



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Miscellaneous Civil Case 378 of 2000

RACHAEL MWIKALI MWANDIA.....PLAINTIFF

VERSUS

KEN MAWEU KASINGA.....DEFENDANT

RULING

1. This is a Ruling on the Notice of Motion Application dated **15th June 2012** and amended on **15th August, 2012**. It is brought under **Sections 1A, 1B, 3 and 3A** of the Civil Procedure Act and **Order 51 Rule 1, Order 9 Rule 9** of the Civil Procedure Rules. It is also brought under **Article 2 (6)** of the Constitution of Kenya and **Article 11** of the United Nations International Covenant on Civil and Political Rights.

2. The Defendant/Applicant is seeking for the following orders:-

1) Spent

2) That the firm of M/S Kiplenge & Kurgat Advocates be granted leave to come on record for the defendant in place of Sheth & Wathigo Advocates.

3) That pending the hearing and determination of the application inter parties, the honourable court be pleased to release the judgment debtor on bond/bail.

4) That in the alternative to prayer (3), the honourable court be pleased to vary the terms imposed by the Deputy Registrar in respect of the Applicant's release to reasonable terms.

5) That this honourable court be pleased to declare that the Plaintiff's claim in respect of interest, on the decretal sum is time barred, and to set aside all execution proceedings in respect thereof.

6) That this honourable court be pleased to set aside the orders made on **13th June 2012** committing the applicant to civil jail.

7) That costs of this application be in the cause.

3. The application is supported by the affidavit of the defendant sworn on **15th June 2012**. It is based on the grounds stated therein among them that the defendant was never served with a Notice to show cause or a mention date. The defendant also avers that the Plaintiff's claim for interest in respect of the decree passed is time barred by limitation and that his means were not ascertained before committal to civil jail.

4. The application is opposed. The Plaintiff filed a replying affidavit dated **26th June 2012** and filed in Court on **27th June 2012**.

5. The background of this matter is that the Plaintiff filed a suit against the defendant in the year 2000 seeking judgment for Kshs. 1,090,000/= and interest at commercial rates from May 1995. The Plaintiff was awarded the prayers sought in her Plaint vide a decree dated **20th July 2000**. Through the assistance of the firm of Rachier & Amollo Company Advocates the Plaintiff procured a Notice to show cause issued on 14th November 2000 and caused the same to be served upon the Defendant with a hearing date scheduled for 15th December 2000. The Defendant made applications to set aside the judgment and further sought a stay of execution of the said decree. However, the said applications were not successful and the Plaintiff embarked on executing as against the defendant.

6. It is only until recently, that is the year 2012, that the Plaintiff came to court seeking to execute the said decree as against the defendant hence the current application. On 13th June 2012, the defendant was arrested and presented before Court where he was required to give a proposal on how he intended to settle the sum claimed by the Plaintiff. The court directed that he be released on bond of Kshs. 12,000,000/= and a guarantee of a similar sum. The defendant could not secure a guarantor and he was committed to serve the term of 30 days at the Industrial Area Prison.

7. The defendant contends that he was never served with a Notice to show cause or a mention prior to his arrest and detention to civil jail. The defendant also contends that the Plaintiff's claim for arrears of interest in respect of the decree is time barred, the same having started running from the date of judgment. Therefore, according to the defendant, the warrants of arrest issued in respect of the principal sum and interest of Kshs. 17,000,000/= is improper and irregular and ought to be set aside. The defendant also avers that his constitutional rights have been infringed on since the Plaintiff has never sought to execute the judgment for the last 12 years.

8. The Plaintiff avers that the delay in executing the said decree was occasioned by the fact that the Court file had mysteriously gone missing from the registry and attempts to trace the same bore no fruits. It was only until the High Court relocated to its current station that the file was traced and the Plaintiff's advocates extracted a Notice to show cause filed on **14th December 2011**. The said Notice to show cause was set to be heard on 29th February 2012.

9. The Plaintiff avers that the defendant was duly served with the Notice to show cause on **24th February 2012**. However, on the hearing date the Defendant did not show up and the Court issued warrants after determining that the affidavit of service on record was sufficient proof to issue warrants. The warrants were effected on 13th June 2012 and the defendant was presented before Court.

10. It is the Plaintiff's case that the Defendant was duly served with the Court process/notices. It is also the Plaintiff's case that there is no issue of any time lapsing or being barred as appertains to interest. The Plaintiff also avers that the Defendant has never from the time that the suit was filed to date offered any form of proposal to repay the money.

11. The Application herein was prosecuted by way of written submissions.

12. I have considered the Application, the affidavits both in support and opposition, the written submissions as well as the authorities cited. In my view, the main issues for determination are as follows:-

a) **Whether the Plaintiff's action to recover the decretal amount plus interest is time barred.**

b) **Whether the defendant was issued with a Notice to show cause as required under the Civil Procedure Rules.**

c) **Whether or not the court should vary the terms imposed by the Deputy Registrar in respect of**

the defendant's release to reasonable terms.

13. On the first issue, it has been submitted on behalf of the defendant that **section 4 (4) of the Limitation of Actions Act Cap 22 Laws of Kenya** provides that no action may be brought on a judgment after 12 years from the date on which judgment was delivered and that interest may not be recovered after expiration of six years.

14. It is not disputed that Judgment herein was entered on 5th July 2000 in favour of the Plaintiff. Therefore with regard to enforcing the same, time should have lapsed on 5th July 2012. The Plaintiff revived the execution of the decree by issuing a Notice to show cause dated 20th February 2012 and apparently served on the defendant on 24th February 2012. When the Notice To Show Cause came up for hearing on 29th February 2012 the defendant did not appear and was subsequently arrested on 13th June 2012. It is therefore clear that these actions took place prior to 5th July 2012 when the twelve years was to lapse.

15. There is also the contention that interest may not be recovered after expiration of six years. On that issue and by virtue of Section 4 (4) of the Limitation of Action's Act, the Plaintiff's claim for interest is time barred. The relevant part of that section states thus,

“.....no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

16. I have noted the Plaintiff's explanation for the delayed execution of the said judgment. Unfortunately, it is not uncommon for court files to go missing. The Plaintiff's case is that their attempts to trace the lost file did not bear fruit until December 2011 when the High Court relocated to its current station. While this may be a valid reason, I am of the considered view that if the attempts of tracing the lost file were not forthcoming, the Plaintiff had the option of making an application to reconstruct the court file. Trying to trace a file for almost eleven years with no result is such a long time. There are also no correspondences to show what efforts the Plaintiff's advocates made in trying to trace the lost file.

17. It is trite law that equity aids the vigilant and in that case the plaintiff or rather her advocates should have known better that time was of the essence. Having found so, I have no option but to find that the action to recover the interest is time barred.

18. The second issue was whether the defendant was issued with a Notice To Show Cause as required under the Civil Procedure Rules. The Plaintiff's case is that the Notice To Show Cause was duly effected on the defendant. An affidavit of service was sworn by **Arthur Odinga, a process server**, to that effect. On the other hand the defendant maintains that he was not duly served. The defendant's case is that he was away in Machakos when the alleged service was effected. The defendant has not in any way rebutted the circumstances in which he was served as stated in the affidavit of service filed by **Arthur Odinga**. The least he would have done was to call the process server for cross-examination. The claim that he was in Machakos is not convincing. I therefore find that the defendant was properly served and in that case the warrants of arrest issued were valid.

19. This brings me to the next issue of whether or not the court should vary the terms imposed by the Deputy Registrar in respect of the defendant's release to reasonable terms. Having established that the delay of tracing the lost file at the court registry is not to be laden on the defendant and that the plaintiff is not entitled to claim interest due to lapse of time, it follows that the defendant is not indebted to the plaintiff in the sum of Kshs. 17 million. As a result, I would vary the terms imposed by the Deputy Registrar in respect of the defendant's release. The bail or bond should be reduced to a sum of Kshs. 3 million and a guarantee of a similar sum.

20. As regards the defendant's committal to civil jail, I do agree that by virtue of section 2 (6) of the Constitution of Kenya, international treaties and conventions that Kenya has ratified are imported as part of the sources of Kenyan Law. Thus, the provision of Article 11 of the International Covenant on Civil

and Political Rights which Kenya has ratified is part of the Kenyan Law. Therefore, enforcing a civil debt through imprisonment is against the said Covenant which guarantees parties basic freedoms of movement and of pursuing economic social and cultural development. The Plaintiff has other options of execution to explore like attaching the defendant's property. Therefore, committal to civil jail should be the very last option. In that case, this Court sets aside the orders made on 13th June 2012 committing the defendant to civil jail.

21. In the upshot, the Defendant's Notice of Motion Application dated **15th June 2012** and amended on **15th August, 2012** is hereby allowed. The costs of this application shall be in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY 2013

E.K.O OGOLA

JUDGE

PRESENT:

Gichemba for Plaintiff

N/A for Defendant

Teresia – court clerk