

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2197 OF 1982

GAVAAPPLICANT

VERSUS

GENERAL PRINTERS LTD.....RESPONDENT

Statutes

Civil Procedure Rules order 48 rule 3, order 21 rule 18, 32, 35

RULING

Arising out of an application by way of a notice to show cause why execution should not issue by way of the personal arrest and committal to civil jail of the managing director of General Printers Ltd, some preliminary objections have been raised by Mr Manek, the advocate for the said managing director. This ruling is restricted to those objections.

The preliminary matters raised are (a) that this application is under Order 21 rule 35 Civil Procedure Rules which only relates to a money part of a decree, but the correct rule for an application for delivery of movable property, which is the case her, is rule 27 of that order; (b) that as this decree is over one year old, the procedure laid down by Order 21 rule 18 is first to issue a notice to show cause and then execution proceedings could be undertaken; and (c) that the registrar does not have jurisdiction over this matter, because under Order 48 rule 3, the registrar's power is restricted to issuing the notice to show cause, the does not extend to ordering arrest and committal.

In answer to these objections Mr Akhaabi contended that neither of the preliminary objections can be sustained in law or in fact. He said that the application for execution of the decree was made on December 3, 1984 and the mode of assistance sought of the court was to ask the managing director of the judgment debtor to show reason why he should not be arrested and committed to Civil jail, the legislative provision under which that was to be done not being indicated by the applicant, except that the form used for this purpose was the usual prescribed form. That being so, Mr Akhaabi contended, it was for court to issue the appropriate notice to show cause under the applicable provision of the rule, ie either under rule 18 or rule 32 of order 21: and if the court made a mistake by issuing the notice under rule 32 instead of under the right rule, the mistake should not be ascribed to the decree-holder to his prejudice. He further said that as this decree was over a year old, the notice to show cause was required under rule 18 of Order 21, and that that rule has been Complied with, and that it was for the judgment-debtor now to show the necessary cause. As to the question of jurisdiction, Mr Akhaabi said that objection to jurisdiction must be taken by motion on notice as it is mandatorily required under order 48 rule 3; and that it is only after an objection has been properly raised that the court other than a judge ceased to have jurisdiction. As the question of jurisdiction underlies the rest of the objection and application itself, it is proper to deal with that point first. If there is not jurisdiction, then there will be no point in my making any order in this application. This may be disposed of briefly. The answer is that the Registrar has jurisdiction over all matters arising under order 21 except those arising under rules 28 and 79 of that order. So, the deputy registrar has jurisdiction over this matter.

As for the substantive objections, I agree with Mr Manek that application should generally cite the right legislative provision under which they are made if there is one which covers the point. I consider that such a requirement conduces to convenience and speed. What is equally clear is that if omission to do so results in hardship or injustice the court will not uphold the injurious application. The same goes for a

citation of a wrong provision resulting in injustice.

I have considered the position in this case and I have failed to see where injustice lies. There is none. The judgment-debtor has not been prejudiced in any way. It is the usual notice to show cause why execution should not issue. There is no extra expense or inconvenience involved, The judgmentdebtor or its managing director is duly served with the notice. The reason for coming to the court is clear to the judgment-debtor and its managing director. Ample time to explain its side of the matter is at its disposal. The parties have been before me for this matter before, ie on January 31, 1985, when the matter was postponed to February 19, 1985, for judgment-debtor to show cause why the manuscript in question should not be delivered to the decree-holder. There was no indication all this time that to do so in the present manner would be unjust or would occasion hardship. A party is, of course, entitled to reconsider his strategies in civil litigation at all stages; but all the posture and technic must be for the doing of justice with reasonable speed. Not to delay justice. Not to frustrate it. Not to dawdle in court corridors for fanciful questions at the expense of expeditions of justice.

Having regard for the question in issue and bearing in mind the submissions on both sides, and not losing sight of the need for timeous justice, I overrule the preliminary objections raised by Mr Manek. I hold that I have jurisdiction over this matter. I hold that the application for execution is properly before the court. I so order.

Order: By consent the hearing of the reasons why the managing director of the J/D should not be arrested and committed to civil jail, is stood over to March 20, 1985 at 2.30 pm.

Dated and delivered at Nairobi this 28th day of February 1982

R.C.M KULOBA

DEPUTY REGISTRAR