



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 1107 OF 1990

KENBOX INDUSTRIES LIMITED.....PLAINTIFF

-VERSUS-

RAMESH SHAH.....DEFENDANT

R U L I N G

1. This is indeed an old matter. Judgment was entered against the Defendant for the Plaintiff on 10th June 2003 by Justice P. J. Ransley (as he then was, now retired). Judgment was for Kshs. 25,175,000, Kshs. 2,258,888 and Kshs. 20,000 all with interest at Court rate from the date of filing suit until payment in full. The Plaintiff was also granted injunctive orders restraining the Defendant from collecting jukeboxes delivered to the Plaintiff.

2. The Court file on this matter was confirmed by the Deputy Registrar, by letter dated 29th June 2018, to be missing at the Court Registry. On 23rd July 2018 the Court, on the application of the Defendant, granted an order for the reconstruction of the Court file subject to the Plaintiff, who failed to attend Court, being permitted to file any other documents relevant to this matter.

3. On the Court file being re-constructed, the Defendant moved the Court to hear its application dated 22nd May 2009. By that application, the Defendant seeks the stay of the order made, by the Deputy Registrar on 8th May 2009 and on an order setting aside or reviewing that order of 8th May 2009.

4. The application is premised on the grounds:

i. There is a mistake and an error apparent on the face of the record.

ii. An order for committal to civil jail has been made without:

a) Notice thereof being served upon the Applicant.

b) Being sought and argued during the hearing on the 9th March 2009.

c) The application before the Honourable Court then and which was argued was notice to show cause dated 6th June 2007 which the Judgment debtor's moveable assets should not be attached and sold.

iii. There is sufficient cause for the review of the order of the Honourable Court.

5. The Defendant in his affidavit in support of the application deponed that he was present in Court when the execution application was heard by the Deputy Registrar when he heard the Plaintiff's Advocate inform the Court that he was seeking an order for attachment and sale of moveable goods of the Defendant.

6. That, however, when the Deputy Registrar delivered his Ruling on 8th May 2009, he ordered the Defendant to be committed to civil jail for 30 days.

7. In another affidavit sworn by the Defendant, and filed in this matter, which is dated 6th June 2018 the Defendant annexed proceedings of 5th June 2009 where Justice Waweru entertained the Notice of Motion dated 22nd May 2009 *ex parte*. In those proceedings Justice Waweru stated in respect to the Deputy Registrar's Ruling of 8th May 2009 that:

“... The notice to show cause before the Deputy Registrar and which was argued by the Counsels, was on execution by attachment and sale of the judgment debtor’s moveable properties.

The Deputy Registrar prepared his Ruling as if the notice to show cause was on execution by the judgment debtor’s personal arrest and committal to civil jail. There appears therefore to be an error on the face of the record which would render the committal order of 08/05/2009 erroneous.

8. The Learned Judge on staying the Deputy Registrar’s orders proceeded to certify the application as urgent and fixed it for *inter partes* hearing on 16th June 2009. What happened on the 16th June 2009, when the application should have been heard *inter partes*, I do not know since the original file is reported as missing.

9. By this Ruling I am considering the application dated 22nd May 2009 *inter partes*. Although the Plaintiff’s Advocate was served with a hearing notice and indeed the Plaintiff was represented on 18th October 2018 by Advocate Mr. Makori holding brief for Mr. Nyakundi. When the now application was fixed for hearing, that is on 26th November 2018, the Plaintiff’s Advocate did not attend Court. There are however, on record of the reconstructed file grounds of opposition filed on behalf of the Plaintiff. The Plaintiff by those grounds stated that the applications premised on what the Defendant supposedly heard.

DISCUSSION AND DETERMINATION

10. The fact that I am dealing with a reconstructed file – which obviously does not have the full proceedings or the orders made is an impediment to me.

11. That as it may be, the first thing I will start by stating is the Defendant in seeking to review the Deputy Registrar’s order before a High Court Judge is in error. Review of an order ought to be made before the Judicial Officer who made the order: see Order 45 Rule 2 (1) and (2). So in the first instance the review should have been before the Deputy Registrar who made the order and if he was no longer attached to the Court the same should have been placed before and the Deputy Registrar – not the High Court.

12. In my view, the application is not supported by the statements in the Deputy Registrar’s Ruling of 8th May 2009. In that Ruling the Deputy Registrar stated:

“This is a Ruling on a notice to show cause (NTSC) made and filed by the decree holder/Plaintiff as to why the judgment debtor/Defendant should not be personally arrested and committed to civil jail for failure to clear the decretal sum now amounting to over Kshs. 82 million.”

13. As I stated before the lack of the original file is an obstacle to knowing what indeed happened in May 2009. However if I am guided by the Deputy Registrar’s Ruling where he seems categorical that he was Ruling on a NTSC why warrant of arrest should not issue then there is no error on record.

14. On the whole there has been, on the part of the Defendant, inordinate delay in dealing with his application. I was able to see that the Court file was available in the year 2016, since some of the proceedings relied upon by Defendant were certified as correct in that year. More particularly the very Ruling the Defendant wishes to have reviewed, of Hon. M. Muiru the Deputy Registrar dated 8th May 2009 was certified on 27th September 2016. Why did the Defendant not move with haste if indeed the order for his arrest was made in error in May 2009. Why wait from 2009 to 2018 to substantially move the Court.

15. The application in my view is unmerited. The Notice of Motion dated 22nd May 2009 is dismissed with no orders as to costs.

16. Further I direct the Deputy Registrar to assist the Court in having the original Court file of this matter traced.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE DEFENDANT