



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 283 OF 2018

HATARI SECURITY COMPANY LTD.....APPLICANT

VERSUS

1. HAMISI CHARO

2. NDUTUMI AUCTIONEERS.....RESPONDENT

R U L I N G

1. Even though the Notice of Motion dated 2/11/2018 is expressed to invoke the provisions of Article 165 (6) & 7 of the constitution, the quarrel with the lower courts is that it issued an attachment to enforce a judgment delivered on 4/12/2014 prior to service of a notice to show cause and without first accounting for the proceed of the chattels earlier on attached.
2. The Respondents do not dispute the fact that the judgment was more than 12 month old on 3/10/2018 when they sought to execute it nor is it denied that there were two chattels; a motor vehicle registration no. KAS 174K and Motorcycle Registration No. KMCS 612B which had been attached pursuant to the warrants of attachment and sale issued on 31.3.2015. their contention is that the court has jurisdiction under Order 22 Rule 18 to issue execution proceedings without the need for a notice to show cause and that the motor vehicle and motor cycle continue to be at a yard which now demands storage charges amounting to Kshs.603,434/=.
3. To this court, the jurisdiction granted to court under article 165(7) is very wide and geared towards supervision not to usurp the powers and independence of the lower courts, tribunals and other bodies exercising judicial and quasi-judicial functions, but to ensure that administration of justice is conducted fairly. Fair administration of justice must of necessity mean dispensation of justice in accordance with the law.
4. It being asserted here that warrants were issued on 3/10/2018 without regard to Order 22 Rule 18 and while earlier warrants of attachment and sale had not been returned to court, I entertain no doubt that the supervisory jurisdiction of the court has been properly invoked.
5. Being so convinced, I have called up the trial court file and had the same perused to satisfy myself whether or not the law has been complied with to pass the test that there has been fair administration of justice.
6. My perusal of the file reveals that the first warrants of attachment and sale were issued pursuant to an application for execution dated 31/3/2015 and filed in court the same day when the warrants were also issued. The warrants were on their face intended to be served upon Ndutumi Auctioneers and made returnable by the 31/5/2015. My reading of the file has not yielded any discovery that the warrants were ever returned to court. The object and need to return the warrants to court is disclosed on the face of the same to appraise the court on when and manner in which the warrant were executed or why they had not been executed. That to me is a rule enforcing accountability and openness in the way court business is handled.
7. In this case, now that the warrants dated 31/3/2015 were admittedly executed but no returns have been made to court, it was not legal to issue a new set of warrants to the same auctioneer before he made his returns to court. For that reason alone I do order and direct that the subsequent warrants issued on 3/10/2018 be recalled and every step and process undertaken pursuant to them be set aside *ex-debito* justitiae. In coming to this decision I have invoked the court's inherent powers to do justice and avoid hardship to the parties which I understand to be the very purpose of our judicial system. I consider that power to be the intrinsic and otherwise ever present ability of the court to do justice and avoid injustice wherever circumstances demand and unhindered by any procedural nuances. The court of appeal^[1] has plainly put it beyond doubt that the power is wide and unfettered when the court said:-

“This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice”.

8. The illuminating words were well informed by what the authors of **Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14** says of that jurisdiction;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectually, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.” (*Emphasis provided*)

9. In this matter to leave the warrants of 3.10.2018 intact would be a perversion of what I consider just. I consider it a perversion because it will leave the defendant with no answers as to what happened to his property earlier on attached.

10. To meet the dictates of the warrants issued to Ndutumi Auctioneers on the 31/3/2015 and the justice of the case, let the auctioneer make his return on the warrants within 7 days after this order is extracted and served upon him. Prior to the auctioneer making his returns, let no steps be taken towards execution until and unless the returns shall have been rendered.

9. In rendering such returns, let it be taken into account that the warrants have since expired. I would stop at this far but it is not lost to me that the judgment is now more than 3 years old and when times comes to consider how to bring the matter to conclusion let due regard be taken by the trial court of the dictates of Order 22 Rule 18.

10. Accordingly the application is allowed to the extent that the warrants of attachment and sale dated 3/10/2018 are set aside for having been issued without regard to those of 31/3/2015 which had not been accounted for.

11. The costs of the application are awarded to the applicant.

Dated and delivered at Mombasa on this 8th day of February 2019.

P.J.O. OTIENO

JUDGE

[1] Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR