



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 288 OF 2011

JASON NGUMBA KAGU (Suing as the personal representative of

NANCY NYAWIRA NGUMBA (Deceased).....1st PLAINTIFF

GATHONI NGUMBA.....2ND PLAINTIFF

NYAMBURA NGUMBA.....3RD PLAINTIFF

Versus

INTRA AFRICA ASSURANCE CO. LIMITED.....DEFENDANT

RULING

1. There is a Judgement herein in favour of the Plaintiffs as against the Defendant for a sum of Khs.6,447,962/= plus costs and interest. Aggrieved by that Judgement, the Defendant filed a Notice of Appeal on 10th April 2014.

2. In the meantime a conditional Stay order of the Execution of the Judgement was made by Gikonyo J. on 22nd October 2015. There is now a Motion in relation to those Orders and execution that happened thereafter. In the Motion dated 22nd July 2016 the Defendant requests for the following Orders:-

1. *Spent*

2. THAT this Honourable Court be pleased to vacate, vary and/or set aside the second term of the Order for Stay of execution delivered on 22nd October 2014 namely that: the Applicant deposits half of the decretal sum in an interest earning account in the names of Counsel for the parties and the Deputy Registrar, at Kenya Commercial Bank, Milimani High Court Branch within 45 days.

3. THAT this Honourable Court be pleased to enlarge the time for compliance with the Order for stay of execution in (2) above by a further fourteen (14) days upon compliance of which the Court be pleased to reinstate and confirm the stay of execution earlier granted pending the hearing of the intended appeal and/or until further orders of this court.

4. THAT a declaration that the alleged proclamation carried out on 7th July 2016 by the Decree Holder and the threatened attachment of the Defendant's/Applicants office equipment on 21st July 2016 in purported execution of the decree is irregular, illegal and null and void *ibi initio*.

5. THAT a declaration that all the payments made by the Defendant/Applicant to the Plaintiffs/Respondents and their Auctioneer pursuant to the said illegal execution were unjustified and made out of duress precipitated against an illegal act and should be refunded unconditionally.

6. THAT pending the hearing of this Application interparties there be issued temporary order of stay of execution.

7. THAT this Court be pleased to issue any further and or other order as it may deem just, fair and expedient in the circumstances.

8. THAT costs of this application be granted to the Defendant/applicant.

3. The background to and reasons for the Application are given from the Defendants perspective in the Supporting Affidavit sworn by Rose Ogwang on 22nd August 2016.

4. The ultimate Stay Orders of Hon. Justice Gikonyo were on conditional the Defendant:-

a) Paying one half of the decretal sum to the Plaintiffs.

b) Depositing the other half in an interest earning account in the names of Counsels for the parties and the Deputy Registrar at Kenya Commercial Bank, Milimani High Court Branch within 45 days of the Order.

Payment of Khs.3,223,981 was made to the Plaintiffs, albeit out of time. That has in itself attracted some controversy to which I shall return to.

5. The joint account needed to be opened. On 27th February 2015, the Defendant's Advocates, Waruhiu, K'Owade & Ng'ang'a, sent Account opening forms to Muriithi & Ndonye the then Advocates for the Plaintiffs. It would seem that those forms were not immediately returned by the Plaintiffs' Advocates and there is a letter dated 11th March 2015 from one Defendant's Advocates requesting for them.

6. Meanwhile the Plaintiffs' Counsel had filed their Bill of Costs on 12th January 2015. Submissions in respect to the Costs were confirmed as received on 19th October 2015 and Ruling delivered on 16th March 2016.

7. It is deponed on behalf of the Defendant, that the Bank insisted on an extracted Court Order to open the Account but its Advocates were unable to extract the Order timeously as the file was in the Deputy Registrar's chambers. Anyhow it was extracted on 23rd February 2016.

8. On 26th February 2016, the Defendant's Advocates forwarded Account opening forms, a second set it would seem, to the Plaintiffs' Advocates for their signature. In that letter the Defendant's Advocates explain the delay. Unsurprisingly, the Plaintiffs' Advocates declined to sign citing the lapse of time.

9. On 21st July 2016, Auctioneers visited the Defendants business premises and threatened to attach and carry away the Defendant's office furniture, equipment and tools of trade unless a sum of Khs.18m was paid forthwith. The Defendant paid Kshs.5m to the Plaintiffs and Kshs.1m towards the Auctioneers fees. The Defendant question the quantum of the Auctioneers fees and the entire execution process. These will be discussed later in this decision.

10. The Defendant position is that it is keen and desirous of pursuing its Right of Appeal and is holding Kshs.8,223,981 and seeks confirmation of the Stay Orders granted earlier.

11. Jason Ngumba Kagu (The 1st Plaintiff) responds to the application on his own behalf and that of the 2nd and 3rd Plaintiffs. That response is in the Replying Affidavit sworn on 17th August 2016. It is a

length Reply comprising of nine typed pages but it can be abridged as follows. On 22nd October 2014, the Court granted a Stay Order pending Appeal on condition that the Defendant pay ½ the decretal sum and deposit the other half within 14 days of the Order. The deadline would be on or about 5th December 2014 or at any rate not later than 8th December 2014.

12. That payment of Kshs.3,223,981.00 being the decretal sum was made on 8th January 2015 being 30 days after the due date for compliance.

13. On the other half for deposit, on 19th February 2015, the Defendant's Advocates notified the Plaintiffs' Advocates that it had been received by them. This, in the calculation of the Plaintiffs, would be 74 days from the deadline for payment and deposit of 8th December 2014. Then it was not until 27th February 2015 that the Defendant's Counsel forwarded to the Plaintiff's Counsel Account opening forms. And even then it forwarded Account opening forms for K-Rep Bank Ltd and not KCB as ordered by the Court.

14. The Defendant's Advocate had attributed further delay in its difficulty in obtaining the extracted Court Order which they claim was required by KCB before opening the Account. The Defendant averred that there was a Bill of Costs by the Plaintiff which was pending a Ruling and hence the delay. The Plaintiffs challenge this and state that they filed their Bill of Costs on 12th January 2015 which would be 90 days after the Stay order was given. This would have been sufficient time for the Defendant to obtain an extracted Court Order. The Plaintiffs assert that the delay upto 23rd February 2016 when the Defendant obtained the extracted Court Order was entirely of the Defendant's own doing.

15. On the execution of the Warrants, Paul Mwangi Gathogo of Daystar Auctioneers responded in an Affidavit sworn on 17th August 2016. On 6th July, 2016, the Auctioneers received the warrant of attachment issued by the Court for recovery of the sum of Kshs. 17,245,492.80. Mr. Gathogo then says that, on 8th July, 2016, he proclaimed assets of the Defendant Company in a proclamation accepted by Stella Aganda who nevertheless declined to sign it. The Auctioneer explains that Stella Aganda introduced herself as the Secretary to the Managing Director of the Defendant Company.

16. The Auctioneer accepts that the proclamation bears the date 7th July 2016 which was a Public Holiday but he depones that the proclamation was infact on 8th July 2016. That the dating was an error on his part.

17. On 22nd July, 2016, the Auctioneer proceeded to the Head office of the Defendant Company so as to proceed for attachment. He depones that a Mr. Muriithi who was said to be the principle officer of the Company requested for a negotiated resolution of the matter. There were negotiations which were attended by among other persons, Mr. Richard Kioko (Counsel for the Plaintiff), Alex Ngatia Thangei (Counsel for the Defendant), Rose Ogwang, Mr. Murithii and the Auctioneer.

18. The Auctioneer depones that the negotiations yielded the following deal:-

“(a) The Defendant/Applicant pays Ksh.5,000,000.00 forthwith to the Plaintiffs/Respondents. The payment would be done as follows:

(i) Counsel for the Defendant/applicant ALEX NGATIA THANGEI would release to the Plaintiffs/Respondents a sum of Kshs.3,200,000.00 that he was holding on behalf of the Defendant/applicant.

(ii) The Defendant/applicant would pay Kshs.1,800,000.00 by cheque. The Defendant/applicant wrote two cheques numbers 003663 and 003664 for Kshs.900,000.00 each and wrote a covering letter immediately to enclose the said cheques. (annexed hereto and marked “PMG/4” is a copy of the letter).

(b) The Plaintiffs/Respondents acknowledges receipt of Kshs.3,223,981 that had been paid earlier in the year.

(c) The balance of Kshs.10,245,442.80 to be paid in 10 equal monthly instalments.

(d) My Auctioneers' charges to be paid forthwith.

(e) In the light of the error on the Proclamation stating that the Proclamation took place on 7th July 2016 when in fact it took place on 8th July 2016, the Defendant/Applicant to acknowledge in writing that the entire execution process was lawful and regular. (annexed hereto and marked "PMG/5" is a copy of letter from the Defendant/Respondent dated 21st July 2016)".

19. The Auctioneer further depones that the Defendant proceeded to make payment of Kshs. 5,000,000/= to the Respondents and his charges.

20. This Court has considered the Application before it, the Responses thereto and submissions of Counsels and has come down to the following as two issues for determination.

(i) Is the delay in deposit of the balance of the Decretal sum sufficiently explained and/or excusable?

(ii) Was the Execution carried out on 21st July 2016 irregular, illegal and a nullity?

21. It is common ground that on 22nd October 2014 Hon. Justice Gikonyo granted Stay of execution of the Decree herein pending the hearing and determination of the Appeal herefrom on condition that one half of the decretal sum be paid to the Plaintiffs and the other half be deposited in an interest earning account in the names of the Counsels for the parties and the Deputy Registrar at Kenya Commercial Bank, Milimani High Court Branch. Both the payment and the deposit was to be made within 45 days of that date. As to what was the decretal sum, the Judge then remarked,

".....the Decretal sum for purposes of this Ruling only and to determine security shall include the Judgement sum of Kshs.6,447,90 plus costs and interest at Court rates from the date of declaring judgment"

22. On my count the Deadline for both the payment and deposit would be 8th December 2014. While there is no evidence as to when exactly the payment to the Plaintiff was made, there is a letter of 8th January 2015 by the Plaintiffs' Advocates acknowledging receipt of payment of Kshs.3,223,981/=. At any rate the Defendant's Counsel have expressly conceded that the payment was made out of time.

23. It is also common ground that the Plaintiffs' Counsel accepted the late payment in the letter of 8th January 2015. The Defendant argued that in accepting the payment the Plaintiffs waived their Right to challenge the said payment. The Plaintiffs rely on the Doctrine of equitable estoppel and cited the decisions in Doge vs. Kenya Cannery Limited [1989] eKLR 127 and Century Automobiles Ltd vs. Hutchings Biemer Ltd [1965] E.A .304.

24. This Court has looked at the Plaintiffs' Counsels letter of 8th January 2015. In it, the Plaintiffs reserve their Right to proceed with Execution proceedings if there would be no full adherence to the Court Orders in '**the next one week**' of 8th January 2015. Clearly the Plaintiffs' Counsel was accepting the late payment but insisted on fulfilment of the Order of deposit within a week of 8th January 2015. My understanding of the matter is that Execution proceeded because of default in the deposit of the balance of the Decretal sum and not because of the first late payment. Whilst it may be true that the Doctrine of equitable estoppel may bar the Plaintiff from challenging the first late payment nothing would stop the Plaintiff from citing that late payment as evidence that the Defendant was in the pattern of failing to comply with timeframes ordered by Court.

25. The Defendants explanation for not making the deposit on time is that the Bank insisted on an extracted Court Order to open the Account. It was further explained that the Court Order could not be extracted because the Court file was with the Deputy Registrar pending a Ruling on taxation. The Bill of Costs was filed on 12th January 2015 and after parties filed their submissions and Ruling was deferred to 3rd December 2015. The Ruling was eventually delivered on 16th March 2016. The evidence by the Defendant shows that the Order was extracted on 23rd February 2016.

26. Is this good explanation for the delay? Even after receiving the Plaintiffs' letter of 8th January 2015 on 9th January 2015 (see stamp of Defendant's advocate) intimating that the Plaintiffs would proceed with execution if the deposit was not made in a week, it was not until a month later on 19th February 2015 that the Defendant's Counsel wrote to the Plaintiffs informing them that they had 'now' received the Decretal sum.

27. This date (19th February 2015) was over two months after the deadline for deposit of 8th December 2014 had passed and was at least one month after the indulgence granted by the Plaintiffs' Counsel had lapsed. No explanation at all is made for this initial delay.

28. Even after the balance was deposited with them, the Defendant's Advocates took over one (1) year to extract the Court Order which they say was necessary for opening of the Bank Account. Miss Rose Ogwang avers as follows:-

“Noting the Ruling on the Bill of Costs was taking quite long our Advocates called at the Deputy Registrar's Chambers and requested for the release of the file to enable to facilitate the extraction of the order and which was allowed and the Order was extracted on 23rd February 2016”.

29. Two issues arise. First, the Advocates themselves did not give any evidence that the delay in extracting the Order was caused by the fact that the file was in the custody of the Deputy Registrar. The Account given by Rose Ogwang would be a hearsay account. Secondly, it has not explained why the Defendant's Advocates had to wait for a year to request the Deputy Registrar for the release of the file. It would seem that the Deputy Registrar had no difficulty obliging to the Defendant's Advocates for release of the file when it was made. There is no reason not to believe that the release of the file would have come much earlier if the Defendant's Advocates had been more diligent and sought its release much the earlier.

30. I agree with the Plaintiffs' Counsel that a delay of over one year is inordinate and ,worse still, when it is not sufficiently explained. It cannot be excused.

31. This Court turns now to the Execution of 21st July 2016. It is said to be irregular, illegal and a nullity for three reasons,

- a) There was no valid or proper proclamation.
- b) No Notice to Show Cause issued.
- c) Warrants were erroneous and illegal.

32. This Court need not consider the three grounds because the execution obviously infringes on the provisions of Order 22 Rule 18 of the Civil Procedure which provides:-

“(1) Where an application for execution is made—

- (a) more than one year after the date of the decree;
- (b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor having changed his employment since a previous order for attachment”. (*my emphasis*)

33. The Judgement herein was delivered on 22nd January 2014. Execution happened on 7th (or 8th) July 2016. This was more than two years after the date of the Judgement. Although Rule 18(6)(a) talks of “Decree”, this Court takes the view that for the purposes of this Rule, the word “Decree” includes Judgement. This view stems from the object of Rule 18(6) (a) which is to eliminate the element of a surprise execution by the Decree holder on a Judgment debtor after failing to take out warrants for a considerable long time after a Decree or Judgement. One can envisage a situation where a Decree holder holds onto a draft Decree approved by the Judgement Debtor under the provisions of Order 21 Rule 8, then waits for more than a year thereafter, obtains a sealed and signed Decree and then proceeds with execution without notice!

34. The Plaintiffs answer to this aspect of the Application is that, first, the Defendant is slothful and is not deserving of the Courts’ protection. The Court is urged to resolve the matter on substantial rather than procedural justice. That at any rate the Court allowed the execution to proceed without the show cause.

35. Clearly the Plaintiffs do not have a good answer to the grievance. Merely because the Defendant has breached timelines ordered by Court is not an excuse to overlook the provisions of the Law. Two wrongs can never make right. As to whether the Court could excuse compliance of the Rule, this Court is of the view that other than the Circumstances exempted by the proviso to the Rule(which are not applicable here), the requirements of Order 22 Rule 18 are unyielding.

36. There being an infraction to Order 22 Rule 18(2)(a), this Court holds that the proclamation of 7(8)th July 2016 and the subsequent execution proceedings were unlawful.

37. What then are the appropriate Orders to make in respect to that unlawful execution? The Defendant asks that all payments made by them to the Plaintiffs and their Auctioneer pursuant to the said illegal execution be refunded unconditionally. But having found that the plea for extension for time for the deposit of the decretal sum is unmerited, the Plaintiffs will immediately be entitled to what remains unpaid under the Decree. The order that commends itself to the Court is that all monies incurred (which is not part of the Decree) by the Defendant because of unlawful decree shall be deducted from whatever sums may still be due and owing. The amounts to be deducted shall be agreed by the Parties and in the absence of an agreement, assessed by the Taxing Master of this Court.

38. The outcome is that Prayers 2 and 3 of the Notice of Motion dated 22nd July 2016 are hereby disallowed. Prayers 4 and 5 are allowed as set out in paragraph 35 above. The Application has partly succeeded and partly failed. Each party shall bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 17th day of October, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Kimaru h/b Thengei for Defendant

Gitau for Plaintiffs

Alex - Court clerk