



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.526 OF 2001

BARCLAYS BANK OF KENYA LTD.

.....**PLAINTIFF**

VERSUS

COAST AVIATION LIMITED &

JOHN THIONGO MWANGODEFENDANTS

Coram: Before Hon. Justice Mwera

Okongo for the Plaintiff

Gikandi for the DefendantS

Court clerk – Sango

RULING

The defendants' application dated 9-12-03 is brought under 0. 21 rr. 18(1), 22(1) Civil Procedure Rules and S.3A Civil Procedure Act. The main prayer therein was that the court issue a stay of execution of the order and/or decree or any consequential order arising from the judgement dated 2.8.2002.

Mr. Gikandi argued that the warrants seeking to execute, taken out on 18/11/03 were irregular because that ought to have been preceded by notice to show cause (NTSc) being served on the defendants. That that course was not taken. That all in all more than a year had elapsed since the decree purported and intended and therefore execution of the same was null and void.

Relying on the supporting affidavit of the 2nd defendant (Thiongo), Mr. Gikandi urged the court to find that even the purported Notice to Show Cause was not served on Thiongo personally at all. That efforts were made to serve it on a lady at some business shop, Sonesta Pharmacy Ltd. on Muindi Mbingu Street Nairobi which was neither the residence of Thiongo nor his place of work. That in any event no attempt was made to serve the 1st defendant with any process in this regard.

Mr. Okongo urged the court to see no merit in the application, positing that the judgment herein was by default of entering appearance. That after it, due notice was served and again there was no reaction from the defendants. That from that point on even with no obligation to serve further process on the defendants, the respondent bank still drew up a Notice to Show Cause which was served on the 2nd defendant's wife and thus on him. That by serving him in that way and for the reason that he was the 1st defendant's director, who himself had executed a personal guarantee for the financial facility that the respondent bank gave to 1st defendant it was as good service even on the 1st defendant.

This court was not well acquainted with the purpose of O 21 r. 22(1) Civil Procedure Rules which was supposed to serve here but it is apparent that the applicant's quarrel was as per O 21 r 18(1) Civil Procedure Rules which reads:

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

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

the court executing 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:

Provided ———.”

In this matter it is on the record that judgment in default of entering appearance by both defendants was entered on 18.9.2003. There is also a decree issued on 2.4.03 and an application to execute it was filed on 28.8.03. A warrant of attachment and sale was sealed on 29.8.03 and a notice to show cause was dated 17.9.03. This is the one George Mutahi tried to serve on the 2nd defendant (Thiongo) on 6.10.2003 at his Museum Hill office without success. Mutahi then proceeded to Sonesta Pharmacy Ltd. aforesaid where he “introduced” himself to a lady there, then the lady became “known to him” as Thiongo's wife and he served the Notice to Show Cause, intended for Thiongo on her. There is no mention of attempts to serve the 1st Defendant a corporation whose name also appeared on the Notice To Show Cause. I

It is not denied by the respondent that all this was done because a year had elapsed as per O 21 r. 18 (1) Civil Procedure Rules. Its only point is that all due steps were followed and thus without showing cause, both applicants should pay up. This court would have agreed with Mr. Okongo had the Notice to Show Cause been served properly on Thiongo (2nd Defendant) or at all on the 1st defendant.

If we take O.5 Civil Procedure Rules to govern not only the service of summonses but all processes in civil litigation, then it was not valid to serve notice to show cause on the unnamed lady at Sonesta Pharmacy Ltd. whom Mutahi termed Thiongo's wife. O. 5 r 12 Civil Procedure Rules speaks of serving process on an adult member of the family of the party to be served residing with the party. This connotes serving process at the party's residence not at the place where the adult family member of the party works. So the purported service here on Thiongo should be considered invalid. There is no word in Mutahi's affidavit of service of the Notice To Shows Cause that that he attempted to serve the 1st Defendant Corporation, another judgment debtor here. So the court need not go into examining that.

All in all the process adopted here by the plaintiff bank fell foul of O. 21 r. 18 Civil Procedure Rules and it is no matter that the judgment had been entered in default of entering appearance. The Civil Procedure Rules do not exclude such judgment debtors from the operation of O. 21 r. 18 Civil Procedure Rules.

Accordingly the orders sought are granted with costs. The plaintiff bank may consider to commence the whole exercise again and this time round in a proper and valid manner.

Orders delivered on 16th June, 2004.

J.W. MWERA

JUDGE