



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2762 OF 1997

FRANCIS KAMAU NJOROGE.....1ST PLAINTIFF

VIRGININA WACHEKE NJOROGE 2ND PLAINTIFF

V E R S U S –

JAMES MBIRE NGAITA.....1ST DEFENDANT

S. N. WARUHIU.....2ND DEFENDANT

H. N. GATHURU.....3RD DEFENDANT

P. M. KIMANI4TH DEFENDANT

J. N. KING'ARA.....5TH DEFENDANT

RULING

1. The 2nd to 5th defendants took out the motion dated 30th March 2016 in which they sought for inter alia, an order setting aside the warrants of attachment issued to **Patrick Ng'ang'a Mburu t/a Virmir Auctioneers** on 22.3.2016. The motion is supported by the affidavit of Henry Ng'ang'a Gathuru. When served with the motion, the plaintiffs filed the replying affidavit of C. Muturi Kigano to oppose the same.

2. I have considered the oral rival submissions of learned counsels from both sides. I have also considered the grounds set out on the face of the motion and the facts deposed in the affidavit filed in support and against the motion. It is the submission for the 2nd to 5th defendants that the decree issued in this matter is erroneous as it contains amounts which are not correct as per the consent order recorded and adopted by the court of Appeal vide C.A no. 318 of 2005 on 2.3.2015 which stated the decretal sum to be ksh.1,600,000/= with each party bearing its own costs in the Court of appeal and before the High Court. The defendants were of the view that the action by the plaintiff to tax their bill of costs went against the terms of the consent order therefore the taxation was of no legal effect. It was further argued that the goods attached by the plaintiff constitute the defendants tools of trade which goods are exempt from execution by law.

3. Mr. Kiragu, learned advocate for the plaintiffs was of the view that the defendants have approached this court with unclean hands. It is pointed out that the defendants had breached the terms of the consent order hence the plaintiff was entitled to execute the decree pursuant to default clause 4 of the consent.

4. The plaintiff urged this court to find the execution process to be proper. It was also argued that the

defendants were all along aware of the taxation proceedings but they chose not to defend. The plaintiff was of the view that the defendants goods which were proclaimed were not tools of trade. It is also argued that it was the intention of the law to protect artisans and not law firms. Mr. Njenga admitted that indeed the consent recorded before the Court of Appeal was breached but he was of the view that the interest which had accrued should have been given to the respondent.

5. After a careful consideration of the rival arguments and the material placed before this court, it is clear to me that there exists some facts which are indisputable. First, the rival parties had recorded a consent order before the Court of Appeal. Secondly, it is not also in dispute that the defendants breached the consent order. The question which this court has been left to grapple with is whether or not the plaintiff was entitled to execute the decree in view of the apparent default. The record shows that the plaintiff proceeded to have the bill of costs taxed when the defendants defaulted in settling the decree in terms of the consent. In fact the bill was taxed at ksh.311,375/=

6. I have critically examined Clause 4 of the consent order recorded by the parties. It is expressly states that if there is default in the payment of any of the aforesaid sums of money or any part thereof, the respondent be at liberty to execute the decree in respect thereof. Clause 5 of the consent order clearly states that each party should bear its cost both in the Court of Appeal and in the High Court. It was therefore wrong for the plaintiff to proceed to tax the bill of costs thus going behind the agreement. Clause 4 basically required the plaintiff to execute the decree in respect of the unpaid amount of the agreed sum. I have been invited to determine whether or not the goods proclaimed are tools of trade. The proclamation of attachment annexed to the affidavit of Henry Ng'ang'a Gathuru indicates that the following items were proclaimed for attachment.

1. Assorted executive desks
2. Assorted office chairs
3. 3 window wall units
4. Assorted cabinets
5. Office carpets
6. Reception desk

7. The above goods are basically office furniture. Under Section 44(1) of the Civil Procedure Act, the properties of a judgement debtor which not liable for attachment or sale are specified. The provision relevant to this case is Section 44(7) (ii) in which it is expressly stated that the tools and implements of a person necessary for the performance by him of his trade or profession shall not be liable to attachment or sale. The defendants are advocates of this court. In my humble view, I do not think furniture can be regarded as the tools of trade or profession of the defendants. Perhaps the tools of trade may include reference materials, the library, money in clients account etc. Therefore the proclaimed properties cannot be treated as tools of trade or profession.

8. In the end, I find the motion to be well founded on the basis that the warrant of attachment is erroneous in that it contained taxed costs whereas the consent order did not provide for costs. The amount recoverable is the consent sum i.e. 1,600,000/= less the amount so far paid. Consequently the motion is allowed in terms of prayer 3.

9. Costs of the motion is given to the defendants.

Dated, Signed and Delivered in open court this 27th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant