



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 80 OF 2019**

**NILE HAULIERS LIMITED.....APPELLANT**

**VERSUS**

**PADAM ENGINEERING WORKS LIMITED.....RESPONDENT**

**RULING**

By an application dated 22<sup>nd</sup> September 2020, the Appellant sought the stay of execution, following the proclamation dated 16<sup>th</sup> September 2020.

1. The Appellant's goods were proclaimed by **ODONGO INVESTMENT AUCTIONEERS**, who were executing the Warrants of Attachment that had been issued in execution of the Decree herein.

2. It was the Applicant's case that the process of execution was incurably defective, thus rendering void ab initio, the warrants of attachment together with the proclamation.

3. The Appellant asked the court to set aside and to recall the warrants of attachment dated 16<sup>th</sup> September 2020, as the same had been issued irregularly.

4. The Appellant submitted that pursuant to **Order 22 Rule 13 (4)** as read with **Order 49 Rule 5** of the **Civil Procedure Rules**, there ought to have been a formal order for the issuance of warrants for attachment.

5. The Appellant further submitted that the formal order could only be made by the Deputy Registrar in the course of proceedings lodged for purposes of execution.

6. In this case, the Appellant noted that there were neither proceedings nor a formal order for the issuance of the warrants for attachment.

7. Secondly, the Appellant submitted that the sum of Kshs 534,461/=, part of which the Respondent had commenced execution for, had not yet become due.

8. In answer to the application, the Respondent noted that the appeal herein was dismissed by a judgment dated 27<sup>th</sup> July 2020.

9. According to the Respondent, a simple interpretation of **Order 22 Rule 6** of the **Civil Procedure Rules** implies that;

***“..... once a decree has been extracted and an application for execution of the decree endorsed by the court, that by itself is an order for execution.”***

10. From my understanding of the submissions by both parties, there is concurrence that a decree holder needs to make an application for execution.

11. The point of divergence between the parties is as regards the nature of the contemplated application. On the one hand, the Appellant holds the view that there should be a formal application, which is then dealt with by way of recorded proceedings.

12. On the other hand, the Respondent was of the view that the application for execution of a decree does not have to take a formal format, which has to be prosecuted by the decree-holder.

13. The provisions of **Order 22 Rules 6** and **7 (2)** of the **Civil Procedure Rules** make it clear that the application must be in writing and

should in accordance with **Form 14** of Appendix A.

14. A perusal of the Court records herein revealed that on 16<sup>th</sup> September 2020, the Respondent's advocates filed an "Application for Execution of Decree", which in accordance with **Form 14** of Appendix A.

15. However, there is nothing in the proceedings that shows whether or not the learned Deputy Registrar gave any directions on the application for execution.

16. Indeed, when the Appellant wrote to the Deputy Registrar on 17<sup>th</sup> September 2020, inquiring if it could be provided with post-judgment proceedings, the prompt response thereto was in the following terms;

***"We acknowledge receipt of your letter dated 17<sup>th</sup> September 2020 at 1.46p.m. Kindly be informed that there are no proceedings available for Post Judgement."***

17. In effect, although there was an application for execution of the decree, there is no record about who took action on the said application.

18. The Respondent submitted that;

***"..... an application for the execution of the decree endorsed by court, that by itself is an order for execution."***

19. It is not clear to me whether that submission was in reference to the court endorsing the decree or endorsing the application.

20. In real terms, the court does not endorse a decree arising from its judgment. The decree is granted by the court. Therefore, that would imply that the endorsement referred to by the Respondent, would be in relation to the application for execution of the decree.

21. Pursuant to the provisions of **Section 38** of the **Civil Procedure Act**, these are the powers of the court when enforcing execution;

***"Subject to such conditions and limitations as may be prescribed, the court may, on 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 manner as the nature of the relief granted may require .....***

22. Pursuant to that statutory provision, when the decree-holder makes an application for execution of the decree, the court may order that execution be carried out.

23. In **KIMANI KAROKI Vs JUSTUS GAKUMI GAKUNGA, HCCC NO. 815 OF 2010** the Court said;

***"..... Rule 13 (4) of Order 22 as read with Order 49 rule 5 of the Civil Procedure Rules must empower the registrar to consider the proceedings before him and then in his discretion, himself make an order.***

***Since the registrar acts as a court in these proceedings he should judicially consider the application by either allowing it or rejecting it."***

24. A decree-holder cannot presume that his application for execution of the decree will be granted.

25. The registrar has the discretion to either allow it or reject it.

26. An example of a reason that could lead to the rejection of the application is that the calculations in the said application are not in conformity with the Decree.

27. In the absence of any order or direction from the registrar, in this case, this court is unable to verify whether or not the registrar exercised his discretion and then gave the green light for the execution process to be undertaken in the terms sought by the Respondent.

28. In the case of **REPUBLIC Vs THE COMMISSIONER OF POLICE & 2 OTHERS EXPARTE KENYA COMMERCIAL BANK, HCCC NO. 784 OF 2007**, Odunga J. expressed himself thus;

*“I also wish to draw the parties’ attention to the procedure for execution. On receipt of an application for execution, the court should make an order pursuant thereto, as required under the provisions of Order 22 Rule 13 (4) of the Civil Procedure Rules.*

.....

.....

*It follows that without a minute made on the Court file by a Deputy Registrar, pursuant to a formal Application for execution, any warrants issued pursuant thereto are, in my view, null and void and the execution proceedings herein are bound to be set aside.”*

29. I am in complete agreement with the views expressed by my learned brother.

30. Accordingly, as the warrants of attachment were issued in the absence of any order or directions from the Deputy Registrar, the same are a nullity.

31. I appreciate that the Respondent was entitled to execute the decree. However, the Appellant was also entitled to due process.

32. The failure by the Deputy Registrar, to record such order as he may have given, renders the issuance of the warrants of attachment a nullity. It also follows that the proclamation founded upon the void warrants of attachment, was incurably defective.

33. Accordingly, the application before me is successful. I therefore recall the warrants for attachment dated 16<sup>th</sup> September 2020, and cancel them forthwith.

34. The proclamation dated 16<sup>th</sup> September 2020 is also hereby set aside.

35. The error which has led to the recall of the warrants for attachment and for the setting aside of the proclamation was made by the Deputy Registrar, who failed to put on record his decision (if any), to have the warrants for attachment issued. In the circumstances, and because the Respondent had correctly filed an application for execution, I find that it would be unjust to condemn the Respondent to pay the costs of the application dated 22<sup>nd</sup> September 2020.

36. I order each party to meet his own costs of the said application.

**DATED, SIGNED and DELIVERED at KISUMU This 11<sup>th</sup> day of February 2021**

**FRED A. OCHIENG**

**JUDGE**