

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

Civil Case 232 of 1995

JACKSON KIANGI PLAINTIFF

VERSUS

KASIKWA MUKUNA & OTHERS..... DEFENDANTS

R U L I N G

Before me is the application dated 25/11/04, brought pursuant to Order 23 Rule 4 (1) and 3, 21 Rule 18 (1) Civil Procedure Rules; Section 3 A, 27 (2) Civil Procedure Act. The plaintiff/applicant prays that the execution herein be stayed pending hearing and determination of this application; that the execution proceedings be declared null and void ab initio, and warrants of Arrest ordered to issue against the plaintiff/applicant on 21/10/04, be lifted and recalled; that the suit be marked as having abated and costs of the application be provided for.

The application is based on grounds found in the body of the application and was supported by an affidavit sworn by the applicant, Jackson Kiangi.

The plaintiff/applicant had filed this suit against Kasikwa Mukuna, 1st defendant; Father and Council in Charge St. Maria Goretti Catholic Church (Upete). By an application dated 23/7/97, and amended on 9/3/99, the defendants moved the court to have the Father and the Catholic Church struck off the proceedings for want of jurisdiction and the fact that the father was wrongly enjoined to the proceedings. The said application was not opposed and on 11/11/99, the court granted the prayers sought in that application. The extracted order reads as follows:

“This application having been served but not opposed, orders as prayed,”

It is the plaintiff’s case that the 1st defendant filed a bill of costs but it was set aside and a consent was recorded. It is contended that the 1st defendant Kasikwa Mukuna, died on 22/2/03, before the execution of the proceedings were filed and has not been substituted and that therefore execution proceedings are improper. It is also urged for the plaintiff that the suit has abated and should therefore be closed. Further it is argued that no decree has been drawn in accordance with Order 21 Civil Procedure Rules and that no notice was issued to the plaintiff to show case as required by Order 21 Rule 18 (2) Civil Procedure Rules. Lastly, it was urged that the sum of costs taxed on 19/2/05, is 51,090/45 and yet the sum being executed for is Kshs. 59,340/= and that interest cannot be charged on costs.

The application was opposed and a replying affidavit was filed by Father Thaddeas Mutuku, who concedes that the 1st defendant is indeed deceased but that burial permit exhibited by the plaintiff as annexure JK 3 is not correct as the 1st defendant died on 22/2/04. He contends that both defendants are entitled to costs because they were wrongly brought to court and that 1st defendant died after execution had commenced; that the plaintiff’s goods were attached on 14/11/00 and remained at the auctioneers premises as the defendant never went to collect them even after execution was set aside on 19/2/03; that the goods were therefore sold in order to recover Auctioneers charges and that there was no need for Notice to Show Cause to be taken out and in any case a year had not lapsed. It is argued that in any event if the suit abated in respect of the 1st defendant, the 2nd defendant is still entitled to costs.

The first issue I note here is whether the defendants were entitled to costs upon dismissal of the plaintiff’s

suit on 11/11/99. As earlier noted, the application dated 23/7/97 as amended on 9/3/99 was granted as prayed. The defendants sought three prayers in that application, that the Father and Church Council be struck off as defendants; that the suit be struck off for want of jurisdiction and thirdly, the defendants asked for costs of that application. Since the orders were granted as prayed, the defendants were entitled to costs of that application. In the proviso to Section 27 Civil Procedure Act, costs will normally follow the event. The event here is that the suit was struck off and must have been so struck off with costs. The Judge never made any orders to the contrary. The defendants had been wrongly dragged to court and they would have costs once suit was struck off. The 1st defendant would therefore be entitled to costs in this suit.

Under Section 27 (2) Civil Procedure Act, costs will not normally earn interest unless the Judge orders so and gives the rate at which interest will accrue. In the present case there is no evidence of such an order that interest would be chargeable on the costs and so the amount now sought to be executed of 59,847/= instead of Kshs.51,045/= is wrong.

It is not in dispute that the 1st defendant is deceased. Though the 2nd defendant Father Thaddeas, alleges that the date in burial permit in respect of the 1st defendant is wrong, there is no evidence to the contrary. The court will therefore accept the date in the burial permit "JK3" to be that date of death, that is, 22/2/03. It is over two years since she died. The suit against her abated after a year elapsed as per provisions of Order 23 as there was no legal representation. The defendants were sued jointly and severally as per plaint dated 27/4/95. It therefore follows that the 2nd defendants (Father and Council of the Catholic Church) can still execute for costs as either or both parties could do so. The claim is still alive as respects the 2nd defendant.

The next issue is whether the execution proceedings are proper. The defendants have conceded that execution was set aside herein on 19/2/03 and that goods which had been attached remained with Auctioneers and were never claimed. If there was a decree on record, it was over a year before this application was filed on 25/11/04. The applicant should have complied with provisions of Order 21 Rule 18 and issue Notice to Show Cause on the Respondent as the decree was over one year since it was issued and no order had been made in this case in the past one year in respect of the said execution. The Respondent's excuse is that the Auctioneers were selling the property to realize their costs but there is no evidence that the Respondent had been notified. They proceeded as if it were a normal execution for costs not storage charges. The applicant should follow procedure in terms of Order 21 Rule 18. Otherwise the application is premature and it is hereby ordered that the execution be stayed, Warrants of arrest issued pursuant to the execution be lifted and the Respondents do bear the costs of this application.

R.V. WENDOH

JUDGE

Dated at Machakos this 13th day of October 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE