



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 101 OF 2002

NATIONAL BANK OF KENYA.....
....PLAINTIFF

VERSUS

LUCY MUTHONI KAHIA MAGELO.....1ST
DEFENDANT

JOSEPH KATANGA MBUGUA.....2ND
DEFENDANT

JOSEPH KATANGA NJUBI.....3RD
DEFENDANT

RULING

On 24th January, 2005, after hearing the learned counsels appearing, I dismissed with costs the 1st Defendant/Judgment-Debtor's application by notice of motion dated 15th December, 2004. I reserved my reasons for delivery today. The said application sought in prayers 5,6,7 and 8 the following orders:-

“5. That the warrants of attachment and sale of moveable property issued on 2nd December, 2004 be set aside.

6. That the warrants of proclamation issued by Joseph M. Gikonyo t/a Garam Investments on the 9 th of December, 2004 be set aside.

7. That the court be pleased to vacate orders for the attachment and sale of the 1st Defendant's property.

8. That the Plainti ff be condemned to pay the costs of this application and of the attachment before any further steps can be taken in this matter.”

The application, which is said to be brought under section 3A of the Civil Procedure Act, Cap. 21 and also under Order XXI, Rules 18 and 22 of the Civil Procedure Rules and all (unstated) enabling provisions of the law, is predicated upon the following grounds as can be discerned from the face thereof:-

(i) That the decree sought to be executed is more than one year old, and the Plaintiff has irregularly obtained warrants of attachment and sale without applying for notice to show cause to be served upon the 1 st Defendant.

(ii) That the execution and attendant attachment are thereby irregular.

(iii) That the 1 st Defendant has been denied the opportunity to negotiate settlement and liquidation of the decretal sum with the Decree -Holder.

(iv) That the execution and attendant attachment are against the rules of natural justice as the 1 st Defendant was not given an opportunity to be heard.

(v) That the 1 st Defendant stands to suffer irreparable loss if the execution proceeds. (vi) That it is in the interests of justice that the orders sought be granted.

The Plaintiff opposes the application upon the grounds appearing in the grounds of opposition dated 14th January, 2005. Those grounds are that the application is frivolous, vexatious and an abuse of the court process; that the 1st Defendant has not come to court with clean hands; that there has not been any serious attempt to negotiate or settle the matter amicably as alleged; that the execution process is lawful and proper; and that the application otherwise lacks merit.

I have read the affidavit sworn in support of the application and that sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing. It seems to me that the grounds upon which the application has been brought crystallize into one—that is, that the execution process complained of is contrary to the provisions of Order XXI Rule 18(a) of the Civil Procedure Rules (the Rules) and therefore irregular and unlawful. That rule requires that the court executing a decree, where application for execution is made more than one year after the date of the decree, shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. But there is an important proviso which I will quote in full:-

“Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment - debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.”

The record of the court shows that summary judgment against the 1st Defendant was passed on 18th November, 2002. Preliminary decree was issued on 8th September, 2003. On 16th September, 2003 the Decree-Holder applied for execution of that decree, and warrants of attachment and sale of moveable property in execution of decree were issued by the court on 22nd September, 2003. These were returned unexecuted on 22nd October, 2003. The Decree-Holder applied for a re-issue of these warrants on 27th February, 2004. The warrants were reissued on 9th March, 2004. They were lawfully so re-issued as the application for re-issue was made within one year from the date of the warrants issued on 22nd September, 2003.

Apparently these re-issued warrants of attachment and sale were also not executed. On 17th November, 2004 the Decree-Holder again applied for re-issue of the warrants, and they were re-issued on 2nd December, 2004. These are the warrants said to offend Rule 18(a) of Order 21 aforesaid. These warrants were re-issued on 2nd December, 2004 upon the Decree-Holder's application dated 17th November, 2004. That application was made within one year from the date of the last order against the Judgment-Debtor made in the form of the warrants re-issued on 9th March, 2004. In my Judgment therefore this third execution process came within the aforementioned proviso, and it was not necessary for a notice to show cause to be issued to the Judgment-Debtor.

That being the position, the application clearly lacked merit, and was thus dismissed on 24th January, 2005.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS.....DAY OF FEBRUARY, 2005.