

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 1009 OF 1972

MWANGI MBOGO.....PLAINTIFF
KAIRU KIROGORI.....PLAINTIFF
SYMON MAINA DANIEL.....PLAINTIFF
WACUI MAINA KANYENYA.....PLAINTIFF

VERSUS

ELIUD NDUGIRE WAITHAKA.....DEFENDANT

ORDER

This matter comes before me by way of a summons in chambers under Order XXIX rule 8 of the Civil Procedure Rules for directions as to the judgment of the court dated March 19, 1974 (mistakenly referred to in the summons as being an order dated the November 22 and 23, 1973) and for what in the summons is referred to as “summary execution” of that judgment.

The suit is one for the taking of accounts of a partnership which has for some years existed and continues to exist between the parties, and by the judgment it was directed that the defendant do within three months from the date of the judgment (that is March 19, 1974) account to the plaintiffs for his dealings with certain of the partnership property, to be followed by a payment to whichever party shall have been found to be entitled thereto by the other party of such monies as the accounts shall disclose as being due. No appeal has been brought against the decision nor has any application been brought for a review.

The decree implementing the judgment was signed, sealed, and issued by the registry at Nairobi on October 1, 1974 but the defendant has failed to comply with it on the grounds, as submitted by his advocate on the hearing of the summons, that, although the advocate was present in court when the judgment was delivered and is aware of its contents, the decree has not been served on him.

No authority was referred to by either counsel to throw light on the matter but in my view a decree, which by Order XX rule 6(1) must agree with the judgment to which it relates and by rule 7(1) must bear the date of the day on which the judgment was delivered, ordinarily takes effect, at the latest, from the time of issue and without the necessity for service upon any party to it who was present or represented in court when the judgment was delivered. From this it follows that the present defendant is clearly in default in disregarding the terms of both the judgment and the decree.

What, then, is the remedy available to the plaintiffs? I do not think that where a judgment has been raised to the level of a decree it would be appropriate for the court, except perhaps in special circumstances, to seek summarily to execute the judgment as such, instead of the decree as I am invited to do here. The better course would seem to be for the plaintiffs to endeavour to pursue whatever remedies may be open to them as decree holders.

The plaintiffs in their summons seek to rely upon the provisions of Order XXIX rule 8 of the Civil Procedure Rules. In this I think they were mistaken, for the present suit cannot be described either as being, on the one hand, a suit between a firm and one or more of its partners or, on the other hand, a suit

between firms having one or more partners in common. All the parties to the suit are members of the same partnership and no suggestion has been made that it either has been or should be dissolved with regard to any one or more of them.

A further error occurs in the summons to which attention should be drawn. The title of the suit as appears in the plaint contains the names of the four plaintiffs and the defendant. This title forms part of the record and strictly can be altered only by order of the court or in the course of a permitted addition of parties or amendment of pleadings. Although no such alteration has been made here the names of the plaintiffs as shown at the heading of the summons are given as "Mwangi Mbogo and others". Abbreviations of this nature may lead to confusion and are not to be encouraged.

The application is dismissed but as the defendant by his inaction is manifestly in default, there will be no order for costs.

Dated and delivered at Nairobi this 23rd day of January, 1976.

L.G.E HARRIS

JUDGE