



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO 10 OF 2014

ANIL RATILAL TAILOR.....1ST APPLICANT

IMPERIAL SCHOOL LIMITED.....2ND APPLICANT

VERSUS

GORASIA HITESHI RAMJI.....1ST RESPONDENT

RAMJI KALYAN GORASIA T/A RAJYOG ENTERPRISES.....2ND RESPONDENT

RULING

1. This is an application by way of Notice of Motion filed on 16th March 2021 brought under **Order 42 Rule 6, Order 22 Rule 18, Order 51 Rules 1, 2, 3 & 7 of the Civil Procedure Rules, Sections 1A, 1B and 3A and 63(e) of the Civil Procedure, Articles 22, 27 (1), 47, 48, 50(1), 159 & 258 of the Constitution of Kenya 2010**. The applicants seek the following reliefs:

1) Spent

2) Pending hearing and determination of the instant application, the Honourable court be pleased to grant an Interim Order of Stay of Execution and/or Implementation of Warrants of attachment and Sale issued to and/or in favour of M/S HEGEONS AUCTIONEERS, on the 11th day of March 2021.

3) The Honourable court herein be pleased to declare that the Execution proceedings, commenced by and/or at the instance of the Plaintiffs/Respondents and the Warrants of Attachment issued to and in favour of HEGEONS AUCTIONEERS, on the 11th day of March 2021, are unlawful, illegal and thus void for all intents and purposes.

4) The Honourable court be pleased to recall and thereafter a null the Warrants of Attachment and sale dated the 11th Day of March 2021 as well as the proclamation served on the 1st Defendant/Applicant, on the 11th day of March 2021.

5) The Honourable court be pleased to cite and punish the Plaintiffs/Respondents and their Advocates on record, for Disobeying and/or otherwise disregarding lawful Orders of the Honorable court issued on the 10th day of December 2019, which Orders have neither been varied nor set aside, whatsoever.

6) Consequent to prayer 5 herein being granted, the Plaintiffs/Respondent and counsel on record, be punished by being committed to Jail for a period not exceeding Six (6) Months and/or otherwise, as the Honourable court may deem fit, expedient and just, towards vindicating the Due process of the law.

7) The Honourable court be pleased to Order and/or direct that the Plaintiffs/Respondents herein, do pay and/or settle the Auctioneer's Charges, if any, arising from the Unlawful Execution.

8) The Honourable court be pleased to issue further and/or necessary directions, pertaining to and as concerns the illegal execution proceedings, commenced and/or originated by the Plaintiffs/Respondents.

9) Costs of this application be borne by the Plaintiffs/Respondents and/or their counsel personally.

2. The application is premised on grounds that the respondents filed a suit against the applicants seeking payment of Kshs 20,417,549/- and

subsequently a judgment was entered on 11th April 2019. The applicants dissatisfied with the decree lodged a Notice of Appeal and made an application for stay of execution pending hearing and determination of the Appeal. The application for stay was heard and disposed of vide ruling rendered on 19th July 2019. However, the ruling of the court rendered on 19th July 2019 was varied vide consent recorded in court on 10th December 2019. Pursuant to the court order, the Honourable court granted an order of stay of execution pending the hearing and determination of the Court of Appeal. The stay was granted on condition that the applicants pay party and party costs in the sum of Kshs 330,000/- and that the applicant further deposit an irrevocable Bank Guarantee from Credit Bank Limited.

3. Despite complying with the orders the respondents moved the Honourable Court on 11th March 2021 and procured warrants of attachment and sale of the applicants' movable properties. The respondents have since retained the services of a nominated Auctioneer and the movable properties of the applicants have since been proclaimed and the same are now due for attachment. It is their case that the execution proceedings have since been commenced and are being undertaken on the face of existing Orders of Stay of Execution pending the hearing and determination of the Appeal.

4. **Dr. Anil Ratilal Tailor** swore the affidavit in support of the application. In his affidavit he reiterated the grounds upon which the application lies. He averred that it was evident that at the time when the respondents commenced the execution proceedings, they were aware of the court order granting stay but they nevertheless chose to disregard the terms of the order. Consequently, the respondents and their counsel have both acted in contempt of lawful court orders. He advanced that the conduct of the respondent ought to be punished to vindicate the integrity of the court process. He averred that even if the respondents were obliged to commence execution, they were still necessitated to extract a Notice to Show Cause in so far as the decree sought to be executed was more than 1 year old. No such Notice to Show Cause was extracted. He advanced that it is apparent that the execution proceedings and the consequential proclamation, commenced on behalf of the respondent was illegal, unlawful and thus void.

5. Ramji Kaylan Gorsiya filed his replying affidavit dated 15th April 2021 on 26th April 2021. He averred that he accepted terms of the consent adopted by court on 10th December 2019 on advice of his advocate in order to avoid wasting judicial time so as to fast track the appeal. According to the respondent, the consent recorded required the applicant to deposit a bank guarantee for the sum of Kshs 4,400,000/-. The consent was meant to last for the entire life of the appeal until the judgment of the appeal is satisfied. He argued that the applicants only complied with the first limb of the consent regarding payment of taxed costs.

6. The respondent acknowledged that the applicants filed a bank guarantee dated 23rd January 2020 on 27th January 2020. He however advanced that the bank guarantee did not satisfy the conditions set out in the consent order recorded on 10th December 2019 for the following reasons: firstly, the entity that provided the bank guarantee is RAM HOSPITAL LIMITED which is not a party to the suit and not privy to the consent order; and secondly, the bank guarantee was ambiguous in respect of its shelf life. He explained that it is indicated on the bank guarantee that its validity lasts up to the time the appeal is heard and determined, while at the same time it provides that the validity is up to 14 days after the determination of the appeal. They also took issue with the fact that the guarantee was set to expire on 24th January 2021, renewable annually. In this regard, the bank guarantee having expired on 24th January 2021 and the right of execution arose on 25th January 2021.

7. The respondent pointed out that the bank guarantee exhibited by the applicants dated 12th March 2021 was filed way after the application for execution was filed and allowed and 2 months after the expiry of the guarantee expired. According to the respondent the guarantee could only have been filed with leave and consent of both parties to the consent which leave was not obtained. The respondent further averred that the commencement of the execution process was a lawful, regular and valid and the auctioneers should be allowed to conclude it.

8. It was also argued that this court has become *functus officio* and the only person with jurisdiction to entertain stay was the Deputy Registrar. It was also averred that a party can only commence an application for contempt of court once leave to file such an application has been sought and granted. He averred that the prayer for contempt of court is made in vacuum and should be dismissed.

ANALYSIS AND DETERMINATION

9. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein. I have also considered the oral submissions by the Counsel for the parties together with cited statutory and case law. In my view, there are only two issues that arise for determination:

a) Whether the applicants complied with the court orders of 19th December 2019?

b) Whether the process of execution was lawful?

10. The consent order of 19th December 2019 directed the applicants to pay of counsel for the respondent costs of the suit in the sum of Kshs. 330,000/=. It is not disputed that the applicants paid the said sum to the respondent's counsel.

11. Secondly, the applicants were also directed to generate a bankers guarantee from Credit Bank Ltd in the sum of Kshs. 4,405,153 and the bank guarantee be deposited with the court within 60 days.

12. In complying with conditions of the stay of execution orders, the applicant filed a bank guarantee dated 23rd January 2020. It is however peculiar that the conditions in the consent order of 10th December 2019 which were to be satisfied by the applicants were assumed by RAM HOSPITAL LIMITED. I note that the bank guarantee was issued on behalf of RAM HOSPITAL LIMITED an entity that was not a party to the suit. Paragraph 1 of the guarantee, read as follows;

“KNOW ALL MEN by the present that CREDIT BANK PLC of P. O. Box 61064 – 00200, Nairobi are bound to the DEPUTY REGISTRAR of the High Court of Kenya in the sums of Kenya Shillings Four Million Four Hundred Thousand Only (Kshs. 4,400,000/-) to be paid to the Deputy Registrar pursuant to court Orders for KISI HCC NO. 10 OF 2014 filed at the High Court at Kisii. This Bank Guarantee is issued subject to the condition that the bond shall be void for all purposes unless Ram Hospital Limited fails to comply with any decree or order of the court.”

13. The Law of Guarantees by Geraldine Andrews & Richard Millet 2nd Edition, at page 156 states as follows: -

“A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point.”

14. Going by the first paragraph, the principal is RAM HOSPITAL LIMITED as opposed to applicants ANIL RATILAL TAILOR and IMPERIAL SCHOOL LIMITED who were the principals required to meet the terms of the consent. Secondly, according to the consent order adopted by this court, the amount to be covered by the guarantee was 4,405,153/- but this was not reflected in the guarantee dated 23rd January 2020. It must also be noted that the law recognizes that a company is a separate legal entity distinct from its shareholders (see **Salomon v. Salomon & Co. Ltd [1897] AC 22**) and it is for this reason that Ram Hospital Limited is considered a stranger in this case. According to the conditions set out in the consent order of 10th December 2019 it was the applicants who were directed to generate a bankers’ guarantee from Credit Bank Ltd. In my view therefore, the applicants failed to comply with the court order of 10th December 2019.

15. Even assuming that the guarantee was issued on behalf of the applicants, I find that the guarantee expired on 24th January 2021. The letter of the Bank Guarantee reads;

“Notwithstanding the provisions above, our liability under the Bank Guarantee is restricted to Kshs. 4,400,000/- (Kenya Shillings Four Million Four Hundred Thousand Only) and this Bank Guarantee will automatically expire on 24th January 2021, renewable annually whether this Guarantee document is returned to us for cancellation, or not, and will become null and void.”

16. The application for the execution of decree was filed on 11th March 2021 upon the expiry of the purported Bank Guarantee and therefore the application was proper in regard to the fact that the applicants failed to comply with the second condition imposed by the order of stay.

17. I now turn to consider whether the process of execution was lawful. Having found that the application was properly filed before the Deputy Registrar, I must then consider the role of the Registrar as articulated under **Order 49 Rule 5** in the following terms;

“Execution may be ordered by Registrar.

5. 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.”

18. The registrar was therefore properly seized of the application for execution. However, in executing the decree of the court, a notice to show cause ought to have been issued to the applicants by virtue of **Order 22 Rule 18**, which provides as follows:-

18. Notice to show cause against execution in certain cases [Order 22, rule 18.]

(1) Where an application for execution is made—

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

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43,

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 that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

19. In the case of **Metro Petroleum Ltd V Turbo Highway Eldoret Ltd [2006] eKLR** the court held that:

“it is clear that between 24.11.2004 and 22.2.2006 a period in excess of one year had elapsed. Accordingly, the court should have issued a notice to the defendant to show cause why the decree should not be executed against it. I have not traced a copy of such NTSC in this record. I take it therefore that no such notice was issued. I have not also seen reasons recorded dispensing with the requirement of the NTSC. In the premises, the execution in question having occurred without compliance with the rules regarding NTSC is irregular.”

20. It is evident that at the time of the application for execution was filed 1 year had since lapsed and the court was required to have issued a Notice to Show Cause but this was not done. Having carefully perused the record, I note that the exception to be considered for not granting a notice to show cause had not been established. Despite an application for execution having been made more than one year after the date of the decree, the requirement dispensing with the issuance of a notice to show cause only applies when the application for execution is made within 1 year from the date of the last order. In this case, the last order was made on 10th December 2019 while the application for execution was filed on 11th March 2021 a clear indication that the last orders of the court was also made more than 1 year prior to the filing of the application for execution.

21. On prayers 5 and 6, I find that the issue of contempt was not does not arise as against the respondents and their respondent’s counsel as the actions referred cannot be held as contemptuous for reasons that the execution process was only irregular in the manner in which the warrants were obtained. Further the applicant failed institute proper proceedings for contempt against the respondents as provided in law.

22. In the end, I find that the execution was irregular on account of non-compliance with the provisions of **Order 22 Rule 18 of the Civil Procedure Rules** and execution of the decree herein is hereby set aside. The warrants of attachment and sale dated 11th March 2021 are recalled and shall be deposited with the relevant registry. With the recalling of the warrants the proclamation served on the applicant cannot proceed. The respondents shall bear costs of the auctioneer for the said proclamation. Costs of the application shall be in the cause as the applicants have not yet complied with the stay orders of 10th December 2019.

DATED, SIGNED AND DELIVERED AT KISII THIS 1ST DAY OF JULY, 2021.

R. E. OUGO

JUDGE

In the presence of:

Mr. Kipng’etich For the Applicant

Mr. Nyamweya For the Respondent

Ms. Rael Court Assistant