



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1165 OF 2003

JOHN BOSCO NGETA MAUNDU PLAINTIFF/APPLICANT

V E R S U S –

WILLIAM WAMBUA KIWIA.....1ST RESPONDENT

CHARLES MUTUKU..... 2ND RESPONDENT

HON. ATTORNEY GENERAL..... 3RD RESPONDENT

RULING

[1] On 23rd October 2015, this court allowed the motion dated 8th August 2014 in the following terms:

(i) That the warrants and the decree issued on 30.07.2014 be amended by reducing the sum stated in the said warrants by ksh.700,000/= being monies paid by the 2nd defendant/judgement debtor in settlement of this decree.

(ii) A decree do issue in the sum of ksh.1,196,647/=.

(iii) The warrants herein be lifted after payment by the 2nd defendant/Applicant of the balance in the sum of kshs.1,196,647/=.

(iv) Each party to meet its own costs.

[2] The Plaintiff has now taken out the motion dated 6th November 2015 in which he sought for the following orders:

(1) THAT pending hearing and determination of this application there be stay of withdrawal of the sum of Kenya Shillings seven hundred thousand shillings (ksh.700,000/=) deposited in court by the Respondent on 11th August 2014.

(2) That this honourable court be pleased to review its ruling delivered on 23rd October 2015 by Hon. Justice J. K. Sergon (Mr) and ascertain the actual decretal amount due.

(3) That upon hearing and determination of this application and subsequent to prayer three (3) above this honourable court be pleased to order that the balance of the decretal amount due to the Plaintiff/Applicant is Kenya Shillings Seven Hundred Thousand shillings (Kshs.700,000/=).

(4) That the costs of this application be borne by the Respondent.

[3] The motion is supported by the affidavit sworn by the Plaintiff. When served, Charles Mutuku, the 2nd defendant filed what he called supporting affidavit to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in this dispute recorded a consent order to have the same disposed of by written submissions.

[4] I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against of the application. It is the submission of the Plaintiff that the deputy registrar of this court made an error or omission which should be corrected by way of Order 45 of the Civil Procedure Rules by way of review. It is said that there is a clear anomaly as to how much is due. The Plaintiff urged this court to ascertain the amount due to avoid a miscarriage of justice to any parties or in the alternative the deputy registrar to be directed to ascertain the amount due. The Plaintiff further argued that this court ought to have independently evaluated the evidence in the court file, analyse the decree issued on 10.2.2005, warrants of arrest issued on 25.6.2013 and the warrants of arrest issued on 30.7.2014 and come up with the mount due.

[5] The 2nd defendant is of the view that there is no error on the face of record to warrant issuance of an order for review. It was also argued that this court was asked to look at both warrants and for reasons set out in its ruling it sought to rely on the warrants dated 30.7.2014 hence this is not a matter for review but a matter that can only be ventilated on appeal. The 2nd defendant also argued that the warrant the Plaintiff sought to use to sequester the 2nd defendant and relied on throughout the proceedings herein is the one issued on 30.7.2014. The 2nd defendant avers that litigation must come to an end. He submits that he has fully complied with the orders of this court, settled the decretal sum herein and consequently he should be allowed to withdraw the sum of kshs.700,000/= being monies he had deposited in court on 11.08.2014.

[6] After a careful consideration of the rival submissions some factual matters appear to be undisputed. The 2nd defendant in his application dated 8.8.2014 argued that the amount due ought to have been kshs.1,196,647/= which amount was arrived at after he had deposited two bankers cheques with amounts totalling ksh.1.196,664/=. It would appear the 2nd defendant moved to court on 11.8.2014 when he was served with the notice to show cause dated 30.7.2014 and made part payments in the notice to show cause of ksh.1,196,664/=. The sum of kshs.700,000/= was deposited in court immediately awaiting the determination of the motion dated 8/8/2014. With respect, I agree with the submissions of the Plaintiff that it is the discrepancies in the warrants of arrest issued on 30.7.2014 that culminated into this court's ruling of 23.10.2015 holding that the Respondent had paid in excess of ksh.700,000/= from the decree. In my view this is an error apparent on the face of record. This can be illustrated when one poses the question as to how much is the decretal amount due? In order to answer this question one must examine the chronology of steps taken since the date of entry of judgement. The record shows that the initial decree was issued on 10.2.2005 showing the decretal amount to be ksh.1,160,000/=. It would appear the judgment debtor filed several applications for stay of execution thus frustrating the settlement of the claim upto 2013 when the Plaintiff filed a notice to show cause giving rise to the ruling of Hon. A. K. Ndungu of 26.7.2013 indicating the amount due to be ksh.2,625,038/=. On the aforesaid date the defendant was ordered to pay the decretal amount by instalments. It would appear the Respondent paid kshs.700,000/= out of the aforesaid amount as reflected in the warrant of arrest issued on 25.6.2013 of leaving a balance of ksh.1.925,038 plus interest. The record shows that the Respondent made another application to liquidate the aforesaid amount by monthly instalments of kshs.50,000 before Justice Hatari Waweru who in the end dismissed the application. It would appear from the brief chronology of events outlined hereinabove that there is an error apparent in the manner the figure of the decretal sum stated on the notice to show cause dated 30.7.2014 was arrived at.

[7] I have taken time to give a detailed sequence of what took place from the date the decree was issued upto this state. It is clear to me that there is a glaring error which is apparent on record in establishing the correct outstanding decretal sum. I find the motion dated 6.11.2015 to be well founded. I issue an order directing the Deputy Registrar Civil Division to ascertain the outstanding decretal sum after hearing the

parties. The matter to be mentioned before the Deputy Registrar, Civil Division on 25.8.2016 for further orders and directions and to fix a date for receiving submissions as directed hereinabove.

[8] The Deputy Registrar to forward to this court her findings within 45 days from the date of this ruling. Mention before this court on 10.10.2016 to confirm the Deputy Registrar's findings and for further orders and directions.

[9] In the meantime I grant an order for stay of execution of the order authorising the withdrawal of ksh.700,000/= in court until 10.10.2016 when this appeal is fixed for mention before this court.

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent