REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 658 of 2004 (OS)

POSTAL CORPORATION OF KENYA …….……..PLAINTIFF

V E R S U S

1. **DONALD KIPKORIR**

2. **JOSEPH TITOO**

3. MWENDA KIARA All t/a KIPKORIR, TITOO & KIARA ADVOCATES……..DEFENDANTS

R U L I N G

The history of this matter is available in the rulings dated 16th June, 2005 and 7th December, 2006 delivered herein. I need not repeat it here. This is an application by the Defendants/Judgment-Debtors by notice of motion dated 15th March, 2007 seeking the main order that the warrants of attachment and sale of the Defendants properties dated 6th March, 2007, and the proclamation of those goods dated 8th March, 2007, be lifted or set aside. The application is properly brought under section 3A of the Civil Procedure Act (the Act) and Order 50, rule 1 of the Civil Procedure Rules (the Rules).

There are two grounds for the application as set out on the face thereof:-

1. That the costs herein have never been taxed and there is no leave of the court to execute the decree before ascertainment of the costs due to the Plaintiff.

2. That no notice to show cause why execution should not issue was ever served upon the Defendants as required by the relevant rule of procedure, the decree being executed being more than one year old.

There is a supporting affidavit sworn by **DONALD B. KIPKORIR**, the 1st Defendant. It sets out the factual basis of application.

The Plaintiff/Decree-Holder has opposed the application as set out in the grounds of opposition dated 20th March, 2007. Those grounds are:-

1. That the Defendants cannot suffer any prejudice whatsoever if execution is allowed to proceed as there is an unchallenged judgement which the Defendants have failed to honour.

2. That the Defendants have failed to honour an order of this court requiring deposit of the decretal sum in court.

3. That the Defendants have not come to court with clean hands, and the application is yet another

attempt to delay the Plaintiff's just entitlement.

4. That the application otherwise has no merit and is an abuse of the process of the court.

There is a replying affidavit sworn by one **EDGAR IMBAMBA**, the manager, legal services, of the Plaintiff. At paragraph 5 of that affidavit it is deponed that the Plaintiff is not claiming any interest or costs and has expressly waived the same. The replying affidavit basically argues the Plaintiff's position in the application.

I have duly considered the submissions of the learned counsels appearing. It is true that the Plaintiff's costs awarded in the decree have never been taxed. It was argued for the Defendants that under section 94 of the Act, before ascertainment of costs the decree cannot be executed without leave of the court. From the wording of that section, this is so. However, in the present case the Plaintiff has waived the costs awarded to it in the decree. This fact was communicated to court by letter dated 20th February, 2007 written by the Plaintiff's advocate. The letter was copied to the Defendants' advocates. As that waiver of costs is to the benefit of the Defendants, there is no justification for them to complain that there has been no taxation of the Plaintiff's costs. For the same reason, it was not necessary for the Plaintiff to seek leave under section 94 of the Act to execute the decree, having waived the costs. The first ground of the application must therefore fail.

The second ground is that execution of the decree is irregular in that no notice to show cause why execution should not issue was ever served upon the Defendants as required by Order 21, rule 18 (1) (a) of the Rules, the decree being more than one year old. The Plaintiff's response to this ground is that the first proviso to sub-rule (1) aforesaid makes the issuance of notice to show cause unnecessary, the last order upon the application for stay of execution filed on 16th December, 2005 having been made against the Defendants on 8th December, 2006. It was submitted for the Plaintiff that time would start to run for purposes of notice to show cause on 8th December 2006. The Defendants' response was that the order of 8th December, 2006 was not made against the Defendants upon an application for execution; it was a conditional stay of execution upon the Defendants' application.

It is necessary to set out rule 18 (1) aforesaid in the material portions. It states:

"**18. (1) where an application for execution is made –**

(a) more than one year after the date of the decree; or

(b) ……; or

(c) …….

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution……..."

I have perused the court record herein. The decree was passed on 17th June, 2005. The application for execution of decree was filed on 23rd February, 2007. That was clearly more than one year after the decree was passed. Ordinarily, therefore, notice to show cause why the decree should not be executed should have been issued and served on the Defendants.

However, under the first proviso rule 18 (1) aforesaid, no such notice would be necessary in consequence of more than one year having elapse between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution. Was there a previous application for execution in this matter? Indeed there was one filed on 16th December, 2005. Was there an order made against the Defendants on that previous application, and if so when was it made? Indeed warrants of attachment and sale of the Defendants moveable properties were issued on 20th December, 2005 upon the application for execution of the decree filed on 16th December, 2005. No other orders were made against the Defendants upon that previous application for execution. The order of 8th December, 2006, as already seen, was not made upon the previous application for execution filed on 16th December, 2005.

The application for execution in issue was filed on 23rd February, 2007. That was not within one year from the date of the warrants of attachment and sale of 20th December, 2005. Clearly, therefore, notice to show cause why the decree should not be executed ought to have been issued and served upon the Defendants when the new application for execution of the decree was filed on 23rd February, 2007. Without such notice to show cause the warrants of attachment and sale issued on 6th March, 2007 were irregular. They must be set aside to enable notice to show cause to be served upon the Defendants as required by law.

I will in the event allow prayer 4 of the Defendants' application by notice of motion dated 15th March, 2007. Regarding costs, as the Defendants have not made any effort to pay the decretal sum awarded to the Plaintiff, I order that the parties bear their own costs of this application. There will be orders accordingly.

DATED AT NAIROBI THIS 16TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17th DAY OF AUGUST, 2007