



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.214 OF 1999

SAMSON MASEA) PLAINTIFFS/RESPONDENTS

JOHANA MASEA)

VERSUS

MOSES JOMO OLE NGEBENI DEFENDANT/APPLICANT

RULING:

Applicant prays for order of stay of execution of the decree dated 24th March 2003 and all consequential orders pending the hearing and determination of Civil Appeal No.29 of 2004 lodged in Court of Appeal. He further prays court nullify warrants of attachment issued to M/S ADUDA AUCTIONEERS and the costs of the said auctioneer to be borne by respondents. He also prays for costs of this application.

Judgment was entered in favour of the respondents/plaintiffs on 24th March 2003. The applicant/defendant, being dissatisfied lodged an appeal in Court of Appeal on 5th February. The appeal is yet to be heard. Counsel for the appellant submitted that he talked to counsel for Respondents who undertook not to execute the decree. However on 21st April 2004 counsel for the Respondent applied for warrants of attachment and the same were issued to M/S ADUDA AUCTIONEERS. He was to attach the applicant's goods in Transmara District. It was submitted that the warrants were issued in contravention of Order 21 rule 18(a) CPR. The decree being more than one year old Notice should have first been issued to the applicant.

Further it was submitted that M/s Aduda Auctioneer has no jurisdiction in Transmara District and as such he could not execute the warrant there.

Court was further told that the respondents are not people of any known means and if the decree is executed and the appeal succeeds they cannot be able to refund the money.

Application was opposed. Mr. Ondika submitted that the decree was not over one year old since though judgment was in March 2003 the decree was extracted on 1/12/03.

He further said Mr. Aduda has jurisdiction in Transmara and he denied giving any undertaking to counsel for the applicant that he will not execute. He therefore submitted that there was delay in bringing the application.

There is no dispute that judgment was entered on 24th March 2003. A decree was extracted on 1/12/03 and according to Mr. Ondika this should be taken as the date of the decree. However with respect I disagree. The decree in this case is the judgment which was given on 23rd March 2003 and that is the time started running. Section 2 of the Civil Procedure Act defines what a decree is. It states:

“decree” means the formal expression of 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 and may be either preliminary or final; it includes the striking out of the plaint

The court made a determination of the issues between the parties when it delivered its judgment. That was the decree and it did not matter when the formal decree was extracted. It is therefore clear that in April 2004 when the Respondent applied for warrant of attachment more than one year was over. Order 21 rule 18(a) CPR is very clear. The court should have first served the applicant with a notice to show cause. This was not done and as such the issuing of the warrant of attachment and all consequential acts were null and void. It was issued irregularly.

The provision of that rule are mandatory.

The applicant had deponed that M/s Aduda Auctioneer has no jurisdiction to effect execution in Transmara. Mr. Aduda was served. He never filed any affidavit to deny this. If indeed he had jurisdiction it would have been easy for him or respondent to show so. I therefore take he had no jurisdiction in Transmara District and as such he could not effect attachment there. If he did so it was illegal and as a licenced auctioneer he knows so.

I don't think there was any delay in bringing the application. Mr. Oguttu deponed that Mr. Ondika gave an undertaking not to execute. Mr. Ondika did not file any affidavit to confirm that averment. He cannot from the bar state that he did not do so.

Applicant deponed that Respondents are men of strum. No affidavit was filed to deny this or show otherwise. The decretal sum is shs.842,000/=. It is not little money and it was upon the respondent to show they are capable of refunding the same if the appeal succeeds. If they cannot the appeal would be rendered nugatory.

From the above therefore I find the application is reasonable the same is allowed.

There will be a stay of execution until the appeal is heard and determined. The applicant however is directed to deposit half (1/2) of the decretal amount in an interest earning account in joint names of counsels for both parties within 45 days from today's date.

The Respondent will bear costs of the auctioneer if any since he flouted provisions of order 21 rule 18(a) CPR. Costs of the application in the cause.

Delivered on 15th June 2004.

KABURU BAUNI

JUDGE

15/6/04

Mr. Ondika for Respondents

Mr. Maisiba holding brief for Mr. Oguttu for applicant.

KABURU BAUNI

JUDGE

15/6/04