



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 140 of 1999

MAWJI PATEL.....PLAINTIFF/DECREE HOLDER

=VERSUS=

TONY KETER.....DEFENDANT/JUDGMENT DEBTOR

RULING

This is an application by the Defendant dated 9th November,2006, inter alia the following Orders:-

- That this Honourable Court be pleased to vary, review, set aside and /or discharge the Orders given by the Court on 15th August 2006 so far as they relate to prayer (c), (e), (f), (g), (h), (i) and (j) of the Plaintiff's Chamber Summons dated 14th August,2006.
- That the Court do grant such further Orders for the preservation of the Status Quo and the Defendant's property herein pending the determination of the proceedings and further stay of all matters herein pending the hearing and determination of this application and the Chamber Summons dated 2nd April 2003.

The application is supported by an affidavit sworn by the Defendant/Judgment debtor on the 19th November,2006. The application is opposed. The Plaintiff /decree holder has sworn an affidavit on 17th November, 2006.

The first question for determination by this Court is whether on the 15th August, 2006 when the application dated 14th August 2006 for, inter alia, garnishee Orders was heard and Orders granted *ex parte* and when the Orders were confirmed on 3rd October,2006 whether the Receiving Order issued against the Defendant in Nairobi – Milimani Bankruptcy Cause No. 143 of 2003 was still in force and whether the Plaintiff through his Counsel had been served and was aware of the stay of execution against rescission of the Receiving Order on 15th August,2006.

I have carefully perused the record, the application and affidavits.

On the 11th November 2003, the Respondent lodged Bankruptcy cause No. 143 of 2003 for the following Orders.

- 1). That a Receiving Order be made in respect of his Estate.

2). That pursuant to Section 11 of the Bankruptcy Act, Chapter 53 Laws of Kenya an order of stay of all execution be granted.

On the same day, the Honourable Justice Mutungi made an order that a Receiving Order be issued against the Applicant's Estate. The Plaintiff herein and another Creditor lodged separate application to have the Receiving order rescinded and the order of stay of any action, execution or other Civil legal process against the applicant's property and / or person issued pursuant to the said Receiving Order be reviewed and / or set aside. After hearing the two applications, the Honourable Justice Mutungi on 18th July, 2006 made the following Orders:-

v I rescind the Receiving Orders made by this Court on 11.11.2003.

v I further rescind the Orders made on 11.11.2003 staying execution of all Civil legal process against the debtor's property or person in any Court.

v Accordingly, the petition by the debtor herein hereby dismissed.

v The Petitioner/debtor/respondent to pay the costs of the application in this application

Soon thereafter, the Applicant filed an application for stay of execution of Justice Mutungi's Orders pending the hearing and determination of an intended appeal. The application was filed on 10th August 2006 under Certificate of Urgency. It was placed before the Honourable Justice Ochieng during the Vacation. After hearing the application ex-parte, Justice Ochieng made the following orders:-

ü That the matter be and is hereby Certified as Urgent and is admitted for hearing during the current vacation.

ü That a temporary stay of execution be and is hereby granted pending hearing of the application set down for hearing on the 29th August, 2006.

The said application was finally heard inter parties by Honourable Justice Azangalala who dismissed it with costs. The interim stay order was thereby vacated.

The Plaintiff has not opposed or challenged this sequence of events and facts. To the contrary, the same are accepted by both parties.

This means therefore that on the 15th August, 2006, the Interim Orders of Stay of execution granted by Justice Ochieng were still in force. The Orders of Justice Mutungi of 18th July, 2007 rescinding the receiving orders and setting aside the orders staying of execution of all legal process against the debtor's property or person in any Court had been stayed on 10th August, 2006 until the inter parties hearing on 29th August 2006. The Order given on 10th August 2006 and issued on the same date speaks for itself. The words are clear and certain. The Orders of 18th July 2006 had become stayed and the Receiving Order and Order of Stay had temporarily been reinstated. No execution could therefore take place against the Applicant.

The Order was given by this Court and it was valid and in force. The Order had to be obeyed the same way that the Order given on 11th November, 2003 had been duly obeyed. It does not matter that the Order was contestable and / or that subsequently another Judge, Honourable Justice Azangalala dismissed it. The Order was binding not only on the Respondent but against all other Creditors or persons with judgments or orders in their favour for attachment of the Applicant's property or arrest of his person.

As long as it was in force, it was a lawful order of the Court that obligated all to obey and respect. The Respondent/Plaintiff does not deny the allegation that the order was served on his advocates on 11th August, 2006. I have seen the affidavit of service sworn by one Barnabas Tuwei Rutto, Process Server

and I am satisfied that M/S Gicheru & Company were duly served with the Order given on 10th August, 2006 and they duly acknowledged receipt /service thereof.

I therefore do hold that it was in disregard and disobedience of the Order for the Plaintiff's advocates to file and prosecute the application dated 14th August, 2006. I do hold that the filing and prosecution of the application was part and parcel of the execution of the decree herein. To extract and execute the Orders obtained were irregular, improper and unlawful. I do not accept that the Order of Stay covered or was confirmed to the Bankruptcy Proceedings. If the Receiving Order could affect all executions, how can its stay be limited to the Bankruptcy proceedings? The receiving Order when in force and its subsequent stay affected all executions in all Civil proceedings against the Applicant.

The upshot in this finding is that the entire application dated 14th August, 2006 was null and void ab initio. It could not be filed without a discharge of the Orders of 10th August, 2006. In any event, no orders could be sought as long as the Order of 10th August, 2006 was in force.

In view of the foregoing, there is no need for the Court to delve into or deal with the other issues raised in other applications.

I therefore do hereby grant Prayers 3 and 4 of the application dated 9th November, 2006. I do hereby set aside the Orders given on 15th August, 2006 and 03/10/2006 in their entirety. The Plaintiff initiated the process leading to the grant of the Orders. His actions were in flagrant disregard of Orders of this Court. The Court frowns upon this and accordingly, he shall bear all consequential costs arising from the execution of the Orders set aside herein and the costs of this application.

DATED AND DELIVERED AT ELDORET ON THIS 5TH DAY OF FEBRUARY, 2008

M.K. IBRAHIM,

JUDGE. 5/02/08.