



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 141 OF 2000

VERONICA NZILANI WAMBUA.....PLAINTIFF

VERSUS

NDUNGE IVUI KATHUKU DEFENDANT

RULING

The Application

The Plaintiff filed in a Notice of Motion dated 23rd November 2015 seeking the following orders:

1. THAT this court be pleased to grant leave to the Plaintiff to change his representation.
2. THAT upon granting leave the firm of M/S Musyoka Kimeu & Company Advocates be granted leave to come on record for the Plaintiff in place of the firm of M/S Wambua Kilonzo & Company Advocates, and further that the Notice of change of Advocates annexed to the instant application be deemed as duly filed upon payment of the requisite court fees.
3. That pending the hearing and determination of the instant application the Court be pleased to lift the warrant of arrest issued on 10/11/2015 in execution of the Judgment delivered on 26/11/2014.
4. THAT the Court be pleased to order that the Taxed Costs of Kenya Shillings One Hundred and Fifty Six Thousand Five Hundred and Ninety Three (Kshs.156,593/=) be liquidated and/or paid through monthly installments of Kenya Shillings Ten Thousand (Kshs.10,000/=) commencing from the month of April , 2016.

The grounds for the application are that the provisions of law state that this Court's leave be sought if any change of representation is to be lawfully executed after a judgment has been entered. Further, that the Defendant has commenced execution proceedings against the Plaintiff and has procured and/or moved the Court for a Notice to show cause why the Applicant should not be arrested and detained in civil jail.

The Plaintiff in a supporting affidavit she swore on 23rd November 2015 stated that on 6/11/2015 she was served with a Notice to show cause dated 25/09/2015, demanding that she appears in Court to show cause why an arrest warrant cannot issue against her for non -payment of Kshs. 156 ,593/= being taxed costs due and owing to the Respondent. That after failing to locate her advocate on record who had moved office, she approached the law firm of Musyoka Kimeu and Company Advocates, who perused the court record and further found that on 6/08/2015 the Respondent moved this Court by way of application for Execution of Decree seeking an order to the effect that a Notice to Show Cause do issue why she should

not be committed to Civil Jail for failing to pay the aforesaid taxed costs, and that the same was granted on 25/09/2015.

According to the Plaintiff the Advocates Act provides that a Judgment Debtor ought to be served with a Certificate of Costs before any action to recover the same can commence, and that the whole of the execution process as undertaken by the Respondent is in gross violation of Section 48 and 51 of the Advocates Act and Order 22 Rules 7 and Rules 27 of the Civil Procedure Rules. Further, that a Certificate of Costs is not an executable legal document, and that no execution of any decree can take place without such a decree coming into existence as in the instant suit. However, that if the court is of the considered opinion that the execution process was proper then the Plaintiff be given time to pay the taxed the sum by way of monthly installments of Ten Thousand Shillings (Kshs.10, 000/=) from the month of April , 2016.

The Response

The Defendant opposed the Plaintiff's application in Grounds of Opposition dated 18th July 2016 on the following grounds:

1. The said application is incompetent, is devoid of merit, and prayers sought therein are not capable of being granted.
2. The Plaintiff/ Judgement debtor is a business woman of substantial financial means, and should pay the decretal sum at one go.
3. The proposed monthly instalments of Kshs . 10,000 are unreasonable, in view of the sum due

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. I note that no objection was raised as to the change of the Plaintiff's Advocate, which prayer arises from the fact that the matter herein has been finalized. This, therefore, means that any advocate seeking to come on record has to seek the leave of the court as provided for under Order 9 Rule 9, and its only after such leave has been granted can such a firm of advocates seek other orders relating to the matter before the court.

The provisions of Order 9 Rule 9 of the Civil Procedure Rules provide as follows:

“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 placed, 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 advocates and the proposed incoming advocate or party intending to act in person as the case may be.”

Since the prayers for change of Advocate are not contested, the same are hereby granted.

The outstanding issue for determination is whether this Court can vary and/or review the ruling and orders granted by the Deputy Registrar in the taxation of costs and execution proceedings thereof, as sought by the Plaintiff.

The applicable law for as regards the varying and/or review of a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

“ (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The said provisions therefore allow for review of a ruling from which no appeal has been preferred or is allowed, but that such an application be made in the Court that made the order. In the present application the said orders as to payment of taxed costs and execution by way of warrant of arrest were made by the Deputy Registrar of this Court, and any application seeking to vary the orders must be made before the said judicial officer. The record in this regard shows that the ruling on the taxed costs and certificate of costs were issued by the Taxing Officer/Deputy Registrar of this Court on 28th November 2014, after a hearing held on 23rd September 2014. Likewise the warrant of arrests were issued by the Deputy Registrar on 29th March 2016, after a Notice to Show Cause was issued on 25th September 2015.

The prayers seeking to lift the warrant of arrest issued by the Deputy Registrar and to vary the mode of payment of the taxed costs of Kenya Shillings One Hundred and Fifty Six Thousand Five Hundred and Ninety Three (Kshs.156,593/=) are therefore not competently before this Court.

The Plaintiff's Notice of Motion dated 23rd November 2015 is therefore accordingly allowed only to the extent of the following orders:

1. The Firm of /S Musyoka Kimeu & Company Advocates be and is hereby granted leave to come on record as the Advocates for the for the Plaintiff in place of the firm of M/S Wambua Kilonzo & Company Advocates
2. The Notice of change of Advocates shall be duly filed upon payment of the requisite court fees.
3. The Plaintiff is at liberty to apply before the Deputy Registrar/Taxing Officer as regards the outstanding prayers.
4. There shall be no order as to costs

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of December 2016.

P. NYAMWEYA

JUDGE