



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
MISC. CIVIL APPLICATION NO. 16 OF 2013
CONSOLIDATED WITH
MISC. CIVIL APPLICATION NO. 13, 14, 15, 17, 41 AND 42 OF 2013
KENYARIRI & ASSOCIATES ADVOCATES DECREE HOLDER
VERSUS
SALAMA BEACH RESORT LIMITED 1ST RESPONDENT
HANS JUERGEN LANGER2ND RESPONDENT
ZAHRA LANGER 3RD RESPONDENT
STEFA UCCELI 4TH RESPONDENT
ISAAC RODROT 5TH RESPONDENT
AND
TEMPLE POINT RESORT LTD OBJECTOR/APPLICANT

RULING

The respondent, M/s Kenyariri & Associates Advocates acted for the applicants in several court matters. The advocate/client relationship came to an end. The advocate's bills were taxed at Kshs.2,271,387.95. The respondent made an attempt to execute and recover his costs but has not been successful.

On 11th August, 2016, the clients/judgement debtors filed an application seeking an order of stay of execution of the judgement and decree in favour of the respondent pending the hearing and determination of suit number Malindi HCCC No. 20 of 2015, Salama Beach Hotel & 3 others v Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates. In this suit, the client contends that it had made payments to the advocate and those payments were not taken into account when the respondent's fees were taxed. Part of the payment is alledged to have been in form of a motor vehicle bought by the client and for the benefit of the advocate.

On his part, the advocate filed an application dated 23rd September, 2016 seeking to have the decretal

sum as per the taxed costs be deposited in court or in an interest earning account. Counsels for both parties agreed to have both applications heard together and determined by way of written submissions.

On his part, counsel for the clients/applicants maintain that there is threat to have the directors of the first judgement debtor committed to civil jail. The judgement creditor has not made any other alternative modes of execution. The threat to have the directors arrested and detained in prison is intended to achieve ulterior motive. No notice to show cause has been issued. It is submitted that the respondent should exhaust all other available and existing mode of execution under section 38 of the Civil Procedure Act and other enabling laws before seeking to have the applicants arrested. It is further submitted that the intended arrest and detention of the applicants is illegal, unlawful and unconstitutional and is only intended to shame, humiliate and subject the judgement debtors to shame and indignity. Several authorities have been cited in support of the submissions. These include the Indian Supreme Court case of **JOLLY GEORGE VERGHESE & ANOTHER V THE BANK OF COCHIN; 1980 [AIR] 470, 1980 SCR (2) 913**. In that case the court held inter alia: -

“Unless there be some other vice or mens rea apart from failure to foot the decree, international law frowns on holding the debtor’s person in civil prison, as hostage by the court. India is now a signatory to this Covenant and Article 51 (c) of the Constitution obligates the State to “foster respect for international law and treaty obligations in the dealings of organized peoples with one another”. Even so, until the Municipal Law is changed to accommodate the covenant what binds the courts is the former not the latter.

Counsel for the applicants maintain that the execution method of having a judgement debtor arrested and detained in civil jail is both draconian and illegal. Counsel also relies on the case of **RE ZIPPORA WAMBUI MATHARA, MILIMAN, BANKRUPTCY case number 19 of 2010 [2010] eKLR** and that of **BEATRICE WANJIKU & ANOTHER V THE ATTORNEY GENERAL & ANOTHER Nairobi Petition No. 190 of 2011, (2012) eKLR**. Reference has also been made to Article 11 of the International Covenant on Civil and Political Rights which states: -

“No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.”

Counsel for the applicants maintain that it would be prudent to await the outcome of Malindi Civil Suit No. 20 of 2015 where the plaintiffs are claiming over Kshs.2.8 million against the judgement creditor which amount is more than the taxed bills.

Mr. Opolu contends that the applicants have paid the respondent over Kshs.20 million. The applicants should therefore not be called upon to deposit the decretal sum in court as the applicants are not intending to abscond. Further, in view of the applicants’ pending suit, the respondent’s claim can be offset against what is being claimed by the respondent.

On his part, Mr. Kenyariri submit that the judgement debtors are German nationals who may abscond from the court’s jurisdiction thereby making the decree impossible to execute. It is further submitted that execution was done on the applicant’s property but objection was raised. Since the decree has been long overdue, it would only be fair to have the taxed sum deposited in court or in an interest earning account.

With regard to the judgement debtor’s application, Mr. Kenyariri maintains that the judgement debtors have simply refused to pay and satisfy the debt. They are not unable to pay the debt but are unwilling to pay. There is a legal obligation to pay the debt and abide by the outcome of the taxation.

The record shows that there was an attachment on goods that were thought to be owned by the judgement debtors. An application was made by Temple Point Resort Ltd objecting to the execution. The reason behind the application was that the goods do not belong to the judgement debtors. This court upheld the objection. The respondent issued a notice to show cause why execution should not issue against the 2nd judgement debtor. The notice is dated 14th July, 2016. That notice led to the filing of the application dated 11th August, 2016 seeking stay of execution among other orders.

I do not wish to dwell on the issue of whether committing a judgement debtor to civil jail is inhuman or unconstitutional. I will also not dwell on Mr. Opolu's contention that the 2nd judgement debtor is being discriminated as he is a foreigner. The simple fact is that he is a director of a company registered in Kenya which company instructed the respondent to undertake legal services. His being targeted for civil jail is simply as a result of his directorship and not due to his nationality or foreign status.

The dispute herein revolves around the respondent's pursuit of his taxed legal fees against the judgement debtor's contention that there is a pending civil suit between the parties. The respondent is a holder of a decree while the judgement debtors base their position on the assumption that the pending suit will be determined in their favour. That is a presumption which is yet to crystalise. It cannot stand on equal footing with an existing decree.

Whereas the applicants are entitled to pursue their suit against the respondent, the respondent is equally entitled to enjoy the fruits of his judgement. Mr. Opolu states in his submission that the court has a duty to balance the interests of all the parties before it in all cases and circumstances. That is the exact position this court intends to consider. The applicants' right to prosecute their case vis-à-vis the respondent's right to enjoy the already processed decree.

The respondent made an attempt to execute against the applicants. That execution process did not materialize. It appears that as of now, any other execution mode may not yield positive results as the only attachable properties were found to belong to a third party. The respondent cannot be told to exhaust other modes of execution as there appear to be none.

My considered view in the entire dispute and in line with the act of balancing each party's rights is that the applicants should pursue their pending civil suit to its utmost end without the fear of looming execution. While the applicants pursue their suit, the respondent should rest assured that should the applicants' suit be dismissed, he shall not be subjected to another execution process. That calls for the deposit of the decretal sum in court so that it would be easy for each party to access the deposited sum. The applicants will be entitled to claim the amount deposited in court should they succeed whereby the taxed costs will be offset against their decree. On the other hand, the respondent will be entitled to claim the deposited amount should the applicants' suit terminate in his favour. That way each party will be the winner. The applicants won't be harassed through constant execution while pursuing their suit while the respondent will not be pondering on his next move to effect his decree.

There is the request by the applicants to have this court apportion liability upon the decree amongst the judgement debtors. I think it is too late for the court to apportion liability at this stage of the dispute. My understanding of the dispute is that the respondent was instructed by Salama Beach Resort Limited to render legal services. The individual judgement debtors have been included in view of their perceived positions in the company. This court cannot share out the liability amongst the directors or workers of a company. The services were rendered to the company and the costs have already been taxed. The request to distribute liability cannot stand.

In the end, I do find that both applications are merited. The applicants' application dated 11th August, 2016 is granted in terms of prayer three (3) whereby there shall be stay of execution of the decree in favour of the respondent pending the determination of Malindi HCCC No. 20 of 2015. Equally, the respondent's application dated 23rd September, 2016 is hereby granted in terms of prayer two (2) whereby the applicants are hereby ordered to deposit in court the sum of Kshs.2,450,374 within Ninety (90) days hereof. Each party shall meet their own costs for both applications.

Dated and delivered in Malindi this 1st day of December, 2016.

S.J. CHITEMBWE

JUDGE