



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 837 of 2000

PALACE DRYCLEANERS.....1ST PLAINTIFF

GEORGE GIKUSU MBUTHIA..... 2ND PLAINTIFF
VERSUS

KENYA POWER LIGHTING COMPANY LTD.....DEFENDANT

RULING

Coram Mwera J

In person 2nd Plaintiff/Applicant

Ms Ochieng for Respondent/Defendant

The 2nd plaintiff/applicant herein filed a notice

of motion under section 51 (2), the Advocates Act, Order 21 Rule 18 Civil Procedure Rules and Sections 1A (1), 3A Civil Procedure Act with prayers:

- i) that there be a stay of execution of certificates of costs dated 18/11/09 and 20.3.07;
- ii) there be a stay of hearing the notice to show cause dated 10.2.10; and
- iii) there be stay of further proceedings until the final hearing and determination of Civil Appeal No. 114/06

The motion was premised on the grounds that the taxing officer was **functus officio** in respect of this application. This application was intended to set aside the certificates of costs (above), while the notice to show cause dated 10/2/10 is a form of execution of a decree yet there was no decree in this cause. So any order following that notice would be null and void. And execution (above) would render the applicants **Civil Appeal No. 114/06** nugatory. There was a short supporting affidavit and the applicant in person argued the application. Ms Ochieng relied on the replying affidavit filed by one Michi Kirimi in opposition.

At the hearing, the applicant asked that the court do determine the motion in his favour on the one point that there was never a decree in this cause and without one, the defendant could not move to execute as per the 2 certificates of costs alluded to because that could be irregular and contrary to the law.

It was submitted that the suit herein was dismissed or struck out with costs on 20.2.06 and on 18.10.02. The reason was that the summons to enter appearance served was invalid for granting the defendant 10 days only to enter appearance. With that, the suit was found to be invalid. The applicant argued that with the suit being invalid, no valid proceedings would arise/follow after the order to strike out. There had been no decree extracted and the defendant could not validly obtain certificates of costs which it now desires to execute. The court heard that all the proceedings, applications, orders etc including his own, which followed the

dismissal order of the suit were of no validity. And if execution for costs proceeds, it will undercut the basis on which **Civil Appeal No. 114/06** stands, which appeal was lodged against the order of 18.10.02. It was still pending.

Ms Ochieng went over this dismissal order of 18/10/02, stressing that the suit was ordered dismissed with costs. The applicant was granted 14 days to apply to extend time to serve valid summons of appearance, a thing he failed to do. Then he began to file application upon application against the defendant all of which were dismissed with costs. On 20.3.07 the defendant had its costs taxed at sh. 123 985/= and a certificate issued. But due to the various applications that the applicant filed and the defendant successfully opposed, costs accumulated and these were taxed and on 18/11/09 whereby a certificate for sh. 115,294/= was issued. The defendant is thus desirous to recover the sums in the two certificates. A notice to show cause was served and is due for hearing on 4.5.10. The plaintiff's moves in the many applications which counsel referred to, were meant to frustrate the defendant and to delay payment of due costs. The matters he raises now were dealt with in the past applications and determined. The court no longer had authority to entertain them and if anything the applicant should move to the Court of Appeal. The court was referred to sections 27, 28 Civil Procedure Act and Order 21 Rule 21 on the meaning/substance of a decree or order to demonstrate that the defendant holding an order which is executable, would do so as if it was a decree.

The applicant responded that he did not want to go into the many applications he had filed and rulings made upon them, save to emphasize that a decree is not equivalent to an order when the aspect of execution arises. He desired that litigation here should now end by a ruling on this motion.

In this court's appreciation of the arguments put forth, it is not in dispute that on 18.10.02 Mbitio J dismissed the suit herein with costs in the event the plaintiff did not in 14 days apply to extend time to issue valid summons, to enter appearance. The latter part of the order i.e extension of time to apply for summons, may stand question in law, but suffice it to note that the applicant did not apply and so the suit stood dismissed with costs.

And this was confirmed by Ransley J on 20.2.06. Following this, a certificate of costs of 20.3.07 was obtained. It was a valid certificate. The applicant did not claim or it was not evident by other source of information that this certificate was set aside by reference or appeal. It therefore validly remains in place.

Then the applicant filed and prosecuted many other proceedings thereafter which the defendant successfully resisted. As a consequence, costs were taxed on 18.11.09. Again this certificate remains valid since it was not set aside, varied or successfully appealed against.

Now the defendant wants to execute for the costs in the 2 certificates following the court **orders** but the 2nd plaintiff/applicant resists that on the basis that they are not arising from **decrees**. Is he right? Not quite, according to law.

In Section 27 Civil Procedure Act it is stated that costs of and incidental to all suits shall be in the discretion of the court or judge. And costs shall usually follow the event unless the court shall for good reason direct.

In the case herein the suit was dismissed with costs, and Mbitio J so directed by his ruling and an order to that effect was drawn.

Section 28 Civil Procedure Act reads:

“ 28. The provisions of this Act relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.”

The same CPA defines a decree-holder as:

“..... any person in whose favour a decree has been passed

or an order capable of execution has been made, and

includes the assignee of such decree or order.”

(underlining supplied)

In the present case, the defendant holds an order capable of execution. The order issued after his/their suit was dismissed with costs. Costs were assessed twice and the defendant is therefore validly moving to execute for the same. The opinion of the applicant in what he puts forth on distinction between a decree and an order is misconceived and lacking in merit. He was similarly wrong to think that no subsequent valid proceedings would follow an order that the cause in which they were, was invalid.

He did not demonstrate how paying the costs here would remove the base of his appeal no. 114/06 and the court discerned none. If that appeal succeeds, the Court of Appeal in its discretion may order costs against the defendant/respondent. The applicant prayed that this litigation come to an end with the determination of this motion. From the history of this case, it shall be desirable that litigation here actually do come to an end at last. Probably that will be the case after the notice to show cause fixed for hearing on

4/5/10 has been determined. However, the rest is left to the parties eg. there having been other proceedings after the certificate of costs dated 18/11/09.

This motion is dismissed with costs.

Orders accordingly.

Delivered on 3/5/10

J. W. MWERA

JUDGE