



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 59 OF 2006

COQUERO LIMITEDPLAINTIFF

-VERSUS-

BRUCE JOSEPH BOCKLE..... DEFENDANT

RULING

1. By a Notice of Motion Application dated 8th April 2015, the Plaintiff seeks the following orders:
 - i. Spent
 - ii. The Plaintiff be allowed to execute the decree dated 25th September 2013 against the Defendant before taxation of costs.
 - iii. The Defendant be evicted from the property known as **Subdivision Number 491 (Original Number 490/1) Section IV, Kikambala** in the enforcement of the judgment delivered on 14th March 2013.
 - iv. The County Commander, County Government of Kilifi and the area District Officer to supervise the enforcement of the orders of this court and to maintain law and order.
 - v. Costs of the Application be provided for.
2. The Application is supported by the Affidavit of FRANKLYN PEREIRA sworn on 8th April 2015. The gist of the Plaintiff's Application is that judgment was entered in its favour on 14th March 2013 by which the Defendant was ordered to vacate the property known as Subdivision Number 491 (Original Number 490/1) Section IV, Kikambala (hereinafter "the suit property").
3. The Defendant appealed the said judgment to the Court of Appeal but its appeal was concluded in favour of the Plaintiff through the judgment delivered on 3rd April 2014. The Defendant then filed a constitutional petition and an application for conservatory orders which application was dismissed on 14th November 2014 hence there is no conservatory order, injunction or stay orders in existence against the Plaintiff.
4. The Application was opposed by the Defendant through a Replying Affidavit sworn by BRUCE BOCKLE on 29th June 2015 and filed on the same day. The gist of the Defendant's opposition is that it has filed a Constitutional Petition No. 28 of 2014 as well as an application in the Court of Appeal for the review of the Court of Appeal's judgment delivered on 3rd April 2014 and the two are still pending. The Defendant states that execution should await determination of the Constitutional Petition and the Court of Appeal application for review lest the two causes be rendered nugatory.
5. The Defendant states that it has developed the suit property which is valued at Kshs. 20,000,000/- per acre, has sentimental attachment to it and the same is of great importance to the Defendant's family. That the Plaintiff should not be allowed to "short circuit" the process because the Plaintiff acquired the title through corruption.
6. The Plaintiff submitted that a successful litigant is entitled to the fruits of its judgment. That the

Defendant was ordered to vacate the suit property but has defied the court order and continues to be in possession. That every judgment of the court is meant to be obeyed without demand and if there is default in obedience the successful litigant is entitled to commence enforcement proceedings.

7. It is the Plaintiff's submission that since there is no conservatory or injunctive orders in place, the pendency of the constitutional petition and the application for review does not preclude the Plaintiff from seeking to enforce a valid judgment of the court. The Plaintiff relied on the case of **D E N v P N N [2014] eKLR** where Kimaru, J. stated that:

“It is not disputed that there exists a valid judgment of this court. That judgment has not been set aside by an appellate court. It is therefore a valid judgment that is capable of enforcement and should in fact have been complied with.”

8. The Defendant submitted that the general rule is that decrees issued by the High Court are executed in the ordinary course of events under **Order 22** of the Civil Procedure Rules, 2010 and for one to be allowed to derogate from the ordinary procedure, **section 94** of the Civil Procedure Act requires presentation of evidence to convince the court that it is essential not to follow the ordinary procedure.
9. The Defendant admitted that the Plaintiff is entitled to enjoy the fruits of its judgment delivered way back in March 2013 but stated that the enjoyment should be in line with the procedure set by law and the “short circuit” provided for in section 94 of the Civil Procedure Act should only be used in exceptional cases.
10. The Defendant submitted that the decree was extracted in September 2013 but the Plaintiff did not file its Bill of Costs until 17th June 2015. That therefore the Plaintiff should not be allowed to sleep on its rights for two years then wake up one day to recover the lost time by bypassing the laid down procedure. It is the Defendant's submission that it will be vexed twice; by eviction and at execution for costs once the same are taxed. The Defendant relied on the case of **AFRICAN COMMUTER SERVICES LTD V KENYA CIVIL AVIATION AUTHORITY & 2 OTHERS [2014] eKLR** where Mabeya, J. quoted with approval the decision of Odunga, J. in *Erad Suppliers & General Contracts Vs Ncpb - Misc. Civ. Case No. 639 Of 2009 (UR)* as follows:

“In my view, the necessity for leave to be obtained where a party intends to execute before taxation is to obviate situations where a judgment debtor is likely to be confronted with two sets of execution proceedings. In respect of the same decree i.e. for the principal sum and for costs. This is a recognition of the fact that in a civil action the main aim is compensation and the process should not be turned into a punitive voyage.”

11. The Defendant further submitted that the nature of the decree in this case is such that the court should not lightly allow to be executed because it is in respect to land which is an emotive issue in Kenya and the court should exercise the greatest care before denying a litigant its property. That the judgment issued herein is not a final judgment since it has been appealed against and the judgment of the Court of Appeal is a subject of review proceedings and since the Court of Appeal has jurisdiction to review its judgment, the rights of the parties herein have not been fully determined.
12. Finally, the Defendant opposed the prayer for use of police, District Officer or the County Government to supervise enforcement of the court orders. The Defendant relied on the case of **KAMAU MUCUHA V RIPPLES LTD [1993] eKLR** where Hancox, CJ. (as he then was) stated that:

“Before concluding this judgment I would refer to paragraph 4 of the formal order extracted on 22nd September 1992. It says that police assistance may be enlisted to ensure that the plaintiff (ie the respondent) is reinstated in the premises. I have not been able to find any such order in Mwera J's ruling, but it would, in any event be unlawful to utilize the police in a civil action for the purpose of effecting or aiding private evictions or reinstatements.”

13. The Defendant submitted that no evidence was adduced to show that the court bailiff will face

resistance at execution and there was no remotest of suggestions that the Defendant is hostile and its eviction will lead to breach of peace.

14. The main issue for the court's determination is whether this is an appropriate case in which this court should grant the Plaintiff leave to execute the court's decree under section 94 of the Civil Procedure Act before costs are ascertained.
15. Execution of a decree before costs are ascertained, is provided for under **section 94** which provides as follows:

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

16. The rationale behind **section 94** was elaborately discussed by Kuloba, J. (as he then was) in the case of **MERCEDES SANCHEZ RAU TUSSEL v SAMKEN LTD & 2 OTHERS [2002] eKLR**, as follows:

“The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment-debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs.

.....

Till such formal expression has been given to the judgment of the court, the decree is not executable, and in order to obviate the difficulty arising in a case where the taxation of the costs would take some time, section 94 permits the decree holder, as it were to execute a “decree” which strictly does not constitute the formal expression of an adjudication in as much as the provision with regard to costs has not been embodied in that decree, and it is perfectly true that an order from the court for a decree to be executed is required if it is a “decree” not in the proper sense of the term as defined by section 2 of the Act. That is the rationale for section 94 making a specific order of the court necessary in a case where a decree holder wants to execute a decree which does not contain the provision for costs, and that permission is necessary because a decree cannot be drawn up and the seal of the court cannot be put upon the decree unless the provision with regard to costs is inserted in it, because it is in the judgment of which the decree is only a formal expression.”

17. Whether to allow execution to proceed before costs are ascertained is a matter of the court's discretion. In the case of **MERCEDES SANCHEZ RAU TUSSEL v SAMKEN, supra**, it was stated that:

“On the wording of the section the ordering of execution to be done forthwith is a matter in the sound discretion of the court when the court considers it necessary that in all the circumstances of the case the decree should be executed before awarded costs are ascertained by taxation.”

18. The question is, is this a case in which the court should exercise that discretion? In the judgment delivered by Tuiyott, J., the learned Judge observed that the feud over the suit property is an old one dating back many years before these proceedings commenced on 26th January 2004. It was not until 2013, nine years later, that the Plaintiff was able to obtain judgment. To date, the Defendant has not vacated the suit property despite being ordered by Tuiyott, J. to do so within 60 days of the date the judgment was delivered on 27th February 2013.
19. Although the Defendant lodged an appeal against the said judgment, its appeal was dismissed on

3rd April 2013. Presently, there is no stay of execution of the decree herein. From the moment the Defendant lost its appeal in the Court of Appeal, he knew that the judgment of the High Court became binding and the Defendant was therefore expected to vacate the suit property within 60 days as had been ordered. To date, over one year after its appeal flopped, the Defendant is still enjoying occupancy of the suit property. I therefore do not see why there should be further delay in vacating the property by the Defendant since it has all along known that the court had ordered it to vacate. Court orders are to be obeyed and the court should not have sympathy with a party who is in blatant breach of a valid court order.

20. The Defendant's argument that its application for review of the Court of Appeal judgment and the constitutional petition will be rendered nugatory if execution is permitted to proceed cannot hold because there is no order staying the execution. It is trite law that the pendency of appeal or an application against a judgment is not a bar to execution of the decree emanating from the judgment. I put reliance on the case of **MERCEDES SANCHEZ RAU TUSSEL v SAMKEN**, *supra*, where Kuloba, J. (as he then was) stated as follows:

“True, aspects of the judgments may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for a review to apportion liability amongst judgment-debtors, no part of a judgment is executable until after determination of the review or appeal. Such a view would permit any person desirous of jamming the justice process or merely to postpone pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment.”

21. Further in the case of **AFRICAN COMMUTER SERVICES LTD V KENYA CIVIL AVIATION AUTHORITY & 2 OTHERS [2014] eKLR**, where Serگون, J. stated that:

“To my mind, I am satisfied that for whatever it is worth, that application said to be pending in the Court of Appeal cannot be a bar to the decree holder as a successful litigant from seeking to enforce its right to enjoy the fruits of its litigation...

The decree sought to be executed is a lawful one issued by the Court of Appeal.”

22. The Defendant has raised other grounds of objection to the application namely that the Plaintiff's title was obtained by fraud and that the Defendant has a sentimental attachment to the suit property. In my view, these are inconsequential. The propriety of the Plaintiff's title has been determined and raising the same here is tantamount to opening the case for re-trial. Further, the sentimental attachment that the Defendant has on the suit property should not stand on the way of the execution process which is pursuant to a valid judgment. The Plaintiff has waited for over 11 years to access its property. Even after the judgment over two years ago, the Defendant is still in occupation of the property. In my considered view, it is time the Plaintiff got access to its property. It is clear to me that this is an appropriate case in which the Plaintiff should be given leave to execute the decree before costs are ascertained by taxation.

23. On the issue of involvement of the police, it is the duty of the police to ensure law and order prevails at all times. I take judicial notice of the fact that many eviction exercises usually turn chaotic and ugly. In any event if it is true, as the Defendant submits that it is not resistant to eviction, then the Defendant will really suffer no prejudice whether the presence of the police just to ensure that peace prevails and any potential conflicts are contained. The officer in charge of the nearest police station should suffice to ensure that law and order is maintained during eviction rather than involve the County Commander, the County Government of Kilifi and the area District Officer. The Plaintiff has not demonstrated a grave situation that warrants security of such magnitude.

24. In the end, I make the following orders:

- i. The Plaintiff be and is hereby allowed to execute the decree dated 25th September 2013 against the Defendant before taxation of costs.
- ii. The officer in charge of the nearest police station to ensure law and order is maintained during the

eviction exercise.
iii. The cost of the application is awarded to the Plaintiff.

**RULING DATED & DELIVERED IN MOMBASA THIS 8TH DAY OF DECEMBER
2015**

A.OMOLLO

JUDGE