



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 472 OF 2014
BERNARD NJOROGE GATHUA..... APPELLANT
VERSUS
MWANZIA MUTISO (suing through his next friend and father
GIDEON MUTISO MUKALI..... RESPONDENT
R U L I N G

There are two applications before the court: -

- A. (i) Respondent's application dated 29th January, 2015 seeking release of decretal sum of Ksh.1,218,538/- deposited in court on 19th December, 2014 and that
- (ii) Appellant/Judgment Debtor be ordered to pay court Auctioneers untaxed charges amounting to Ksh.337,479/- that arose during the halted execution.
- B. The appellant's application dated 27th October, 2014 seeking both interim and temporary stay pending the final determination of the application and of this appeal.

The parties agreed that there be a consolidation of the two applications for easy hearing.

The application of 29th January, 2015 by the Respondent raised issues that now dominate in this ruling. The Appellant in his said application of 27th October, 2014 had sought and obtained interim stay of execution on the condition that he deposited the decretal sum in court on or before 10th November, 2014. The Appellant had failed to do so. He filed a further application to extend the period to deposit on 17th December, 2015. The application was heard on 18th December, 2014 and the court extended the order of interim stay on condition that the decretal sum shall be deposited in court by end of the working day of 19th December, 2014. The Appellant actually deposited the amount and thus took advantage of the interim stay, which is still in effect until the Appeal is determined.

The issues before the court presently, are those raised by the Respondent/Decree Holders application of 21st January, 2015. He sought release of the decretal amount on the basis that the Appellant, failed to deposit the decretal amount by 10th November, 2014, as originally ordered. That since he was and therefore riding only upon the protection of the interim order of stay which was destined to last only until the 10th November, 2014 he had lost such protection when he failed to deposit the decretal sum by 10th November, 2014 when the stay order itself was to stand discharged.

On the other hand, the Respondent also sought the release of the decretal amount of Kshs.1,219,538/- deposited in court when the court extended the stay of execution on the basis that there is now nothing preventing him from enjoying his judgment and decree.

The court notes that the Appellant failed to deposit the decretal sum in court to sustain and make use of the interim stay order granted on 27th October, 2014 which was due to expire on 10th November, 2014 if not complied with. However, on the 18th December, 2014 this court extended the interim order out of time. This court of course had jurisdiction to extend the time and neither party has argued differently. The court notes that the Respondent/Decree Holder completely failed to appreciate the fact that the court extended the interim stay order on 18th December, 2014. Indeed it is clear from the record that the Respondent did not recognize the said order of stay of execution made on the 27th October, 2014 and intended to last until 10th November, 2014 when the Appellant was expected to renew or validate its extension by payment of the deposit of the decretal sum. The court reaches this conclusion because the record confirms that on 7th November, 2014, three days before the court stay order was to stand discharged if the Appellant failed to comply with it, the Respondent's Auctioneer was busy executing the decree by proclaiming the Appellants property. This was declared and conceded by the Respondent in Kyalo Mbobu's Supporting affidavit of this application sworn on 29th January 2015. That means that even had the Appellant deposited the decretal amount on 10th November, 2014, the Respondent's Auctioneers were in the process of execution already.

Be that what it may the position the court recognizes is that a stay of Execution order was granted in the interim on 27th October, 2014 and was extended. Although out of time, nevertheless it was extended on 18th December, 2014 and presently persists. Since the application was heard in consolidation with this application of the Respondent, this court taking account of the fact that the decretal sum is in the custody of the court until the appeal is determined, hereby considers it reasonable to alter the interim stay into a temporary stay until the final determination of the appeal subject of course to what the court will determine of the Respondents prayer to have the decretal sum released to him forthwith.

I now turn to the immediately above stated issue. That is to say, is there a basis upon which the decretal sum of Ksh.1,219,337/- could be released to the Respondent/Decree-holder?

There is an appeal pending determination of this court. The appeal should not of course be rendered nugatory in case the Respondent/Decree holder, if the appeal succeeds, finds himself unable to refund the same and thereby causes the Appellant irreparable loss.

The Appellant pointed out that the Respondent is sick (mad) and as conceded by the Respondent Representatives he would in that state be able to obtain funds to return to the Appellant. The court did not hear any denial of the above mentioned sickness from the Respondent and accordingly, accept it as a fact. Furthermore, with the decretal amount being deposited in court, the Respondent was sure to eventually get a settlement of its judgment although a little later. In the above circumstances, there are adequate grounds to confirm the stay of execution until appeal is determined.

As to the issue of the Auctioneer's costs, the auctioneer as noted earlier, went ahead to execute the decree on 7th November, 2014 while the interim court order of stay still stood valid until 10th November, 2014. That was in contempt of court order which would deserve punishment were it properly presented before the court. How then would the same auctioneer seek an order for costs in his favour? As I said, what he deserves is punishment. The prayer for costs in the Auctioneers favour, is therefore, rejected. He can only turn to his instructing principal to get his fees.

The final results therefore are that: -

- a. **The interim stay order is hereby made temporary until the appeal is heard and determined.**
- b. **The decretary sum of Ksh.1,219,538/- shall stay deposited in court or a counsel's joint**

interest earning account until determination of appeal or as court may otherwise order.

- c. The prayer for auctioneer's costs from the Appellant in respect of the execution which was illegal, is hereby rejected.**
- d. Costs of the Respondent's application only are to the Appellant.**

Orders accordingly.

D A ONYANCHA

JUDGE

Dated and delivered at Nairobi this 18th day of November, 2015.