



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

LAND AND ENVIRONMENT COURT

CIVIL CASE NO.42 OF 2009

HUMPHREY MBAKA NANDI.....PLAINTIFF

VERSUS

JENNIFER NYAMBURA KAMAU.....DEFENDANT

R U L I N G

The application before court is dated 12th October 2012 and made under Section 3A of the Civil Procedure Act. The applicant Jennifer Nyambura Kamau is a daughter of Moses Kamau Mwangi(Deceased) who died on the 1st November 1998 at Muranga Hospital. She is the Administratrix of the estate of her late father and the defendant in this matter .She prays for an order setting aside the warrant of arrest issued against her on 14/9/2012 and the barring of all execution against the defendant.

The application is grounded according to the defendant's legal view that costs of this case are payable by the estate not the defendant personally and that the plaintiff misled the court on the issue of warrant of arrest.

The application is supported by the affidavit of the defendant whose import is *inter alia* that the judgment of the court was clear that costs were to be paid by the estate of her father.

In his brief replying affidavit, the plaintiff states *inter alia* that the defendant should pay costs granted as per the certificate as she is the administratrix of the estate of the deceased.

Having read all pleadings judgment, decree, certificate of costs the Notice of Motion, supporting affidavit and replying affidavit and having read submissions of the plaintiffs advocate and defendants advocate, this court finds that the applicant/Defendant is the administratrix of the estate of the deceased.

The plaintiff sued the defendant in her capacity as a legal representative of the estate of the deceased seeking for orders that the registration of Moses Kamau Mwangi (deceased) made on 15th October 1998 as proprietor in respect of all that parcel of land being NGINDA/SAMAR/BLOCK2/315 be canceled and reinstate the plaintiff as the registered owner and also prayed that the defendant do pay costs of the suit. The court heard both parties and entered judgment in favour of the plaintiff against the defendant as prayed in the plaint whose consequence was that the Land Registrar Muranga was

directed to cancel the name of Moses Kamau O.Mwangi (deceased) from the register of **L.R NO NGINDA/SAMAR/BLOCK2/315** and in its place the name of Humphrey Mbaka Nandi was to be inserted and further the court ordered that the costs of the suit were to be met by the Estate of the Moses Kamau O. Mwangi(deceased). This court finds that Hon justice Sergon was very clear as to from where the costs were to be paid thus the estate of the deceased. The defendant was liable to pay costs from the estate but not personally.

This court finds that an application for execution of decree was made by the decree holder and Notice to show cause why execution should not issue under order XXI rule 18 of the Civil Procedure (revised) Rules 2010 issued by the court, however the notice to show cause implies that the judgment debtor has two options, to pay the decretal amount or go to jail for six months. I do find that the Notice to show cause to the extend that the judgment debtor should appear in court to show cause why she should not be arrested and sent to jail for six months is illegal as the same cannot be issued under Order XXI rule 18 as this rule only provides for Notice to show cause why execution should be made against the legal representative. The Legal Representative cannot be jailed in execution unless it is established that he has refused to pay the decretal sum from the estate.

Under Order XXI rule 18, the Deputy Registrar has no powers to order for arrest and imprisonment of the judgment debtor as the order only provides for a notice to show cause why execution should not be made against the legal representative of a deceased person.

The procedure for the execution of decree for payment of money by arrest and imprisonment of a judgment debtor is provided for in Order XXI rules 32, 33, 34 and 35 and not Order XXI rule 18.

Having found as above, I do order that the defendant/judgment debtor do appear before the Deputy Registrar to show cause why execution should not issue against her as legal representatives as provided under Order XXI rule 18 and thereafter, the procedure under order XXI rules 33, 34, and 35 to follow. Each party to bear its own costs. Orders accordingly.

Dated, signed and delivered at Nyeri this 29th day of November 2013.

A. OMBWAYO

JUDGE



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