



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 303 OF 2014

RADHESHYAM TRANSPORT LTD.....PLAINTIFF

-VERSUS-

CORPORATE BUSINESS CENTRE LTD.....DEFENDANT

RULING

1. The plaintiff/applicant, took out the motion dated 18th September 2019 and sought for the following orders:

i. THAT this matter be certified urgent and the same be granted an early hearing date.

ii. THAT there be a stay of execution of the decree and warrants issued herein pending hearing and determination of this application.

iii. THAT the execution of the decree herein be stayed until leave of court to execute the same is granted and that the same be executed procedurally.

2. The motion is supported by the affidavit sworn by Ravji Kerai.

When served, the defendant filed grounds of opposition to resist the motion.

3. I have considered the grounds stated on the body of the motion and the facts deposed in the supporting affidavit. I have further considered the grounds of opposition and the rival oral submission made by learned counsels appearing in this matter.

4. The main issue which commends itself for consideration is whether the decree and or order which the defendant seeks to execute is more than one year and if yes whether it was necessary to have the same executed by way of a notice to show cause.

5. It is the submission of Mr. Mare, learned advocate for the plaintiff/applicant that the order being executed by the defendant was issued on 20th November 2015 and therefore the same can only be executed by way of a notice to show cause which was not taken out in this suit.

6. It is also the submission of the learned advocate that since the suit is still pending the decree that ought to issue is a preliminary decree which can only be executed with the leave of the court which was not sought. The plaintiff therefore is of the view that the warrants have been issued irregularly hence execution is proceeding in an unprocedural manner.

7. Mr. Ouma, learned advocate for the defendant, on the other hand is of the submission that the decree being executed is the one issued on 18th July 2019 hence one year has not lapsed since it was issued.

8. Order 22 rule 18(1)a of the Civil Procedure Rules provides as follows:

“Where an application for execution is made more than one year after the date of the decree the court execution 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.”

9. The learned advocates in their submissions were in agreement that a decree which is more than one year can only be executed through a notice to show cause.

10. On 20th November 2015, this court issued inter alia an order directing the plaintiff to refund to the defendant a sum of ksh.6,000,000/=. On 18th July 2019, the defendant successfully applied for the aforesaid order to be deemed as a decree pursuant to the provisions of Section 28 of the Civil Procedure Act. The question is which date was the decree issued.

11. It is apparent that the date of the decree is the date when the order or judgement was made which in this case is on 20th November 2015. The order was formally deemed as a decree for purposes of execution on 18th July 2019. The decree the defendant is attempting to execute is therefore more than one year.

12. With respect, I agree with the submission of the plaintiff that the defendant should first have applied to this court to issue a notice to the plaintiff to show cause why the decree should not be executed. There is also no evidence that the defendant applied to be exempted from issuing a notice to show cause under Order 22 rule 18(2) of the Civil Procedure Rules. I am also persuaded by the arguments of the plaintiff that the decree has been unprocedurally executed hence an order for stay should be granted.

13. In the end, the motion is found to be with merits.

Consequently, an order for stay of execution of the decree is granted. However, the defendant is at liberty to apply to have the decree procedurally executed in the manner alluded hereinabove.

14. In the circumstances of this case a fair order on costs is to order which I hereby do, that each party meets its own costs of the motion.

Dated, signed and delivered at Nairobi this 1st day of November, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent