

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 471 of 1998

CHARLES MBINDYOPLAINTIFF

VERSUS

ABUBAKAR MADHUBUTI.....1ST DEFENDANT

ANUPAM H. PAREKH2ND DEFENDANT

R U L I N G

By a motion dated 28th March 2006, the 1st Defendant, Abubakar Madhubuti sought for the application for execution dated 6/3/2006 and the notice to show cause given on the same date to be struck out and dismissed and the suit between the plaintiff and 1st defendant be marked as settled. The motion is supported by the affidavit of Abubakar Madhubuti sworn on 28th March 2006.

Mr. Mohamed Khatibu filed a replying affidavit to oppose the motion.

It is the submission of Mr. Kinyua, advocate for the 2nd defendant/applicant, that the decree has been satisfied. He referred to certain annexures showing that Mr. Khatib had acknowledged that the decree had been fully satisfied. The learned advocate is of the view that the current application for execution of the decree and the notice to show cause is a gross abuse of the process of court and amounts to extortion.

Mr. Khatib resisted the motion by stating that the 1st defendant had not paid anything as alleged. The learned advocate claimed that the undated agreement he purportedly prepared was a contract he was instructed to draw but did not witness any payments being made. The explanation given by Mr. Khatib appears to admit that he participated in some sort of compromise with the 1st defendant with a view of tricking the 2nd defendant to settle some outstanding fees. The learned advocate challenged the 1st defendant to tender evidence acknowledging receipt of the decretal sum.

I have carefully considered these lengthy submissions made by the rivaling parties. What is not denied is that a notice to show cause dated 9th March 2006 had been issued pursuant to order XXI rule 18 of the Civil Procedure Rules. In brief that notice required the 1st Defendant to show cause why execution should not issue against him. As far as I am concerned the issues raised herein can competently be raised in answer to the notice to show cause. The issues raised herein are not contemplated under Order XLVIII rule 3 of the Civil Procedure Rules. If indeed the 1st Defendant has paid the decretal sum as alleged then it is simple and appropriate to go before the Deputy Registrar and show cause. For the above reasons I do not see any merit in this motion. The same is ordered dismissed. I will not award any of the parties cost because they are participants in the mystery surrounding this matter. Let the 1st defendant squarely face the Deputy Registrar to answer the Notice to show cause.

Dated at delivered at Mombasa this 9th day of February 2007.

J.K. SERGON

J U D G E

In open Court in the presence of Mr. Khatib for the plaintiff and Mr. Kinyua for 2nd Respondent/applicant