



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL CASE NO. 32 OF 2019

KIPLAGAT KOTUT.....APPELLANT

VERSUS

ROSE JEBOR KIPNGOK.....RESPONDENT

AND

STANDARD CHARTERED BANK

KENYA COMMERCIAL BANK LIMITED.....GARNISHEES

RULING

1. *Rose Jebor Kipngok*, the Respondent, filed the Notice of Preliminary Objection dated the 16th September, 2019 to the Motion by Kiplagat Kotut, the Applicant, dated 10th September 2019, raising the following grounds;

- (a) That the service upon the Respondent was effected out of time and without extension of time and hence the proceedings are null and void.
- (b) *That the law does not provide for an appeal against the decision of the Deputy Registrar, but only a reference to the Judge.*
- (c) *Simultaneous execution is not allowable as the Notice to Show Cause was pending.*
- (d) *The supporting affidavit should be struck out as it is by Counsel and contains contentious matters.*

2. The Applicant's Motion dated and filed 10th September, 2019 sought for the following prayers;

- (a) *Application to be certified urgent and service dispensed with in the first instance.*
- (b) *Interim order to Standard Chartered Bank & Another, Garnishee to preserve the balances in account No. 0100342888900 pending the hearing and determination of the application.*
- (c) *Interim order to the Garnishee to preserve the balances in account No. 0100342888900 pending the hearing and determination of the appeal.*

3. The learned Counsel for the parties appeared in court on the 19th September, 2019 and directions on filing of written submissions on the preliminary objection were given. The Respondent's Counsel filed theirs dated the 23rd September, 2019. They submit that the Applicant had on the 10th September been ordered to serve their application in two (2) days, but the Respondent was not served until the 13th September, 2019 which was outside the period directed. That whereas, **Order 49 rule 5 of Civil Procedure Rules** provides for attachment, notices to show cause or applications for arrests to be before the Deputy Registrar, no appeal lies on their decisions but references. That where objections are raised on such processes before the Deputy Registrar, the proceedings should take place before the Judge, but the Applicant herein proceeded with the matter before the Deputy Registrar. That the Applicant has already filed for execution through M/s Blue Rift Auctioneers, and no application for change of mode of execution had been filed when the application dated 10th September, 2019 was filed. That the Applicant has also filed an application to attach the Respondent's debts in **Misc. Application No. 145 of 2019**, and a notice to show cause has been listed for 19th September, 2019. That though **Order 22 Rule 12 of Civil Procedure Rules** gives the court the discretion to allow simultaneous executions, the power should be exercised judiciously so as not to amount to persecution of the Judgment debtor. That the supporting affidavit sworn by Counsel for the Applicant deals with contentious matters like how the Counsel got details of the Respondent's account, and balances therein without disclosing the source.

4. The Counsel for the Applicant filed their submissions dated the 18th November, 2019. The learned Counsel submits that the preliminary objection has no merit and is misplaced as Court of Appeal decisions are implemented and executed in the High Court in terms of **Section 4 of the Appellate Jurisdiction Act**. That the Court of Appeal had awarded the Appellant costs in ELC No. 691 of 2012 and Appeal No. 31 of 2015. That the Applicant had initiated execution of costs in ELC No. 691 of 2012 which had nothing to do with costs awarded on the appeal. That the Deputy Registrar erred in applying **Sections 30 and 34 of the Civil Procedure Rules** in dismissing their application. The learned Counsel cited the decision in **Mombasa Misc. Civil Application No. 553 of 2016 Global Vehicles (K) Ltd Vs Lenana Road Motors Ltd [2017] eKLR**, where the court relied on **Section 4 of the Appellate Jurisdiction Act and Section 51 (2) of the Advocates Act** in the matter where the Appellant was seeking to execute costs of the Court of Appeal matter. That as the costs remains unpaid, the Deputy Registrar should have ordered the sum attached to be released to the Applicant's Counsel.

5. The following are the issues for the court's determinations;

(a) *Whether or not the application was served outside the time given and or without extension of time, and if so whether that renders the proceedings null and void.*

(b) *Whether an appeal against the decision of the Deputy Registrar of the court is provided for in law.*

(c) *Whether simultaneous execution process has been undertaken in this matter and if so, whether it is provided for in law.*

(d) *Whether the supporting affidavit by the Appellant's Counsel contains contentious issues, and if so, whether the application should be struck out.*

6. The Court has carefully considered the grounds on the notice of preliminary objection, the learned Counsel's written submissions and come to the following findings;

(a) That **Order 49 of the Civil Procedure Rules** provides for the Special Powers of Registrars. That **Rule 7(2)** of the said Order provides as follows;

“An appeal from a decision of the Registrar under the orders referred to in sub-rule (1) shall be to a Judge in Chambers.”

That from the annexed ruling by the Deputy Registrar of 10th September, 2019, the issues before her were about execution and attachment for decree on costs which by virtue of **Order 49 Rule 7(1)(x) and (xi)** are matters to be determined by the Deputy Registrar. That it follows that appeals from the Deputy Registrar decisions on such matters therefore lies to this court as aforementioned. That accordingly, the ground that there is no provision for an appeal against the decision of the Deputy Registrar to this court therefore has no merit and fails.

(b) That indeed when the application under Certificate of Urgency dated 10th September, 2019 was presented before the court on the same date, directions were issued to serve it in two (2) days for hearing on the 19th September, 2019. The Respondent has submitted that she was served on the 13th September, 2019 which was outside the two (2) days given, while the Garnishees were served on the 10th September, 2019. That submission has not been disputed by the Applicant. That as the Respondent filed the replying affidavit together with the notice of preliminary objection on the 16th September, 2019 which was about three (3) days to the date fixed for hearing, there was no prejudice suffered by the Respondent, and that would not be reasonable basis of striking out the application under the circumstances. That **Order 51 Rule 14(2) of Civil Procedure Rules** requires documents in opposition to an application to be filed and served ***“not less than three clear days before the date of hearing”***.

(c) That a look at paragraphs 1 to 11 of the supporting affidavit sworn on the 10th September, 2019 by Jonah K. Korir Advocate and attached to the Chamber summons of the same date, shows that the matters referred to in paragraphs 1, 2, 3, 4, 6, 7, 10 and 11 are matters that Counsel on record for the Applicant would ordinarily know or have information on from the court documents and processes. However, the matters referred to under paragraphs 5 and 8 of the supporting affidavit on details of the Respondent's bank accounts with the financial institutions which are matters that are not apparent on the Deputy Registrar's ruling or the decree nisi annexed and the deponent has not disclosed his source. That such matters are best deponed to by the client or party and not by Counsel. That accordingly, paragraphs 5 and 8 of the supporting affidavits are hereby struck out. That as the other paragraphs remain still intact, the striking out of the two paragraphs is insufficient to result to the chamber summons being struck out.

(d) That **Section 4 of the Appellate Jurisdiction Act Chapter 9 of the Laws of Kenya** provides that ***“Any Judgment of the Court of Appeal given in exercise of its jurisdiction under this Act may be executed and enforced as if it were a judgment of the High Court”***. That from the ruling of the Deputy Registrar of 10th September 2019, it is clear the application before her dated 9th August, 2019 was seeking to be allowed to execute costs awarded in Eldoret Court of Appeal Civil Appeal No. 31 of 2015. That among the grounds put forward in opposition was that the application was premature as there was a notice to show cause coming up for hearing on the 17th September, 2019 in Eldoret ELC No. 691 of 2012. That fact has given rise to the ground of simultaneous execution in the preliminary objection. That whereas simultaneous execution appears to be provided for by **Order 22 Rule 17 of the Civil Procedure Rules** that is in the following words; ***“The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment debtor”***, the fears of the Respondent in this matter are not far-fetched as there is no disclosure as to the status of the execution in Eldoret ELC No. 691 of 2012. That the court is of the considered view that the Applicant should have moved the court through the record of the original suit, being Eldoret ELC No. 691 of 2012, to execute the decree on costs awarded in the **Eldoret Court of Appeal Civil Appeal No. 31 of 2015** instead of moving the court through the **Eldoret Misc. Civil Application No. 145 of 2019**, that is subject matter of this appeal.

7. That from the foregoing, the court finds no merits in the Respondent's preliminary objection filed through the notice dated the 16th September, 2019 and is dismissed with costs.

Orders accordingly.

Dated and signed at Eldoret this 12th day of February, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

Mr. Korir for Appellant/Applicant.

Mr. Mogambi for Mr. Chebii for Respondent.

No appearance for Garnishee.

Court

Assistant:

Christine