



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1747 OF 1997

FRANK OWENPLAINTIFF

V E R S U S

1. ENOCK TUITEOK

2. REENO HIDES & SKINS LTDDEFENDANTS

R U L I N G

In this application (by notice of motion dated 15th May, 2007) the 1st Defendant/Judgment-Debtor seeks the main orders:-

1. That there be stay of execution of the order of the deputy registrar of 10th May, 2007 for his arrest pending hearing of his application for review by notice of motion dated 19th April, 2007 (filed on 24th April, 2007).

2. That the warrant of arrest issued against him on 10th May, 2007 be lifted.

The order of 10th May, 2007 was issued when the 1st Defendant failed to attend court to show cause why he should not be committed to civil jail in execution of decree. The application is made upon the grounds that he was not personally served with the notice to show cause, and that the Plaintiff/Decree-Holder is in possession of the 1st Defendant's property and earning rental income therefrom, and that therefore execution of the decree (which is a money decree) in these circumstances will amount to unjust enrichment of the Plaintiff. There is a supporting affidavit sworn by the 1st Defendant. There is a further supporting affidavit sworn in response to the replying affidavit.

The Plaintiff/Decree-Holder has opposed the application as set out in the replying affidavit filed on 24th May, 2007. The gist of the objection to the application is that this is yet another attempt by the 1st Defendant to delay the course of justice in this matter and to prevent the Plaintiff from enjoying the fruits of his litigation.

I have read the supporting and replying affidavits. I have also perused the court record. Finally, I have considered the submissions of the learned counsels appearing. I note that the decree herein was passed by consent in the year 2000. Under the decree, the Defendants were to refund to the Plaintiff the sum of KShs. 3.5 million and also his costs of the suit and interest. Alternatively, the Defendants could provide another property acceptable to the Plaintiff within 30 days of the passing of the judgment. Upon satisfaction of the decree by the Defendants the Plaintiff would vacate the suit property which would then revert to the Defendants. The Plaintiff was apparently in possession of the suit property at the time the

suit was filed.

As it happened, the Defendants did not refund the KShs.3.5 million; nor did they provide an alternative property acceptable to the Plaintiff. The Plaintiff therefore moved to execute the decree to recover the sum awarded, costs and interest.

I respectfully agree with the learned counsel for the Plaintiff that the 1st Defendant cannot, in this application, raise the issue of service upon himself of the notice to show cause. That issue was raised before the learned deputy registrar on 10th May, 2007, and he made a finding thereon. He found that the 1st Defendant had been duly and personally served with the notice to show cause. That finding can only be challenged by way of an appeal under Order 48, rule 5 (2) of the Civil Procedure Rules.

The learned deputy registrar also found that the 1st Defendant should have attended court as the application for execution sought his arrest and committal to civil jail. That may be so. But because the notice to show cause stipulated that the 1st Defendant could appear either personally or by duly authorised agent, it was not proper for the learned deputy registrar to order for the arrest of the 1st Defendant for failure to attend court on the 10th May, 2007 because on that day he properly appeared through counsel. He should have adjourned the notice to show cause to another date and then require the personal attendance of the 1st Defendant on that date. I therefore hold that the order for the arrest of the 1st Defendant in these circumstances was not properly made. I will set it aside.

Regarding the prayer that there be stay of execution of decree pending hearing of the application for review dated 19th April, 2007, I have the following observations. The Plaintiff/Decree-Holder is still in possession of the suit property. He is earning rental income therefrom. I do not think he will be unduly prejudiced by waiting a little longer to allow hearing and disposal of the said application for review, for whatever it may be worth. I have noted the Plaintiff's plea that the 1st Defendant is just trying by any means to delay execution of the decree. That may well be so. But, on the other hand, I cannot ignore the fact that the Plaintiff is in possession of the suit property and is earning rental income from it. The delay occasioned in execution of the decree pending hearing and disposal of the application by notice of motion dated 19th April, 2007 is thus mitigated.

I will therefore grant stay of execution of decree pending hearing and disposal of the application by notice of motion dated 19th April, 2007. But I will not leave matters there. I shall at the time of delivery of this ruling give directions as to hearing of that application to ensure that it is disposed of without undue delay.

In conclusion, the 1st Defendant's application by notice of motion dated 15th May, 2007 is allowed. The order of the deputy registrar entered on 10th May, 2007 for the arrest of the 1st Defendant is hereby set aside, and the warrants of arrest issued pursuant thereto lifted. There shall also be stay of execution of decree pending disposal of the notice of motion dated 19th April, 2007.

In the circumstances of this case, the 1st Defendant does not deserve any costs of the application. There shall be no order as to costs of the application. Those will be the orders of the court.

DATED AT NAIROBI THIS 25TH DAY OF JULY 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 27TH DAY OF JULY 2007