



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 544 OF 1994

HEZEKIAH MWANGI MACHARIA1ST PLAINTIFF

TED JOSHUA MACHARIA 2ND PLAINTIFF

VERSUS

LAURA WAITHIRA NG'ANG'A 1ST DEFENDANT

ZIPPORAH WAMAITHA NG'ANG'A.....2ND DEFENDANT

KIHONGE NG'ANG'A3RD DEFENANT

ALICE MUMBI NG'ANG'A4TH DEFENDANT

(Being an Appeal Pursuant to Order 49 Rule 7(2) and (3) Civil Procedure Rules from the Ruling and Orders of the Hon. A.K. Ndungu Deputy Registrar delivered on 21st January, 2015)

JUDGMENT

On 21st January, 2015 the Deputy Registrar of this court (as he then was) in addressing a notice to show cause dated 14th April, 2014 held that the appellants herein, who were originally the 3rd and 4th defendants, and who had been adjudged judgment debtors, should be compelled to meet the liability of the estate of the deceased one Joseph Ng'ang'a Kihonge. In so holding, the Deputy Registrar ordered that a warrant of arrest do issue for the appellants to be brought before the court as soon as practicable for further orders.

Aggrieved by the said order, the appellants moved to this court under Order 49 Rules 2 and 3 of the Civil Procedure Rules. In the Memorandum of appeal contained in the record filed herein, the Deputy Registrar is faulted for many reasons relating to procedure and impact of the orders enjoining the appellants to the suit as legal representatives of the deceased, that no judgment existed when the estate was distributed and therefore no debt capable of being paid could be provided for and that there is nothing in the Civil Procedure Act or any other law that permits or authorizes legal representatives to be arrested in execution of a decree against the estate.

The Deputy Registrar was also faulted for failing to show any evidence placed before him to the effect that the appellants had not properly accounted for or misapplied the property of the estate which in fact is the only instance for the application of Section 39 of the Civil Procedure Act which authorises execution against the property of a legal representative.

It was also the position of the appellants that the Deputy Registrar erred in issuing the warrant of arrest against them.

Further, an inventory is returnable before the Family Court and not this court and no evidence of default had been placed before him. The Deputy Registrar was also faulted for failing to find that the estate had been fully distributed despite evidence placed before him.

The Deputy Registrar was also faulted for holding that the appellants were personally liable to satisfy the decree and in any case he failed to apply the correct legal principles to the facts placed before him. Counsel appearing for the parties filed submissions to address the issues raised. They have also cited some authorities which I have read.

Section 39 of the Civil Procedure Act provides as follows,

“ 39 (1) where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) where no such property remains in the possession of the judgment – debtor, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment – debtor to the extent of the property in respect of which he has failed to satisfy the court in the same manner as if the decree had been against him personally.”

Counsel have addressed the court on the background of this matter leading to the decree subject to this appeal. As at the time the appellants came onto record, the deceased had already filed a defence to the claim by the decree holders. There is no issue therefore that can be raised with regard to the striking out of the defences of the appellants by Lady Justice Ang’awa. The defence filed remained even after the death of the deceased.

It is instructive to note that the appellants did not challenge the finding of Lady Justice Ang’awa and they fully participate in the proceedings up to this stage. Another order was made by Justice Mbitio enjoining the estate of the deceased. Again, that order was never challenged by the appellants. Upon the joinder of the estate into the proceedings by revival thereof, the appellants did not inform the court that the estate had been distributed.

As at the time the Deputy Registrar was making the order, now the subject of this appeal, in the event the estate had been distributed, no inventory or account was presented before him.

The appellants as administrators are expected, and ought to have had a full and accurate knowledge of all the assets of the deceased. This information was not presented to the court otherwise this appeal would not have proved necessary. If any action had been taken in the Family Court, only they had knowledge of that. No evidence to that effect was presented. The silence on the part of the appellants must be held against them.

The only issue that may have some substance in the appeal is the issuance of the warrant of arrest. Section 39 cited herein above does not provide for the issuance of a warrant of arrest in execution or enforcement of a decree against a legal representatives. That is different from the requirement that summons be issued against a party requiring his attendance to court. I know Section 40 of the Civil Procedure Act is a consequence of the issuance of a warrant of arrest, but a warrant of arrest must follow the interrogation of a judgment debtor under Section 39 and only in default of an order issued thereunder, should a warrant of arrest be issued.

To that extent only may the order by the Deputy Registrar be interfered with. What the Deputy Registrar should have done is to be satisfied that a notice to show cause had been issued for the appellants to come to court and state why attachment and sale of property belonging to the deceased should not proceed, or under sub section 2 why execution against them personally should not be ordered. In the event they failed to justify the requirement of Section 39 1 and 2 then a warrant of arrest would then issue.

In my judgment therefore I see no merit in the appeal which is hereby dismissed with costs to the respondents. The appellants shall appear before the Deputy Registrar on a date to be appointed by the Deputy Registrar for interrogation in line with the requirement of Section 39 of the Civil Procedure Act. No order as to costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 16th day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE