



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 244 of 1998

AHAMED MAHAMUD ADAN.....PLAINTIFF
VERSUS
JIMMY TOMNO.....1ST DEFENDANT
WILFRED CHEPKURGAT.....2ND DEFENDANT
MICHAEL CHEPKWONY.....3RD DEFENDANT

RULING

On 22nd June, 1008 the plaintiff in this suit, **Ahmed Mohamed Adam** filed a claim for general and special damages arising from an accident on 20th December 1996 involving him and two motor vehicles, KAC 569R and KLN 835 (tractor). The former motor vehicle was said to belong to the 1st defendant herein, Jimmy Tomno.

On 20th March, 2000 a consent was recorded in which parties, through their counsel agreed that:-

- (i) the 1st defendant to shoulder 50%
- (ii) the 2nd and 3rd defendants to shoulder 50%
- (iii) quantum to be determined by written submissions to be filed within two (2) weeks from 21st March, 2000.

On the basis of this consent, the matter proceeded to hearing on quantum on 4th April, 2006 and subsequently judgment was given in favour of the plaintiff against the defendants in the sum of Kshs.2,558,306 plus costs and interest. Eight (8) months after the

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delivery of the judgment, the 1st defendant filed a motion seeking a temporary order of stay of execution/proceedings pending the *inter partes* hearing of the application and the review or setting aside of the consent order and the judgment.

The 1st defendant contended in that application that he is not the owner of motor vehicle KAS 569R; that he never instructed any advocate to represent him in the matter and was therefore not a party to the consent of 30th August, 2001; that he was not served with the summons and other court papers.

The court (Koome, J) considered the application and allowed it stating that the 1st defendant was not involved in the consent of 30th August, 2001; that the advocate purporting to act for him was not instructed by him. The consent order, the judgment and the decree were set aside in a ruling dated 15th February, 2008.

The 2nd and 3rd defendants have now brought the instant application to stay the execution and order, pursuant to

section 34(1) of the **Civil Procedure Act**, that there is no judgment or decree in the matter capable of being executed.

From the grounds upon which the application is premised and the submissions by counsel before me I understand the applicants to be stating that the court having set aside the consent order, the judgment and the decree, there was no basis for the plaintiff to

purport to execute against the 2nd and 3rd defendants (now applicants in this application).

The application is also based on the ground that **Order 21 rule 18(1)** of the Civil Procedure Rules on execution of decrees have not been complied with by the plaintiff.

I will begin with the first issue – whether the order setting aside the judgment had the effect of discharging the 2nd and 3rd defendants (the applicants) from the consent order and the judgment itself.

The application for setting aside was made by the 1st defendant for very specific reasons unique to himself, namely,

- he was not served with the plaintiff’s pleadings hence was not aware of the existence of the suit
- he did not own motor vehicle registration No.KAC 569R
- he did not engage the services of an advocate who purported to represent him
- he did not authorize the advocate to record a consent.

The court in allowing the application was categorical that the consent order, judgment and decree were set aside in so far as the 1st defendant was concerned. In allowing the application, the learned judge said:

“In view of the above, I allow the application and set aside the consent judgment entered on 30th August, 2001 on liability and also the judgment of this court of 13th October, 2006 as well as the consequent decree in respect of the 1st defendant”
(Emphasis supplied)

The 2nd and 3rd defendants (applicants) clearly wish by this application to reap where they did not sow. They recorded a consent with the plaintiff on liability at 50% independent of the owner of motor vehicle No.KAC 569R which was involved in the accident and which the court found did not belong to the 1st defendant.

Secondly, after the judgment of 13th October, 2006, the 2nd and 3rd defendants lodged a notice of appeal on 23rd October, 2006 to challenge the judgment while the 1st defendant opted to seek a review in the application brought on 8th June, 2007.

By dint of **Order 44 rule 1** of the **Civil Procedure Rules**, the 2nd and 3rd defendant having chosen to appeal cannot at the same time benefit from a review application.

Order 44 rule 1(1)(a) aforesaid under which the 1st defendant’s application was brought provides that:

“1 (1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred

.....
.....

may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

Finally, regarding the ground that execution coming more than one year after the date of the decree ought to have been preceded by a notice to show cause, it is common ground that the decree was issued on 13th October, 2006 and application for execution filed on 18th May, 2007, approximately eight (8) months, thus taking the execution in this matter outside the preview of **Order 21 rule 18** aforesaid.

If my computation is inaccurate, I find that indeed there was notice to show cause dated also 18th May, 2007 signed by the Deputy Registrar.

In the result, the chamber summons dated 13th August, 2008 fails and is dismissed with costs to the plaintiff.

Dated, Signed and Delivered at Nakuru this 3rd day of May, 2010.

**W. OUKO
JUDGE**