



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

MISC. CASE NO. 109 OF 2004

EVANS KANGU.....APPLICANT/RESPONDENT

VERSUS

THE CHAIRMAN , LDT BUTERE DIVISION

JOHN AMUKOBOLO.....RESPONDENT/APPLICANT

RULING

This application is dated 6th May 2014 and brought under section 1A, 1B and 3A of the Civil Procedure Act, order 10 rule 11 order 45 rule 1 & 2 and order 51 rule 1, 3 & 15 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this matter be certified as urgent and be heard exparte in the first instance service of the same dispensed with.
2. That the order of this court issued on 10th March, 2014 be set aside or in the alternative without prejudice, the execution of the same be stayed pending the hearing and determination of this application.
3. That an order be issued for review of the said order of 10th March, 2014 to establish actual amount of decree already satisfied and balance due at the inter-parte hearing.
4. That an order be issued for the applicant to pay in installments any decretal balance found to be due without the harsh methods adopted by the respondent.
5. That an order be issued to avail to court file for suit No. 80 of 2007 for directions on the hearing of the suit.
6. That costs of this application be provided for.

The applicant submitted that on or about August, 2004, he commenced proceedings in the now defunct Butere Land disputes Tribunal to protect his right of ownership of 1 ½ acres portion of land within land parcel No. Marama/Buchenya/197, which portion the respondent, District Commissioner and Assistant Chief of Bumamu were alienating from him by force. (Annexed are copies of letters marked JAN 1a & b.) That the said tribunal made judgment in his favour but before the same was adopted in court through Civil Misc. application No. 83 of 2004, it was quashed by an order of this court. Annexed is a copy of order marked JAN 2. On or about 29th October, 2007, he filed suit no. 80 of 2007 dated 11/4/2007 in this court in his effort to assert his right to the said 1 ½ acres portion of land within land parcel No. Marama/Buchenya/197. (Annexed is a copy of the suit marked JAN 3.) That meanwhile the respondent herein obtained certificate of taxation dated 28th October, 2008 taxed at Ksh. 63,358/=. (Annexed is copy of certificate marked JAN 4.)

That he has made tremendous effort and progress in paying off the decretal amount starting from 2nd April, 2012 upto 31st January, 2014, given his humble condition, but the decretal amounts due have kept increasing from 63,358 to 87,808 without satisfactory explanation to him, while the amounts paid were not correctly taken into account. (Annexed are copies of execution warrants marked JAN 5 a & b.) That by 20th January, 2014, he paid a total of Ksh. 65,000/= leaving a balance of Ksh. 7,808/= yet in the said execution warrant of 31st January, 2014, it was indicated he had paid only Ksh. 53,000/= of the wrongly calculated and entered figure of Ksh. 87,808/=. (Annexed is a copy of receipts and letter marked JAN 6 a & b.) That on 6th February, 2014 he paid a further Ksh. 10,000/= in satisfaction of the Ksh. 7,808/= decretal balance due as at 20th January, 2014 wrongly entered at Ksh. 33,808/= in the said warrant of 31st January, 2014. Receipt No. 036 of 6th February, 2014 was issued, which payment cleared the balance due and resulted in an overpayment of Ksh. 2,192/= (i.e 10,000-7,808=2,192). Annexed is copy of receipt marked JAN 7. That by 6th February, 2014 he had already paid in excess by Ksh. 2,192/= the decretal amount, thereby rendering the action of the respondent herein of arresting him on 7th March, 2014 and having him locked in unnecessary. Annexed is copy of committal to jail marked JAN 8). That am advised by his advocate on record, which advice he verily believe to be true, that the action of the respondent in extracting a further Ksh. 27,000/= under undue pressure, forcing him to append his

thumb print on a document whose contents were not disclosed to him and in which it was alleged he consented to and agreed to pay a further Ksh. 45,000/= to satisfy a decretal amount already overpaid and without even affording him presence in court to confirm or deny the said consent, were all unlawful, unprocedural and not binding. (Annexed is copy of consent marked JAN 9).

That even if the calculations of the decretal amount due entered in the execution warrant of arrest dated 31st January, 2014 were found to be correct and his payments of Ksh. 65,000/= already made by 20th January, 2014 correctly taken into account only a balance of Ksh. 22,808/= would be the result. (i.e. 87,808-65,000/=). That subsequently, when he paid a further Ksh. 10,000/= on 6th February, 2014 resulting in the balance of Ksh. 12,808/= (i.e. 22,808 - 10,000 = 12,808/=), this little balance cannot justify the harsh, punitive, oppressive and suppressive methods resorted to by the respondent on 7th March, 2014, as he could have paid it off at once. (Annexed are copies of release orders marked JAN 10. That he believes the apparently harsh, punitive and suppressive methods resorted to by the respondent herein are done in bad faith with clear objective of relentlessly suppressing my ability to pursue my right to 1 ½ acres portion within land parcel No. Marama/Buchenya/197 in suit no. 80 of 2007 pending in court.

The respondent's submitted that, following the court's decision, the respondent lodged a bill of costs in court on 25th February, 2008, for a total sum of Ksh. 64,884/=. The applicant herein did not make any efforts to settle the decretal sum thus incurring interests on the said amount. When the applicant/judgment debtor appeared in court on 16th March, 2012, the amount due had risen to Ksh. 87,808/= which amount constituted the decretal sum of Ksh. 72,808/= and the bailiff's fees of Ksh. 15,000/=.

By 27th August, 2012, the applicant/judgment debtor had made part payment leaving a balance of Ksh. 37,808/=. On several occasions, the applicant/judgment debtor made promises to settle the balance which promises he did not fulfill leading to fresh applications for execution. As at 5th November, 2013, when this honourable court ordered that fresh warrants of arrest to issue against the applicant/judgment debtor the sum due had risen to Ksh. 48,908/= at court rates.

The applicant/judgment debtor was subsequently arrested. The respondent's firm paid Ksh. 2,000/= as a committal fee Ksh. 1,000/= towards transport and a further Ksh. 21,000/= to the bailiff's fees for the 3 arrests he executed. All this amounted to Ksh. 72,000/= as at March, 2014. The applicant on 10th March, 2014 paid a sum of Ksh. 27,000/=. On 9th May, 2014, the applicant/judgment debtor acknowledged and signed a consent that there was a balance of Ksh. 45,000/= that was due from him. The said consent was signed with Mr. Joshua Olando Nyikuli, Advocate of the High Court.

The applicant/judgment debtor signed the consent on his own free will without any coercion and in the presence of his own 3 sons who are adults, educated and employed. The applicant does not wish to pay the amount of Ksh. 45,000/= together with interest that is due from him. The respondent/decretal holder ought to enjoy the fruits of the court's ruling. Your honour, we therefore pray that this honourable court declared that the sum of Ksh. 45,000/= remains outstanding to date together with interest at court rates. The sum of Ksh. 45,000/= continues to attract an interest. The applicant/judgment debtor has blatantly and deliberately refused to pay the said sum.

Contrary to the applicant's claim that the respondent's methods are harsh, punitive and suppressive, it is their submission that the Civil Procedure Act under section 40 makes provision for the arrest and detention of judgment debtors. In fact they submit that it is procedure for a judgment debtor to be committed to civil jail upon his failure to pay his debts as a means of enforcement of a judgment debt.

Section 38 of the Civil Procedure Act reveals that where the decree is for payment of money, execution by detention in prison shall be done after giving the judgment debtor an opportunity to show cause why he should not be committed. That the respondent gave the applicant herein multiple opportunities to show cause why he should not be committed to civil jail. This is referenced in the affidavit of reply dated 23rd August, 2014.

This court has carefully considered both the applicant's and the respondent's submissions. The application is based on the annexed affidavit of the applicant and other grounds to be given at the hearing thereof. There have been discovered errors in calculations and entries of the decretal amounts due, amount paid and balances due in several documents leading to the said order. The consent dated 10th March, 2014 and filed in court on the same date was apparently obtained under undue pressure exerted upon the applicant. The applicant was not afforded an opportunity in court to confirm or deny his consent to the filed consent before the court order was issued. The decretal amount entered in the warrant of arrest in execution dated 31st January, 2014 was wrongly calculated and wrong amount due and paid entered as Ksh. 87,808/= and Ksh. 53,000/= respectively when it should correctly have been entered at Ksh. 72,808/= and Ksh. 65,000/= respectively. The wrong calculations and entries, shown in (i) above inevitably resulted in wrong entry of decretal balance due as Ksh. 33,808 instead of Ksh. 7,808/= (i.e. 72,808-65,000= 7,808/=) balance due as at 20th January, 2014.

On 6th February, the applicant paid a further Ksh. 10,000/= in satisfaction of the Ksh. 7,808/= decretal balance due as at 20th January, 2014 wrongly shown as Ksh. 33,808/= in the said warrant of 31st January, 2014; a receipt no. 036 of 6th February, 2014 was issued which amount payment cleared the balance due and resulted in overpayment by Ksh. 2,192/= (i.e. 10,000- 7,808 = 2,192/=). By 6th February, 2014 therefore the applicant had already paid in excess by Ksh. 2,192/= the decretal amount, thereby rendering the action of the respondent herein of arresting the applicant on 7th March, 2014 and having him locked in unnecessary. On 10th March, 2014, the respondent under undue pressure extracted a further Ksh. 27,000/= from the applicant, forced him to append his thumb print on a document whose contents he knew not and in which the respondent purported the applicant consented to and agreed to pay a further Ksh. 45,000/=-, to satisfy the decretal amount already over paid, and without even affording him presence in court to confirm or deny the said consent. And even if the calculation in the warrant of arrest in execution dated 31st January, 2014 were to be correct and the payments of Ksh. 65,000/= already made by the applicant as at 20th January, 2014 correctly taken into account, it left a balance of Ksh. 22,808/= (i.e. 87,808-65,000-22,808/=). On 6th February, 2014 the applicant made a further payment of Ksh. 10,000/= thereby leaving a balance of Ksh. 12,808/= (i.e. 22,808-10,000=12,808/=), which balance could not justify the harsh, punitive, oppressive and suppressive methods resorted to by the respondent on 7th March, 2014, as the applicant could have easily paid the said balance. The apparent harsh, punitive and suppressive methods adopted by the respondent herein were done in bad faith with clear objective of suppressing his ability to pursue his rights to land parcel No. Marama/Buchenya/197 in suit No. 80 of 2007 pending in court.

By an application dated 6th May, 2014, the applicant herein prays for an order inter alia, of review to establish the actual amount of decree already satisfied and the balance due. I have perused the court file, in 2004, the applicant herein sued the respondent in Butere Land Disputes Tribunal claiming ownership of 1 ½ acres of portion of land parcel No. Marama/Buchenya/197. The said Tribunal entered judgment in his favour.

However, by a ruling dated 13th July, 2006, Honourable Justice GBM Kariuki, upon considering the respondent's application for judicial review for orders certiorari, granted the application and issued an order of certiorari quashing the decision of the Butere Lands disputes Tribunal concerning the said parcel of land Marama/Buchenya/197. The honourable judge also ordered that costs of application be borne by the applicant herein. On 9th May, 2014, the applicant/judgment debtor acknowledged and signed a consent that there was a balance of Ksh. 45,000/= that was due from him. The said consent was signed with Mr. Joshua Olando Nyikuli, Advocate of the High Court. I find that this is a matter which was dealt with by the taxing master and any disputes as to the accounts ought to be sorted out before the deputy registrar and not this court. I find this application has no merit and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD DAY OF MAY 2018.

N.A. MATHEKA

JUDGE