



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 505 OF 1995

MARY APONDI ONGORO.....PLAINTIFF/RESPONDENT

VERSUS

KENBLEST LIMITED.....1ST DEFENDANT

WANJORA NJUNGE.....2ND DEFENDANT

FRANCIS NGIGE NGANGA..... 3RD DEFENDANT

FREDRICK WAWERU.....4TH DEFENDANT

RULING OF THE COURT

The Application

1. The 3rd and 4th defendants' Notice of Motion dated and filed herein on **26th September, 2016** prays for the following orders;

- a. That this application be certified as urgent and service be dispensed with in the first instance.
- b. That the Court be pleased to grant leave to **M/S Peter N.Musila Advocates** to act for the 3rd & 4th defendant/applicants in place of **M/S Kimani & Michuki Advocates**.
- c. That there be stay of execution of the Judgment and Decree in this Suit pending the hearing and determination of this application.
- d. That an Order of account be taken to ascertain the decretal amount due from the 3rd & 4th defendants/applicants.
- e. That the 3rd defendant/applicant be allowed to liquidate the ascertained decretal sum in monthly installments of Kshs. 2000 w.e.f 30th September, 2016 or such other sum as the Court may order until payment in full.

2. The application is supported by affidavit of **Francis Ngige Nganga** – the 3rd defendant sworn on **26th September, 2016** and a Supplementary Affidavit of the same person sworn on **31st October, 2016**. The applicant's case is that the Plaintiff/Respondent has commenced execution proceedings against the 3rd Defendants /Applicant's movable property which were proclaimed on 8th September, 2016. The claim

arises out of a Road Traffic Accident on 17th June, 1994 involving the 3rd defendant/Applicants motor vehicle which had been insured by Stallion Insurance Company Ltd and the 3rd defendant/applicant has always been under the impression that the claim was settled. It is alleged that the 3rd Defendant/Applicant is currently not in any meaningful employment and should the attachment of movable goods including his livestock proceed he will suffer irreparable loss as they are his sole source of income. Further it is alleged that no notice was issued against the 3rd defendant/respondent before these execution proceedings were commenced, and that it is in the best interest of justice that this application be allowed and Orders sought granted.

The Response

3. The application is opposed by the plaintiff/Respondent through a Replying Affidavit sworn by the plaintiff on **21st October, 2016**. The Respondents' case is that the application is not merited, and that it seeks to secure a prayer which the applicant has not expressly prayed for, viz; order to set aside the warrants of attachment issued on **26th August, 2016**.

Submission

4. Parties filed submissions which I have considered. The applicant submitted that The Application was brought to counter to an irregular execution process by the plaintiff/respondent as clearly seen in the court record. The applicant submitted that **Order 22 r 18** provide that where an application for execution is made more than one year after the date of the decree the court shall issue 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. The applicant submitted that as deponed in both affidavits of the 3rd defendant/applicant he was never served with a notice to show cause on 19th July, 2011 and all further processes thereafter were done by way of correspondence by the Advocates for the Plaintiff/Respondent as clearly sworn in the annexure marked "MAO 16" "MAO 17" of the plaintiff/respondent replying affidavit sworn on **21st October, 2016**.

5. It was over one (1) since the matter was in court and since the decree was issued and as such all orders and subsequent processes from 29th July, 2011 were unprocedural and the warrant of sale of property in execution of the decree issued on 26th August, 2016 were improperly issued. It is evident that they were issued after five (5) years since the matter or orders were issued and the correct procedure would have been to issue fresh notices. The 3rd defendant/applicant having deponed that he was never served with the Notice to Show Cause to appear in court on 29th July, 2011 he was not able to contest the amount claimed or show his proposed mode of payment.

6. The respondents submitted that the court can only grant orders which have been expressly sought by an applicant. It was submitted that the applicant has not sought for any orders to set aside the warrants of attachment issued on 26th August, 2016.

7. The applicant, through his submissions dated 1^{0th} November, 2016 argued that the execution process followed by the respondent herein was irregular, as it did not meet the requirements of **Order 22 Rule 18**.

8. **Order 22 Rule 18** of the **Civil Procedure Rules** states as follows;

Where an application for execution is made-

a) More than one year after the date of the decree;

b) Against the legal representative of a party to the decree; or

c) For attachment of salary or allowance of any person under rule 43,

The court executing 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. Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment- debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

10. The respondent submitted, correctly in my view, that the scenario in this case falls under the proviso above stated ***“Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application ismade on any previous application for execution...”***

11. It is apparent that the execution attempted by the respondent is not the first of its kind. In her replying affidavit sworn on the 21st October, 2016, the respondent produced “MAO 10 and 11” which are the application for execution and notice to show cause dated 17th March, 2005. This notice was extended several times but the Applicant was not served with it since he could not be traced.

12. Thereafter, as produced by the respondent and marked as “MAO 12”, another application for execution was made on 3rd May, 2007, with another notice to show cause issuing on 16th November, 2007 which was served on the Applicant together with a hearing notice dated 26th November, 2007, alerting him to show cause on 6th December, 2007. This court subsequently issued a warrant of arrest marked “MAO 13” indicating that the court was satisfied that the Applicant had been adequately served.

13. The Applicant was thereafter arrested on 8th January, 2009 and positively identified by the respondent’s daughter as indicated in the investigative report marked “MAO 14”. During this arrest he was made aware of a judgment against him, leading to the execution proceedings against him.

14. Thereafter, the Applicant was once again issued with another notice to show cause which was served on himself, as indicated and marked “MAO 15”. The Applicant failed to appear in court on 29th July, 2011 and the court gave orders to have him arrested. The advocates on record for the respondent requested that warrants of arrest be issued against the Applicant in a letter marked “MAO 16” and dated 8th August, 2011.

15. Via a letter dated 8th May, 2012 and marked “MAO 17” the advocates on record for the respondent requested a re-issue of the warrants of arrest. The respondent engaged the services of investigators who indicated that the applicant was out of the country in a report dated 16th April, 2013 and marked “MAO 18”. The investigators searched for the Applicant until they confirmed his physical residence in a letter dated 14th March, 2016 and marked “MAO 19”.

16. In the case of ***National Bank of Kenya v Lucy Muthoni Kahia Magelo & 2 others [2005] eKLR*** the court, in dismissing a similar application, had this to say;

“The record of the court shows that summary judgment against the 1st defendant was passed on 18th November, 2002. Preliminary decree was issued on 8th September, 2003. On 16th September, 2003 the Decree-Holder applied for execution of that decree, and warrants of attachment and sale of moveable property in execution of decree were issued by the court on 22nd September, 2003. These were returned unexecuted on 22nd October, 2003. The Decree-Holder applied for a re-issue of these warrants on 27th February, 2004. The warrants were re-issued on 9th March, 2004. They were lawfully so re-issued as the

application for re-issue was made within one year from the date of the warrants issued on 22nd September, 2003. Apparently these re-issued warrants of attachment and sale were also not executed. On 17th November, 2004 the Decree-holder again applied for re-issue of the warrants, and they were re-issued on 2nd December, 2004. These are the warrants said to offend Rule 18(a) of Order 21 aforesaid. These warrants were re-issued on 2nd December, 2004 upon the Decree-Holder's application dated 17th November, 2004. That application was made within one year from the date of the last order against the Judgment-Debtor made in the form of the warrants re-issued on 9th March, 2004. In my judgment therefore this third execution process came within the aforesaid proviso, and it was not necessary for a notice to show cause to be issued to the Judgment-Debtor."

17. The application of the proviso in **Order 22 Rule 18** was also applied in the case of **Odhiambo Owiti & Company Advocates v. Standard Assurance (K) Limited & 3 others [2015] eKLR**, in which the court dismissed a similar application while declaring;

"My finding is that the Decree Holder/Respondent's case falls under the proviso. Whereas the decree herein is more than a year old the last order in the case is that contained in the judgment of the Court of Appeal dated and delivered on 13th March, 2015 and there is also evidence on the record that previously this Court had ordered execution against the 3rd Garnishee/Applicant.

Accordingly that application is also dismissed."

18. It is therefore clear that the execution from which this application is pegged is not the first execution attempt made by the Respondent, but rather the latest in a series of attempts to get the Respondent the fruits of her judgment. It is also apparent that the Applicant's assertions that he was not aware of any judgment against him are false, since he was arrested after failing to appear in court after being served with a notice to show cause, a fact which he has not denied.

19. From the foregoing, it is clear that the applicant has come to this court with unclean hands. He is a person who has all along known that a judgment and decree were issued against him. He has attempted to avoid every Notice to Show Cause for so long that when the last one caught up with him, he now pretends to be a law abiding citizen and runs to this court for safety. However, this court cannot be duped. It is more than sixteen (16) years since judgment was entered against the applicant. That is a very long time to wait. It is not sincere for the applicant to state as he does at paragraph 6 of his supporting affidavit that after the judgment he was never notified what transpired. This despite the fact that in 2005 he was arrested by OCS Thika police station in an attempt to execute the decree. Those who come to court to seek equitable orders must be prepared to say the truth.

20. For the foregoing reasons, the application fails for lack of merit except that leave is granted to **M/S Peter N. Musila** advocate to come on record for the 3rd and 4th defendants/applicants in place of **M/S Kimani & Michuki** advocates.

21. Costs of this application be for the plaintiff/respondent.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Musila – for Applicant

Gichumbi – for Respondent