



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 3 OF 2009

IMANI A. YUMAN.....PLAINTIFF

VERSUS

1. AMINA AHMED ABDULLAH

2. AWES ABU SHEIKH..... DEFENDANTS

Coram:

Mwera J.

N/A for Plaintiff

Ananda for Defendant

Mwakisha for 3rd Party/Applicant

Furaha Court Clerk

RULING

Awes Abu Sheikh, the 3rd party/applicant moved the court on 14th May, 2012 under sections 1A, 1B of Civil Procedure Act and Order 1 rules 17, 19, 21 of Civil Procedure Rules for orders:

- (i) that the *ex parte* judgment entered against him be set aside and leave be granted to file a defence;
- (ii) that the warrant of arrest and other execution proceedings of the said judgment be set aside; and
- (iii) that in the meantime there be a stay of that judgment.

In the grounds it was stated that the applicant had been arrested on execution of the *ex parte* judgment entered against him. He had never been served with any third party processes and in any event the defendant herein had not been found liable in the first place by way of a judgment because the plaintiff's claim was still pending unprosecuted. The applicant filed a supporting affidavit setting out the details of the grounds above. To him, all that had gone on was irregular and invalid, basically that he had at no time been aware of the proceedings in this cause even as the defendant was his relative and a neighbour.

At the *ex parte* stage the applicant was ordered released from civil jail until the hearing of his application *inter parties*.

An affidavit in reply by the defendant (Amina) was to the effect that on 9th July, 2010, Ojwang J, as he then was, made a ruling that the applicant owed the amount stated in the 3rd party notice. That notice was served on the applicant who failed to enter appearance. A due application was then made for a default judgment and one was entered against him. A notice to show cause was served on the applicant for appearance in court on 3rd June, 2011. Seemingly, he failed to show up and a warrant of his arrest was issued and executed. Thus all along the applicant knew of the proceedings herein and even a decree was processed against him when the applicant committed himself to pay this subject sum (annexure AAA 5, 6). So being advised by her counsel that a 3rd party notice was as good as a claim when the applicant did not satisfy it he had to be arrested as it was done. However, if the orders sought are granted the applicant should deposit the subject sum in a joint account. Both parties submitted.

The decision in this matter is that serving a 3rd party notice under the old Order 1 and 14 Civil Procedure Rules now rule 15, is in our present case governed by rule 17 (Civil Procedure Rules 2010).

“17. If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the “third party”) desires to dispute the plaintiff’s claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or to indemnify, as the case may be, to the extent claimed in the third party notice:

Provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the court for leave to enter an appearance, and for good cause such leave maybe given upon terms, if any, as the court shall think fit.”

In the present case the applicant denies that he was at any time served with 3rd party processes. On the other hand the defendant depones that the applicant was served with the third party notice (annexture AAA 1) and also the hearing date of the notice to show cause (annexture AAA 3). While in the first process the applicant was said to have declined to sign for a copy of the 3rd party notice, the process server deponed that he appended his signature to the duplicate of the notice to show cause. In both aspects the applicant seemingly did not enter appearance or appear at the hearing of the notice to show cause.

The defendant averred in the affidavit in reply that Ojwang J. found that the applicant was truly owing the sum stated in the 3rd party notice – Shs. 6.96 million – part payment of a house purchase sum made to the defendant but received by the applicant. The chamber summons that Ojwang J. heard dated 12th October, 2009 was filed by the defendant who sought orders, *inter alia*, to stay execution of a default judgment entered against her. A decree for the claim sum Shs. 6,960,000/= had been extracted on 16th October, 2009 and was in the process of being executed. The learned Judge, while granting the order of stay observed:

“It is obvious in these circumstances that the defendant if sued, will seek to enjoin (sic) Awes Abu Sheikh as a 3rd party. If such a joinder is done, then rights as will accrue to the plaintiff, on the basis of a judicial decision, will at least in substantive part, be made good from the resources of Awes Abu Sheikh.”

The ruling was delivered on 9th July, 2010. A third party, notice was issued on the defendant’s behalf on or about 23rd September, 2010 stating the defendant’s claim as against the applicant, Awes Abu Sheikh as Shs. 6.9 million. The applicant did not enter appearance or defence against that. He did not attend court on notice to show cause either. He has not denied or refuted the contents of affidavits by the process server that he served him with both the 3rd party notice and the notice to show cause. The process server

on both occasions was shown or he knew the applicant.

So in short the applicant was caught under the old Order 1 rule 14 Civil Procedure Rules (now Order 1 rule 17). He defaulted in entering appearance even after due service. He was thus deemed to admit validity of the decree obtained against the defendant – Shs. 6,960,000/=. This was stated in the 3rd party notice. It could be executed against him.

Accordingly, his application before this court is dismissed with costs. He should pay up as per the notice to show cause or go to civil jail. But in the event he desires to contest the 3rd party notice, he has thirty days to deposit Shs. 6,960,000/= in the two lawyers' joint income-earning account then proceed with expedition.

Orders accordingly.

Delivered on 10th July, 2012.

J. W. MWERA

JUDGE