



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 232 of 2001

KESHRA VISHRA t/a ALPESH

ENTERPRISES PLAINTIFF/RESPONDENT

- Versus -

REUBEN MUSYOKI MULI

t/a KONZA MERCHANTS DEFENDANT/APPLICANT

Coram: Before Hon. Justice Mwera

Masika for Applicant/Defendant

Alwenya for Chitembwe for Respondent

Court clerk – Kazungu

R U L I N G

The notice of motion dated 26/5/2005 and brought under Order 21 rule 18 (1)(a), (2) and Order 50 rules 1, 3 Civil Procedure Rules plus Section 3A Civil Procedure Act sought two main orders.

1. That the execution herein be declared null and void because it followed a decree made on 5/5/2003, and that the said execution was thus contrary to Order 21 rule 18 (1) (a) Civil Procedure Rules.
2. That following the above the plaintiff/respondent do pay the auctioneer's charges .

Going by his own affidavit and the grounds in the body of the application, Mr. Masika's central argument was that with the judgment of the court having issued on 5/5/2003 summarily, and having thus not been executed for more than a year, the plaintiff would only do so as per the proclamation of

attachment by M/s Thaara Auctioneers issued on 23/5/2005, by first serving on the defendant/applicant notice to show cause under Order 21 rule 18 (1) (a) Civil Procedure Rules. That such notice did not issue, the move to execute is null. To the defendant for all purposes and intents, a judgment is equal to a decree.

Mr. Alwenya held a different view in that even if the judgment issued over a year ago, and despite a notice of appeal in between and some inter-locutory proceedings, the plaintiff filed and served a bill of costs dated 18/3/2004. That the bill was taxed on 3/12/2004 at Sh. 125,713/= . That the certificate of costs only issued on 28/2/2005 and therefore following that with applying for execution on 13/5/2005 was in order.

Order 21 rule 18 Civil Procedure Rules reads thus in the relevant parts relied on:

“18(1) where an application for execution is made –

(a) more than one year after the date of the decree; or

(b) (b) ... (c) ...

the court issuing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause why, on a date to be fixed, the decree should not be executed against him;

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 ...:

Provided

Order 21 is about EXECUTION OF DECREES AND ORDERS. A decree is defined in section 2 Civil Procedure Act as:

“... the formal expression of an adjudication which, so far as regards 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;”

Taking that part as the relevant one to our approach to what a decree is summary judgment issued on 5/5/2003. After inter partes taxation the due certificate issued on 28/2/2005 A decree was earlier sealed on 5/3/2005.

On 2/3/2005 the plaintiff sent by prepaid post to the defendant’s lawyer Mr. Masika, the decree plus a copy of certificate of costs – to approve the former and keep the latter for its records. All was still within one year of 5/5/2003.

By 12/4/2005 Mr. Masika had not approved the decree and so the plaintiff asked the deputy registrar to approve it. A copy on record shows that that was done and on 13/5/2005 the plaintiff applied for warrants of sale of the property in execution of decree for money.

In this court’s opinion, and in the circumstances of the case, and also noting that there had been no order to execute the decree before costs were taxed, it was only proper that execution begins and progresses after the orders of taxation. That is what seems to have happened here.

In sum this application is dismissed with costs.

Orders delivered on 21/10/2005.

J.W. MWERA

JUDGE