



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMNI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 416 OF 2008

SAMUEL MWAMBA AMBUNDO.....1ST PLAINTIFF
EPHRAIM KAMOTHO WAMBUGU.....2ND PLAINTIFF
PURITY KINYA MACHARIA.....3RD PLAINTIFF
ELIZABETH ACHIENG OCHIENG.....4TH PLAINTIFF
JOHN KIILU SAMBO.....5TH PLAINTIFF
JULIET NJERI KARANJA.....6TH PLAINTIFF
FREDRICK KIRIMA KIHARA.....7TH PLAINTIFF
PRISCILLAH GAKII MBUTURA & 380 OTHERS.....8TH PLAINTIFF

-VERSUS-

SPELL INVESTMENT COMPANY LIMITED.....1ST DEFENDANT
CONSOLATA NABWIRE ASEMBO.....2ND DEFENDANT
CONSOLIDATED BANK OF KENYA LIMITED.....3RD DEFENDANT
FRANSISCAH ADIKINYI ASEMBO.....4TH DEFENDANT
ROBERT AKUMU ASEMBO.....5TH DEFENDANT

RULING

1. The application for consideration is the 3rd Defendant/Applicant's Notice of Motion dated 7th December 2020 brought under **Section 1A (3) Section 1B, Section 3A** of the **Civil Procedure Act, Order 51 rule 1 of the Civil Procedure Rules** and all other enabling provisions of the Law. The application seeks the following orders:

a. Spent.

b. Spent.

c. Spent.

d. THAT the honorable court be pleased to issue an order barring the Plaintiffs from executing the decree until after the valuation of Title No. Dagoretti/Riruta/1254 and L.R. No 3734/114 in terms of the Judgment delivered on 22nd October, 2019.

e. THAT the costs of this application be borne by the Plaintiffs in any event.

2. The application is based on the grounds on the face of it and supported by the Affidavit of the 3rd Defendant's legal manager **ALBERT ANJICHI** sworn on 7th December 2020. He deposed that on 22nd October, 2019 this court entered judgment for the Plaintiffs against the Defendants for the decretal sum of Kshs. 82,623,350/= . He averred that Kshs. 17,285,250.95/= had been deposited in court by Equity Bank Limited pursuant to the orders made by Hon. Justice Njagi on 26th October, 2011 and that the decree was clear that the said amount was to be deducted from the decretal amount.

3. He averred that the court further decreed that Title No. Dagoretti/Riruta/1254 located in Dagoretti and L.R. No 3734/114 located in Lavington and registered in the name of Boniface Anderson Ngosia be sold or valued to determine their current values which would then be deducted from the decretal sum.

4. Further, it was his contention that according to the clear wording of the decree, the Plaintiffs can only apply to execute the balance of the decretal sum (if any) after deducting the amount deposited in court and the value of the two properties from the decretal sum. He complained that the Plaintiffs have however obtained warrants of attachment and instructed auctioneers to proclaim the 3rd Defendant's assets in the purported execution of the decree, in total disregard of the unequivocal wording of the judgment and the clear steps set out in the Decree.

5. He averred that unless this court grants the Orders sought in the application, the Plaintiffs will unjustly enrich themselves by selling the 3rd Defendants assets in execution of the decree and at the same time claim the amount of Kshs.17,285,250.95/= deposited in court. Further, he deposed that unless stopped by the Court, the Plaintiffs will go ahead to cart away the proclaimed goods which will paralyze the 3rd Defendant's banking business and occasion it loss and damage.

6. The 3rd Defendant also filed a Supplementary Affidavit sworn by the same deponent on 9th December 2020 in which he averred that he did not annex documents to his Supporting Affidavit sworn on 7th December 2020 on the mistaken belief that the judge who will be handling the application will have the physical file before her when considering the Application. He also averred that the Decree issued on 9th November, 2020 erroneously indicates that the Judgment was delivered on 22nd October, 2020 instead of 22nd October, 2019.

7. He argued that it is clear from the said Decree that the judgment sum for Kshs. 82,623,350/= was only issued against the 1st and 2nd Defendants and no monetary decree has been issued against the 3rd Defendant. He reiterated that it is clear from paragraph C of the Decree that execution can only issue against the 3rd Defendant after the Plaintiff has taken into account the value of the two properties and deducted the sum Kshs. 17,285,250.95/= from the decretal sum.

8. Further, he deposed that on 2nd December, 2020 the Plaintiffs instructed Sadique Enterprises Auctioneers to proclaim and attach the 3rd Defendant's goods in purported execution of the Decree. He averred that the said proclamation arose from the warrant of attachment and sale issued by the court on 27th November, 2020 without following the clear steps set out in the Decree. As such, he stated

that unless a stay of execution is granted, the 3rd Defendant will unjustifiably suffer due to the Plaintiffs' blatant disregard of the clear wording of the Decree.

9. In opposition, the Respondents filed Grounds of Opposition as well as a Replying Affidavit sworn on 14th December 2020 by one of the Plaintiffs namely **MARTIN KISOMBE MWANJALA**. The grounds of opposition are replicated in the averments made in the Replying Affidavit to the extent that the Application is frivolous because the 3rd Defendant has misrepresented facts to the court. It was deposed that on 22nd October 2019, the court entered judgment for the Plaintiffs jointly and severally for the sum of Kshs. 82,623,350/-. That this was after the court had considered the evidence presented and found that the Defendants were liable as per the amended Plaintiff filed in Court on 16th January, 2009.

10. He stated that in the said judgment, the 3rd Defendant was specifically found to have been negligent and therefore liable to pay since the Plaintiffs suffered loss as a result of the same. He confirmed that indeed Njagi J. ordered that the sum of Kshs. 17,285,250.95 be deposited in court by Equity bank and a receipt dated 10th May 2012 was issued to that effect but that the decretal sum is Kshs. 204,905,908/=.

11. Further, he averred that when this matter was mentioned on 24th November 2020, this court ordered that parties do enter into a consent before the money could be released to the Plaintiffs. That consequently, their advocate prepared a draft consent and presented to counsel for the 3rd Defendant for approval and execution but they declined to endorse it and demanded for the inclusion of Counsel for the other Defendants which frustrated the process of releasing the money to the Plaintiffs.

12. It was further deposed that judgment was entered against the 1st and 2nd Defendants after they failed to enter appearance and/or file their Defences and they cannot now be traced to sign any consent. It was also deposed that since the 4th and 5th Defendants did not put in their Defences or final written submissions, it is clear that they have abandoned their case hence getting them to sign a Consent or participate in any further proceedings in this case will be difficult. The deponent thus contended that in any case, since the decretal sum is Kshs. 204,905,908/=, the 3rd Defendant may be given credit for that sum during the recovery process and as such, the Court should not stop the recovery of the entire decretal sum just because of the Kshs. 17,285,250.95/= that was deposited in court.

13. Additionally, he deposed that the Plaintiffs do not stand to unjustly enrich themselves as alleged by the 3rd Defendant and that the fact that execution may interfere with the 3rd Defendant's banking business does not exempt it from fulfilling its legal obligations under the Law.

14. It was averred that the two properties named hereinabove were registered in the names of Boniface Anderson Ngosia but before the judgment was delivered an unknown person transferred the Lavington property into his name, subdivided it into 2 portions and sold it to two different people despite the fact that there was a caveat and a court order against interference with any of the plots before the conclusion of this case. He deposed that this issue has since been reported to the Director of Criminal Investigations for proper and thorough investigations.

15. Further, he argued that valuation of the two properties cannot be done unless the sale and partition of the Lavington Property is reversed which process may result in further delay since it may require criminal investigations or a full court trial.

16. It was also argued that since judgment was entered against the Defendants jointly and severally, the Decree Holders have the right to pursue all or any of the Defendants for the decretal sum and none of them can dictate how or where the execution process should commence. Finally, it was contended that this application has been brought in bad faith with the sole aim of derailing the execution process so that the Plaintiffs are kept away from enjoying the fruits of the judgment for the longest time possible whereas the Plaintiffs have been waiting for justice for thirteen (13) years.

Submissions

17. The Application was canvassed by way of oral submissions. Learned counsel Mr. Njeru appeared for the 3rd Defendant whilst learned counsel Ms. Kanyangi appeared for the Plaintiffs.

18. Mr. Njeru submitted that **Sections 1, 1A and 3 of the Civil Procedure Act** requires parties to assist the court in with complying with court orders. Counsel reiterated that the Plaintiffs are required to comply with the decree with the first step being the valuation of the two properties set out in the application before applying for the court to release the sum of Kshs. 17 million that is being held in the court. He also reiterated that the amount that the Plaintiffs are purporting to execute should be executed against the 1st and 2nd Defendants.

19. Further, Mr. Njeru argued that Order (a) in the Decree is clear that the amount of Kshs. 82,623,350/= should be paid by the 4th and 5th Defendants. He submitted that even if the court were to order the payment of any amount of money, it cannot be the sum of Kshs. 82 Million but Kshs. 54 Million because the Plaintiffs had only pleaded for the latter amount.

20. Mr. Njeru also urged the court to note that there are 388 Plaintiffs in the case and if execution proceeds it will be scattered over the 388 Plaintiffs. As such, if valuation of the two properties is done and it is found out that the value far exceeds the amount being claimed by the Plaintiffs, it will be impossible to get it from the 388 Plaintiffs who are not known to the 3rd Defendant.

21. Further, counsel argued that contrary to the averments by the Plaintiffs, the orders made by the court were not “joint and several” but each order was directed to a specific Defendant. It was his contention that the court cannot issue attachment for Kshs. 82 Million against the 3rd Defendant when the Decree itself does not compel the 3rd Defendant to pay the said amount. He submitted that the warrants of attachment should be withdrawn or cancelled until a valuation of the properties is done as ordered which valuation in his view is not barred by the selling of the two properties. Counsel argued that in any event, the Plaintiffs are to blame because they did not register the order when it was issued to preserve the property whilst the proceedings were going on.

22. Further, Mr. Njeru contended that if the orders sought are not granted, the Plaintiffs will unjustly enrich themselves at the expense of the 3rd Defendant because after receiving the Kshs. 207 Million, the Plaintiffs will still be able to get the sum of Kshs. 17 Million deposited in the court as well as the two properties in Dagoreti and Lavington that were adjudged to them.

23. In response, learned counsel for the Defendant Ms. Kanyangi submitted that the Constitution enjoins the court to administer justice without undue regard to technicalities of procedure. She reiterated that the Plaintiffs sued the Defendants jointly and severally and judgment was entered against the Defendants as such. She also reiterated the Plaintiffs position that the 3rd Defendant is liable for the entire sum of Kshs. 207 Million and argued that should the court find that it is liable for Kshs. 120 Million; the Plaintiffs shall accept the same less the Kshs. 17 Million held by the court, then the balance can be recovered from the sale of the two properties. It was also her submission that the 3rd Defendant is not in a special category of judgment debtors and in any event, the 3rd Defendant has a right to pursue the other Defendants to recover the amount paid.

24. Further, counsel submitted that valuation of the properties was not a condition in the judgment. She argued that the bank is simply trying to buy time while the Plaintiffs are being kept away from enjoying the fruits of their judgment. It was her contention that the 3rd Defendant has never appealed against the judgment nor applied for it to be reviewed. She reiterated that the 389 Plaintiffs have waited for years to get justice and thus public interest demands that the application be declined so that the execution process can proceed.

25. Additionally, counsel stated that Tuiyott J. found that the Lavington Property had been bought with money invested by the Plaintiffs and argued that a caveat was registered on it as ordered by the court but someone went ahead and sub-divided it into two and sold it. She therefore urged that the application be

dismissed for lack of merit.

26. In rebuttal, Mr. Njeru submitted that the execution of Kshs. 207 Million against the wrong party cannot be regarded as a mere technicality. He submitted that the 3rd Defendant filed a Notice of Appeal against the said judgment on 5th November 2019 and the same was served on the Plaintiffs' advocate on 20th November 2019. He contended that it is evident from Ms. Kanyangi's submissions that the Decree is ambiguous as it lacks clarity on the Plaintiffs' exact claim from the 3rd Defendant. He argued that, should the court allow the execution to proceed, it means that it shall allow an error margin of over Kshs. 70 Million yet the decree is not clear on who should pay the decretal sum. In his view, according to order No. 1 of the Decree, the said amount is supposed to be paid by the 1st and 2nd Defendants, see.

27. Finally, counsel noted that the finding that the 3rd Defendant was negligent is different from the order for payment of Kshs. 84 Million.

Analysis and Determination

28. I have carefully considered the application, the parties' respective affidavits and submissions by counsel. The issues that arise for determination are: whether judgment was entered jointly and severally against the Defendants and whether the 3rd Defendant; and whether the court should bar the Plaintiffs from executing the decree until after the valuation of Title No. Dagoretti/Riruta/1254 and L.R. No 3734/114 in terms of the judgment delivered on 22nd October, 2019.

29. On the first issue, I note that the Plaintiffs instituted this suit against the Defendants jointly and severally. However, my perusal of the judgment of 22nd October 2019 delivered by Nzioka J. and the Decree extracted therefrom which the Plaintiffs seek to execute reveal that judgment was not entered against the Defendants jointly and severally. A verbatim extract of the subject Decree reads as follows:

“a) THAT Judgment be and is hereby entered against the 1st and 2nd Defendants for the sum of Kshs, 82, 623, 350.

b) THAT a declaration is issued that the 3rd Defendant bank was negligent and breached its professional and fiduciary duty to the Plaintiffs as a bank.

*c) THAT there is evidence that, a certain sum of money was recovered from; Equity Bank limited and deposited in court. There is further evidence that there is property suspected to have been bought with the subject sum therefore, **the sum recoverable from both 3rd and 4th Defendant (if any), is the sum unrecovered after recovery of the sum at Equity Bank Limited and disposal and/or valuation of the suit property.** The sum recoverable shall attract interest at court rates from the date of filing the suit to payment in full.*

d) THAT the Plaintiffs are entitled to the sums of money presently being held at; KNUT House and Harambee Avenue Branches of Equity Bank.

e) THAT the properties Nairobi L.R. No. 3734/1142 Lavington area and Dagoretti/Riruta/1254 be declared to have been purchased using the money the Plaintiffs invested with the 1st Defendant and same to be forfeited to the Plaintiffs.

f) THAT costs of this suit in favour of the Plaintiffs.”

30. Joint and several judgment generally connotes a shared responsibility for a judgment sum whereby each judgment debtor is held responsible for the entire judgment sum and the Plaintiff has the liberty to recover the entire sum from any of the Defendants. In **Republic v Permanent Secretary in Charge of Internal Security – Office of the President & another ex-parte Joshua Mutua Paul [2013] eKLR** Odunga J. when explaining the meaning and effect of a “joint and several” judgment or liability cited

the case of **Dubai Electronics v Total Kenya and 2 Others High Court (Milimani Commercial and Admiralty Division) Civil Case No. 870 of 1998** where the Court stated as follows:-

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability. In the case of Kenya Airways Limited vs. Mwaniki Gichohi (supra) Ringera, J (as he then was) stated as follows:

‘The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).’”

31. According to the extract of the Decree reproduced hereinabove, it is evident that judgment was entered against the Defendants severally but NOT jointly. The judgment sum was apportioned amongst the four Defendants/Judgment Debtors according to the tune of their liability. In the premises, I find that the Plaintiffs argument to the contrary is incorrect and they cannot therefore execute the entire judgment sum against the 3rd Defendant only merely on the ground that they have been unable to trace the other Defendants. It is only the sum of Kshs. 54,094,130/= plus interest thereon, which the 3rd and 4th Defendants were found liable for, that can be executed against the 3rd Defendant entirely, if at all.

32. Indeed, there are several channels availed by the law that the Plaintiffs can follow in tracing the 1st and 2nd Defendants and it is now up to them to seek the relevant legal advice from their counsel to enable the Plaintiffs execute against the them.

33. The next issue for determination is whether the court should bar the Plaintiffs from executing the decree until after the valuation of Title No. Dagoretti/Riruta/1254 and L.R. No 3734/114 in terms of the judgment delivered on 22nd October, 2019. In my considered view, this issue does not require much deliberation. Order (c) of the Decree is glaringly clear that the sum recoverable from the 3rd and 4th Defendants would be the remaining balance AFTER the Plaintiffs have recovered the sum of 17 million from Equity bank which was deposited in court together with amount obtained after the sale or valuation of the suit properties.

34. It is not disputed that the 17 Million shillings is in court and can be disbursed to the Plaintiffs at any time. However, the value of the two properties is unknown and a valuation must be undertaken to determine the same. Only then can the Plaintiffs know how much is remaining to be recovered from the 3rd Defendant, if at all to enable them proceed with execution.

35. In the interests of justice therefore, I will issue a stay of execution against the 3rd Defendant for a period of twenty one (21) days to enable a valuation of two properties. The matter shall be mentioned soon after to confirm if the same has been undertaken and for further orders and directions. It is so ordered.

Dated and delivered at Nairobi this 19th March, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Kanyangi for the Plaintiff/Applicant.*
2. *Mr. Njeru for the Defendant/Respondent.*