



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MIS. CIVIL SUIT NO. 834 OF 2006

THE BOARD OF GOVERNORS ST. JOHNS COLLEGE
PLAINTIFF

VERSUS

JOHN NGANYI LIBOYI
DEFENDANT

R U L I N G

This application is brought by way of a Notice of Motion dated 15th March, 2010 and taken out under **Order XXI Rule 22 and Order XLIV Rules 1 and 2** of the **Civil Procedure Rules**. The Applicant seeks 3 main orders as follows –

- 1. That there be a stay of the warrants of arrest herein pending the review of the ruling delivered on 25th February, 2010.***
- 2. The ruling delivered on 25th February, 2010 be reviewed.***
- 3. Any further orders that this Honourable Court may deem fit and just to grant.***
- 4. Costs be in the Cause.***

The application is supported by the annexed affidavit of John N. Liboyi, the Defendant/Judgment-debtor, and is based on the following grounds –

- (a) The applicant stands to suffer extreme prejudice in the event the warrant of arrest is executed before the hearing of his application dated the 15th day of March, 2010.***
- (b) There is a consent between the two parties on record to repay the balance decretal amount BY installments, which consent was not taken into account thus leading to an error in the ruling.***
- (c) Counsel for the decree-holder appeared in Court on the 8th day of February, 2010 and on the 25th day of February, 2010 when he was not certified to practice for the year 2010, based on the JNL O annexed printout.***

(d) The decree extracted by the decree-holder incorporates interest which was neither prayed for nor availed. There is therefore an error or mistake apparent on the face of the record.

(e) The committal did not comply with the legal requirements for committal to civil jail under Order XXI Rule 35 of the Civil Procedure Rules.

(f) The Applicant has no means or ability to pay the decretal sum at once, or a portion of the decretal amount more substantial than already proposed.

At the hearing of the application, Mr. Mutuli appeared for the

Applicant while Mr. Mutisya appeared for the Respondent. Mr. Mutuli argued that the review was sought on the grounds of discovery of new and important evidence. The evidence was that Counsel for Respondent did not have a Practising Certificate at the time of arguing the application in respect of whose ruling the review is sought. He also argued that there was an error apparent on the face of the record since the judgment which the Respondent sought to enforce contained an error in respect of additional interest. It was also his submission that there was a consent between the parties for the payment of the decretal sum by installments and the same had not been set aside.

Opposing the application, Mr. Mutisya argued that the Applicant had not attached any evidence to show that the Respondent's Counsel had no Practising Certificate and that the Court ordered payment of the decree with interest. He also submitted that the Applicant had not paid the sum of money which he had undertaken to pay when he was threatened with committal to jail. He finally submitted that the application was a pure act of delay and prayed that it be dismissed with costs.

I have considered the pleadings and submissions of Counsel. Appearance in Court by an Advocate who does not have a current Practising Certificate is a serious transgression of the Advocates' Professional Ethics. It is admitted in this matter that the Advocate on record who appeared for the Respondent had no Practising Certificate at the material time. **Section 9** of the **Advocates Act** states that –

“Subject to this Act, no person shall be qualified to act as an advocate unless –

(a) he has been admitted as an advocate; and

(b) his name is for the time being on the Roll; and

(c) he has in force a practising certificate”

The incorporation of the conjunction “and” after paragraphs (a) and (b) above denotes that all the 3 requirements must be complied with. The Practising Certificate referred to in the said **Section** is meant to authorize the Advocate named therein to practice as an Advocate. In the case of **KENYA POWER & LIGHTING CO. LTD v. MAHINDA & ANOR [2005] EA 102** it was held that an Advocate representing a party must be an Advocate competent to practice under **Section 9** of the **Advocates Act**. In the words of the Court of Appeal –

“If no practising certificate had been issued when the act was done, the advocate was not qualified to do that act at the time he did it.”

I suppose it is for this reason that **Section 24 (1) of the Act** requires that every Practising Certificate shall bear the date of the day on which it is issued and shall have effect from the beginning of that day.

The Respondent's Counsel has not shown to the Court a copy of his Practising Certificate at the material time. This is to be held adversely against him. However, as the said Advocate admits that he may have gone against the law for which misdeed he profusely apologized to the Court, I do not wish to pursue the issue any further. For the same reason, I don't see the merit in pursuing the other issues raised.

On account of the Respondent having been represented by an inelligible person, which borders on contempt of Court, the proceedings of 8th February, 2010 and the dismissal of the Applicant's application by Chamber Summons dated 5th June, 2009 are hereby vacated. The application by Notice of Motion dated 15th March, 2010 is accordingly allowed. If the Applicant had applied for costs, I would have considered awarding them. However, since he prayed for the costs to be in the Cause, so be it.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 8th day of September, 2011.

L. NJAGI
JUDGE