REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 165 OF 2012

HENRY SIMIYU MURWA.....PLAINTIFF

VERSUS

TIMOTHY VITALIS.....1ST DEFENDANT

INGRID YVONNE DEWAERN.....2NDDEFENDANT

RULING

Introduction

1. In determining the 2nd defendants application dated 12/11/2013 the court. **KASANGO J,** by a ruling dated 19/3/2015 ordered that:-
    a. This suit is hereby marked as 'Withdrawn'. Parties will be at liberty to move the Court on the issue of costs of the suit.

b. The 1st Defendant shall within 21 days from this date hereof release to the 2nd Defendant through her Advocate Kshs.4,000,000/=.

c. The 1st Defendant shall pay costs of Notice of Motion dated 12th November 2013 to the 2nd Defendant.

2. My reading of the ruling is that a judgment was entered, or an order was made for the 2nd defendant against the 1st defendant in the sum of Kshs.4,000,000 payable within 21 days from the date of that ruling.
3. By a Notice of Motion dated 13/6/2015 the 2nd defendant has moved the court under the overriding objectives of the court as well as the inherent powers of the court for orders that the order dated the 19/3/2015 be varied by adding at the end of order No. 2 in paragraph 14(b) the words; **"and in default execution to issue against the 1st defendant".** I consider the application to be seeking an order that simply seeks to effectuate the determination by the court that the 1st defendant pays to the 2nd defendant the sum of Kshs.4,000,000. To me this is the kind of a scenario the provisions in sections 1A, 1B 3A and 99 Civil Procedure Act were intended for.
4. The affidavit in support of the application avers that inspite the existence of the said order by the Judge, the 1st defendant did not pay as ordered and an attempt by the 2nd defendant to execute was halted by the Deputy Registrar who maintained that there was no default clause in the ruling and therefore the court could not issue execution powers.

5. To the application was filed an opposition in the nature of Replying Affidavit by the 1st defendant in which it is contended that the ruling of 19/3/2015 did not account to a decree capable of being executed because it did not arise out of suit by the 2nd defendant, that there being no default clause, the order did not create a decree; that no draft decree has been served upon him and therefore there is no decree be execute and lastly that the failure to include the default clause was not an accidental slip as the order is not a judgment. It is further contended that it is **malacious fide** (*nay mala fides*) for the 2nd defendant/applicant to wait for the judicial officer who gave the ordered to be transferred only to ask another judicial officer to find that the former officer had erred and that the case did not manifest itself itself as capable of being treated as a slip on the part of the judicial officer.
6. This matter first came to court on the 9/9/2015 when it was adjourned at the instance of the 1st defendant on account that he was sick. The next time the matter was listed for hearing, Ms.Ali made another application for an adjournment once again that the 1st defendant was indisposed. To support the application, medical note were produced which showed the 1st defendant was on medication till the 29/9/2015. That application was declined on the basis of reasons given in the Ruling of that date.
7. At the hearing parties relied on the affidavits filed but Mr.Gikandi for the 2nd defendant stressed the fact that the need to seek addition of the words was necessitated by the refusal by the Deputy Registrar to sign warrants of attachment and sale and that the words were purely accidental slip and their inclusion would be the only way to give effect to the determination by the court.
8. Miss Mboku on behalf of the 1st defendant however did not add anything to the Replying Affidavit filed preferring to leave it to court.

Determination:

9. The single issue for determination is whether it is desirable to include a default clause in the Ruling and order of the court given on the 19/3/2015. A perusal of the pleadings in this matter reveal that the dispute was essentially between the plaintiff and the 2nd defendant as to who between them was entitled to the sum of Kshs.4,000,000 held by the 1st defendant as an advocate who acted for the two parties in a conveyance.
10. In any view the only expected determination was who between them was entitled to the sum. That is the issue the court determined in its ruling of 19/3/2015. Having so determined, it is difficult to fathom what other dispute remains between the parties for determination by the court. I have failed to see any pending dispute save for the issue of costs for which the court granted the parties the liberty to apply.
11. That being my finding, I hold that this matter needs to be given directions by which it should reach its logical and desired conclusion.
12. There is a pronouncement by the court that the money in contention be paid by the 1st defendant to the 2nd defendant. That to me is a final order or determination or judgment whichever way one looks at it. It is to me a judgment because it determines who the money is to go to.
13. Ordinarily, a judgment need not have a defendant clause for it commands a party to undertake some action. The natural and expected repercussion of default is that execution process issues to enforce the decision of the court. In case like this where what was due for delivery by the 1st defendant was money, the obvious mode of enforcement is by way of warrants of attachment and sale. It is thus illogical and unduly technical for the Registrar to have insisted that the court adds a difficult clause.
14. Secondly, it is a public policy issue that litigation must come to an end so that the court system, reports back to the sovereign that what was placed before it for determination has been dealt with. That to me is accountability by the state organ that judicially is. Now that the matter has been determined, the remaining ministerial of action of execution is also expected to be carried out in a timely and proportionate manner without undue delay.
15. I therefore do not find it plausible for the 1st defendant/Respondent to content as he has done that the matter, being not a judgment against should remain in its current status. To do that would be to affront the dictates of the oxygen principle and an abdication of the inherent power of the court.
16. It is however legitimate that before a warrant of attachment and the issues, the provisions of order

21 Rule 8 be complied with to the letter.

17. That provision provides:

[Order 21, rule 8 (1) (2) (3) and (4)

"Judgment, when pronounced [Order 21, rule 1.]

In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.

Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

2. ***Power to pronounce judgment written by another judge [Order 21, rule 2.]***

(1) A judge may pronounce a judgment written and signed but not pronounce by his predecessor.

(2) A judge of the High Court may pronounce a judgment written and signed but not pronounced by another judge of the High Court.

3. ***Judgment to be signed [Order 21, rule 3.]***

(1) A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.

(2) A judgment pronounced by a judge other than the judge by whom it was written shall be dated and countersigned by him in open court at the time of pronouncing it.

(3) A judgment once signed shall not afterwards be altered or added to save as provided y section 99 of the Act or on review.

4. ***Contents of judgment [Order 21, rule 4.]***

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions."

18. Consequently allow the application dated 13/6/2012 prayed, order that to order in paragraph 14 (b) of the ruling dated 19/3/2015 be added it words **"in default, execution to issue against the defendant".**

19. That execution shall however issue subsequent to full compliance with order 21 Rule 8.

20. Costs of this application are awarded to the 2nd defendant against the 1st defendant.

It is so ordered.

Dated, signed and delivered at Mombasa this 18th day of December 2015.

In the presence of:-

No appearance for the Applicant/plaintiff.

No appearance for the Defendant/Respondent.

P.J.O.OTIENO

JUDGE