



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 21 OF 2014

AHMED SALIM SAID.....1ST APPELLANT

FAIZ SALIM SAID2ND APPELLANT

VERSUS

MUNAA AHMED SALIM.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Aboubakar Mwanakitina advocates for the appellants

Richard O. advocates for the respondent

RULING

This is an application by the appellants seeking stay of execution of the decree on grounds that the decretal sum in favor of the respondent has been settled.

The main grounds are that the appellants were ordered to pay the respondent her share equivalent of Kshs.640,000/= within forty five (45) days of the Judgment. That pursuant to that Judgment the decretal sum was appropriated in tranches of Kshs.540,000/= and subsequent balance of Kshs.100,000/=.

The appellants further filed an affidavit in Court dated 30.10.2020 detailing modes of payments to convince the Court that there is no outstanding decretal sum. In response to this application, the respondent relying on the averments by the appellants demonstrated to the Court that the payment is outstanding. Further, the background to this claim is to be found in the decisions of the Court dated 3.12.2019 and 8.7.2015.

Determination

Issues

Whether the appellants have settled the claim of Kshs.640,000/= arising out of the Judgment of the Court delivered on 14.6.2016. In that Judgment **Chitembwe J.** ordered payment to the respondents against her share of 1/8 which amounts to Kshs.640,625/= of the deceased's estate within forty five days hereof.

The Law

Enforcement is the act of compelling observance or compliance with a Law, in this case a Court Judgment in Civil Appeal No. 21 of 2014. Having considered the appeal, it is clear that the appellants were ordered to make good the value of 1/8 of the Estate to the respondent approximated at Kshs.640,625 within forty-five (45) days from that date of 14.6.2016. In **Halsbury's Laws of England 17th Vol 4th Edition at para 40** it was stated that:

“The word execution in its widest sense signifies, the enforcement or giving effect to the Judgment or orders of Courts of Justice. In a narrower sense, it means the enforcement of those Judgment, or orders by a public officer under the writs of Fiery Facias, elegit sequestration, attachment, possession, delivery fiery facias, debones ecclesiastics etc.”

The issuance of execution is a process under Order 22 of the Civil Procedure Rules to realize the fruits of a Judgment by enforcing the decree against the Judgment debtor. The execution takes many forms, by way of an application for attachment of movable and immovable property,

warrant of arrest to direct the Judgment debtor to show cause why he or she should not be committed to prison for non-compliance to settle the decretal sum, attachment of partnership property, attachment of share and other property in possession or not in possession of the Judgment debtor, or attachment of salary or allowance.

Indeed, I note that the appellants contrary to the averments in the notice of motion and affidavits he has acted contrary to the Judgment of the Court which demanded of him to settle the share of the Estate quantified at Kshs.640,625/= to the respondent within forty-five (45) days with effect from the delivery of the aforesaid Judgment.

In the best conception of the parties' arguments certainly, there is a presumption that the appellants have since settled the decretal sum. However, the factual issues raised on payment of the decretal sum vide issuance of cheques drawn in favor of the respondent is clearly controverted in the replying affidavit in which those allegations are completely controverted. Manifestly, therefore every issue initially heard and finally decided by **Chitembwe J** is conclusive between the parties to this litigation. What is more so conclusive, is the Judgment against the appellants.

Following, the Judgment the appellants were under the obligation to settle the amount at that early stage of enforceability within forty-five (45) days in any event of the order. The non-reciprocating by the appellants' offends the Judgment of the Court. The time frame specified by the Court having lapsed without any variation places the appellants as a contemnor of such orders of the Court capable of being punished for disobedience. The appellants in the whole have not shown sufficient cause for not complying with the decree from a competent Court.

In resolving this issue, looking at the dispute again and again, the decision of the Court on settlement of term in the matter of the estate adjudicated in **Civil Appeal No. 21 of 2014** is yet to be distributed and settled in consonant with the Judgment. Moreso, specifically to the share attributable and ascertained for the benefit of the respondent.

Furthermore, the details of the cheques drawn purporting to settle the decretal sum equivalent to 1/8 of the share remains largely in the domain of the appellants. Such averments no doubt without corresponding statement of account to show a debit and credit in favor of the respondent can be described as scintilla evidence, incapable of proving that fact; in the strict sensu.

Therefore, against that stated position by the appellants, the actions and disobedience not to honor the decree is tantamount to contempt of the Court order, punishable in accordance with the Law.

Borrowing a leaf from the matter of public Law in **R v Nairobi City County & Another exparte Wainana Kigathi Mungai Misc. Case No. 356 of 2013** the conduct by the appellant ought to be sanctioned for in foregoing the legitimate expectation of the respondent a basic principle founded upon fairness and justice.

When I weigh the competing rival affidavits, and their relative strength, it's clear that the appellants continue to deprive the respondent of her fruits of the Judgment of the Court with some level of impunity.

From what has been presented before this Court, the application only amounts to a vexatious and an abuse of the Court process. In the circumstances, this application is denied and the following order shall abide:

(a) The appellant to comply with the Judgment of the Court delivered on 14.6.2016.

(b) I would take it that the appellant has the money due and owing and the same shall be settled within seven (7) days from today's Ruling.

(c) From the foundation of this litigation, and regarding the infringement of the respondent's right, its therefore plain that the appellant ought to be prosecuted in accordance to the rules on execution and enforcement of a decree duly issued by the competent Court.

(d) Similarly, in the earlier state of affairs where the Court ordered for interest to accrue in terms of Section 26 of the Civil Procedure Act there exists exceptional circumstances to vary and set aside the order on interest.

(e) In the original decree the record bears me witness the Court expressing itself conclusively in that matter, did not provide for interest or cost of the suit. The award of interest in the course of execution and enforcement of the Judgment is deemed to be a fiction not well thought by the respondent counsel on an oral application to the Court.

(f) In the instant case, the error to award interest is self-evident on the face of the record itself for this Court to invoke Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules to vary and set it aside as being voidable. In this case, an adjudication of the case did not meet the conditions for an award of interest.

(g) In this matter, the decree holder has the option to adopt any of the modes specified in the Civil Procedure Act and Rules to enforce the decree in the event no payment is forthcoming from the appellants within the (7) seven-day period. Those are the orders of the Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF MARCH 2021

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R. NYAKUNDI

JUDGE

NB: This Ruling has been dispatched to the advocates respective emails.

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