



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CHERERE-J)

MISC. CIVIL APPLICATION NO 174 of 2017

BETWEEN

PETER ROESER -OTT.....APPLICANT/CLIENT

AND

HEZRON ABOK t/a ABOK ODHIAMBO

& COMPANY ADVOCATES.....RESPONDENT/ADVOCATE

RULING

1. By a notice of motion amended on 02nd December, 2019, brought under Section 3A of the Civil Procedure Act; Order 42 Rule 6, Order 50 Rule 6 and Order 52 Rule 6 of the Civil Procedure Rules, the Applicant prays for orders: -

1. **That a stay of execution be granted pending the hearing of the application**
2. **To restrain the auctioneers from selling the Applicant's goods pending the hearing of this application**
3. **To recall, revoke and set aside the warrants of attachment and notice of sale of Applicant's property**
4. **Directing the Respondent to release the Applicant's property**
5. **That the Applicant be granted leave to file a reference out of time**
6. **Costs be provided for**

2. The motion is premised on the grounds on the body of the application and the supporting affidavit of the Applicant sworn on 03rd November, 2019. He avers that the attachment of his property and notification of sale were unprocedural since no proclamation notice was rendered and further that he stands to suffer irreparable economic loss if stay of execution is not granted.

3. The application is opposed on the basis of a replying affidavit sworn by the Respondent on 02nd December, 2019. He avers that Retainer is not denied and that the Respondent was served with the notice of taxation, notice of application for entry of judgment and notice of ruling but opted not to defend the same. The deponent further avers that a proclamation was issued before attachment and that the auctioneer is therefore entitled to his costs.

4. I have considered the notice of motion in the light of affidavits on record and submission by counsel for both parties and I have deduced the following issues for determination.

- 1) **Whether execution in this matter is legal**
- 2) **Whether Applicant ought to be given leave to file a reference out of time**

5. Order 21, rule 7 provides as follows on the contents of decree.

- (1) **The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the**

parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state by whom or out of what property or in what proportion the costs incurred in the suit are to be paid.

6. Order 22, rule 7 on applications for execution

(1) Where a decree is for the payment of money the court may on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the court.

(2) Save as otherwise provided by sub rule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing,

7. Order 22, rule 13 provides for procedure by court on receiving an application for execution of decree in the following terms:

(1) On receiving an application for the execution of a decree as provided by rule 7 (2), the court shall ascertain whether such of the requirements of rules 7 to 9 as may be applicable to the case have been complied with; and, if they have not been complied with, the court may reject the application, or may allow the defect to be remedied there and then or within a time to be fixed by it.

(4) When the application is admitted, the court shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application.

8. I have considered the foregoing provisions *vis a vis* the holding in Rubo Kimngetich Arap Cheruiyot vs. Peter Kiprof Rotich [2006] eKLR and having perused the court file, I am convinced that the Respondent extracted a decree and made an application for execution.

9. Consequently, I disagree with the Applicant that the execution against him was unprocedural.

Whether Applicant ought to be given leave to file a reference out of time

10. An affidavit of service filed on 09th November, 2018 demonstrates that a certificate of taxation issued on 17.05.18 among other documents was sent to P.O BOX 2304-50100 KAKAMEGA. The Applicant/Client has not denied that that is his address and on the authority of Sifuna & Co Advocates v Akhtar Shahid Butt & Another [2018] eKLR, I find that there was proper service on the Applicant more than one year before the present application was filed.

11. Paragraph 11 of the Advocates Remuneration Order provides as follows:

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

expired. "

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired. "

12. The foregoing provisions gives the court discretion to extend time for lodging a reference notwithstanding the expiry of the 14 days' period prescribed for filing of the reference.

13. In exercising its discretion in this regard, the Court should consider whether there has been inexcusable delay in presenting the application. The Applicant has not made any effort to explain the one-year delay.

14. The foregoing notwithstanding, this court has a duty to consider if the Respondent will be prejudiced if the Applicant is granted leave to file a reference out of time. The Applicant has already deposited Kshs. 500,000/- which is part of the decretal sum with the court and I therefore find that enlargement of time within which to file a reference will not unduly prejudice the Respondent.

15. The upshot of this is that the notice of motion amended on 02.12.19 is allowed in the following terms:

- 1) Kshs. 300,000/- (three hundred thousand) of the Kshs. 500,000/- deposited in court be released to the Advocate/Respondent forthwith
- 2) The Client/Applicant is hereby granted 14 days from today's date to give notice in writing to the taxing officer of the items of taxation to which he objects.
- 3) The Client/Applicant shall within fourteen days from the receipt of reasons file a reference as against the taxations in issue
- 4) The Applicant/Client shall pay the Advocate/Respondent's costs of this application.
- 5) The Applicant/Client shall also pay the auctioneer's costs to be agreed and/or taxed

DATED AND SIGNED IN KISUMU THIS 05th DAY OF MARCH, 2020

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Applicant / Client - Mr. Onsongo hb for Mr. Opondo

For the Respondent/ Advocate - Mr. Mbeka hb for Mr. Abok