



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 2892 of 1993

JAMES H. GITAU MWARA.....PLAINTIFF

V E R S U S

THE ATTORNEY-GENERAL.....DEFENDANT

R U L I N G

1. In a ruling dated 3rd and delivered herein on 7th December 2012 the court (Waweru, J) dismissed an application by the Defendant to set aside the judgment dated and delivered on 9th June 2010 (notice of motion dated 15th December 2011).

2. Subsequently, the Plaintiff/Decree-Holder filed **notice of motion dated 16th January 2012** which is the subject of this ruling. Two main orders are sought –

“(a) ...

(b) That the decretal sum of KShs 4,749,122/80 already released to the Attorney-General by the Permanent Secretary, Ministry of Home Affairs, in compliance with the decree of this court, be deposited in the Decree-Holder’s Advocates client’s bank account...

(c) That in default leave be granted to the Decree-Holder to institute civil and criminal contempt of court proceedings against the Senior Deputy Solicitor-General, Ms Muthoni Kimani,....

(d) ...

(e)”

3. The application is stated to be brought under **section 3A** of the **Civil Procedure Act, Cap 21** and **section 5** of the **Judicature Act, Cap 8** and also under **Order 52** of the **Supreme Court of England Rules. Order 22, rule 1(a) and (b)** and **Order 51, rules 1, 2 and 3** of the **Civil Procedure Rules** are also cited.

4. The grounds for the application appearing on the face thereof include –

(i) That the Plaintiff has a decree against the Defendant against which no appeal was filed or a stay of execution obtained.

(ii) That the Attorney-General has publicly directed all Permanent Secretaries to comply with all court decrees against the Government served on them.

(iii) That in October 2012 the Permanent Secretary, Ministry of Home Affairs, duly complied with the court decree herein by releasing to the Attorney-General the decretal sum of KShs 4,749,122/80 for onward transmission to the Plaintiff/Decree-Holder and communication in that was made to his advocates.

(iv) That the Plaintiff's advocates did that all was procedurally necessary to enable the Defendant to release the funds.

(v) That despite all that the Defendant has not released the funds to satisfy the decree.

5. The Defendant has opposed the application by replying affidavit sworn by one MUTHONI KIMANI, a Senior Deputy Solicitor-General. She depones, in part, that among her duties is "to review and approve settlement of decrees against the Attorney-General issued by various courts to litigants", whatever that may precisely mean. She also goes on to argue the issues canvassed in the application that resulted in the ruling dated 3rd and delivered on 7th December 2012.

6. The learned counsel also points out that the Defendant was dissatisfied with the aforesaid ruling and duly lodged a notice of appeal. She is silent with regard to whether stay of execution of the decree was sought or granted, by either the Court of Appeal or this court, in the meantime.

7. The long and short of this matter is that there is a money decree in place in favour of the Plaintiff against the Defendant. There is no stay of execution of decree sought or granted. Needless to say, Muthoni Kimani, Senior Deputy Solicitor-General cannot appear to decree such stay of execution, no matter how noble her intentions. The Defendant's client Ministry has released the necessary funds to the Defendant to satisfy the decree for onward transmission to the Plaintiff's advocates. The Defendant's duty is to release those funds, unless there is stay of execution in place, duly sought and granted by this court or the Court of Appeal. It is not open to the Senior Deputy Solicitor-General to decide whether or not to release the funds. She does not in law have such discretion!

8. In the circumstances I will grant prayers (b), (c) and (e) of the application, save that in respect to prayer (b) a cheque made out in the name of the Plaintiff's advocates on record shall be delivered to them within fourteen (14) days of service of this order upon the Defendant. Those will be the orders of the court.

DATED AT NAIROBI THIS 30TH DAY OF APRIL 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 3RD DAY OF MAY 2013