



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 23 OF 2013

NAIVAS LIMITED.....PLAINTIFF

VERSUS

NEWTON NYORO MUKUHA T/A GREENMART STORES.....DEFENDANT

GREENMART STORES LIMITED.....OBJECTOR

RULING NO. 3

1. By the application dated 9th November 2015, the defendant sought orders to stop the court broker from taking steps to finalise the process of execution. That became necessary after the Court broker had attached the defendant's vehicle registration **KBX 383 M**.
2. Secondly, the defendant asked the court to discharge or set aside the proclamation and the warrants of attachment which the Deputy Registrar had extended on 21st October 2015.
3. The primary reason for seeking the settling aside of the execution process was that the Deputy Registrar had no lawful authority to extend a warrant of attachment which was more than one year old.
4. In this case the first attempt to execute the warrant was undertaken on 21st March 2014.
5. Thereafter, the Decree-holder did not take any steps to execute the Decree until 21st October 2015. Clearly, by 21st October 2015, over a year had lapsed since the plaintiff had last taken steps to execute the Decree. Therefore, the defendant invoked Order 22 Rule 18 of the Civil Rules to submit that the plaintiff should have taken out a Notice to Show Cause.
6. The said Rule 18 provides as follows;

“(1) 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 the 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.

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 judgement – debtor, if upon a previous application for execution against the same person the court had ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgement-debtor having changed his employment since a previous order for attachment.

(2) Nothing in sub-rule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgement debtor before execution is issued against him?.

7. In the light of the rule cited above, the applicant submitted that the decree – holder should have taken out a Notice To Show Cause, since the process of execution was being undertaken more than one year after the last step was taken in the case.

8. In **MINI BAKERIES (K) LTD Vs GEORGE ONDIEKI NYAMANGA, CIVIL APPEAL No. 18 of 2013** (at Kisii) Sitati J. expressed the following appreciation of Order 22 rule 18;

“What I discern from the above provisions is that a notice to show cause is issued where an application for execution is made after more than one year after the date of the decree”.

9. There is no doubt that the learned Judge was correct in articulating the basic rule as set out in rule 18 (1) (a) of the Civil Procedure Rules.

10. In the case of **REUBEN NYANGINJA NDOLO Vs DICKSON WATHIKA MWANGI & 3 OTHERS, ELECTION PETITION No. 11 of 2008**, Odunga J. set out the rationale for the requirement of a notice being issued before execution, when a decree was more than one year old. This is what the learned Judge said;

“The requirement for Notice To Show Cause serves two purposes in my view: First, it serves to give notice to the Judgement- debtor to pay the decretal sum in cases where as a result of the lapse of time, he may have forgotten about the existence of the decree altogether; secondly, the requirement for notice to show cause is also meant to put the decree holder on notice that if he delays in pursuing his rights, the process of execution will be subjected to the said notice”.

11. As the decree in that case was over one year old, the learned Judge held that a Notice To Show Cause should have been taken out by the decree holder.

12. In **ROSSLN DEVELOPMENT LTD Vs BIDCO OIL REFINERIES LIMITED, Hccc No. 20 of 2004** Ougo J. dealt with a case in which the decree was more than a year old, yet the decree holder applied for the issuance of warrants of attachment, without first taking out a notice to require the judgement debtor to show cause.

13. The learned Judge held as follows;

“Having not complied with the provision [O.22 rule 18 (1) (a)] then it is only in order that the warrants of attachment and sale be cancelled. Any goods that could have been attached shall be released to the defendants unconditionally”.

14. I do agree with the decision, that where an attachment was carried out in violation of the law, the same should immediately be terminated, and the goods released to the judgement-debtor whose goods had been attached.

15. All the authorities cited make reference to the main rule, however, none of them tackles the situation contemplated in the *proviso* to rule 18.

16. If execution had commenced and was then stopped, the decree holder need not apply for Notice To Show Cause when he restarts the execution process, if he does so within 12 months from the date when the earlier process was stopped.

17. In this case, the parties did, on 8th December 2014, inform the court that they had a consent to record. Indeed, Mr. Njenga, the learned advocate for the plaintiff, did spell out the terms of their said consent.

18. However, immediately after the court had signed the said consent, Mr. Ogeto, the learned advocate for the objector indicated that he had an application.

19. As there appeared to be some un-finished discussions between the parties, the court allowed them time to hold further discussions.

20. But thereafter, both parties failed to return to court to record anything further.

21. In the circumstances, the consent order remained in place.

22. However, the said order was not inclusive of the defendant. Therefore, I hold the considered view that the *proviso* to Order 22 Rule 18 of the Civil Procedure Rules does not apply to this case.

23. I so find because, although the decree-holder was intent on executing the decree against the judgement-debtor, the process appears to have targeted property which did not belong to the judgement-debtor during the earlier process.

24. In the result, I find that the process of execution should have been undertaken through the issuance of a Notice To Show Cause directed at the judgement-debtor.

25. As no such Notice was issued, the issuance of the warrants of attachment was irregular. Therefore, this court has no alternative but to set aside the warrants of attachment. The goods which had been attached are to be released forthwith, to the owners.

26. The decree holder will pay to the judgement-debtor the costs of the application dated 9th November 2015.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Chege for Kiiru for the Plaintiff

Waweru for the Defendant

Collins Odhiambo – Court clerk.