



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 100 of 1999

BARCLAYS BANK OF KENYA LTD.PLAINTIFF

VERSUS

ANNE ATIENO ADUL1ST DEFENDANT

ELIJAH ADUL2ND DEFENDANT

RULING

The Notice of Motion before the court is premised under Section 3A and 80 of Civil Procedure Act, Order XX Rule 3(1) (3), 5 and 11, Order XLIV Rules 1, 2, 3 and 4 and Order L Rules 1 and 5 of Civil Procedure Rules.

It seeks prayers that the execution of the decree dated 16th June, 2005 be stayed pending hearing and determination and that the Judgment of the court delivered on 16th May, 2005 be set aside and/or declared no Judgment at all.

At the time of hearing of the application the alternative prayer of liquidation by instalments was not submitted upon.

It may be appropriate that the Defence of the Defendants/Applicants was struck out by the court and the Defendants did not appear on the date of hearing of the suit. Hon. Ransley J heard the Plaintiff's case and delivered Judgment by allowing the claim of the Plaintiff against the Defendants.

The Order striking out the Defence has not been challenged.

While this application was pending, the Plaintiff applied for Notice to show cause why the Defendants be not arrested for failure to pay the decretal sum. The Defendants asked for time to prepare the payment by instalments which was granted by the learned Deputy Registrar.

On the date fixed the Defendants once again did not appear and warrant of arrest was issued execution whereof is stayed pending hearing and determination of the application on hand.

The application also has been severally adjourned for various reasons since its filing.

The basis for the application is that the Judgment in question was not dated although signed by the Honourable Judge. It is stressed that the mandatory provision of Order XX Rule 3(1) of Civil Procedure

Rules which provides:

“3(1) A judgment pronounced by the Judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.”

The Applicants only annexed a part of the proceeding on the material date. The date on which the suit was heard and handwritten Judgment was delivered is appearing on the record. The date is not put under the signature of the handwritten Judgment.

It is further stated that the Decree also shall agree with the Judgment as per provisions of Order XX Rule 6 and thus the date of decree which is not shown on the Judgment is improper rendering the Decree incapable of execution.

From the submissions it is apparent that the Applicants are not seeking review under Order XLIV although it is mentioned in the provisions relied upon.

I must make myself cautions and I must consider whether the non-observation as alleged is an irregularity or a fatal defect which should result in nullification of the Judgment.

I have already stated that the Judgment was delivered immediately after the suit was heard and the record amply states the date when the court heard and determined the suit by giving Judgment.

The court furthermore must be aware that it does not give the Order in vain.

In this case, the Defence was struck out and the Order of dismissal has till to-date not been challenged.

Thus the Plaintiff's case is in respect undefended, and it shall not serve any purpose if the Judgment is set aside which in my opinion, under the circumstances of the case is not fatally respective.

Moreover, the Defendants have agreed before the learned Deputy Registrar to make proposals on liquidation of the decretal sum by instalments. The Defendants thus have compromised their stand and cannot be allowed to approbate and reprobate at the same time.

I do not agree that the Defendants have satisfied the court that the Judgment as on record is a nullity or fatally defective to result in its being set aside.

I therefore dismiss the application dated 5th December, 2005 with costs.

Dated, Delivered and Signed at Nairobi this 15th day of October, 2007.

K.H. RAWAL

JUDGE