



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION 197 OF 2010

NICODEMUS ATITO ARODI.....APPLICANT

VERSUS

MAXWEL OTIENO ODONGO.....RESPONDENT

RULING

The defendant's notice of motion dated 23-9-2011 prays for the following orders:-

(1)The decree and judgment or order giving rise to execution together with the entire execution process be and is hereby set aside.

(2)The defence annexed hereto be deemed properly filed and served and the matter to proceed to full hearing inter parties with both parties being at liberty to call witnesses and participate in the case in the usual way upon fulfillment of the normal preliminaries.

The application is supported by the defendant's affidavit as well as that of Sylvester Otieno Madialo Advocate.

This suit has had a very long history full of intricacies. The suit was filed way back in the year 2005. Thereafter it appears that the defendant was served. The counsel on record entered an appearance but did not file defence as required. The plaintiff requested for judgment which was granted and execution proceedings commenced against the defendant.

The execution proceedings according to the parties was compromised through a consent on 8-5-2006 which I have been unable to get from the court file. In the alleged compromise the defendant was granted leave to file his defence. He did not but again there is allegation from the supporting affidavit of Mr. Madialo sworn on 23-9-2011 that he filed and gave the same to Mr. K'opot advocate who in fact proceeded to frame issues.

As stated earlier on I have been unable to get the proceedings of Judge Mwera of 8-5-2006 as contended by Mr. Madialo's supplementary affidavit sworn on 5-6-2012.

The plaintiff has sworn a replying affidavit dated 24-1-2012 in which he has accused the defendant among other things taking part in the “**disappearance**” of the court file for the period of upto three years.

Setting aside any judgment must of course attract the discretion of the court. Having gone through the pleadings by the parties, what is clear is that there have been numerous technical obstacles laid on the way of this suit. Part of the obstacles include the counsels appointed by the defendant. It is indeed difficult to know whether Mr. Madialo served the Mr. K'opot with the defence or not. One wonders why

Mr. K'opot proceeded to frame issues for determination.

The other issue is the non compliance by the plaintiff or Order 22 rule 6 of the Civil Procedure Rules which was indeed fatal. The same states:

“Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree or if the decree has been sent under the provisions herebefore contained to another court, then such court or to the proper officer thereof and applications under this rule shall be in accordance with form No. 14 of Appendix A provided that where judgment in default of appearance or defence has been entered against a defendant no execution by payment attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given either at his address for service or served on him personally and a copy of that notice shall be filed with the first application for execution”.

It follows therefore that the notice of such judgment ought to be served to the judgment debtor so as to forewarn him of the impending executions.

I have been unable to see such notice by the judgment creditor. What is in the court file is dated 4-12-2007 but does not have the address of the defendant.

I have further perused the plaint herein. It raises triable issues which requires adduction of evidence. The defendant ought not to be contempt unheard. Whether or not the statute of limitation militates against the plaintiff is for the trial court to determine.

In light of the decision of **Python Waweru Maina -VS- Mugiria [1983] KLR page 79** where the court state:

“There are no limits or restrictions on the Judge's discretion except that it should be based on such terms as may be just because the main concern is to do justice to the parties”.

Taking the totality of this case and the history behind it and in applying the discretion of the court I do order that:

(a)The defendant is hereby granted leave to file and serve his defence with 14 days from the delivery of this ruling.

(b)The defendant shall deposit with the Deputy Registrar within the next 30 days from the date of delivery of this ruling the sum of Kshs. 335,000/=.

(c)In default of prayer (b) above the plaintiff shall proceed to execute for the whole amount.

(d)Costs of this application to the plaintiff/respondent.

Dated, signed and delivered at Kisumu this 15th day of October 2012

**H.K. CHEMITEI
JUDGE**

In the presence of:

Agone for Omayya for the applicant

Omondi for the respondent

HKC/va