



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO 6 OF 2018

BENSON NKAULO.....APPLICANT

VERSUS

SAMSON KAAPEI.....RESPONDENT

(From the original judgement and decree dated 8/2/2018 in Kilgoris Principal

Magistrate's court in Civil Case No. 21 of 2018, Samson Kaapei v. Benson Nkaulo).

RULING

1. The appellant/applicant filed his application under the vacation rules namely section 2 of the Judicature Act and section 8 and 9 of the Law Reform Act and was certified to be heard during the vacation.
2. The applicant's application was filed under certificate of urgency pursuant to Order 2 rule 6, Order 5 rule 1 of the 2010 Civil Procedure Rules, sections 1A, 1B, 3A and 63(e) Civil Procedure Act (Cap 21) Laws of Kenya.
3. The application is supported by six grounds set out in the notice of motion dated 12/9/2018. The major grounds are as follows. First the applicant sought stay of execution of the judgement and decree in Kilgoris Principal Magistrate's court in Civil Case No. 21 of 2018 together with all consequential orders pending the hearing and determination of this appeal. Second, the applicant has stated that the ruling of the magisterial court was delivered on 8/2/2018 which dismissed his application of 2/10/2017 which he seeks to be reviewed or to be set aside. Finally, the applicant has stated that he should be released Metangwale prison pending the hearing and determination of his application and or appeal.
4. He has also stated that the respondent is in the process of executing judgement and decree in which the applicant has been arrested and committed to civil jail. Furthermore, he has stated that his appeal has overwhelming chances of success and that he would suffer substantial loss and damage unless his application is allowed. He has also stated that his appeal would be rendered nugatory unless his appeal is allowed. And that he should not be made to suffer inadvertent mistake of his counsel.
5. The applicant has deponed to a 15 paragraphs supporting affidavit. The major averments in that affidavit are as follows.
First, he has stated that the respondent obtained a default judgement against him in Kilgoris SPMCC No. 21/2016 in which he claimed general and special damages for an alleged assault. Second, the applicant challenged the default judgement vide his application dated 22/10/2017 which was dismissed by the magisterial court on the ground that his counsel (Mr. Nyamwange) was not properly on record.
6. The High Court dismissed his application and as a result, the respondent caused the arrest of the applicant on 10/9/2010 leading to his committed to civil jail. The applicant has replicated the grounds in support of his application in his supporting affidavit.
7. The respondent has opposed the applicant's application. In that regard, he has filed eight grounds of opposition dated 14/9/2018. The following are the major grounds. He has stated that the applicant's application dated 12/9/2018 violated the mandatory provisions of Order 42 of 2010 Civil Procedure Rules as there is no appeal in respect of the judgement and decree of the trial court that was delivered on 13/10/2016. Furthermore, he has also stated that this court lacks jurisdiction to grant prayers 2 and 3 of the application dated 12/9/2018 because the dismissal orders of the trial court could only be challenged by way of an appeal to this court and not by way of application.
8. Furthermore, the respondent has stated that the applicant has delayed for almost after two years because the judgement and decree were delivered on 13/2/2016. Additionally, the execution has taken place because the applicant has been sent to civil jail.

9. In addition to the foregoing, the respondent has stated that the appellant has evaded the execution process and has only been prompted into action because he is faced with execution process.

Submissions of both counsel

10. Both counsel filed written submissions which I have considered. In the light of the applicant's affidavit evidence, the submission of his counsel and that of the respondent together with his grounds of opposition, I find the following to be the issues for determination.

1. Whether or not Order 22 rule 18 (1)(a) of the 2010 Civil Procedure Rules were complied with.
2. Who bears the costs of this application?

Issue 1

11. The requirement of Order 22 rule 18 (1) (a) requires the court executing the decree to issue a notice to the person against whom execution is applied for to show why the decree should not be executed against him on a date to be fixed by the court. In the instant application, the judgement and decree were issued almost two years ago. In the circumstances, I find that the provisions of this order were not complied with since the requirement is that such a procedure ought to have been followed where the application for execution is made more than one year after the date of the decree. The provisions of this order are couched in mandatory language.

12. I also find that the memo of appeal raises weighty issues of the applicability of international treaties in Kenya. I bear in mind that I raise this issue on my own motion (suo motu) because the liberty of the applicant is at stake.

13. It therefore follows that the applicant's application succeeds in terms of prayer numbers 2, 3 and 4 of the notice of motion dated 12/9/2018; with the result that the applicant will have the cost of this application.

Ruling delivered in open court this 13th day of November, 2018 in the presence of Ms Adallah holding brief for Mr. Otieno and in the absence of Mr. Nyamwange for applicant.

J. M. Bwonwonga

Judge

13/11/2018