



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 25 OF 2017

ISAIAH OWINO LAWI.....APPELLANT/DECREE HOLDER

-VERSUS-

SOUTH NYANZA SUGAR COMPANY LIMITED...RESPONDENT/JUDGEMENT DEBTOR

RULING

The decree holder filed a Notice to Show Cause dated 11/1/2021 for the judgement debtor to show cause why its property cannot be sold and attached in the execution of the decree in this appeal. The decree holder claims a total of Kshs. 913,266/=.

In response, the judgement debtor filed grounds of objection dated 30/4/2021. The grounds of objections are as follows:-

i. That the appellate decree of this court dated 9/4/2019 set aside the decree of the subordinate court dated 20/8/2015 in Kehancha PMCC No. 137 of 2004 and substituted it with the award herein.

ii. That the appellate decree herein substituted the original decree of the subordinate court, which dismissed the respondent's suit with costs and allowed the appellant's suit.

iii. That the only aspect of the decree in this appeal which can be executed lawfully to give effect to the decree of this appeal dated 9/4/2019 is the costs of this appeal awarded to the appellant, thus this court cannot execute the decree against the respondent to recover the principal sum, interest thereon and costs of the suit before the subordinate court.

iv. Had the appellant taken out the instant proceedings against the respondent, to recover the taxed costs of this appeal, there would be no problem.

v. In any event, the costs of the subordinate suit were already assessed within the suit. Additionally, the costs of this appeal were taxed within this appeal, independent of and separately from the costs of the suit before the lower court and the orders made.

vi. Thus, regarding the principal award, interest and costs of the suit in the subordinate court can only be executed therein.

vii. The warrant sought if granted, would be ultra vires the powers of this court and unlawful; that the instant Notice to Show Cause is fatally incompetent for want of jurisdiction and should be struck out with costs to the respondent.

The Notice to Show Cause was canvassed by way of written submissions. The judgement debtor filed its submissions dated 22/6/2021 on 23/6/2021 and reiterated its grounds of opposition in its submissions. In support of its case, it relied on the decision delivered in **Kenya Wildlife Services & Another vs Douglas Opiyo Shem**; which Counsel did not furnish a copy of the same to this court to have the benefit of reading it. The said ruling is not available online, thus the court can only treat it as non-existent.

The decree holder filed his submissions dated 3/8/2021 on 4/8/2021 and mainly hinged his arguments on the provisions under Order 42 of the Civil Procedure Rules which gives the High Court powers to pass any decree and the court to which the appeal is preferred shall be dated, drawn up, sealed and signed as directed by rules 7,8,9, of Order 21.

Further, the decree holder submitted that the respondent is confusing applications for execution in the High Court with those of the Court of Appeal; that in the latter, the procedure is provided for under Rule 57 of the Court of Appeal Rules which provides that judgements at the Court of Appeal are executed through the High Court but there is no similar provision that the judgements in the High Court are executed through the subordinate court. The decree holder urged the court to be guided by the principles set out in Section 1A of the Civil Procedure Act and decline the judgement debtor's arguments.

I have carefully considered the rival arguments by both parties. The single issue for determination is whether the **Notice to Show Cause proceedings by the Decree Holder are regular.**

The origin of this appeal was against the judgement and decree delivered by the trial court in **Kehancha PMCC No. 127 of 2004 – Isaiah Owino Lawi vs South Nyanza Sugar Co. Ltd** wherein the suit by filed the plaintiff (**now the decree holder**) was dismissed with costs. By a judgement of this court delivered on 9/4/2019, the court awarded the decree holder an amount of Kshs. 253,475/= with interest at court rates from the date of filing the plaint and the costs of the suit as well as the appeal.

The decree holder filed a notice to show cause dated 11/1/2021 seeking execution of a total of Kshs. 913,266/=. The judgement debtor opposed those proceedings on the grounds that this court has no jurisdiction to entertain the execution proceedings but instead, the execution thereof should be conducted in the subordinate court; that the only aspect of the decree which can be executed lawfully in this court is the costs on appeal but not the principal sum, interest and costs of the suit in the subordinate court.

On the other hand, the decree holder contends that nothing stops this court from executing a decree which it has passed and relied on several provisions in the Civil Procedure Rules to advance her argument and in particular **Order 42 Rule 32** which provides:-

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.”

Order 42 of the Civil Procedure Rules as a whole, provides for appeals filed in the appellate courts. Order 42 Rule 32 of the Rules as read together with Section 78 of the Civil Procedure Act, outlines the powers of the appellate court to exercise jurisdiction and to consider or pass any decree, order either in whole or in part in relation to the appeal filed before it. The term *‘decree’* used therein is not synonymous with the decree that is drawn up for execution purposes. Rather, it is a pronouncement made by the appellate court. I respectfully disagree with the interpretation of the said provision by the decree holder.

As properly observed by the decree holder, whereas there are clear provisions on the procedure of execution of decrees of the Court of Appeal, which are executed through the High Court, there is no similar provision as regards decrees passed by the High Court. Generally, it is Order 22 of the Civil Procedure Rules that deals with execution of decrees and orders. It does not specify whether they are decrees emanating from the High Court or the lower court. In absence of any specific procedure, what guides the court, is Order 22 Civil Procedure Rules because there can never be a vacuum in the law.

When the High Court entered judgment for the appellant, it set aside the decision of the lower court. I do agree with the judgment debtor's view that once the appeal was allowed and the decision of the trial court was replaced with this court's judgment, that became the decree of the subordinate court and it is that decree that will be executed against the judgment debtor.

For the above reasons, I allow the objection. The Notice to Show Cause as filed is fatally incompetent and it is hereby struck out with costs to the judgment debtor.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 25TH DAY OF NOVEMBER, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Mwita Kerario for the Appellant/Decree Holder.

Mr. Odero for the Respondent/Judgement Debtor.

Nyauke Court Assistant



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