REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.18 OF 2013

BETWEEN

MINI BAKERIES (K) LTD. …..... APPELLANT

AND

GEORGE ONDIEKI NYAMANGA …..... RESPONDENT

(Being an appeal arising from the judgment of Hon. Kibet Sambu, SPM,

in Kisii CMCC No.142 of 2012 delivered on 1st February, 2013)

RULING

1. The appellant herein Mini Bakeries (K) Ltd. filed a Notice of Motion under **Order 22 Rule 18, Sections 1A, 1B** and **63 (e)** of the **Civil Procedure Act** dated 3rd June 2014 seeking:-

1. *Spent.*
2. *Pending the hearing of this application, the respondent be ordered to unconditionally release the appellant's motor vehicle registration number KBT 150 S together with other accessories on board attached on 30th May 2014 by MOCO AUCTIONEERS in Kisii CMCC No.142 of 2012.*
3. *Spent*
4. *Pending the hearing and determination of the appeal herein, this honourable court be pleased to grant an interim stay of execution of the decree in Kisii CMCC No.142 of 2012 dated 1st February 2013 together with all its consequential orders.*
5. *The honourable court be pleased to declare that the attachment of the appellant's property is unlawful and illegal and hence the appellant ought to be compensated for the loss and damage suffered.*
6. *The honourable court be pleased to order that the damages occasioned to the appellant by the unlawful and illegal attachment be borne by the person who disobeyed the court orders of 3rd April 2013 and misled the court to unlawfully and/or illegally extend the warrants.*
7. *Costs of this application be borne by the Respondent.*

1. The application was premised on the grounds set out on the face thereof numbered (a)-(g), the gist of which is that the apepllants did not deliberately fail to comply with the court orders; that it was the respondent who tossed back the cheque forwarded to them in fulfillment of the conditions of the stay order issued by the trial court.
2. The application is also supported by an affidavit sworn by Eric Ntabo Advocate on 3rd June 2014. In the affidavit the deponent refers to certain correspondence exchanged between himself and the respondent's counsel and in particular the letters dated 22nd April 2013 and 9th May 2013, both of

which are exhibited to the supporting affidavit as annextures **"EN5"** and **"EN6"** respectively. The deponent also says that since the decree which the respondent sought to execute had taken more than a year, the respondent ought to have applied to the court for the applicants to show cause why execution should not issue instead of simply applying for extension of warrants of attachment. In summary, the deponent says that the execution by the respondent was not only unlawful and malicious but the same was also incompetent and commenced contrary to the practice of law.

3. The respondent opposed the application vide a Replying Affidavit sworn by Mr. Bernard K. Gichana, advcoate on behalf of the respondent. He refutes the averments of the supporting affidavit and contends that the deponent is clearly guilty of perjury as the annextures marked **"EN5"** and **"EN6"** to the supporting affidavit never reached him, for if they had, they would have been duly acknowledged. The deponent also says that Mr. Eric Ntabo Advcoate fraudulently caused the judgment sum to be paid to the firm of George Morara & Co. Advocates which firm never acted for the respondent. Further, counsel depones that since the applicants had breached the conditional stay order, there was no order barring the respondent from proceeding with execution. Finally, the deponent says that by the time Eric Ntabo advocate purpotedly forwarded the cheque for the decretal sum to facilitate opening of a joint interest earning account, the window of 21 days allowed by the court had lapsed and that counsel for the paplicants who was advised to apply for extension of time within which to comply did not do so.
4. Finally, the deponent says that the applicants are the authors of their own misfortune for which they should not hold the respondent accountable. He urged the court to dismiss the application with costs.
5. When the matter came up for hearing interpartes on 11th June 2014, Mr. Ntabo for the applicants reiterated the averments of the Supporting Affidavit and asked the court to determine the following 2 issues:-

- *Whether the attachment herein is lawful and*
- *Whether the applicants herein complied with the orders of the trial court issued on 1st February 2013.*

1. Counsel submitted that the appellant complied with the conditions of the stay order by remitting a cheque for the decretal sum vide a letter dated 22nd April 2013 but the cheque was returned. He further submitted that the attachment herein is unlawful for breach of **Order 22 Rule 8** of the **Civil Procedure Rules, 2010**.
2. Mr. Gichana submitted that there was no compliance with the court order as no deposit of the decretal sum was made and that the two letters purportedly written by Eric Ntabo advcoates were a forgery for which the said advocate should be held accountable. Regarding the provisions of **Order 22 Rule 8** of the **Civil Procedure Rules**, Mr. Gichana submitted that counsel for the appellant had misapprehended the same since extension of the warrants of attachment in this case was based on non-compliance of the court orders; that there was no dormant period in the execution process to which **Order 22 Rule 8** could have applied.
3. Finally, Mr. Gichana submitted that the instant paplication is *res judicata* since the same orders being sought herein were granted by the trial court.
4. In reply, Mr. Ntabo submitted that the respondent ought to have moved the court for a notice to show cause upon the applicant instead of moving the court for extension of warratns of attachment.
5. The facts giving rise to the instant paplication are as follows: On the 1st February 2013 the trial court (Hon. K. Sambu, PM) delivered judgment in Kisii CMCC NO.142 of 2012 in favour of the respondent as follows:-

- *General damages …..... Kshs.200,000/=*
- *Special damages …..... Kshs. 6,500/=*

Total Kshs.206,500/=

plus costs and interest.

1. The appellant contends that it was not aware of the judgment date and was only informed by the respondent's advocate on 6th February 2013 that judgment had been delivered on 1st February 2013.
2. On 8th February 2013, the respondent took out warrants of attachment and served them upon the appellant herein. By a notice of motion dated 22nd February 2013, the appellant asked the court for stay of execution pending hearing and determination fo the appeal. That application was heard inter partes and by a ruling dated 3rd April 2013, the learned trial court allowed the application and made the following orders:-
    1. *That the applicant herein be and is hereby ordered to deposit the entire decretal amount in the joint names of both counsel on record in an interest earning account within the next twenty one (21) days from the date hereof.*
    2. *That in default execution shall issue without further notice to the applicant.*
    3. *That the applicant in the circumstances of the presented application is condemned to pay the auctioneers charges so far incurred during the execution process and the auctioneer in this regard is hereby directed to file his Bill of Costs in court for assessment.*
3. There is a dispute as to whether or not the applicant complied with the conditional stay granted by the court on 3rd April 2013 but what is clear to me is that the joint interest earning account was to be opened on or before 23rd April 2013, and that if that did not happen, the respondent was at liberty to execute without further recourse to the court. The appellant alleges to have forwarded a cheque for the decretal sum vide a letter dated 22nd April 2013 with a follow up letter dated 9th May 2013.
4. While agreeing that the appellant got a conditional stay, the respondent says there was no compliance hence the execution proceedings.
5. Having now carefully considered the application as filed and the submissions by both counsel, I have reached the conclusion that the letter dated 22nd April 2013 did not reach the respondent's counsel. The reason for reaching this conclusion is that the said letter does not bear an acknowledgment stamp from the respondent's counsel's firm of advocates. I note that the letter dated 3rd May 2013 from the appellant's firm to the respondent bears the acknowledgement stamp by the respodnent's firm of advocates.
6. Secondly, I find that the appellant did not dispute the allegation by counsel for the respondent that the letter dated 22nd April 2013 was a fraud and on a balance of probability, the respondent's contention that he did not receive the account opening forms and the cheque on 22nd April 2013 stands unchallenged. It follows therefore that by the end of the 21 days within which the decretal sum was to be deposited in an interest earning account, the appellant had taken no step whatsoever to comply with the same. It follows then that the appellant was in breach of the conditional stay orders granted to it by the trial court on 3rd April 2013.
7. Regarding the appellant's contention that the respondent's action of execution was a flagrant breach of **Order 22 Rule 18** of the **Civil Procedure Rules**, it is important to set out in full the provisions of the said rule which reads as follows:-

> **"18. (1) Where an application for execution is made -**
>
> **(a) more than one year after the date of the decree;**
>
> **(b) against the legal representative of a party to the decree; or**
>
> **(c) for attachment of salary or allowance of any person under rule 43.**
>
> **the court executing the decree shall issue a notice to the person**
>
> **against whom execution is applied for requiring him to show cause,**
>
> **on a date to be fixed, why the decree should not be executed against**

him.

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the paplication is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3)Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him."

8. What I can discern from the above provisions is that a notice to show cause is issued where an application for execution is made more than one year after the date of the decree. In the instant case, the decree was issued on 1st February 2013 and the warrants of attachment were taken out on 8th February 2013 before the trial court issued the conditional stay on 3rd April 2014. Then on 30th May 2014, the respondents proceeded to attach the appellant's motor vehicle. Clearly, 30th May 2014 was more than a year since the decree was issued on 1st February 2014 and it was therefore necessary for the respondent to ask the court executing the decree to issue a notice to the appelant requiring it to show cause why the decree should not be executed against it. Having failed to so so, the respondent was clearly in breach of **Order 22 Rule 1 (a)**. The record does not show that the trial court made any other order after 3rd April 2014 which would have negated the requirement for a notice to show cause to be issued to the appellant/applicant.
9. There is another issue that was raised by the respondent: that the instant application is *res judicata*. The doctrine of *res judicata* is provided for in **Section 7** of the **Civil Procedure Act, Cap 21 Laws of Kenya** to the effect that **"No court shall try any suit or issue in which the matter directly and substantilly in issue has been directly and substantially in issue in a former suit between the same parties; or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."**
10. In the case of **Lotta -vs- Tanaki [2003] 2 EA 556**, it was held as follows:-

"The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are: (1) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

11. Further, in the case of **Gurbachan Singh Kaisi -vs- Yowani Ekori Civil Appeal No.62 of 1958** the Former East African Court of Appeal stated as follows:-

"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time … No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all … A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

12. In the case of **Apondi -vs- Canuald Metal Packaging [2005] 1 EA 12** Waki, JA stated as follows:-

"A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the court process to allow litigation by instalments."

13. In the instant case, there is no litigation by instalments because the orders granted by the lower court are now spent and a whole new process of execution has commenced, necessitating the filing of the instant application.
14. In conclusion, I find and hold that the application by the appellant has merit for the reason that the execution was premature. I allow the application in term sof prayers 2 and 4 subject to the appellant depositing into court the entire decretal sum within the next fourteen (14) days from the date hereof, failing which execution shall proceed.
15. As to costs and considering the fact that both parties are to blame for the circumstances in which they have found themselves, I make no order as to costs.
16. It is so ordered.

Dated and delivered at Kisii on 26th day of June, 2014

R.N. SITATI

JUDGE

In the presence of:-

Mr. Nyagwencha for E. Ntato for the Appellant

Mr. S.M. Sagwe for B. Gichana for the Respondent

Mr. Bibu - Court Assistant