REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

HIGH COURT CIVIL CASE NO.837 OF 2000

PALACE DRY CLEANERS.....1ST PLAINTIFF

GEORGE GIKUBU MBUTHIA……...……..2ND PLAINTIFF

-VERSUS-

KENYA POWER AND LIGHTING .....DEFEDANT RULING

1. The application before this court is a Notice of motion dated 2/8/2013. The same is brought under Section 1A (3) of the civil procedure Act. The applicant seeks orders that, the orders given by the Deputy Registrar Wangila on 18th June and 18th July 2013 and the warrants of arrest be struck out and that the costs of the application be provided for.

2. The application is based on the following grounds; that the applicant was forced to close its business by the draconian acts of the defendant being the sole supplier of electricity in Kenya in 1994. That the applicant is and still remains the director of the said company. That the plaintiff filed this suit in 2000 and served the summons to the respondents to enter appearance and copy of the plaint. That the respondent did not enter appearance and did not file a defence mandatory requirements of Order IX rule 2 and Order VII rule 1(2) respectively of the Civil Procedure Rules. That the respondent did not specifically transverse the allegations of fact and law pleaded by the plaintiff and by virtue of Order VI rule 9(1) of Civil procedure Rules, the allegations on the plaint are deemed to be admitted and. Therefore there are no issues of fact or law pending to be tried now and in future. That the respondent's affidavits and legal arguments filed in court so far have not been predicted on any pleadings and law canvassed in its affidavits are not supported by any decree. That the 2nd plaintiff and respondent have pending applications and appeals not yet disclosed by the respondent as follows; Civil appeal No.2 of 2005, Civil appeal No.114 of 2006, Civil appeal 126 of 2010, Civil application No. Nai. 93 of 2013.That the court failed the 1st principal test of committal and arrest for a judgment debtor since the judgment debtor has since the date of decree had means to pay the amount of decree without ascertaining that the applicant has never been declared a judgment debtor. That the court failed a 2nd principal test of committal and arrest for a judgment debtor namely production of namely the production of a decree capable of execution. That the respondent method of rushing to apply and obtain warrants of arrest after the applicant served it with HMCA case no.101 of 2005 is designed to scuttle hearing of the appeal and the application. That there can be no execution of any decree and certificate of costs cannot form and the high court in the past has struck out such warrants of execution. That the defendant herein is not a decree holder the mandatory requirement of section 38 of the Civil Procedure Act and order 22 rule 31 of the Civil procedure rules and therefore cannot purport to be executing a decree by arrest and detention of the 2nd plaintiff. That the past practice of having magistrate and judges on the bench unlawfully fix cases for the benefit of wealthy merchant lawyers to the detriment of Wanjiku has to stop in adherence of the new constitution 2010.

3. The application is supported by the sworn affidavit of George Gikubu Mbuthia dated 2nd August, 2013 where he reiterates the grounds on the face of the application.

4. The application is opposed and there are grounds of opposition filed dated 15th August, 2013. The respondent avers that the application is fatally defective frivolous and vexatious. That all the grounds raised in the application are res-judicata the same having been determined by various courts over the years. That what the respondent seeks to execute are orders of costs which the applicant has blatantly refused to pay. That there are no orders staying execution, as all applications seeking stay had been dismissed by both the superior court and Court of Appeal. That the application is a blatant abuse of the Court process particularly paragraph 13 which impunes the dignity of the court. That the applicant should not be given audience until he has paid all outstanding costs.

5. The application came up for hearing on 4/11/2013. Mr. Gikubu acting in person sought prayers (a) and (b) of his application and relied on the grounds on the face of his application. He argued that the defendant did not defend the suit that there were appeals and an application which hadn't been heard. He argued that Order 6 rule 9(1) Civil Procedure Rules the defendant failure to file a defence was admitting the claim. That the defendant did not have a decree to execute, that section 33 of the Civil procedure Act requires one to have a decree and not a court order. That it was the respondent had already admitted that they are executing a certificate of costs. He sought to rely on the case of ***Obutu and Co. Advocates –vs- Lorna Jebiwott Kiplangat HMCA no.101 of 2005*** where it was held;

   "What this court is concerned with at the onset is that the warrant of arrest and committal which has been issued a form of execution and any subsequent execution of the "decree" herein on the assumption that indeed then is a "decree". As I have repeatedly stated that there can be no execution of any decree of in fact thereon, no decree. A certificate of costs cannot be a decree."

   He argued that the defendant did not file a defense and thus the grounds of oppositions filed are null and void. He added that the defendant counsel cannot address the court without a defense.

6. Mr. Makori for the respondent sought to rely on their grounds of opposition. He argued that the applicant's application was seeking to set aside the warrants of arrest resulting to an application of Notice to Show Cause which he failed to attend. He stated that the applicant filed this suit in 2000 obtained interim orders pending the hearing and determination of the suit which he failed to serve. That the defendant moved the court to dismiss the suit and the court gave its orders and the defendant was awarded costs. He admitted that they were heard without a defence as the matter pertained to two certificates filed in court. That the applicant appealed the same and his appeals were dismissed that there is one application dated 3/5/2013 that is yet to be heard. That there was no order staying execution. He urged the court to go through the file and rule that the application is an abuse of the court process. On the issue that there is no decree to execute he argued that the matter was not determined and added that the respondent only taxed for that which he is entitled to. He urged the court to dismiss the application.

7. Mr. Gikubu in reply stated that since the respondent failed to file a defence they are not entitled to costs. Order IX rule 2- on recognized agents. Order VII rule 1(2)-provide that upon being served with summons should file a defence or enter appearance within 14 days from the date of filing his defence.

8. The applicant herein has made numerous applications seeking similar orders. Upon perusal of the court file it is evident that the applicant herein has made numerous applications seeking similar orders in superior courts all of which have been dismissed with costs to the defendant. A brief history. The plaintiff herein filed the suit in 2000 and made an application obtaining interim orders pending hearing and determination of the suit. Upon obtaining the said orders he failed to serve summons upon the defendants to enable them file their defence despite being directed to do so by the court. The defendant two years later applied for the suit to be struck in an application dated

24/06/2002 out for want of prosecution and the same was allowed on 20/02/2006 with costs to the defendant. It's in pursuant to the costs awarded by the court that the defendant's taxed the certificate of cost which they seek to execute. This was however not possible as the plaintiff filed numerous applications seeking stay and invalidation of the taxation of costs. Application to set aside taxation dated 15/3/2008 was dismissed by J. Khamoni, which led the applicant file application dated 31/3/2008, 5/6/2008 and 9/9/2008. The defendant filed another certificate of taxation on 18/11/2009 and the plaintiff filed an application dated 18/11/2009, application 22/02/2010 seeking stay was dismissed on 3/05/2010 by J. Mwera. The plaintiff appealed J. Mwera's decision in application dated 4/05/2010 which was similarly dismissed. Application civil appeal nai. 96 of 2010 seeking stay similarly dismissed on 16th July 2010.

9. I have carefully read and considered the affidavits and oral and written submissions made by the parties and concluded that the issues to be determined in this matter are;

i. Whether the 2nd plaintiff has shown good cause to warrant the setting aside of the orders by the Deputy Registrar Wangila on 18th July 2013 and warrants of arrest issued on 31st July 2013
ii. Whether the applicant's application is res-judicata.

10. The applicant has moved the court under Section 1A(3) which provides;

"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court". The same is in furtherance to expeditious litigations.

The Orders and warrants of arrest the 2nd plaintiff seeks to vacate are on execution emanating from the taxation of certificate of costs. A keen look at the documents on court record there is no stay of execution staying the said execution.

11. On the issue as to whether the plaintiff's application is res-judicata. The respondent has argued that the plaintiff's application is res-judicata. It is trite law that in order to rely on the defence of res judicata there must be:

(i.) a previous suit in which the matter was in issue;

(ii.) the parties were the same or litigating under the same title.

(iii.) a competent court heard the matter in issue;

(iv.) the issue has been raised once again in a fresh suit.

Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya Provides that:-

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court." In the case of ***UHURU HIGHWAY DEVELOPMENT LIMITED v CENTRAL BANK OF KENYA & 2 others [1996] eKLR***

"There is no doubt at all that provisions of section 7 of our Civil Procedure Act relating to res judicata in regard to suits do apply to applications for execution of decrees but there is no doubt, also that these provisions are governed by principles analogous to those of res judicata. See pages 536 and 537 of Mulla on the Code of Civil Procedure vol. 1 13th Edition.

12. The 2nd plaintiff has evidently abused the court process by filing several suits and applications so as to prevent the defendants from recovering its costs. In the case of ***SHAH v. MBOGO [1967] E.A. 116*** Justice Harris said at p.123-

"I have carefully considered...the principles governing the exercise of the court's discretion to set aside a judgment obtained exparte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

The plaintiff seeks to rely on section 1A (3) of the civil procedure Act. The same provides that:

"A party to civil proceedings, or an advocate for such party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the direction and, orders of the Court."

The Court of Appeal in ***Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010***, held that:

"overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained".

The 2nd plaintiff was served with the notice to show cause but failed to attend court leading the court to issue the said orders and warrants of arrest. The orders have been properly obtained and no sufficient reasons have been advanced to set it aside. I find that the plaintiff is undeserving of any relief. The applicant's application is dismissed with costs to the defendants.

Orders accordingly.

Dated, signed and delivered this ***6TH*** day of ***March*** 2014.

R. E. OUGO

JUDGE

In the presence of:-

…….....For the Applicant/2nd plaintiff

……For the Respondent/Defendant

……...……..Court Clerk