

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Suit 24 of 2000

SUNFLAG TEXTILE AND KNITWEAR MILLS LIMITED.....PLAINTIFF

VERSUS

GEOFREY WACHIRA MAHINDA

LOISE WANJIRU T/A NYERI FAMILY WEARDEFENDANTS

CHRISTOPHER MAHINDA.....INTERESTED PARTY

R U L I N G

By an application brought under order XLIV rule 1 of the Civil Procedure Rules, the Plaintiff/Applicant seeks to have a ruling delivered by Hon. Juma J. on the 19th September 2001 reviewed in part in so far as it states that the decree holder did not comply with order XXI Rule 18 (1) a of the Civil Procedure Rules. The Applicant further seeks review of the order granting costs to the judgment debtor. It is contended by the applicant that there is an error apparent on the face of the record in that the court file will show that the Plaintiff/Decree Holder filed an application for execution of the decree on the 27th April 1987 which was within one year of the said decree and accordingly the provisions of order XXI Rule 18 (1) (a) of the Civil Procedure Rules requiring a notice to show cause to be first issued before execution did not apply.

For the Respondent it was submitted that review under order XLIV of the Civil Procedure Rules was not available to the applicant as the Hon. Judge clearly considered the provisions of order XXI rule 18 (1) of the Civil Procedure Rules and found that the Decree Holder had not complied with the provision. It was submitted that there was no error apparent on the face of the record and that the Decree Holder's only recourse if dissatisfied with the ruling was to appeal against the ruling.

I have considered this application, the ruling made on the 19th September 2001 and the entire court record. It is evident that the Hon. Juma J. considered the provisions of order XXI rule 18 (1) (a) of the Civil Procedure Rules and made a finding that the provisions were not complied with. I am now being asked to find that there was in fact an error on the face of the record since the provisions of order XXI rule 18(1) (a) of the Civil Procedure Rules were in fact complied with, and there was no need for the Decree Holder to apply for a notice to show cause.

The ruling under reference dealt with interpretation of order XXI rule 18 (1) (a) of the Civil Procedure Rules. Hon. Juma J. having considered that rule found rightly or wrongly, that there was need for a notice to show cause before the Decree Holder could proceed with the execution. He found further that no evidence was tendered before him to show that there was compliance. In my view this was not a question of an error apparent on the face of the record. It was a matter of interpretation and application of the rule as well as substantive findings made by the Hon. Judge. It would not be proper for me to re-examine that interpretation or the application of the rule to the facts, or indeed to reconsider the finding made by the Hon. Judge. That in effect would be sitting on appeal against my brother's ruling which I am not competent to do. I concur with the advocate for the Respondent that the Decree Holder if dissatisfied ought to have appealed against that ruling.

I find that this is not a matter for review under order XLIV rule 1 of the Civil Procedure Rules. I accordingly dismiss the application with costs.

Dated, signed and delivered this 15th day of June 2006.

H. M. OKWENGU

JUDGE