



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 682 OF 2009

KENYA PROGRAMMES FOR SUSTAINABLE DEVELOPMENT.....PLAINTIFF

- VERSUS -

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

1. The application dated 9th October 2017 was brought by the Judgement-Debtor, **CFC STANBIC BANK LIMITED**.
2. It is an application seeking Stay of Execution pending the hearing and determination of an application dated 25th August 2017.
3. It is common ground that on 19th July 2017 the trial court delivered its judgement, through which the plaintiff was awarded USD 16,000 together with the costs of the suit.
4. It is further common ground that by an application dated 25th August 2017, the Judgement-Debtor sought stay of execution pending the determination of its appeal.
5. When the application dated 25th August 2017 came up for hearing, it transpired that it had not yet been served upon the respondent. The applicant informed the court that their inability to effect service upon the respondent was due to the fact that it had failed to trace the respondent.
6. In the circumstances, the Judgement-Debtor sought and was granted leave to serve the respondent by way of substituted service.
7. The Judgement-Debtor did serve the application on the plaintiff through an advertisement in the “*Daily Nation*” newspaper of 7th October 2017.
8. The court had scheduled the application dated 25th August 2017 for hearing on 19th October 2017.
9. However, on 5th October 2017 the Decree-Holder, through Court Brokers named **CASH GATE AUCTIONEERS**, proclaimed the bank’s assets.
10. In the Proclamation Notice, the Court Brokers indicated that they would cart away the proclaimed goods and auction them, if the bank would not have paid the decretal amount and auctioneer’s fees within

7 days.

11. The bank then felt obliged to rush back to the court because, although its application for stay of execution was already scheduled for hearing on 19th October 2017, the Court Brokers would have carted away the bank's assets prior to that date. It is then that the bank filed the application dated 9th October 2017.

12. When canvassing the application dated 9th October 2017, Mr. Karungo advocate submitted that the bank has an arguable appeal.

13. He also said that because the respondent did not even have a known current address, the bank would suffer irreparable loss if it was forced to pay the decretal amount now. It is the view of the bank that the plaintiff would be unable to refund the money.

14. The bank expressed a willingness to provide security, as a pre-condition for the grant of the order for stay of execution. In its view, the security would provide the plaintiff with an assurance that if the bank's appeal failed, the decretal amount would be readily available to the plaintiff.

15. In answer to the application, Mr. Ochieng advocate pointed out that on 20th July 2017, the court had granted to the bank, a period of 14 days within which it could have brought a formal application for stay of execution.

16. As the bank failed to come to court within the said period of 14 days, the plaintiff submitted that the court was *functus officio*.

17. The plaintiff also noted that although the bank had filed its Notice of Appeal on 25th July 2017, the bank has not explained why it did not come to court within 14 days, to seek stay of execution.

18. As far as the plaintiff was concerned, it is also entitled to justice. Therefore, the plaintiff urged the court to dismiss the bank's application for stay of execution.

19. In order to determine the application, I have given due consideration to all the submissions made by the parties. I have also carefully perused the record of the proceedings.

20. I note that on 25th August 2017, Onguto J. declined to certify as urgent, the bank's application dated 25th August 2017. The learned Judge noted that execution was unlikely to take place soon, as the party and party costs had not yet been assessed.

21. In effect, the delay in the prosecution of that application was not attributable to the applicant's lack of desire to canvass it. The applicant had filed a Certificate of Urgency, hoping to persuade the court to give it a hearing date, on priority.

22. Secondly, and in any event, when the defendant did not file a formal application within 14 days of the judgement, that was not a bar to an application for stay of execution being lodged thereafter.

23. In theory, when there was no order for stay of execution, there was a possibility that the plaintiff could have taken steps to execute the Decree.

24. Ordinarily, before a Decree can be executed, the party and party costs have to be assessed or agreed upon by the parties. The reason for that is that the process of execution should take place once. There should not be a process in which execution was for the decretal amount, Excluding, the costs that had been awarded in that case.

25. However, when a Decree-Holder had made a conscious decision to proceed with execution prior to the assessment of party and party costs, he would need to make a formal application.

26. If the court were to grant leave to the Decree-Holder to carry out execution before taxation of costs, the general understanding would be that the Decree-Holder had chosen to forego the costs.

27. In this case the plaintiff has not responded to the facts deponed to by the applicant's Senior Legal Counsel, Elisha Nyikuli. I therefore find that the plaintiff's conduct on 8th September 2017 was akin to subterfuge.

28. Two of their representatives, Martin Njuguna and a lady whose identity was not disclosed, stormed into the bank's reception, demanding payment of the decretal amount. The said representatives threatened to send in their Auctioneers if the bank did not make payment.

29. Furthermore, the said representatives demanded that payment be made to them, alleging that they were no longer dealing with the matter through their advocates.

30. As it has now turned out that the plaintiff was still dealing with the case through Leonard Rufus Ochieng, I hold the considered view that the plaintiff's actions are so shrouded in mystery and secrecy that if the decretal sum was paid over to them, it would be difficult for the bank to recover the same, if the bank's appeal were to ultimately succeed.

31. I have also noted that in the Warrant of Attachment dated 28th September 2017, there is no indication of the quantum of the taxed costs.

32. It therefore appears that the process of execution may well have been premature, because execution before taxation can only be undertaken after the court has granted leave. In this case, the plaintiff has not demonstrated that it ever sought and was granted leave to execute the Decree prior to taxation.

33. Meanwhile, as the bank was ready and willing to provide security for the due performance of the Decree, I find that the plaintiff would not be prejudiced if the execution was stayed.

34. In the result, I order that there shall be a stay of execution until the Appeal was heard and determined. However, as a pre-condition for this order taking effect, the bank is required to make available a sum of money that was sufficient to pay-off the decretal amount. The said money shall be held in a joint interest-earning bank account, which account shall be operated by Leonard Rufus Ochieng and Messrs Walker Kontos Advocates.

35. The joint account is to be opened within the next 7 days from today.

36. However, if the plaintiff does not cooperate with the bank, so as to make it possible for the account to be operationalised within the next 7 days, the bank may have the funds deposited with the court.

37. The costs of the application dated 9th October 2017, is awarded to the applicant.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of December 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Oseko for Ochieng for the Plaintiff

Omino for Karungo for the Defendant

Collins Odhiambo – Court clerk.