



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Misc Appli 114 of 2000

A.N GEKE & COMPANY ADVOCATES..... APPLICANT

VERSUS

MUNICIPAL COUNCIL OF NAKURU..... RESPONDENT

RULING

This ruling is in respect of an application dated 1st December, 2003 filed by one Mr. Onesmus Mutua named therein as the "AFFECTED PARTY". The Applicant, is a firm of advocates and the Respondent is the Municipal Council of Nakuru. The affected party is the current Town Clerk of the Municipal Council of Nakuru and his advocate, Mr. Mungai Mbugua, told the court that the affected party took up that position only a few months ago. The affected party prays that the warrant of arrest issued against the Town Clerk of the aforesaid council be declared null and void and the same be recalled and cancelled.

The application was made on the grounds that a warrant of arrest had been issued against the affected party who is not the judgment debtor in the matter. It was also made on the ground that Section 263 A of the Local Government Act does not allow arrest and detention of the Clerk. It was further stated that the Town Clerk had been arrested on 2nd November 2001 on account of the same debt and released at the instance of the Respondent and under Section 42(2) of the Civil Procedure Act the Judgment debtor cannot be imprisoned twice. The affected party also argued that the said execution process was irregular, illegal and fatally flawed because the execution of a decree of costs cannot issue on a miscellaneous application filed to tax a bill without a proper suit for recovery of costs having been filed.

The application was supported by an affidavit sworn by the affected party on 1st December, 2003.

M/S S. N. Geke & Co. Advocates filed grounds of opposition dated 10th December, 2003 but did not file any replying affidavit. In their grounds of opposition, they stated that the application had no merit and was meant to obstruct justice and was made in bad faith. They also stated that the application was unprocedural, an abuse of the court process and the orders sought were incapable of being granted by this court. They further submitted that the application was incurably defective.

A brief background of this matter is as follows:-

Sometimes in 1998 M/S A.N. Geke & Co. Advocates, the Applicant, were instructed by the Municipal Council of Nakuru, the Respondent to file an application for an injunction against the National Housing Co-operation from taking over the management of the Respondent's houses out of a debt of Kshs. 150,612,292.40 in Nakuru High Court case No. 463 of 1998. This matter was eventually settled and the

suit was withdrawn. On 19 May, 2000 the Applicant filed a Miscellaneous Application Number 114 of 2000 and prayed that the advocate/client bill of costs be taxed and the costs of the application and interest on the amount taxed on the bill of costs be paid by the Respondent. Filed together with the said application was an advocate/client bill of costs amounting to Kshs.5,551,597.60. On 13 June, 2000 the said bill of costs was by consent taxed at Kshs.4.3 million and on 21st July 2000 a certificate of costs was issued by the Deputy Registrar. On 1st August, 2000 the Applicant wrote a letter to the Deputy Registrar requesting that a notice to show cause be issued against the Treasurer and the Town Clerk of the Respondent as to why they should not be committed to civil jail for failing to remit what they referred to as "the decretal amount as per the bill of costs."

On 3rd August, 2000 a Notice to Show Cause why execution should not issue under Order XXI Rule 18 of the Civil Procedure Rules was issued against the Respondent's Town Clerk and he failed to attend court and a warrant of arrest was issued against him and when he was brought to the court on 16/8/2000 he was released on a bond of Kshs. 100,000/- and ordered to appear in court on 23rd August, 2000. On that date the Applicant told the court that it had been agreed that the Town Clerk was to pay a sum of Kshs.300,000/- on that day and the matter be mentioned on 19th September, 2000. After some mentions of the matter, the Town Clerk was taken to court on 2nd November, 2001 under a warrant of arrest and after hearing arguments from both parties, the Deputy Registrar ordered that the Town Clerk be committed to civil jail for one month.

However, the court granted a stay of execution on condition that the "Judgment Debtor deposits with the decree holder" a sum of Kshs. 150,000/- pending the filing and prosecution of a formal application for stay of execution before the High Court. He was released on a bond of Kshs.200,000/-. On 5th November, 2001 a consent order was recorded to the effect that the Respondent release a banker's cheque of Kshs. 150,000/- to the Applicant forthwith and another banker's cheque of Kshs.200,000/- on 31/12/2001 and a review on the mode of payment of the balance be done on 5/2/2002 and that the Town Clerk's bond be extended to 31/12/2001. On 5th April, 2002 the Applicant informed the court that "the Judgment Debtor" had not complied with the previous consent orders and prayed that a warrant of arrest against the Town Clerk be issued so that he could be brought to court to show cause why he could not be committed to civil jail and the court granted the application.

The record shows that the general trend in this matter was that the Respondent would make some payment only when a warrant of arrest was issued against its Town Clerk and in turn the Applicant would give the Respondent a breather while interest on the unpaid balance continued to accrue.

On 16th December, 2003 when the present application came up for hearing the learned counsel for the affected party submitted that all the applications made by the Applicant for the arrest of the Respondent's Town Clerk and the subsequent warrants of arrest issued against him were all wrongly issued as the execution proceedings were irregular and fatally flawed. He submitted that the Applicant, upon obtaining a certificate of costs, should have filed a suit to recover the money that was due and payable. The Respondent would then have been entitled to defend the suit and if it had a counter-claim, file the same. He relied on the Court of Appeal decision in M.G. SHARMA VS UHURU HIGHWAY DEVELOPMENT LTD. Civil Appeal No. 133 of 2000 (NAIROBI).

He further submitted that the Town Clerk was not the judgment debtor in the matter, it was the Municipal Council of Nakuru. He also submitted that under Order XXI Rule 36(b) the Town Clerk could only be examined on the ability of the council to pay the decretal sum. He referred the court to the provisions of Section 263A of the Local Government Act Cap 265 of the Laws of Kenya

deals with execution of process against local authority. The same states as follows:-

"J Where any judgment or order has been obtained against a local authority, no execution or attachment or process in the nature thereof shall be issued against the local authority or against the immovable property of the local authority or its vehicles or its other operating equipment, machinery, fixtures or fittings, but the Clerk of the local authority shall, without delay, cause to be paid out of the

revenue of the local authority such amounts as may, by the judgment or order, be awarded against the local authority to the person entitled thereto. "

He stated that if the Applicant had obtained orders of mandamus against the affected party compelling him to pay the money owed and he failed to do so, then the affected party would be liable for arrest for contempt of court.

The learned counsel for the Applicant Mr. Okaru conceded that no suit was filed after the taxation and according to him there was no need of doing so because "a consent judgment" had been entered between the Applicant and the Respondent. He further submitted that there were even further consents entered into between the Applicant and the Respondent for paying the money by installments which had not been honoured. He said that the affected party and the Respondent cannot be separated and he quoted the provisions of Section 263 A of the Local Government Act and asserted that it was the affected party who had failed to pay the money due and owing to the Applicant and so, according to him, the only mode of compelling the Town Clerk to pay was to arrest and detain him in civil jail.

Another argument that was advanced by Mr. Okaru was that the order for the arrest and committal to civil jail as against the affected party was issued by the Deputy Registrar in his enhanced jurisdiction as a High Court Officer and therefore the application for stay and or setting aside of the order was not properly before the court. He further submitted that Section 66 of the Civil Procedure Act provides that Decrees of the High Court should be challenged in the Court of Appeal. He therefore concluded by submitting that the application was wrongly before this court and urged the court to dismiss it with costs.

Mr. Nyamwange, the learned counsel representing the Respondent submitted that the Deputy Registrar does not exercise the power of a Judge of the High Court even when he taxes a bill of costs. He said that a Deputy Registrar is given special powers under Order 48 of the Civil Procedure Rules and so this court had the capacity to hear the application before it.

Having set out the history of the matter and the opposing arguments I now wish to examine the various issues which have arisen herein and determine the same. It is imperative that I first of all consider whether this court has the jurisdiction to hear and determine this application and if it does not, I have to down tools and make the appropriate orders.

Order XL, V11I Rule 3 of the Civil Procedure Rules provides as follows.-

"Formal orders of attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the High Court may be made by the Registrar or, in a subordinate court, by an Executive Officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a Judge. Such objection shall be taken by motion on notice. "

There is no dispute that the Applicant's application for notice to show cause why the affected party could not be arrested and be committed to civil jail was brought before the Deputy Registrar Mr. Ateya purportedly under the above quoted provisions of the law. Section 66 of the Civil Procedure Act states that an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.

First of all, both of the above provisions of the law refer to a decree of the High Court whereas in this matter there is no decree at all. A decree is very different from a certificate of costs. When the Applicant filed its bill of costs for taxation, a consent on the amount payable was recorded and thereafter a certificate of costs was issued, not a decree.

Order XX Rule 8 of the Civil Procedure Rules provides that where the amount of costs has been agreed upon between the parties or fixed by the Judge or Magistrate before the decree is drawn or certified by the Registrar under paragraph 68 A of the Advocates (Remuneration) Order or taxed by the court, the amount

of costs may be stated in the decree or order. The certificate of costs dated 21st July 2000 was not capable of execution nor was the consent order dated 22nd June 2000. It was therefore not right for the Applicant to write in its letter dated 1st August, 2000 that the affected party had failed to remit "the decretal amount as per the bill of costs". The term "*decretal amount*" refers to the sum payable under a decree. A decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

In terms of Order XLVIII Rule 3, once an objection arises in proceedings being conducted by a Registrar, further proceedings are taken before a Judge and not before the Court of Appeal. This court therefore has jurisdiction to hear and determine the aforesaid application.

I now wish to examine whether the execution process as undertaken by the applicant was lawful and procedural.

Rule 13 of the Advocates (Remuneration) Order allows an Advocate to file his bill of costs against his client for taxation in a miscellaneous cause which the Applicant herein did on 19th May, 2000. The same was taxed by consent at Kshs.4,300,000/- and thereafter a certificate of costs was issued. The Applicant then took this certificate of costs to be a decree of the court and applied for the issue of a notice to show cause why execution should not issue. The right procedure would have been for him to file a suit for recovery of costs using the certificate of costs as the main weapon or basis of the suit.

In Civil Appeal No. 133 of 2000 at Nairobi, M.G. SIIARMA VS UHURU HIGHWAY DEVELOPMENT LIMITED Justice Akilano Akiwumi, J.A. (as he then was) stated that the taxation of costs under Rule 13 of the Advocates Order does not by itself amount to a judgment. Rule 13(1) states as follows:-

"The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client....."

This taxation can be contested or may be done by consent as was the case in the present matter. Section 48 and 49 deal with suits for recovery of costs after the bill of costs has been either taxed or filed. Where the costs have been taxed and certified and subsequently a suit has been filed for the recovery of the same, the court may enter judgment by consent. There cannot be a judgment debtor and a decree holder unless there is first a judgment that has been entered.

Having stated as above, I conclude that the purported actions by the Applicant to execute a non-existent decree were null and void and the notice to show cause and the several warrants of arrest issued thereafter were all unprocedural and consequently any warrant of arrest as against the affected party that may be in force is hereby cancelled. This would have been sufficient to dispose of this application but there is one more important issue that was raised by the parties which requires to be commented on. Mr. Okari stated that for purpose of execution, the Town Clerk is the judgment debtor on behalf of the council and further stated that in recovering a debt from a local authority, the only mode of executing a decree is by arresting the Town Clerk. He cited the provisions of Section 263A of the Local Government Act and Section XXI Rule 36(b) of the Civil Procedure Rules which provides as follows:-

"Where a decree is for the payment of money, the decree-holder may apply to the court for an order that -

(a)

(b) *in the case of a corporation, any officer thereof; or*

(c)

be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment debtor or officer, or other person, and for the

production of any books or documents:"

I do not think whether any of the above provisions can be of any help in a valid application to commit a Town Clerk of a local authority to civil jail on account of the authority's failure to settle a decretal sum. Section 263A would apply where there is a judgment or an order capable of execution. In the present case there is none. Even where there is a judgment, Section 263 A merely states that the Clerk of the local authority shall, without delay, cause to be paid out of the revenue of the local authority such amounts as may be payable under the judgment. It does not state what ought to be done in the event of any default. Suppose there are several judgments against a local authority and other liabilities which by far exceed the revenue of the authority, does it mean that the Town Clerk would be arrested and be committed to civil jail for failing to pay the decretal sum or sums? I do not think so. The Town Clerk is not the debtor, it is the local authority. Even in the case of an individual judgment-debtor who has been taken to court under a warrant of arrest with a view to committing him to civil jail, the court has to examine him and fully comply with the provisions of Order 35 Civil Procedure Rules before committing him to civil jail.

In the present case, the affected party, the Town Clerk, cannot personally be held liable for the debt of the Respondent and it would be wrong in law to arrest and haul him to prison for the Respondent's inability to settle its financial liabilities unless there is a mandamus order lawfully issued by this court compelling him specifically to cause to be paid out of the revenue of the Respondent any sum in question and he deliberately refuses, fails and/or neglects to do so.

The end result is that the application is allowed with costs to the affected party.

DATED, signed and delivered at Nakuru this 16th day of January, 2004.

DANIEL K. MUSINGA

AG. JUDGE

16/1/2004