



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC CIVIL APP NO. 9A OF 2010

(ORIGINAL MALINDI HIGH COURT CIVIL CASE NO. 61 OF 2006)

OMAGWA ANGIMA & COMPANY.....APPLICANT

VERSUS

JAPHET NOTI CHARO.....RESPONDENT

RULING

1. By a Notice of Motion application dated and filed herein on 4th October 2017, the Judgment debtor Japheth Noti Charo prays for an order that the execution proceedings herein be declared premature and/or illegal and the same be vacated for being in violation of the provisions of Order 22 Rule 18 (1)(a) of the Civil Procedure Rules.

2. The application is based on the grounds inter alia that:-

i) The decree set to be executed was issued on 22nd December 2010;

ii) The application for execution has been made after a period of more than one year from the date of the decree;

iii) That the Judgment debtor has not been served with any Notice to show cause as required under the provisions of the Civil Procedure Rules; and

iv) That there is a pending Ruling in Malindi HCCC No. 61 of 2006 which has a direct bearing with this matter and the Judgment debtor has good grounds why execution should not issue.

3. In a Replying Affidavit sworn by Omagwa Angima-Advocate and filed herein on 4th December 2017, the Judgment creditor contends that the application is misconceived and amounts to an abuse of the Court process. It is the Judgment Creditor's case that execution has issued herein more than three times and the debtor-always applies for stay of execution.

4. The Judgment Creditor accuses the debtor of trying to buy time as there is no ruling pending in the said HCCC No. 61 of 2006 after the debtor's application for stay was dismissed on 12th May 2017.

5. Order 22 rule 18(1) of the Civil Procedure Rules provides as follows:-

(1) Where an application for execution is made-

a) More than one year after the date of the decree;

b) Against the legal representative of a party to the decree; or

c) For attachment of salary or allowance of any person under Rule 43,

The Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the Judgment-debtor, if upon a previous application for execution against the same person in Court has ordered execution to issue against him.”

6. In the matter before me, it is not in dispute that the decree which is the subject matter of these proceedings was issued many years back, precisely on 22nd December 2010. It is the Judgment debtor's case that he has been ambushed with the execution proceedings as no Notice to Show Cause was served upon him prior to the attachment of his movables by Messrs Kilimanjaro Auctioneers.

7. A perusal of the record however reveals that there have been no less than three attempts made by the Judgment Creditor to execute the decree. The first time was in April 2011 when the Judgment Debtor persuaded Lady Justice Maurine Odero to grant orders of stay. The second time was in July 2012 when again the Judgment debtor persuaded Lady Justice Meoli to grant another stay of execution.

8. In the third instant, it is apparent from the annexures to the Judgment Creditor's affidavit in reply that the applicant herein obtained orders before the Honourable Justice Said Chitembwe on 19th August 2016 in Malindi High Court Civil Case No. 61 of 2006 temporarily staying execution herein. According to the Judgment Creditor, that application was eventually dismissed on 12th May 2017 thus paving the way for the execution process to resume. The Applicant does not deny that assertion.

9. Arising from the foregoing, it is clear to me that the present application is clearly an abuse of the Court process. It does not lie under the provisions of Order 22 Rule 18(1) (a) as cited by the Applicant and is merely meant to delay the conclusion of this matter.

10. For those reasons, I find no merit in the application dated 4th October 2017. The same is dismissed with costs to the Judgment Creditor/Respondent.

Dated, signed and delivered at Malindi this 28th day of September, 2018.

J.O. OLOLA

JUDGE