

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Case 121 of 2005

ISMAEL SHEMAKA SHEEPLAINTIFF

V E R S U S

ROBERTO ROSELLIDEFENDANT

R U L I N G

On 28th July 2006 the parties herein recorded a consent whereby judgment was entered for the plaintiff against the defendant in the sum of KShs.5.8 m. On 3rd August 2006 a notice to show cause why execution should not issue was issued and the same came for hearing on 23rd August, 2006.

On that day the hearing of the notice was adjourned and extended to 30th August, 2006 as Mr. Ochieng for the judgment - debtor was indisposed. A further adjournment was granted on 30th and the notice extended to the 1st September 2006.

Once again counsel for the judgment debtor was absent when the case was called out on 1st September 2006, prompting the court, on the application of the decree - holder, to issue a warrant of arrest. Before the execution of the warrant, counsel for the judgment debtor has applied to this court to stay execution of the warrants of arrests pending the hearing and determination of this application, a review or the setting aside of the order of arrest and committal to civil jail against the judgment - debtor. The application, finally seeks unconditional leave for the judgment - debtor to appear personally or through counsel to show cause why execution should not issue.

The application is opposed and learned counsel for the decree-holder has deposed that it has been brought in bad faith and with the intention of delaying execution.

That the judgment - debtor ought to have presented himself before the court to show cause.

That this application is an abuse of the court process.

I have given due consideration to the foregoing arguments.

It will serve no purpose to consider the prayer for stay of execution as its objective has been spent. Regarding the prayer for review or setting aside the order of arrest and committal to civil jail, the application is expressed to be brought under Order 44 rule 1 (1) (b) and rule 2 of the Civil Procedure Rules. Under this rule the court can review an order, if, among other grounds, there is sufficient ground to do so. This is the ground upon which this application will be decided. Has the judgment – debtor demonstrated sufficient reason to warrant a review of the Deputy Registrar’s order? What the judgment – debtor is challenging in this application is the decision of the Deputy Registrar to proceed with the matter before him in the absence of his counsel. That the notice to show cause ought to have been adjourned to enable his counsel to come and argue it.

It is explained that counsel having the conduct of the matter was indisposed, although on this occasion he had indicated that he would come to court to conduct the matter personally at 10 am. That indeed he arrived before 10 am only to be informed that the warrant had been issued.

It is established law that the court has unfettered discretion to grant or to refuse to grant adjournment. The exercise of such discretion will not be interfered with unless the presiding officer either acted on wrong principle or exercised his discretion unjudiciously. See **Mugachia v Mwakibundu** (1984) KLR 572.

The Deputy Registrar granted two adjournments prior to the date in question. On the first occasion, Mr. Mwandilo held Mr. Ochieng's brief and explained that he was indisposed. On the second occasion, Mr. Mtai explained that learned counsel was still indisposed.

On the fateful day, as far the record reveals, there was no representation of the judgment – debtor, hence the warrant of arrest. Without going to the history of this matter, I am satisfied that the Deputy Registrar exercised his discretion in this matter judiciously. He had nothing before him to indicate why either Mr. Ochieng or any other advocate holding his brief – or even the judgment – debtor himself was not before him. According to Mr. Ochieng the warrant must have been issued before 10 am. But Mr. Machuka maintains that the matter was called out at about 11am. What is significant here is that Mr. Mtai had been in attendance the last time the hearing of the notice was adjourned and heard the strong arguments against adjournment, ought to have appeared and applied personally to the Deputy Registrar to place the file aside to enable Mr. Ochieng to arrive. The court clearly had been extremely accommodative as matters of health must be treated with sympathy. But I reiterate that under Order 21 rule 32 (1) and (2) of the Civil Procedure Rules, the Deputy Registrar had no option in the circumstances but to issue the warrants.

I find no compelling reason to interfere with his orders of 1st September 2006. The application is dismissed with costs.

Dated and delivered at Malindi this 27th day of September 2006

W. OUKO

J U D G E