



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 576 OF 2008

NGURE KAIRUPLAINTIFF/APPLICANT

-VERSUS-

AMIN ABDULKADIR MOHAMED1ST DEFENDANT/RESPONDENT

HALIMA SHEIKH HERSI2ND DEFENDANT/RESPONDENT

R U L I N G

1. The application before the court is a **Notice of Motion** dated 9th September 2014 and filed in court on 11th September 2014 by the Plaintiff under Order 22 Rule 18, Rule 19 and Rule 22, Order 48 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A, 25 and 63 (e) of the Civil Procedure Act, and all enabling provisions of the law.
2. The application seeks the following orders:-
 1. *That the application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.*
 2. *That pending the hearing and determination of the application herein the Honourable Court be pleased to order a stay of execution of the warrants of attachments of moveable property and warrants of sale of property of the Plaintiff issued on 26th August 2014 to Mr. Nathan M. Pala training as Muhatia Palal Auctioneers.*
 3. *That the Honourable Court be pleased to raise the proclamation dated 4th September 2014 over the Plaintiff's attachable assets carried out by Muhatia Pala Auctioneers.*
 4. *That the costs of the application be borne by the Defendants.*
 5. *That the Honourable Court be pleased to grant any further orders as it deems fit.*
3. The application is premised on the grounds set out therein and is supported by affidavit of the Plaintiff **Mr. Ngure Kairu**.
4. The 1st and 2nd Defendant/Respondents have both opposed the application through a replying affidavit sworn by **Amin Mohamed** dated and filed in court on **6th October 2014**.
5. The brief facts of the application are as follows. The Plaintiff through a Plaint dated 10th April 2008 filed suit against the Defendants seeking:
 - a. *A declaration that the Charge registered on 19th October 2007 over ALL THAT Parcel of Land known as L.R. No. 7785/77 and held by Amin Abdulkadir Mohamed and Halima Sheikh Hirsi*

be declared null and void.

- b. *That consequently the Registrar of Titles be ordered by this Honourable Court to discharge the aforesaid Charge.*
 - c. *The costs of this suit together with interest thereon at court rates from the date of Judgment until payment in full.*
6. The Plaintiff in its Plaint admitted owing the Defendant a sum of Kshs 4,500,000/=. The Defendants as result filed a Defence and Counterclaim on 20th May 2008. In the counterclaim the Defendant sought as follows:
- a. *The sum of Kshs 25,425,000/= being the whole amount due for payment by the plaintiff to the Defendant as at 24th May 2008.*
 - b. *Interest on (a) above at the agreed rate of 31% per month from 24th May 2008 until payment is made in full.*
 - c. *That in default of payment of the sums aforesaid and additional interest and costs as sought in (a) and (b) above LR No. 7785/77 the Plaintiff's property and the subject of the said charge instrument be sold by the Defendants to defray the first and second defendants claims herein plus costs and interests aforementioned.*
 - d. *Costs of this suit and interests thereon.*
7. The Defendants thereafter made an application dated 18th September 2008, whereby the Defendants sought inter alia judgment on admission. Hon. Justice Kimaru L. on 11th February 2009 delivered a Ruling on the Application in which he held that other than the admitted sum of Kshs 4,500,000/= the Defendants application lacked merit and was dismissed. The Plaintiff therefore successfully opposed the Defendants' application to dismiss the Plaintiff's suit. However, Justice Kimaru awarded costs at an interlocutory stage to the Defendants on the sum adjudged in their favour. The Defendants then proceeded to make an application seeking leave to execute the Decree extracted before taxation. This Application was dismissed with costs by Khaminwa J. on 23rd March 2009. Thereafter the suit proceeded to full trial. The Court on 6th November 2012 in its Judgment found in favour of the Plaintiff, granted all the prayers sought in the Plaint and further dismissed all the prayers in the Defendants Counterclaim save for the judgment of Kshs 4,500,000/= which had already been entered in favour of the Defendant. In short, the Plaintiff successfully proved his claim against the Defendants. The Plaintiff successfully defended the counterclaim and therefore as the overall successful party was awarded costs of the suit. The Plaintiff as a result proceeded to file a Bill of Costs for an assessment of costs. The Defendants, however, alleging confusion created by the two (2) orders of costs, filed the application dated 10th May 2013 seeking a review, variation and/or setting aside of the orders of 6th November 2012. Parties filed written submissions to the Application for review but the same is pending ruling. The Defendants thereafter filed execution proceedings. The present application is as a result of that process.
8. Parties filed written submissions to the application. The Plaintiff did that on 15th October 2014 while the Defendant did that on 17th December 2014. The sum of the Plaintiff's/Applicant's submissions is that the Defendants' attempt to carry out the execution exercise is illegal for the reason that the taxation process has not been completed, and no leave has been granted to carry out execution before taxation. The Applicant further submits that the said execution cannot be legal since the said decree issued on 6th November 2012 is more than one year old, and so a Notice to Show Cause under Order 22 Rule 18 should first ensue to the Judgment Debtor before the decree can be executed. The Applicant further submitted that the Respondents have already applied for a review of the orders of 6th November 2012 and the same has not been determined, hence the said execution is irregular and should be halted.
9. On their part, the Respondents submitted that the execution process is lawful, and that in any event, the Plaintiff is simply delaying the Defendant from enjoying the fruit of its Judgment. The Respondents contend that if the process were to be halted for any reason the decretal sum of

- Kshs.4,500,00/= should be paid to the Defendant or at least be deposited in court.
10. I have carefully considered the above submissions. The issue to determine is simply whether the said execution is procedural and proper. The other issue which this court may want to consider is why the Plaintiff has, since 11th February 2009, not paid the Kshs.4.5 million awarded to the Defendant.
11. On the first issue, I am satisfied that under Order 22 Rule 18 of the Civil Procedure Rules, where an application for execution is made more than one year after the date of the decree, the court executing the decree is required to issue a Notice to the person against whom execution is applied requiring him to show cause why the decree should not be executed against him. There is no evidence that the Plaintiff herein was ever issued with such a Notice. On this ground alone the Plaintiff's application appears to have a sound grip.
12. The second issue is why the Plaintiff has not bothered to pay the decretal sum more than six (6) years since the same was issued. There is no evidence that the Plaintiff has appealed against the order to pay the Kshs.4.5 million. This sum is due to the Defendant, and regardless of the outcome of taxation, the same will be paid to the Defendant. It is possible that the Plaintiff fears that since the Plaintiff has won the suit in other respects, the taxation process will yield a sum which the Defendant may find difficult to pay. In that regard, and if the same is true, then the Plaintiff is using the said Kshs.4.5 million awarded to the Defendant as security for the Plaintiff's costs, and that would explain the reluctance by the Plaintiff to pay the same. If that reasoning holds any water, then the Defendants also should have a misgiving of the Plaintiff ever being able to pay the said Kshs.4.5 million. Clearly, both parties need some kind of security. This court is also a court of equity. Equity demands that a party who comes to its court does so with clean hands, and that a party seeking equity should be prepared to do equity. In my view, the Plaintiff cannot come to this court to seek to stop the execution process without at the same time explaining why for a period of six years the principal decretal of Kshs.4.5 million awarded to the Defendant remains outstanding. My view is that the said Kshs.4.5 million shall remain security for either party to be disbursed after taxation and for that to happen that amount must be secured. In the upshot I make orders as follows:-
- a. *The Plaintiff's/Applicant's Notice of Motion application dated 9th September 2014 succeeds in terms of prayer number 1, 2, and 3.*
 - b. *In terms of prayer number 5 thereof being a request by the Applicant for any further orders as it deems fit, this court directs that the Plaintiff shall within 21 days from the date of this Ruling deposit the said sum of Kshs.4.5 million in a joint interest earning account in the names of the parties advocates.*
 - c. *The costs of this application shall be for the Plaintiff/Applicant.*

Orders accordingly.

READ, DELIVERED DATED AND AT NAIROBI

THIS 30TH DAY OF JANUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Shah holding brief for Rimuyu for the Plaintiff/Applicant

No appearance for Defendants/Respondents

Teresia – Court Clerk