



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 70 OF 2014

ECO BANK KENYA LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

ELSEK & ELSEK (KENYA) LIMITED.....1ST DEFENDANT/JUDGMENT DEBTOR

ELSEK & ELSEK CONSTRUCTION LIMITED...2ND DEFENDANT/JUDGMENT DEBTOR

OSMAN ERDINC ELSEK.....3RD DEFENDANT/JUDGMENT DEBTOR

DENIZ ELSEK.....4TH DEFENDANT/JUDGMENT DEBTOR

RULING

1. The application before me is dated 6th October, 2017. It has been brought under the provisions of Order 22 rules 47, Order 51 rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A, 38 and 44 of the Civil Procedure Act. It seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That the Honourable court be pleased to attach the decree in **Nairobi Miscellaneous Application No. 356 of 2015, Elsek & Elsek Construction Company Limited vs Presbyterian University of East Africa Registered Trustees** towards the satisfaction of the entire decretal amount herein of Kshs. 50,000,000/= plus interest at the rate of 23% per annum from the date of filing of suit until payment in full together with costs taxed at Kshs. 934,969.40; and

(iv) That the Judgment Debtors be condemned to bear the costs of this application.

2. The application is anchored on the grounds in support of it and the affidavit of Harshil Shah Advocate sworn on 6th October, 2017. The respondents filed grounds opposition on 30th October, 2017 to challenge the application.

3. Mr. Rimui, Learned Counsel for the applicant in his submissions stated that Order 22 rule 47 allows this court to stay and attach a decree which they are seeking to have attached although the said decree was not issued by this court. He urged that Order 22 rule 47(1)(b) provides that this court has powers to attach a decree issued by another court. He submitted that this court can issue a Notice to the other court to seek stay of execution of the decree. He further submitted that this court has the powers to attach the decree to the satisfaction of the decretal sum. Counsel stated that a decree is property that can be attached but that such attachment must come from the court that has issued a decree that the court seeks to enforce. He argued that once a stay of the judgment is given, this court can attach the decree.

4. In making reference to the grounds of opposition filed challenging the procedure followed, he submitted that the procedure was correct and if it was not, he urged the court to do substantive justice. He stated that the respondents have come to court with unclean hands by trying to frustrate the execution of the decree. He prayed for the application to be allowed.

5. Ms Muyaa, Learned Counsel for the respondents opposed the application for the reason that when the applicant came to court, it sought to stay the decree of a case in Nairobi but it did not indicate if it was a subordinate or High court matter but the said information only comes out through the applicant's affidavit.

6. She relied on the provisions of Order 22 rule 22(1) which provides that the court to which a decree is sent to is the only one which can stay a matter. She submitted that the said provisions give discretion to a higher court but not a court of concurrent jurisdiction, thus this court is being asked to overstep its jurisdiction.

7. She stated that Order 22 rule 47(1)(b) of the Civil Procedure Rules provides that a decree can be attached if it was passed by the same court. Counsel argued that this court can only issue a notice to the court that passed the decree, requesting such other court to stay execution. She further submitted that this court cannot give orders for stay of the decree in issue directly. She prayed for the application to be dismissed with costs for being scandalous, frivolous and vexatious.

ANALYSIS AND DETERMINATION

The issue for determination is if this court can attach a decree issued by another court.

8. The decree that this court has been moved to attach was issued by the Judge F. Ochieng in Nairobi High Court Commercial Miscellaneous Application No. 356 of 2015, Elsek & Elsek Construction Company Limited vs Presbyterian University of East Africa Registered Trustees.

9. Order 22 rule 47(1) provides as follows:-

“(1) Where the property to be attached is a decree, either for the payment of, money or for the sale in enforcement of a mortgage or charge, the attachment shall be made:-

(a) If the decrees were passed by the same court, then by order of such court; and

(b) If the decree sought to be attached was passed by another court, then by the issue to such other court of a notice by the court which passed the decree sought to be executed, requesting such other court to stay the execution of its decree unless and until-

(i) The court which passed the decree sought to be executed cancels the notice; or

(ii) The holder of the decree sought to be executed or his judgment debtor applies to the court receiving such notice to execute its own decree.

(2) Where a court makes an order under subrule (1) (a), or receives an application under subrule (1)(b)(ii), it shall, on the application of the creditor who has attached the decree of his judgment – debtor proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.”

10. The provisions of Order 22 rule 47(1)(b) show that this court has jurisdiction to attach a decree issued by another court as prayed by the applicant and thereafter issue a notice to the court that passed the decree to stay the execution of its decree subject to either one of the two conditions stipulated under Order 22 rule 47(1) (b) (i) or (ii) being effected.

11. Does the foregoing then mean that I should outrightly dismiss the said application since the applicant herein did not apply for a Notice to issue to the court that passed the decree in the Nairobi case? I think not. Section 1A of the Civil Procedure Act provides as follows:-

“(1) The overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;

(2) the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);

(3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”

12. Section 1B of the said Act provides: -

“(1) For the purposes of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) the just determination of proceedings;

(b) the efficient disposal of the business of the court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all the proceedings in the court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

12. The applicant herein has a decree that has remained unsatisfied since the consent order of 16th December, 2014. This court is enjoined by the above provisions to handle matters that come before it with the aim of attaining the overriding objectives. Dismissal of the present application will frustrate the efforts being made by the applicant to execute the decree in the present case.

13. Article 159(2)(d) of the Constitution of Kenya states that:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a).....

(b).....

(c).....

(d) justice shall be administered without undue regard to technicalities; and

(e).....

14. It is my considered view that the present application should not be sacrificed in the alter of technicalities. In the said circumstances, I invoke the provisions of Section 3A of the Civil Procedure Act which provides as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

15. I hereby attach the decree issued in **Nairobi High Court Miscellaneous Application No. 356 of 2015, Elsek & Elsek Construction Company Limited vs Presbyterian University of East Africa Registered Trustees** in satisfaction of the decree issued in **Mombasa High Civil Suit No. 70 of 2014, Eco Bank Kenya Limited vs Elsek & Elsek (K) Ltd & 2 others**. I further issue a notice informing the said Honourable court of attachment of the said decree and requesting the said court to stay execution of the decree unless and until this court cancels the notice herein **or** the holder of the decree sought to be executed or his judgment debtor applies to the court receiving such notice to execute its own decree.

16. This application herein has been precipitated by non-satisfaction of a decree by the respondents. Costs are therefore awarded to the applicant.

DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of February, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Nabwana holding brief for Mr. Rimui for the decree holder/applicant

Ms. Obura holding brief for Ms. Muyaa for the Judgment debtor/respondent

Mr. Oliver Musundi - Court Assistant