



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 6031 OF 2013

HARUN THUNGU WAKABA.....PLAINTIFF

-VERSUS-

THE ATTORNEY GENERAL.....DEFENDANT / JUDGMENT DEBTOR

RULING

1. The application before this Court is a Notice of Motion dated 19.12.12 brought under Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya; Order 51 rules 1, 2 & 3 and Order 22 rule 1 of the Civil Procedure Rules 2010.
2. The applicant seeks Court Orders compelling the defendant to comply with the judgment and decree of this court and release of the deposited sum of Kshs. 2,297,915.50 to his advocates on record Gitau J. H. Mwara Co. Advocates. The application is based on the grounds on the face of the application and the applicant's supporting affidavit sworn by James H. Gitau Mwara on 19th December, 2012.
3. A brief background of the matter is as follows; the applicant herein successfully sued the defendant for illegal arrest, detention assault and malicious prosecution and was awarded damages on 7th December 2009 for Kshs. 2,297,915.50 The plaintiff extracted the decree and served it upon the Attorney General on 3rd August but the officer in charge deputy solicitor General refused to comply prompting the applicant to file the application dated 15th December 2011 where he sought leave to institute contempt proceedings against the public officer one Muthoni .Subsequently on 23rd December 2011 the respondent filed an application seeking to set aside judgment delivered on 26th March 2012 claiming that the same was res judicata and allowing the plaintiff's application for release and payment of decretal sum would amount to double compensation the said application is also still pending.
4. The applicant argues that there is no stay of execution in place and as per Order 22 rule 1 and the decretal amounts should be paid to the Court which is to execute the decree and that the decree herein is being disregarded by the highest state law officers.
5. The application was opposed and the respondent filed a replying affidavit sworn by Charles Mwanza Mutinda on 3rd July 2013. He stated that judgment was entered in favor of the applicant for Kshs 1.7 million and that at that time the plaintiff was already deceased and as such the claim could not survive him; that the applicant had a similar claim in HCCC 1411 where he was awarded 3 million which they had since paid and argued that paying the applicant in this suit would amount to double compensation and payment of the same is on advisement of the attorney General that was lacking.

6. The applicant filed written submissions and reiterated the grounds on the face of the application and the applicant's supporting affidavit which I have carefully read and considered them. The issue before this Court is whether the sums deposited in court in the amount of Kshs. 2,297,915.50 should be released to the applicant's advocates. As I consider this ruling I have read the ruling of Justice Waweru dated 8/2/2013 which was pending at the time this application was filed. In dismissing the plaintiff and defendant's applications for contempt and setting aside of judgment respectively. The Justice Waweru stated the following;

“As already seen the present suit (Nairobi HCC No. 6031 of 1991 was based on torts of illegal arrest, false imprisonment and malicious prosecution. The damages awarded were based on the pleaded torts. On the other hand, Nairobi HC MISC. Civil case no. 1411 of 2004 was based on violation of fundamental rights and freedom under the Constitution then in place and the damages awarded were specifically pleaded for those violations. It is also noted that the judgment herein was delivered on 7th December 2009 while the judgment in HC Misc. Civil Case no. 1411 of 2004 was delivered on 21st July 2010 so if any judgment were to be challenged it ought to be the earlier judgment which was delivered in the earlier case. For these reasons I find no merit in the two applications and the same are dismissed with costs. ”

7. From this ruling Justice Waweru observed that if any judgment was to be challenged it should have been the latter one of the latter case being HC Misc. Civil Case no. 1411 of 2004. From the affidavit of Mr. Mutinda the A. G. has settled the decree in the said suit. In the current suit the Respondent argue that they are desirous of pursuing an appeal on the grounds that the judgment delivered by the Court was based on constitutional violations for which the plaintiff has filed a similar suit being NRB. HCCC 1411 of 2004 claiming violation of his fundamental rights for which the High court in a judgment delivered on 21st July 2010 awarded the plaintiff damages in the sum of Kshs. 3 million. The defendant has settled the decree in NRB. HCCC 1411 of 2004. He depones further that they are yet to advise the Permanent Secretary, Provincial Administrator and Internal Security to satisfy the decree herein as it would amount to conferring double benefit to the plaintiff contrary to the public financial interest and that the Attorney General was intent on challenging the decree in the Court of appeal since it is at the moment not the compensatory. Counsel further disclaims exhibit '**JHG 2**' on its authenticity and that on the face of it is illegal in that the AG is the counsel on record and all correspondence has to be through the Attorney General. Lastly he depones that the respondent is in the process of preparing an application for stay of execution of the Court judgment to be filed with the Court of appeal.
8. It is apparent that the applicant has 2 judgments in his favour in 2 separate suits which the respondent claims arise from similar cause of action and which would amount to double compensation. '**JHG 2**' is a certificate order against the government; it is not evidence of money deposited in Court. From what has been deponed by the respondent's counsel they are intent on pursuing an appeal but has failed to demonstrate to this Court that there is a Notice of appeal that has been filed in the Court of appeal. So long as there is no appeal or stay order the applicant is entitled to execute his judgment and in wanting to do so they have sought to have the decretal sum deposited in Court and if deposited in Court to have the said sum released to the advocates. I have perused the Court file and find no receipt evidencing deposit of the decretal sum. There is also the element that there could be an element of double compensation a fact that I cannot ignore as a Court of justice. Although I note the respondent has taken time to lodge its appeal in the Court of Appeal in the interest of justice I order that the respondent shall file their Notice of Appeal within 30 days from the date of this ruling failure to which the applicant is at liberty to proceed with execution against the respondent as provided in the Civil Procedure Rules. The orders sought are not granted as the applicant is at liberty to proceed with execution as directed. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 19th day of **September** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Plaintiff/ Applicant/DH**

..... **For the Defendant/Respondent /JD**

.....**Court Clerk**