22 Rule 7 (2) (e)** the court could not have acted in accordance with **Order 22 rule 13(1)**.

33. Clearly each party has its blame to carry but as far as the process of the application for execution was concerned, I find nothing in the allegations made by the applicant.

34. With regard to the prayer for a **restraining order** against the Respondents their agents, servants and employees from seeking to advertise for sale, attaching, auctioning off and selling any moveable property proclaimed on 25th August 2020 pending further orders of the Court:

35. It is evident that the parties are not in agreement as to what is still owing if at all due to the divergence in the mode of calculations. There are also auctioneers fees in dispute. It would not be proper for the decree holder to continue with the execution yet the issue of what the judge actually said in her ruling appears to be in dispute. For instance whether or not the 1st respondent was awarded Kshs. 5,000/= as costs.

36. A restraining order would allow for these issues to be settled and the parties to comply with order **22 rule 13 of the Civil Procedure Rules**. I find and hold that a restraining order do issue as prayed.

37. As to whether a **permanent injunction** can issue against the Respondents as sought, I borrow from the decision in the case of **Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib, Civil Appeal No.24 of 2016 [2018] eKLR**, where the Court defined a permanent injunction as follows; ...

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected”.

38. In the case of **William Ndeti t/a Ndeti Enterprises vs NIC Bank Limited [2020] eKLR Chepkwony J** stated as follows;

“In any case, a prayer for permanent injunction cannot issue at the interlocutory stage. This may be sought later on during the hearing of the suit itself after evidence in support of and against the claim has been tendered. A permanent injunction should however not be confused with a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified period/time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties. In the circumstances, I hold that a prayer for permanent injunction is out of place at this stage”.

39. In view of my holding with regard to the restraining order, it is evident that the issues in this matter are not settled and each party has a role to play to settle them. A permanent injunction would not be appropriate in the circumstances and that prayer is declined.

40. In the circumstances, and in the interests of justice, the following orders issue:

1. A restraining order is and is hereby issued against the Respondents their agents, servants and employees from seeking to advertise for sale, attaching, auctioning off and selling any moveable property proclaimed on 25th August, 2020 pending further orders of this Court.

2. Within thirty (30) days hereof;

a. The parties to comply with order 22 rule 2(1) and (2) of the Civil Procedure Rules.

b. The respondent to comply with Order 22 rule 7(2)(e)

c. The Deputy Registrar to comply with order 22 rule 13 (1)

d. The matter be mentioned before the Deputy Registrar on the 29th of March 2021 to confirm the position.

e. If parties find that there are unpaid balances of the decretal sum after a, b and c, and the same is confirmed on 29th March 2021, and the parties are unable to settle the same, the restraining order to lapse and execution to proceed.

3. Each party to bear its own costs.

4. Right of Appeal 30 days

Dated and delivered virtually this 26th February, 2021.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant Edna

F. A. Badia & Co. Advocates for the applicants

Hari Gakinya & Co. Advocates for the Respondents

Mumbua T. Matheka

Judge