REPUBLIC OF KENYA

HIGH COURT IN ELDORET

CIVIL CASE 133 OF 1993

RUBO KIMNGETICH ARAP CHERUIYOT …….....…… PLAINTIFF

VERSUS

PETER KIPROP ROTICH …….....…….. DEFENDANT

R U L I N G

This is an application by the plaintiff for orders that warrants of attachment and sale issued on 16th January 2006 be set aside and the execution levied be declared null and void.

The Judgment in this suit was delivered on the 25th April 2004 dismissing the plaintiff's suit but allowing the defendant's counterclaim. The plaintiff with a view of appealing against the said decision filed an application for stay of the execution of decree and/or decision. The application was fixed for hearing on the 9th November 2004 when it was not heard by the court. The Court adjourned the matter and made the following order:-

1. That pending the hearing and determination of this application dated 29th June 2004 there be temporary orders of stay of execution of the decree herein.

2. That the application be fixed for hearing on priority basis.

There is no dispute that the said application has not been heard todate and is still pending for hearing. In the meantime the defendant proceeded to have its costs taxed. The Court issued a certificate of costs on 29th November 2005. The Defendant's costs were certified at Kshs. 116,015/=. On the 13th January, 2006, the Defendant filed an application for the execution of the Decree to recover the taxed costs and court collection fee all totaling Shs. 117,575.00. The Court then issued the Warrants of attachment and sale on 16th January 2006. They were allocated to Mr. John Muita of Jomuki Auctioneers to execute the said warrants.

It is as a result of the foregoing that the Applicant/Plaintiff has made this application. The Applicant raised 5 grounds, namely:-

(a) That this Honourable Court issued orders for stay of execution on 9/11/2004 and the orders are still in force and the execution levied against the Plaintiff's property is irregular.

(b) That the Applicant's application for stay of execution is still pending for determination.

(c) That no decree has been drawn and approved as provided under Order XX Rule 7 (2) of the Civil Procedure Rules.

(d) That is over one year since the decree was passed as provided under Order XXI Rule 18 of the Civil Procedure Rules.

(e) That no proclamation was served upon Applicant herein.

The application was supported by an affidavit sworn by Mr. Alfred K. Nyairo Advocate on 24th February, 2006. The Defendant/Respondent opposed the application and filed a Replying Affidavit sworn by Mr. Simiyu Maondo Advocate. The Defendant agrees that the Plaintiff through his application dated 29th June, 2004 sought for and obtained temporary stay of execution pending the hearing and determination of the application inter partes. He submitted that the application sought for temporary stay of execution and not further proceedings. As a result there was nothing to stop the Defendant from proceeding to tax costs. The Defendant further argued that there was no stay of execution of the taxed costs and an intention to lodge a reference to challenge the taxation of costs did not amount to an automatic stay of execution. That the execution herein was for the taxed costs and that the warrants were validly issued by the Court and the execution was thus legal and proper.

The Defendant stated that proclamation of the attached goods were done. Further the Defendant argued that taxation of his bill of costs took place on 29th November, 2005 and as such one year had not lapsed at the time of the execution.

I have considered the application herein both the rival affidavits and submissions by Counsel. The first question that arises in this application is whether a decree had been drawn capable of being executed. In the Judgment of the Court, the Honourable Justice Nambuye concluded as follow:-

" ***1. ……..***

In the final analysis the Plaintiff's suit is dismissed with costs to the Defendant.

2. The Defendant's counterclaim succeeds with costs to the defendants.

3. The Plaintiff is allowed nine months to move from the said land failing which execution to issue for eviction.

4. There will be liberty to apply"

After a Judgment is delivered, a "decree" is drawn by the parties with the approval of the Court. In the interpretation section of the Civil Procedure Act, Section 2, "decree" is defined as follows:-

" ***"Decree" means the formal expression of an adjudication which so far as regard the Court expressing it, conclusively determines the rights of parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; ……."***

It is the decree as a legal instrument which is executable and not the judgment by itself. It is my view that in a suit what is executable is the "Decree" of the Court. I have carefully perused the court record and find that no decree has ever been drawn, approved and signed by the Court through the Deputy Registrar or otherwise.

It is trite law that no execution of any decree can take place without such a decree coming into existence i.e. drawn, approved and signed and sealed by the Court. It is common that a party or his/her/its Counsel would prepare the initial draft of the decree for the approval of the other party and subsequently the court. Once it is so approved, it is then signed and sealed by the Registrar of the Court.

This is provided for in Order XX, Rule 7. If the other party does not approve the draft decree, the Registrar may subsequently receive the same and approve it.

The Defendant applied for the execution of Decree when he filed the application on 13th January, 2006. It is in the prescribed form. It is headed:

"***Application For Execution of Decree"***

The column for costs (Column 8) refers to –

"***As awarded in the decree ……..."***

It is my view that a Decree duly approved and signed had to be on record for any execution to take place, whether for the eviction, costs or otherwise. As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being "executed". Warrants of attachment and sale cannot in law be issued on the basis of a certificate of costs. There must be a decree first.

It is true that the Decree may not be necessarily or always contain the ascertained costs. Costs can be determined before a decree is issued or subsequently, after the Decree has been drawn. However for one to recover costs, there must be a decree. Any money awarded by court including costs is only payable under a decree particularly, if it is through enforcement (see Order XXI, Rule 1).

Order XXI, Rule (b) provides as follows:-

"***Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinabove contained before another court, then to such court or to the proper officer thereof, and applications under this rule shall be in accordance with Form 5 of Appendix D.***

……***."***

As indicated earlier, the Defendant made an application for execution of the "Decree". He used form No. 5 of Appendix D. To apply under this Rule, there must exist a Decree.

In this case, there was no decree under which the certificate of costs could be underpinned. The certificate of costs is only for the ascertainment of the payable costs, it is not the decree.

The second question is whether the Defendant was entitled in law to execute for the recovery of the taxed costs on the basis of the certificate of costs or at all, at the time the execution took place. At the time of the execution, it is common ground that there was a temporary order of this court staying execution of the decree pending the hearing and determination of the application dated 29th June 2004. From the finding of the court hereinabove, the costs were awarded in the judgment and expressed in the Decree. The costs were payable to the Defendant by the Plaintiff. Since there was and could be no stay of "further proceedings" in so far as ascertainment of costs was concerned through taxation, the Defendant was perfectly entitled to have his bill of costs taxed. However, he could not have the said costs or any other order in the decree enforced by way of execution. This would be the case even if a Decree had been drawn, approved, signed and sealed (which was not the case here).

The order of this court had stayed any form of execution of the decree. This included recovery of costs which could only be expressed in the decree. I see no logic in the argument that the stay of execution was confined or limited to the eviction order. Both costs and eviction could only be executed through the Decree. As stated earlier, the certificate of costs is not an executable instrument.

In the circumstances, I do hereby find that the Defendant openly and wantonly violated an order of this court and the said action of execution of the warrants of attachment and sale during the pendency of the

application for stay of execution amounted to an abuse of the court process.

By the aforesaid order of stay of the decree the entire enforcement or execution of the decree had been stayed and remained stayed. The costs were awarded by the Judgment and decree and not the certificate of costs. Taxation was not an independent proceedings. It emanated from the judgment and contemplated decree and was part and parcel thereof.

It follows from the foregoing, that since the application for execution had been made after one year of the judgment, the Defendant was obliged to take out a Notice to show cause before execution could take place as envisaged by Order XXI, Rule 18. It is my view that this is the case despite the fact that Rule 18 refers to a "*more than one year after date of decree*". The law contemplates that decree is issued shortly after judgment. However, where the parties do not procure the issuance of a decree within the year, it is my view that the said Rule 18 still would apply even in the absence of a formal decree. It is my view that just like in an appeal "decree" includes a judgment for purposes of an execution.

In any case this last holding is academic, since no execution can take place without a formal decree having been drawn and issued by the court.

As regards the claim that the plaintiff's attached goods were not proclaimed, I have taken into account the testimony of the auctioneer, Mr. John Muita. On a balance of probability, I do find that the goods were proclaimed and a copy thereof filed in court on 16th January 2006.

In conclusion, I do hereby find and hold that the execution for costs herein and the issuance of the warrants of attachment and sale were irregular, null and void for the reasons given hereinabove. The Deputy Registrar ought to be vigilant on this question and mode of execution. No execution can take place without a decree, preliminary or final.

I, therefore, do hereby grant prayers 2, 3 and 4 of the application dated 24th February, 2006. The Defendant shall bear the costs of the application. The Defendant shall also bear and pay the costs and charges of the Auctioneer incurred in the said illegal and unlawful execution.

Orders accordingly.

Dated and delivered at Eldoret this 19th day of December 2006.

M. K. IBRAHIM

JUDGE