



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HIGH COURT CIVIL CASE NO. 216 OF 1994

JOSEPH NJAGI KAGAU ::: PLAINTIFF

VERSUS

DINESH KANTILAL BARKANI ::: DEFENDANT

R U L I N G

The application dated 26/5/04 is brought by the defendant/Applicant pursuant to Order 21 Rules 60 (1) 18 (1); Order 20 Rules 7 (2) and Order 50 Rule 1 and 3 Civil Procedure Rules, Section 3A Civil Procedure Act. The applicant urges the court to declare the execution done herein unlawful for the following reasons, the decree given on 21/9/00 was more than one year at the time of execution.

2. The Court of Appeal altered the decree by reducing the amount by Ksh. 200,000/- and the decree should have been drawn and approved by the parties afresh.

3. The plaintiff applied an interest rate of 14% to the decretal sum instead of the normal court rate of 12%.

4. That an additional court fees calculated at Ksh. 36,457/- was included in the taxed costs which is irregular.

The applicant also prays that the court do order the respondent to pay the auctioneers charges as the proclamation is unlawful and the respondent to pay costs of this application. Grounds upon which the application is brought are found in the body of the application.

The application is also supported by the affidavit of Francis Masika counsel for applicant. In addition to the grounds, he depones that the plaintiff was given judgement by the court in the sum of 832,200/- and the defendant/applicant being dissatisfied with the judgement, appealed to the Court of Appeal. The Court of Appeal heard the matter and reduced the decretal sum by Ksh. 200,000/- which left a balance of 632,200/-. Before the matter was heard the bill of costs was taxed which included the additional court fees of Ksh. 36,457/-. The same figure was added to the decretal sum which was irregular. It amounted to double charging of the same.

The plaintiff/respondent prepared a decree without excluding the 200,000/- which the Court of Appeal had reduced the decree by. The respondent did not amend or draw a new decree, and sent it to the applicants for approval but went ahead to execute for Ksh. 1,257,294/-, instead of 1,008,845/- and that is why the applicant avers that the execution is illegal and the plaintiff/respondent should be condemned to pay the auctioneers charges.

A replying affidavit was filed by Jane Njagi Advocate for plaintiff/applicant who depones that the new interest rates are 14% but not 12%; that the alteration of the decree by the Court of Appeal does not make

the execution unlawful; that notice of execution was duly served on defendant/applicant on 8/4/04 and, therefore, costs should be paid by the applicant and lastly that prayers 2, 3 and 4 of the application do not amount to prayers and cannot be granted.

On 10/6/04 the present application was set down for hearing in the presence of both counsels for the parties.

However, when the application came up for hearing on 21/10/04 Njagi Nyaboke Counsel for Respondent was absent. In fact Mrs Njagi Nyaboke had appeared in court on 21/6/04 when the money which had been deposited in court by Mr Masika i.e Ksh. 1,008,845/= was released to the counsel and it was ordered that the application do proceed as scheduled which was on 21/10/04. Counsel was therefore aware of this application coming up for hearing but for some reason, failed to attend court. The court proceeded to hear Mr Masika for the defendant/applicant.

On a perusal of the court record, it is true that the decree is dated 21/9/00. Application for execution was not made till 2004. Order 21 Rule 18 (1) provides that where an application for execution is made more than one year after the date of the decree the court executing shall issue a notice to the person against whom execution is applied requiring him to show cause on a specific date, why the decree should not be executed. The Respondent does not say that they ever issued such Notice to Show Cause.

There is no evidence on record to show that such Notice to Show Cause was ever issued on the applicant and the execution therefore offended provisions of Order 21 Rule 18 (1) Civil Procedure Rules.

The Court of Appeal having altered the decree by deducting the sum by 200,000/=, the Respondent should have prepared a fresh decree excluding the deducted figure. Order 20 Rule 7 (2) requires the party preparing the decree to submit the draft decree to the other party for approval and if the other party declines to approve within 7 days then the Registrar can be moved to approve it after satisfying himself that it is drawn in accordance with the judgment. Again the Respondent never amended the decree and sent it for approval to the applicant's counsel nor was it approved by Deputy Registrar as per provisions of Order 20 Rule 7 (2) Civil Procedure Rules. In the case of **CARLOS SANTOS Versus MDAUPER ENTERPRISES & ANOTHER**, the Court of Appeal held that the provisions of Order 20 Rule 7 (2) Civil Procedure Rules are mandatory and the court will not allow parties to flout procedure i.e. Order 20 Rule 7 (2) Civil Procedure Rules.

In the case before court the Respondent should have prepared a draft decree and sent it to the applicant for approval. If the applicant failed to approve, then the application would have been made to the Deputy Registrar to approve and seal it. Failure to follow procedure renders the purported decree worthless and just a document as held in the above case.

The Respondent avoided to respond to the question as to why the additional court fees which had been included in the taxed costs was again added to the decretal sum. It was irregular and that amounted to unjust enrichment by the plaintiff. In the replying affidavit the Respondent admits having applied an interest of 14% which is said to be the court rates. The court interest rates still stand at 12%. It was irregular for plaintiff to apply interest of 14% which is unjustified and also amounts to unjust enrichment.

The upshot is that the execution was unlawful for the reasons given above. The applicant did not seek specific prayers as to what happens after the court finds that the execution was unlawful. The only order that the court can make is that the execution having been unlawful, it should be set aside with the Plaintiff /Respondent paying for the auctioneers charges and costs of this application.

Dated, read and delivered at Machakos this 28th day of October 2004.

Read and delivered in the

Presence of

R.V. WENDOH

JUDGE