



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL CASE NO. 107 OF 2013

JACINTA NJERU KAITHA.....1ST APPLICANT/PLAINTIFF

CATHERINE RWAMBA GICHOVI..2ND APPLICANT/PLAINTIFF

VERSUS

DAVID K. KANYIRI..... DEFENDANT

RULING

1. The applicants in the application dated 15/03/2018 and filed in court on 16/03/2018 seeks for a host of orders. Prayers 1, 2, and 3 have been spent. The rest of the prayers are as follows:-

(a) That this court issues orders for split of costs of Kshs.84,224/= in this case between the applicants for each to pay half of the amount.

(b) That stay of execution be granted to allow the defendant to clear her part of the decretal amount and costs totaling to Kshs.83,227.25 installments of Kshs.5,000/=.

(c) That this court do strike out the attachment notice issued in this matter for non-compliance with the law with costs and assess the auctioneers charges.

2. The application is supported by the affidavit of Catherine Rwamba Gichovi the 2nd applicant and that of Jacinta Njeru the 1st applicant. The 2nd applicant deposes that she suffered stroke after the ruling of the court that condemned her to pay costs and as such, she cannot remember whether she was served with the notice to show cause.

3. That the auctioneer visited her home while she was admitted in the hospital and attached her property to satisfy a decree of Kshs.166,458/= and valued the goods at Kshs.40,000/= and then levied charges of Kshs.45,645/=. Her prayer is that the auctioneers fees be assessed by the court for the figure is unreasonable.

4. It is argued that the auctioneer attached goods and continues to hold them despite the existence of orders of stay of execution issued by this court which is contrary to Order 22 of the Civil Procedure Rules.

5. Due to to the illness of the 1st applicant and lack of regular income on the part of the 2nd applicant, the applicants are not in a position to pay the whole decretal amount in a lump sum. It is their prayer that they be allowed to clear the decretal amount in installments of Kshs.5,000/= a month.

6. The respondent filed grounds of opposition terming the application as bad in law and an abuse of the due process of the court an afterthought. It was stated that the respondent is not agreeable to payment in installments of Kshs.5,000/= as offered by the applicants. It was also contended that the applicants have never been keen in paying the decretal and costs amount on which interest has accrued since 2014 when the orders were issued.

7. Ms. Muriithi for Ms. Thungu submitted that the applicants were willing to clear the decretal amount of Kshs.166,458/= by payment in installments. If the court grants the prayer to split the amount between them, each will require to pay Kshs.83,227/= as prayed.

8. The notice of attachment did not describe the property to be attached and is defective. Ms. Muriithi urged the court to strike it out. Neither did it show the value of the property contrary to the provisions of Order 22 of the Civil Procedure Rules.

9. The applicant argues that the fees of the auctioneer was exaggerated to Kshs.45,645/= while the value of the property was shown as

Kshs.42,000/=.

10. Ms. Mbwiria argued that the firm of Anne Thungu & Co. came on record nonprocedurally for it failed to comply with order 9 of the Civil Procedure Rules. The auctioneer had already attached the property by the time the interim orders were issued. She further argued that payment by installments would take ages to clear the decretal amount.

11. Having heard the parties, I identify the issues for determination as follows:-

(1) Whether the applicant's counsel complied with Order 9 Rule 9 of the Civil Procedure Rules.

(2) Whether the applicants have satisfied the court as to:-

(i) Splitting of the debt

(ii) Payment in installments

(3) Whether the attachment was wrongful.

(4) Whether the auctioneer's charges are excessive or are payable.

12. Order 9 Rule 9 provides:-

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

13. An advocate coming on record after judgment is required to comply with the provision. I note that the respondent did not include this aspect of his argument in its grounds of opposition. Neither did Ms. Mbwiria point out in her oral submissions in court what Ms. A. Thungu & Co. did or did not do. The counsel only mentioned that Ms. Thungu did not comply with Order 9 Rule 9.

14. It is the duty of any party fronting an argument or alleging non-compliance to explain it clearly and specifically so as to present the opposing party with an opportunity to respond. The court requires material on which to make a determination.

15. However, Ms. Thungu applied for leave to represent the applicant in this case citing the fact that judgment had already been delivered. This court however granted the said leave before this application was heard inter partes. The orders of this court or the manner in which they were obtained were not challenged. I find that Ms. Thungu is properly on record for the applicants.

16. Regarding the splitting of the debt between the parties, I note that it was not opposed by the defendant in its grounds of opposition. Ms. Mbwiria said it is upon the parties to split if they found it appropriate. I am not aware of any rules that bar the court from granting such an order.

17. The payment of the debt by installments of Ksh.5,000/= for each applicant which amounts to a total of Kshs.10,000/= monthly was opposed on grounds that it would take long to clear the debt. The decree was made in 2014 and no payment has been made since then. I agree with the defendant that the applicants have not been keen to clear the decretal amount.

18. The applicants ought to give a more reasonable offer if they are financially constrained. This court has discretion to determine what is reasonable in the circumstances. On the alleged wrongful attachment, I note that the re-issued warrant is dated 21/06/20... year not indicated. It was received by one Peter on 21/02/2018.

19. The proclamation is dated 10/03/2018 and lists the property as electronics, furnitures, kitchenwares and any other movable property as earmarked for attachment and sale by public auction. The interim orders for stay were issued on 9/03/2018 which was after the proclamation. It is not indicated when the goods were carried away and no particulars of the goods have been given.

20. The stay orders having come after proclamation and there being no evidence of when the said orders were served, I find no basis of declaring the attachment unlawful.

21. On the auctioneers charges of Kshs.45,645/= for attachment of property of Kshs.42,000/=, I find this to be on the higher side. There is need to have the auctioneers charges assessed according to scale.

22. The failure to indicate the value of the specific properties for attachment on the the proclamation and to specify the attached properties does not violate Order 22 Rule 13 as argued by the applicants counsel. She did not point out the specific provisions violated. My reading of Rule 13 does not support the allegation of non-compliance.

23. I find no reason to justify the striking out of either the warrant of attachment or the proclamation.

24. I have considered all the issues raised and I hereby allow the application in the following terms:-

(1) That the decretal amount of Kshs.166,548/= plus any further interests and costs be equally split between the applicants.

(2) That each applicants pay installments of Kshs.10,000/= towards the amount owed by each of them on the 1st of every month commencing in June 2018 until the whole amount is cleared and in default of any one installment, execution to issue.

(3) That the goods held by the auctioneer to be released upon payment of his charges which will be assessed by the Deputy Registrar within 14 days.

(4) That each party to meet his/her own costs of this application.

25. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 24TH DAY OF MAY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Ane Thungu for Applicants

Ms. Mutegi for Joe Kathungu for Respondent