



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL CASE NO. 3B OF 2017

STANBIC BANK KENYA LTD.....PLAINTIFF

VERSUS

KIPSIGIS STORES LIMITED.....1ST DEFENDANT

ALFRED KIPKORIR MUTAI.....2ND DEFENDANT

SAMWEL CHERUIYOT MUTAI.....3RD DEFENDANT

RULING

1. The 2nd and 3rd Defendants who are the Applicants have moved this court under the Notice of Motion Application dated 20th April 2021. It has been brought under Section 424(l) of the Insolvency Act 2016, Sections 1A, 1B, 3A, 38(d) (f), 40, 42, 63(e), 64(a) of the Civil Procedure Act Cap 21, Order 51 Rules 1, 3, 4, 10 and 15 of the Civil Procedure Rules. The Application seeks the following Orders:

i. Spent.

ii. **THAT** this Honourable Court do grant stay of any further action, execution or other legal process against the person of the 2nd and 3rd Defendants.

iii. **THAT** this Honourable Court do grant stay of any further action, execution or other legal process against the person of the 2nd and 3rd Defendants pending the determination of the interlocutory application and proceedings herein.

iv. **THAT** the orders of arrest and detention of the 3rd Defendant herein be stayed pending the hearing and disposal of the application herein.

v. **THAT** the orders of arrest against the 2nd and 3rd Defendants be stayed as it is violation of the law.

vi. **THAT** the warrants of arrest in the hands of the CID officers be recalled as they are null and void in law.

2. In response to the aforementioned Notice of Motion Application, the Respondent filed a Replying Affidavit dated 29th April 2021 together with its annexures.

The Applicants' Case

3. The Applicants seek the lifting of the warrants of arrest and detention of the 3rd Defendant in which the 3rd Defendant was committed to prison. The Applicants contend that there was a failure in application of Section 424 of the Insolvency Act and Section 40 of the Civil Procedure Act.

4. The Applicants state that the Deputy Registrar made Orders while ignoring that once a person has been brought before court, he should be given an opportunity to show cause. That under Order 49 rules 1 and 5, the powers of the Deputy Registrar become hamstrung. They submit that the Deputy Registrar should have referred the debtor to the judge who would commit him. That the Orders of Justice Muya had directed the 1st and 2nd Defendant to show cause and that the 3rd Defendant was not given an opportunity to show cause. They further submit that the decision to commit the 3rd Defendant was meant to force parties to undergo civil jail.

5. The Applicants submit that the Respondent has other remedies and referred the court to Section 38 of the Civil Procedure Act. They state that in the aforementioned section of the Act there is a proviso that decree execution by imprisonment shall not be ordered unless the Judgment Debtor has been given an opportunity to show cause why they should not be committed.

6. The Applicants state that no decree has been extracted formally. They further submit that the ex-parte Judgment and Orders given on 13th October 2017 is not a Decree. It is the Applicants case that there is no Judgment and Decree. That the warrants have been drawn in the form of a decree and the same was not served upon the Defendant. That the committal was an error in law.

7. The Applicants submit that a formal application ought to have been made now that the Official Receiver had come onto the scene. They submit that the role of directors is now hamstrung by the appearance of the Official Receiver.

8. The Applicants contend that they learnt that there was an interlocutory Judgment and Decree which was not served upon them. They pray that this court should set aside the orders of the Deputy Registrar and release the 3rd Defendant to come before it and show cause. They referred the court to the case of **George Arab Muli Mwalabu VS Senior Resident Magistrate Kangundo & 2 Others (2019) eKLR, Mbugua VS Mbugua (1992) KLR 448 and Beatrice Wanjiku & Another VS The Attorney General & Another (2012) eKLR**

The Respondent's Case.

9. The Respondents filed a Replying affidavit opposing the application. In various averments they state that what is being executed is a clear warrant in execution of lawful orders issued by the court. The Respondents submit that the Applicants were not being truthful in stating that they were unaware of the judgment as prayer 4 in the Application dated 10th December 2018 filed by Ngeno sought to have the interlocutory judgment set aside.

10. Regarding the issue of Notices to Show Cause, the Respondent submitted that paragraph 4 of his Replying Affidavit explains the process and the facts leading to the Committal Order. The Respondent further submits that there was an outstanding amount of money owed to the Respondent. That in the Ruling dated 31st October 2017, the Judge found that the Defendants' business premises had been closed. That the Judge then directed the Applicants to show cause on 28th February 2018. In the Ruling on the Show Cause on 7th June 2018, the Judge directed that the Applicants deposit the amount in court, therefore it was not correct to say that Section 38 of the Civil Procedure Act was not complied with. The Respondent contends that failure to comply with the court order is what has led to the warrants of arrest being issued.

11. The Respondent submits that the Liquidation proceedings were heard behind the back of the court, the intention of which was to have the company wound up. That there was no disclosure of the winding up. That there was a scheme by the Defendants to further their own schemes and evade making good their debt.

12. The Respondent referred the court to his annexure, a report by the DCI which showed that other motor vehicles have been interfered with. The Respondent avers that they have complained to the DCI as the Applicants' conduct borders on fraud. They contend that there is nothing for them to enforce from the Official Receiver.

13. The Respondent submits that committal to civil jail is an option as all others have been exhausted. That the Applicants have put the assets beyond the reach of the court.

14. The Respondent submits that the appointment of the Official Receiver does not extinguish the liability of the Applicants against the Respondent. That the Applicants are sued in their won capacity and cannot hide behind liquidation. That there is no bankruptcy order against the 2nd and 3rd Applicants and therefore they have an obligation individually to satisfy the decree.

15. The Respondent contends that the law on court orders is clear, they must be obeyed unless set aside. The Respondent further contends that civil jail exists in the law today and should the 3rd Applicant wish to be released, he should comply with the Orders of 7th June 2018 or orders on security so as to protect the integrity of the judicial process. He relied on the cases of **Jedida Chepkoech Mutai (suing as the legal representative of the estate of Julius Kipkorir Mutai (Deceased)) Vs Cheron Beatrice (2018) eKLR, and; Fred Matiangi, The Cabinet Secretary of Interior And co-ordination of National Government Vs Miguna Miguna & 4 Others (2018) eKLR.**

The Official Receiver.

16. The Court granted limited audience to the Official Receiver to shed light on the application. The Official Receiver submitted that they were made aware of this case on 28th April 2021 and are yet to file their papers. Mr. Korir appearing for the Official Receiver sought more time to properly come on record and sought to be supplied with any pertinent proceedings.

17. He told the court that they were appointed by an Order dated 26th July 2018 and were yet to take control of the assets of the Applicants.

18. I have considered the Notice of Motion Application dated 20th April 2021, its supporting affidavit, the Replying Affidavit dated 29th April 2021, the oral submissions of the parties, the 2nd and 3rd Defendants list of authorities dated 30th April 2021; and; the Plaintiff's list of authorities dated 30th April 2021.

19. The sole issue for determination is whether the execution proceedings and detention of the 3rd Defendant was procedural and valid.

Analysis and Determination.

20. I have perused the suit file to understand the history of this case so as to get a clear picture of the application. The mother application in this matter was filed on 1st August 2017 and it was dated 19th July 2017. In his Ruling on the said Application dated 13th October 2017, Muya J held that he was satisfied that in the interests of justice, that an order is issued in terms of prayer 5 of the Application and accordingly ordered that summons do issue. Prayer 5 stated:-

“THAT pending the hearing and determination of the suit herein, this Honourable Court be pleased to issue an order directing the 1st Respondent through its directors and/or authorized agents to show cause why it should deliver to the possession of the court and or the applicant within such period as shall be directed by the court, all such vehicles acquired by way of Hire Purchase facilities vide Hire Purchase Agreements dated 12th June 2014, 11th June 2014 and 27th February 2014 and being Trailers ZE 6541, ZE 6542, ZE 6543, ZE 6544 and ZE 6545, Prime Movers Registration No. KBY 900Y, KBY 400Z, KBY 500Z, KBZ 900B and KBZ 600B and Nissan Navarra Pick Up Reg No. KBY 800J.”

21. A Notice to Show Cause dated 5th February 2018 was issued against the 2nd and 3rd Defendants requiring them to appear in court on 15th February 2018 to show why the aforementioned orders should not be granted. The 2nd Defendant filed a Replying Affidavit dated 13th February 2018 in response to the aforementioned Notice to Show Cause.

22. A second Notice to Show Cause was issued against the 2nd and 3rd Defendants requiring them to appear in court on 28th February 2018 to show why the aforementioned orders should not be granted. The assertion by the 3rd Defendant that he was not given a chance to show cause is therefore incorrect.

23. In his Ruling dated 7th June 2018, Muya J ordered the 1st Respondent to deliver the assets subject matter of this application to the bank within 45 days and in the alternative to deposit the sum of Kshs.69,444,104.56 being the sum outstanding as at 14th July 2017 pending the hearing and determination of this suit.

24. The proceedings before Muya J. show that a warrant of arrest was issued by the court on 21st September 2018. However, it is not clear from the record how the warrants of arrest issued on account of failure to show cause converted to warrants in execution of a decree for which the defendants would be liable for committal to civil jail without further process.

25. The Ruling at the heart of this Application is the Ruling dated 15th April 2021. I have read the aforementioned Ruling by the Honourable Deputy Registrar. Before he made his Ruling, he stated that the counsel for the Plaintiff was categorical that the orders of the Honourable Judge have not been complied with and that similarly, the orders have not been vacated hence the process of arrest in execution was proper. The Honourable Deputy Registrar also noted the submissions of the defendants' advocate who submitted that there was no decree arising from the proceedings hence execution was improper. Counsel had submitted that the 1st Defendant is currently under liquidation and the Plaintiff had not followed the due process in seeking the execution of the order.

26. In his Ruling, the Honourable Deputy Registrar stated that the orders of the Judge directing the arrest of the 2nd and 3rd Defendant issued on 21st September 2018 have not been vacated. He further stated that he cannot vacate or vitiate them, that his work is to actualize them in line with his jurisdiction provided under Order 49 of the Civil Procedure Rules. Accordingly, he committed the 3rd Defendant to civil jail for 30 days.

27. Order 49 of the Civil Procedure Rules provide for the special powers of the Registrars. Specifically, Rule 5 states that:-

“Formal Orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and ordered by 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.”

28. Having carefully read the Honourable Deputy Registrar's Ruling and the aforementioned Order 49 Rule 5 of the Civil Procedure Rules, I note that there were objections raised by the counsel for the Defendants regarding the execution of the Judge's Orders. The law clearly states that in the event of an objection to the execution proceedings, further proceedings ought to be brought before a Judge. I therefore find that the Deputy Registrar fell in error when he side stepped the clear proviso to refer the proceedings to the Judge once the 3rd Defendant's counsel raised an objection.

29. It is salient to note that this was not arrest and detention as a mode of execution of a Decree. I have noted that there is no Decree extracted. A Decree is defined in the Civil Procedure Act as 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 and may either be preliminary or final. An Order on the other hand is defined as the formal expression of any decision of a court which is not a decree and includes a rule nisi.

30. In addition, I observe from the record that there is no application for execution of a Decree for payment of money by arrest and detention of the judgment debtor. Such an application would then trigger the sections that counsel submitted upon being Sections 38, 40 and 42 of the Civil Procedure Act.

31. I however agree with the Respondents that there exists a judgment in their favour which has not been set aside and ought to enjoy its fruits. This now brings us to the issue of Liquidation of the 1st Defendant, a fact on which the parties submitted extensively.

32. The 2nd and 3rd Defendants state that the 1st Defendant is under liquidation and hence the powers of the directors are hamstrung by the

Liquidation Order. They have attached a Liquidation Order given under the seal of the court on 26th July 2018 and issued on 19th September 2018. The Liquidation Order stated that the Official Receiver be constituted as the liquidator of the company.

33. Section 443 (1) of the Insolvency Act provides for the functions of the liquidator of the company that is being liquidated as;

a) To ensure the assets of the company are realized and distributed to the company's creditors.

b) If there is surplus, to distribute the surplus to the persons entitled to it.

Additionally, Section 444 of the Insolvency Act states that a Liquidator assumes control of the company's property once a Liquidation Order has been made.

34. As stated earlier in this ruling, the Official Receiver has not formally been enjoined in these proceedings. His appointment may very well affect the execution proceedings in issue in this application. I must however state that the Official Receiver and his duties in this case shall only be ventilated effectively once the Official Receiver is procedurally on record.

Conclusion

35. In the upshot, I have found that the committal of the 3rd defendant was unprocedural and therefore not valid to the extent that he was not presented before a Judge and given an opportunity to show cause. He is thus released from custody forthwith.

36. The Application therefore succeeds only in terms of prayers 4, 5 and 6.

37. The 2nd and 3rd Defendants are hereby summoned to attend court to show cause as per the court's earlier order within 14 days of this ruling.

38. The costs of this application shall be in the cause.

39. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 7TH DAY OF MAY, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the virtual presence of Mr. Kurgat, Mr. Maondo for the Respondents, 3rd defendant and Kiprotich (Court Assistant).