

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 421 of 2010

KARACHIWALLA (NAIROBI) LIMITED.....1ST PLAINTIFF

VERSUS

KITILI KITHOME T/A WALUK K. ENTERPRISESDEFENDANT

RULING

The application under consideration is a Notice of Motion brought by the Defendant dated 18th April 2012. The application is brought under the provisions of Order 22 Rule 22 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. The outstanding prayer in the said application is that the warrants herein be called and cancelled for being obtained fraudulently.

The grounds for the application are that the said warrants were obtained illegally and that the Defendant has already paid the decretal sum in excess, his goods having been attached by auctioneers in the presence of the Plaintiff's Advocate and policemen. The grounds are further explained in the supporting affidavit sworn by the Defendant on 18th April 2012. He states that he paid Keysian Auctioneers Kshs 285,000/= on 10/05/2011 upon threats to attach his goods, and agreed verbally with the said auctioneers that he would pay the balance of Kshs 400,000/= to satisfy the decretal amount within one week. However, that on 12/05/2012 the said auctioneers took goods worth 550,000/= from his shop. The Defendant then learnt on 12/04/2012 that there was a notice to show cause left at his premises indicating that he would be committed to civil jail if he did not pay a total of Kshs 685,537/=.

The Plaintiff Advocate, Mr Denis O. Olonde, stated in a replying affidavit sworn on 14th May 2012 that it is not true that the Defendant has fully settled the decretal sum and interest. The Plaintiff's Counsel admitted that Keysian Auctioneers attached the Defendant's/Judgment Debtor's moveable goods in May 2011, but that despite advertising the same for sale, the attached goods did not attract any bids/buyers with the consequence that the same still remain unsold and are lying at the auction yard. The Plaintiff annexed as evidence a letter dated 29th September 2011 from the auctioneers confirming the same.

The Plaintiff claims that the notice to show cause is therefore legitimately before this Honourable Court and was properly served on the Defendant, who should be made to settle the outstanding decretal sum together with interest in the sum of Kshs.686,537.00. Further, that the grounds advanced by the Defendant/Judgment Debtor in his application ought to be raised at the point of hearing of the Notice to Show Cause.

Counsel for the parties reiterated the above arguments in written submissions which were highlighted during the hearing of the application on 25th September 2012. The Defendant's Counsel in submissions filed on 2nd August 2012 contended that the Notice to Show Cause for committal to civil jail was not obtained in good faith as the Plaintiff did not disclose to the court that they had been receiving money and had attached the Defendant's goods of trade. Further, that the Plaintiff had not disclosed to the Defendant that the goods had not been sold. The Defendant also relied on the decision by this Court (by Koome J. as she then was) in **Re Zipporah Wambui Mathara, Bankruptcy Cause No. 19 of 2012**, that committal to civil jail is contrary to the international convention on civil and political rights.

The Plaintiff's Counsel in reply submissions dated 22nd August 2012 argued that the Defendant has not stated the efforts he is making to settle the decretal amount so as to obviate any future execution. He relied on the decision in **Kenya Bus Services Ltd & 2 Others vs the Attorney General H.C Misc. Suit**

No. 413 of 2005 that fundamental rights were not absolute, and in the decision in **Tabitha Moraa Mokaya vs Samson Ekongo Asiachi, H.C. Pet. No 275 of 2012** that the judgment of a court of competent jurisdiction cannot form a basis of a constitutional reference. The Plaintiff further argued that the provisions of section 40 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules which sanction committal for civil debt have not been declared unconstitutional.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The issue before the court is whether the Notice to Show Cause which is referred to as a warrant in the application, and which was issued against the Defendant/Judgment Debtor on 11th April 2012 should be cancelled. The provisions of section 40 of the Civil Procedure Act and Order 22 Rule 18 of the Civil Procedure Rules envisage a situation where a decree has not been executed against a judgment debtor, before a notice to show cause for committal to civil jail can issue. Two questions need to be answered by this Court: firstly, whether or not there had been execution of the decree dated 19th January 2011 before the issue of the contested Notice to Show Cause, and secondly, whether there is a decretal amount of Kshs 642,369.67/= outstanding as stated in the said notice to show cause.

It is not disputed that the Defendant's goods were attached by Keysian Auctioneers at the Plaintiff's instructions on 12/05/2011 and have not yet been sold. Whatever the value of the attached goods, the sale should have been completed before the Plaintiff could come to court for a notice to show cause for execution of the outstanding amount. It is therefore not entirely accurate to state that there has been no execution, and that there is an outstanding decretal sum of 642,369.67 when Keysian Auctioneers still have the attached Defendant's goods in their custody.

To allow the hearing of the notice to show cause in the present circumstances would not only be unconscionable, but also an abuse of the process of court. The Plaintiff therefore has the option of completing the sale of the said goods before he can properly be issued with a notice to show cause, or restituting the Defendant for the attached goods, and applying for fresh warrants of attachment. The arguments made and authorities cited as to whether or not committal to civil jail is allowed are therefore inapplicable and premature in light of the findings herein.

For the foregoing reasons it is ordered that the Notice to Show Cause issued on 11th April 2012 be and is hereby cancelled, and the Plaintiff shall meet the costs of the application.

Dated, signed and delivered in open court at Nairobi this ____15th____ day of ____October____, 2012.

P. NYAMWEYA

JUDGE