



CIVIL PRACTISE AND PROCEDURE

- *Order 21 in case of joint and several judgment does not require that execution be always directed at both defendants.*
- *Joint or several judgment means that decree holder can demand from either one or more judgment debtors, separately or all of them together at his option.*

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Case 1158 of 2002**

MOHHAMED & MUIGAI ADVOCATES.....PLAINTIFFS

VERSUS

SAMUEL KAMAU MACHARIA1ST DEFENDANT

JOSEPH GILBERT KIBE.....2ND DEFENDANT

R U L I N G

By Notice of Motion dated 30th November 2005 and brought under Order 48 Rule 2 of the Civil Procedure Rules the defendants have moved this court.

The defendants rely on the following grounds: -

- the liability in this matter is joint and several
- the notice to show cause has been issued against one of the two defendants.
- It is in the interest of justice that all the defendants be before the court.

Defence, learned counsel Dr. Kamau Kuria, stated that following the constitutional reference ruling, delivered on 7th November 2005, the defendants had set out to comply with the position of law as found in that ruling.

That notice to show cause was issued against the 1st Defendant to attend court on 30th November 2005, to show cause.

He said that the defendant's bone of contention was that the notice to show cause should have been issued against both defendants rather than one. Defence counsel submitted that under Order 21 Rule 18 it was mandatory for both defendants to be served with Notice to Show Cause and that to direct the Notice to one defendant rendered that notice invalid, null and void.

Defence counsel further submitted that under Order 48 Rule 2 a Judge had supervisory powers over

the deputy Registrar. That is the exercise of that supervisory power the court could order that the Notice to Show Cause be quashed and order that proper notice to show cause be issued.

He further stated that what the Deputy Registrar undertakes is an inquiry and if the procedure followed by the decree holder, in issuing the notice was faulty it would render the inquiry by the Deputy Registrar to be defective. That since the Notice to Show Cause would have the effect of taking away the defendant's liberty it was important for the court to construe the procedure followed strictly. In this regard defence relied on the book, Statutory Interpretation by F.A.R. Bennion. Counsel read the following passage:

“.....where an Act confers a right to interfere with the freedom of any individual, the prescribed conditions are treated as mandatory and must be strictly complied with.....”

Defence counsel said that in the present case the defendant's liability was joint and it therefore followed that notice to one and not the two defendants rendered that notice null and void.

Defence relied on Mulla. The code of Civil Procedures page 2660, which discussed rule 22 of India, which is similar to our Rule 18. Counsel read the following passage in page 2660;

“Under this rule, the court has a discretion to refuse to order the arrest and detention of a debtor who is unable to pay. In a case where there was a joint decree against A and his relations B, C and D, and the judgment creditor instead of proceedings against B, C and D, who were able to pay, sought to arrest A who was unable to pay in order to put pressure upon his relations, the court rejected the application for the arrest of A.”

Defence counsel finally submitted that there is no defendant who can settle debts for the other defendant.

Learned counsel, Mr Nyaoga opposed the application.

He began by saying that the application is made on behalf of both defendants by the same counsel and yet that application seeks the courts finding that one defendant was served with the notice while the other was not. Plaintiff's counsel found the application to be mischievous.

He said that the defendants liability is joint and several and he said it is trite law that in such a case the plaintiff can follow the defendants jointly or severally, that is individually or collectively.

That the plaintiffs had accordingly exercised their right under that judgment to pursue one defendant and that the plaintiff can only be impuned if it recovered more the amount of judgment.

Counsel described joint and severally as the defendants being tied at the hip.

Plaintiff's counsel relied on Halsbury's Laws of England Vol 26 page 276 and read the following: -

“So long as proceedings are taken against all joint contractor's judgment obtained summarily or otherwise against one or more is no bar to the action proceeding against the remaining defendant or defendants.”

The defendants complaint basically lies in the issue of the Notice to Show Cause against S.K. Macharia and not also to his co-defendant hereof.

Defence argued hat such a notice not directed to both defendants is both null and void. Contrary to the argument by the defendant there is no requirement that I could find in order 21 requiring that such a notice must be directed to both defendants.

The parties agree that the judgement obtained against the defendants is joint and several. I accept the

plaintiff interpretation of joint several as correct. The decree holder can chose to follow one or all of the defendants. The Black's Law Dictionary defines joint and several liability as:

“A liability is said to be joint and several when the creditor may demand payment or sue one or more of the parties to such liability separately, or all of them together at his option.”

That definition answers the defendant's application. The plaintiffs are entitled at their option to follow any of the defendants hereof.

It follows therefore that the finding of this court is that the defendant's application is misconceived and does not lie, and accordingly the Notice of Motion dated 30th November 2005 is hereby dismissed with costs to the plaintiffs.

Dated and delivered this 20th December 2005.

MARY KASANGO

JUDGE