



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

Civil Appeal 6 of 2003

JUSTUS WEKESA WANYONYI APPELLANT

VS

MAURICE NAMITI KOKONYA RESPONDENT

RULING

By an application by way of Notice of Motion, dated 13th October 2006 pursuant to the provisions of Order XX Rule 7(1), (2), (3) and 4, Order XXI Rule 25 of the Civil Procedure Rules, sections 40 and 42, sections 3 and 3 A of the Civil Procedure Act and all other enabling statutes, the applicant seeks orders:

- (a) *That service of this application be dispensed within the first instance.*
- (b) *That there be a stay of execution of the decree herein and the Judgment Debtor be unconditionally released from civil jail.*
- (c) *That the entire execution process set in motion by the decree holder be varied, lifted and or set aside.*
- (d) *That the value of properties attached by Ongumwe Auctioneers and subsequent committal of the Judgment Debtor to prison be born by the respondent and or his counsel personally.*
- (e) *That costs of this application be provided for.*

The application is based on the grounds:

1. *That the execution commenced by the decree holder is unlawful and illegal ab- nitio.*
2. *That the Judgment Debtor who is an ailing old man is serving illegal and unlawful custody in prison.*
3. *That there is no formal order on record granting leave or change in the mode of execution for the decree holder to proceed with committal of Judgment Debtor in prison.*
4. *That there is a pending suit between the decree holder and the Judgment Debtor vide BUNGOMA SPM MISC. APPLICATION NO.189 OF 2006 yet to be determined.*

5. *That counsel purporting to act for the decree holder is improperly on record.*

The application is predicated upon the annexed affidavit of Maurice Zitungu Namiti sworn on the 13th day of October, 2006.

I certified the application as urgent by reason of the fact the execution was imminent.

For the applicant it was argued that the decree holder has initiated execution proceedings without recourse to Order XX Rule 7.

Order XX Rule 7 provides:

“ 7 (1) *A decree shall bear the date of the day on which the judgment was delivered.*

(2) *Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if he is satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.*

(3) *If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if he is satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.*

(4) *On any disagreement with the draft decree any party may file the draft decree marked as for settlement and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.*

(5) *In a subordinate court the decree shall be drawn up and signed by the magistrate who pronounced it or by his successor.*

(6) *Any order, whether in the High court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.*

(7) *Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.”*

That no decree has been drawn. None has been served on the judgment debtor for approval. The execution process is therefore premature.

I have perused the entire court file and find as a fact that there is not decree drawn. On account of the respondent's non-compliance with the law in the execution process I am constrained to grant a temporary stay pending the hearing of the application inter-parties. A hearing date to be taken in the Registry.

DATED and DELIVERED at Bungoma this 27th day of October, 2006.

N.R.O. OMBIJA

JUDGE