

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 687 of 2005

KENYA TOURIST DEVELOPMENT CORPORATION PLAINTIFF

VERSUS

WILLIAM K. ARAP CHELASHAW DEFENDANT

RULING

The appellant William K. Chelashaw appealed against the ruling of the Deputy Registrar Mr. S.A. Okato, delivered on 14th day of May 2009 on the grounds that the learned deputy registrar failed to discharge the legal obligations under order 21 rule 35 of the Civil Procedure Rules. The learned deputy registrar was also faulted for placing the onus of prove and compliance upon the appellant and for committing the appellant into prisonment without any evidence. This grounds were further expounded by counsel for the appellant during the hearing of the appeal. Counsel submitted that under order 21 rule 35 the appellant was supposed to appear in court. The learned deputy registrar was supposed to enquire and be satisfied that the appellant with the object or effect of obstructing or delaying the execution of decree was likely to abscond or leave the local limit of the jurisdiction of the court or the appellant after the institution of the suit was passed dishonestly transferred consumed or removed any part of his property or committed any other act of bad faith. The law further provides that the appellant had since the date of decree the means to pay the amount of the decree for a substantial part thereof but he refuses or neglects to pay the same. Counsel contended that the deputy registrar did not follow the steps set out under the law during the proceeding of 14th May 2009 there was no evidence that the appellant was about to abscond from jurisdiction or he had transferred his property to avoid execution of decree. Moreover, no evidence was presented to show the appellant had substantial means to payoff the debt. The appellant presented himself in court on a notice to show cause. That is when the court is said to have placed the burden of prove upon the appellant. He was able to explain that he has been out of employment from 2003. This information is within he knowledge of the respondent who was the employer. There was a consent order filed on 4th September 2007 where the appellant had agreed to pay the decreetal sum in installments. This consent order was entered into when the appellant presented himself to court under arrest and threat of imprisonment. The appellant explained to court as to why he was unable to pay the decreetal sum because he was impecunious. This was compounded by the loss of the appellant's father. The appellant also became sick and finally the people who had promised to help him with some money failed to honour their promises. Thus on 14th May 2009 the appellant could have made another consent and the court had a right to consider whether to set him free. Because the earlier consent was spent when the appellant was rearrested. Counsel submitted that the burdens of proving that the appellant had the means to pay the debt rested with the respondent. He therefore urged the court to set aside the order by the deputy registrar. This appeal was opposed by counsel for the respondent. He submitted that the decreetal sum arose as a result of a claim by the plaintiff who was the employer of the respondent in respect of personal loans travel interests, car loan incurred by the appellant while working as the Managing Director. The suit was filed in 2005 default judgment was entered. Notice to show cause was issued upon the appellant on 24th April 2007. Mr. Adere represented the appellant and requested for time to put forward a repayment proposal. That was supposed to be done on 29th May 2007. That was not done on 27th June 2007 and order of arrest was made. The appellant was arrested on 22nd September 2007 a consent order was recorded on how the appellant would pay the decreetal sum as follows:-

1. That the judgment debtor shall liquidate the outstanding amount by payment of Ksh.500,000/- on or before the 12th September 2007 and a further Ksh.500,000/- on or before the 30th September 2007. Thereafter, the balance shall be liquidated by monthly installments of ksh.1 million or before the 30th day of each month with effect from 30th October until payment in full.
2. That in default of any one installment on its due date, this agreement shall come to an end and a warrant of arrest shall issue against the judgment debtor.
3. All payments are to be made by way of bankers cheques to the plaintiffs advocates, Hamilton Harrison & Mathews.
4. This case be mentioned on the 19th September 2007 to confirm that the first payment has been received.”

The matter was mentioned severally and finally a warrant of arrest was issued. The appellant was all along promising to pay and was given an opportunity to pay. It was only on 14th of May 2009 when he for the first time indicated that he was unable to pay because he was unemployed. Prior to that there were proposals to pay the decreetal sum. Going by the consent order the appellant had refused to pay and that is what the deputy registrar relied on to satisfy himself that the appellant had the means to the decreetal sum for a substantial portion thereto. From the time judgment was entered on 25th July 2005, up to May 2009 there appellant never said he was impecunious. This is despite the fact that he was well represented and did not even file the bankruptcy proceedings. Counsel urged the court to dismiss their claim in the alternative if the appeal is allowed the judgment debtor be brought back before the deputy registrar for the proper procedure to be followed.

This appeal is brought under the special provisions of order 48 rule 5 of the Civil Procedure Rules. An issue for determination is whether the procedure provided for under order 21 rule 35 was complied with when the appellant was arrested on a notice to show cause. The execution proceeding in this court began on 7th March 2007 when the notice to show cause was issued. The appellant appeared in court on 24th May 2007 before the deputy registrar. The appellant was allowed time to put forth a proposal for settlement and since non was forth coming after several mentions on 7th June 2007 an order was made for the warrant of arrest thereafter the above consent order was entered on 11th September 2007. The matter was various mentioned in court until the 14th May 2009 when the appellant was brought the deputy registrar. Counsel for the respondent urged the deputy registrar to commit the respondent to civil jail for refusing to pay the decreetal sum since 2007 and for failing to honour the consent on the payment. That is when the appellant told the court that he had no ability to pay the money since he made the proposal in the consent order his father fell sick and passed away. He pleaded to be given more time to discuss the matter with the respondent. The court made the following ruling:-

“I have considered the application by counsel for the judgment creditor that the judgment debtor be committed to civil jail. I have seen the consent orders recorded on 11.9.07. The judgment debtor has never made effect to pay even a coin of the decreetal sum. He has not offered to pay any amount at the moment. He voluntarily entered into the consent which is binding on him and since he has not showed reasonable course why he should not be committed, I hereby commit the judgment creditor to civil for 6 months to pay for his subsistence.”

As stated earlier in this judgment, am not satisfied that the steps provided for under order 21 rule 35 were not followed by the deputy registrar when he issued the order committing the appellant to civil jail. The deputy registrar considered the consent order whereby the appellant had given a previous promise to pay the money. The import of that consent order was that the appellant had the ability to pay. If indeed there were circumstances that prevented him to pay the money from September 2007 he should have applied to set aside the consent order. The contention that the appellant was impecunious was only raised on the 14th May 2009 and going by the history whereby the court records is a wash with promises by the appellant to pay the deputy registrar properly exercised the powers provided for under order 21

and committed the appellant to civil jail for refusing to pay the decretal sum. I find no justifiable reason why the decision by the deputy registrar should be set aside. The appeal is hereby disallowed with costs to the respondents.

RULING READ AND SIGNED ON THIS 12TH DAY OF JUNE 2009.

M.K. KOOME

JUDGE