



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 541 of 1999

P.S. BHANGRA..... PLAINTIFF/RESPONDENT

VERSUS

AUSTIN S. KITOLO. DEFENDANT/APPLICANT

R U L I N G

The application is a Notice of Motion brought under Order III rule 9A, Order XXI Rule 35, Order 1 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is dated 1st July, 2009 and the substantive prayer for consideration is prayer No. 4. The other prayers are moot.

The Defendant's advocate Mr. Kigano urges that the Defendant is willing and able to work for the purpose of finding means of paying the decretal amount and that the warrant and committal orders issued against the Defendant impede him from undertaking work for the purpose of finding means of paying the decretal amount. That the Defendant is ready to furnish security for his appearance in court when required.

The application has been opposed. Mr. Mungai for the Plaintiff has urged that the application is misconceived since under Order XXI rule 35 the prayer sought under prayer 4 of the application that the court is not empowered to lift the Warrant of Arrest but can grant the payment by installments.

Order XXI rule 35 states as follows:

“35(1) Where a judgment-debtor appears before the court in obedience to a notice issued under rule 32, or is brought before the court after being arrested in execution of a decree for the payment of money, and it appears to the court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or, if that amount is payable by installments, the amount of any installment thereof, the court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be.”

The application has been brought under order XXI rule 35. Sub rule 1 of rule 35 gives the court power for sufficient cause to be shown to disallow the arrest and detention of a judgment-debtor and to direct his release upon such terms as it thinks fit.

The Applicant's contention is that he was unaware of the warrant of arrest. Mr. Kigano for the Applicant submitted that in law a warrant of arrest can be issued where it has been shown that the Judgment Debtor has been in avoidance. I agree with Mr. Kigano that a Warrant of Arrest can be issued where the Judgment Debtor has been avoiding to pay the debt. There is no evidence before the court that that has

been the case. Mr. Mungai for the Respondent did not file any papers and therefore that position is not controverted.

The Decree Holder has not filed any papers to oppose the application. Going by Mr. Mungai's brief submission on points of law, there is no serious opposition to this application.

I have considered the supporting affidavit by the Judgment Debtor. He has explained that he is unable to pay the entire decretal sum and has deposited in court 20% of the decretal sum. He offers to pay Kshs.200,000 a month effective 30th September, 2009. This means that he will be able to pay the balance of the decretal sum within 20 months. I am inclined to grant the judgment-Debtor's application in the following terms:

1. That the Judgment-Debtor be and is hereby granted leave to pay the decretal sum by installments.
2. The Judgment-Debtor should pay the decretal sum by installments of Ksh.200,000 effective from 31st July, 2009 and thereafter on the 30th of every month until payment in full or until further orders of the court
3. The order in (2) above will be subject for review to be increased upwards on application by either party.
5. The Kshs. 1 million deposited in court by the Judgment Debtor be released to the Decree Holder.
4. The cost of the application be in the cause.

Dated at Nairobi this 24th day of July, 2009.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Ms. Kinyanjui holding brief Mr. Kigano for the Applicant/ Respondent

N/A for Mr. Muigai for Defendant /Plaintiff

LESIT, J.

JUDGE