



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.1198 OF 1999

MIDDLE EAST BANK KENYA LIMITED.....PLAINTIFF

VERSUS

KILIFI AIR CHARTERS LIMITED.....1ST DEFENDANT

DAVID HARRIS.....2ND DEFENDANT

EDGAR IVAN MANASSEH.....3RD DEFENDANT

TIMOTHY MTANA LEWA.....4TH DEFENDANT

RULING

1. On the **29th October 2010** judgment was entered for the plaintiff, **Middle East Bank Kenya Limited**, against all the defendants.
2. The 2nd defendant **David Harris** has filed a Notice of Motion dated **30th May 2018**. He seeks a prayer for injunction against the judgment of this Court, pending the hearing and determination of the 2nd defendant's appeal, at the Court of Appeal, being Civil Appeal No. 34 of 2011.
3. The plaintiff and the 2nd defendant filed their affidavits and submissions in respect to the Notice of Motion. I have considered those affidavits and submissions.
4. The salient issue raised by the applicant 2nd defendant is that he filed an appeal to the Court of appeal. That appeal was fixed for hearing on **22nd May 2018** and **23rd July 2018** but the same could not proceed for hearing. No fault can be attributed to the 2nd defendant for failure of hearing of the appeal. The 2nd defendant denies delay in seeking an injunction. That the plaintiff, decree holder, did not seek to execute the judgment passed on **29th October 2010** until **May 2018** when a Notice to show cause was obtained against the 2nd defendant. 2nd defendant deponed that the plaintiff does not seek to execute judgment against the other defendants which the 2nd defendant views as personal vendetta. That the plaintiff has a legal charge over the 1st defendant's property being **L.R. No. 1705/44 Kilifi**.
5. The plaintiff does oppose the application. In opposing the plaintiff stated that the 2nd defendant in an attempt to delay execution of the decree herein has transferred his property valued at Kshs.100 million to his son. The plaintiff termed the 2nd defendant's application as incompetent because the Rule do not give this Court jurisdiction to issue injunction after judgment. That the applicant has also failed to meet the conditions of stay pending appeal set out in the Rules. That he failed to satisfy the Court that he will suffer substantial loss if the order sought is not granted; had not provided security; and had made the application after unreasonable delay. That the land upon which the plaintiff holds a legal charge was invaded by squatters and accordingly no buyer has been willing to take the risk of purchasing the land.
6. I have considered the parties evidence submissions and authorities.
7. It is clear that although judgment was entered against all the defendants in the year 2010 the plaintiff failed to execute that judgment, against the 2nd defendant, until **May 2018**. The plaintiff is also secured by the legal charge over the Kilifi property. I do take note that the said land has been invaded by squatters thereby frustrating the plaintiffs attempt to realize its security.
8. Having considered the parties affidavits and submissions, I find that the interest of justice demand, since the decree has remained unexecuted for more than 8 years that stay of execution be granted. I am aware that what the 2nd defendant prayed for is an injunction but in

my view what he requires is a stay of execution. I will consider that what the 2nd defendant requires is stay of execution and this I do invoking section IA of the Civil Procedure Act Cap 21, the overriding principle, which guide all Courts, where the Court is required to facilitate a just resolution of Civil dispute. I am satisfied that there is sufficient cause to grant stay pending the hearing and determination of the appeal since the hearing of that appeal is imminent. I am also of the view that to refuse stay of execution May, as deponed by 2nd defendant, cause the 2nd defendant's substantial loss.

9. Accordingly I grant the following orders:

a) There shall be stay of execution of the judgment in this matter pending the hearing and determination of the Civil Appeal No. 34 of 2011.

*b) The costs of the Notice of Motion dated 30 May 2018 shall abide with the **outcome of the Civil Appeal No. 34 of 2011.***

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE