



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 131 OF 2002

NATIONAL HOUSING CORPORATION...DECREE HOLDER/APPLICANT

VERSUS

LAWI KIPLAGAT.....JUDGMENT DEBTOR/RESPONDENT

RULING

1. The applicant herein has filed a notice of motion dated 12th May, 2015 seeking the following orders:
 - i. That this honourable court be pleased to grant an order permitting it to utilize the respondent's property known as Flat No. J4-14 located in Kibera Highrise within Nairobi County (herein after called '*property*') as part payment of the outstanding decretal amount in the decree herein dated 8th July, 2002.
 - ii. That this court be pleased to order for the attachment and sale of the property in execution of the decree.
 - iii. That this court be pleased to issue a prohibiting order against the respondent from transferring or charging the property in any way and any other person(s) from taking any benefit from such purported transfer or charge.

2. The motion is brought under order 22 rule 9 (a) and (b), 48 (1) of the Civil Procedure Rules and sections 1, 3 and 3A of the Civil Procedure Act. It is supported by the affidavit of Kennedy K. Munala who is the applicant's legal officer. He stated that judgment was entered in this suit against the respondent on 8th July, 2002 for the sum of KShs. 18,883,261.90/= together with interest of KShs. 371,900/=. That the respondent has neglected to make good the judgment. That the applicant applied to this court to issue warrant of attachment to enable it to attach and sell by public auction, the respondent's movable properties. That there has been one successful attachment where the applicant recovered KShs. 6,515,463/=. That since then, the year 2011, efforts by the applicant to recover the outstanding sum have been thwarted by a series of applications by the respondent. That the total decretal amount as per the notice to show cause issued by court on 13th November, 2014 was KShs. 43,473,061.02/=. That in the year 2011 the respondent filed an application seeking to set aside the judgment but the same was dismissed. That upon dismissal of the respondent's application, the applicant has made attempts to execute the decree to no avail since the respondent has transferred his properties to various third parties. That the applicant has also made applications to court to have the respondent arrested but it has been unable to trace the respondent. That the applicant is at the verge of transferring the property herein to the respondent which property the respondent bought from applicant by an agreement entered into in

December, 2000. That the applicant is apprehensive that if the said property is transferred to the respondent, he will transfer it to a third party and the applicant is unable to trace the respondent's property both movable and immovable for purposes of execution save for the property stated herein.

3. The respondent opposed the motion by his replying affidavit sworn on 24th November, 2015. He denied that his failure to furnish the decretal sum was deliberate. He contended that he indicated earlier in these proceedings that he was never served with summons to enter appearance in this matter and that he was not aware the matter proceeded ex parte. That he has not refused to settle the decretal sum since his property LR NRB BLOCK 99/113 was attached for KShs, 6,515,463/=. That the applicant has failed to comply with or move the court to ensure the compliance of the requisite provisions of the law in relation to endorsement of the process initially undertaken by the applicant i.e. issuance of warrant for committal and verification of inability to execute the said initial mode of execution. That the record shows that the applicant sought a change of the mode of execution by way of a letter dated 23rd October, 2014 seeking to re-issue the notice to show cause. That as a consequence thereof, the present notice to show cause and the present application is fatally defective and the initiated sale of LR NRI BLOCK 99/113 was irregular.

4. The applicant's submissions were essentially a repetition of the averments in the affidavit while the respondent beefed his with legal backing. The respondent specifically made reference to legal provisions. The respondent submitted that the mode of execution and endorsement of process in regard to warrants of attachment and sale was not done according to the laid down procedure and law. Section 38 of the Civil Procedure Act and Order 22 rule 7 (j) were therein cited. It was further submitted that order 22 rule 6 and 13 (2) requires a judgment creditor to apply for execution to the court that passed the decree and that if application for execution is amended, it should be signed and dated by the judge or registrar. That in the instant case, the mode of change of execution was done by an ordinary letter. That order 9 provides for description of the immovable property and the specification of the judgment debtor's share of interest in the property. That there was no endorsement of the execution process as required under order 22 rule 21 (1) which requires the applicant to show the manner in which the warrants were executed or reasons for non execution of the warrants as the case may be in respect of the initial mode of execution. It was submitted that under Order 22 rule 9 an application of immovable property should contain certain particulars.

“where an application is made for the attachment of any immovable property belonging to the judgment debtor, it shall contain at the foot-

(a) A description of such property sufficient to identify the same, and in case such property can be identified by boundaries, numbers in government records or surveys, a specification of such boundaries or numbers; and

(b) A specification of the judgment debtors share or interest in such property to the best of the belief of the applicant and so far as he has been able to ascertain the same.

Order 22 rule 21 (1) provides as follows:

(1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason for the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the court may examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

5. In the instant case, the provisions of order 22 rule 21 (1) were not adhered to. However, it is not explained why the respondent waited until this application was made for him to raise it, in my view, the said rebuttal is an afterthought and has come after the fact.

6. The procedure for execution is provided for in Order 22 Rule 13(4) of the Civil Procedure Rules. The said position was reiterated in the case of **Mandavia v. Rattan Singh Civil Appeal No. 27 of 1967 [1968] EA 146** as follows:

“The words “formal order for attachment and sale of property may be made by the Registrar” in Order 48, rule 3 must mean that the Registrar has to actually consider the application before him and then make the necessary orders to effect the attachment of the sale. Formal order here does not mean that the registrar has only to prepare and issue a formal order which has in fact already been made by the judge, as for instance where he draws and signs a decree after the judgment or as in this case an order after the judge has decided an application. In such cases, the registrar does not “make” the order, he only prepares the order already “made” by the judge. Rule 3 must empower the Registrar to consider the proceedings before him and then in his discretion himself make an order. In a sense this will usually only be a formal order as a judgment has already been obtained and, if not settled, execution against the judgment debtor’s property will follow as a matter of course without dispute, and the rule goes on to make it clear that if any dispute arises, then on the objection being taken in the manner provided, the matter will be taken over and dealt with by a judge. Order 48, rule 4 provides that for the purposes of rules 2 and 3 the registrar shall be deemed to be civil court, so that in effect a registrar sitting to deal with applications or proceedings under rule 3 would be the presiding officer of a civil court, and a civil court here must mean a tribunal where civil issues are settled and not just a body that is only going to put into formal phraseology an order already made on an issue tried and disposed of by a judge. Form 27 in Appendix D of the schedule to the rules sets out the form of the notification of sale under rule 61 and this does provide for the signature by “judge” but in this connection it is to be noted that judge is defined in section 2 of the Civil Procedure Act as meaning “the presiding officer of a civil court” and this would include the deputy registrar when he is acting under the provisions of Order 48 rule 3...It is clear that Order 48 rule 3 confers on the registrar not merely the power to make formal orders of attachment and sale, but also to conduct ‘proceedings thereunder’, at any rate until some formal objection is taken by motion on notice whereupon all further proceedings are to be before a judge. This must be the position here since the intention of this rule is to allow the registrar to conduct the necessary proceedings, and issue the appropriate directions and orders so as to carry out an execution by way of attachment and sale of property, provided that the proceedings are not contested. Therefore the expression “formal orders for attachment and sale of property” include not only the actual orders for the attachment and sale but any other consequential orders, which are necessary to effect this purpose, and this includes an order made under rule 61.”

7. The court has considered the application, and the submissions by the parties. It is not disputed that there is a judgment against the judgment debtor and that he has already satisfied part of the decree. Though he alleges that he was not served with the summons to enter appearance, he unsuccessfully applied to set aside the interlocutory judgment but the application was dismissed. He did not appeal against that ruling.

8. The only reason why the judgment debtor is opposing the present application, is purely on a technicality in that the re-issue of notice to show cause was not done as per the laid down procedure under the Civil Procedure Rules. Article 159 (2) (d) is very clear on procedural technicalities.

That justice shall be administered without undue regard to procedural technicalities. In view of the foregoing, I find and hold that the application dated 12th May, 2015 has merits and it is hereby allowed as prayed.

Costs to the decree holder applicant.

Dated, Delivered and Signed at Nairobi this 9th day of March, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of

..... ***For the Decree Holder/Plaintiff.***

.....***For the Judgment Debtor/Respondent***