REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 85 OF 2010

FLORENCE HARE MKAHA …….……..... PLAINTIFF/RESPONDENT

V E R S U S

1. PWANI TAWAKAL MINI COACH

2. MOHAMED ATHMAN …….…….. DEFENDANTS/APPLICANTS

RULING

1. The Court is considering two applications in this Ruling both filed by the Defendant. The first is dated 28th October 2013 which in my view is seeking almost similar prayers as the second one dated 29th October 2013. The one dated 28th October 2013 sought orders for stay of execution of the decree pending appeal and for mandatory order to be issued directing Plaintiff to release Defendant's attached motor vehicles.

2. The second application dated 29th October 2013 is for orders that the Court stay execution of the decree pending appeal and for the Court to review or enlarge time within which to deposit the decretal sum or to order a bank guarantee be provided within seven (7) days and for the release of Defendant's motor vehicle registration No. KBN 848F.

BACKGROUND

3. Plaintiff filed her plaint on 24th March 2010. At that time she was represented by the law firm of Pandya & Talati Advocate. Judgment after full hearing, was pronounced on 31st July 2012.

4. At this stage, if the Plaintiff required to change her advocates, she needed to fulfil the requirements of Order 9 Rule 9 of the Civil Procedure Rules. That Rule provides-

> **"9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court-**
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> **a) upon an application with notice to all the parties; or**
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> **b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."** (underlining mine)

5. The record of this file shows that the Plaintiff did not proceed as provided in the above Rule. This is because the Bill of Costs was filed by S. R. Shikely Advocate who did not obtain the leave of the Court to so file.

6. A Notice of Motion dated 26th August 2013 was filed by Kinyua Njagi & Co. Advocates who sought leave to take over the conduct of this case on behalf of the Plaintiff from Pandya & Talati Advocate.

7. That firm did not fix that Notice of Motion for hearing and instead filed a Notice of Change of Advocates on 10th October 2013. It seems that that firm filed that Notice of Change of Advocates on the strength of the consent letter dated 10th October 2013 which was signed by that firm, Kinyua Njagi & Co. Advocates and Shikely Advocate.

8. I bring out these anomalies because they have bearing in the process undertaken in this matter on behalf of the Plaintiff.

9. On 10th October 2013 the firm of Kinyua Njagi & Co. Advocates wrote a letter to the Deputy Registrar attaching an application for execution of the decree by issuance of warrant of attachments against the Defendant. On that same day Warrants of attachment as sought were issued to Murphy Merchants Auctioneers. There is a letter of Murphy Merchants Auctioneers in the Court file addressed to the Executive Officer of this Court by which the Auctioneers alleged that they proclaimed the Defendant's attachable goods on 11th October 2013.

DEFENDANT'S SUBMISSIONS

10. Defendant submitted that the Advocate who gave instruction for the attachment of the Defendant's goods was not properly on record, because the Court had not granted him the leave to take over the conduct of the Plaintiff's case. Defendant referred to Order 9 Rule 9.

11. The Defendant's learned counsel submitted that he was involved in negotiations with the Plaintiff's then advocate when without notice the firm of Kinyua Njagi & Co. Advocates applied for execution of the decree and attachment of the Defendant's motor vehicle proceeded, without proclamation as required by the Rules to attach Defendant's vehicle.

12. Defendant did provide a bank guarantee as ordered by the Court filed in Court on 7th November 2013, where their bank guaranteed to pay Kshs. 5,500,000/-. Defendant therefore submitted that with that guarantee it would be fair and just to grant stay of execution as sought. In this regard Defendant referred to the provisions of Order 42 Rule 6(2) which was discussed by the Court of Appeal in the case **HALAN & ANOTHER –Vs- THORTON & TURPIN (1963) LTD (1990) KLR.** The Court stated-

> **"The High Courts discretion to order a stay of execution of its order on decree is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause, secondly the Court must be satisfied that the substantial loss would emerge from a refusal to grant stay and thirdly the Applicant must furnish security. The application must of course be made without delay."**

PLAINTIFF'S SUBMISSIONS

13. Plaintiff submitted that the Defendant has engaged in delaying tactics all along from the date judgment was entered in her favour. That the Defendant failed to file Notice of Appeal and it was only after Plaintiff sought to tax her Bill of Costs that Defendant filed an application at the Court of Appeal seeking leave to file the Notice of Appeal out of time. That even after obtaining that leave Defendant had failed to file its record of appeal. Further the Defendant had failed to seek stay of execution of the decree until the Plaintiff attached its motor vehicle.

14. On substantial loss Plaintiff submitted that the fact she is unemployed was not a basis to deny her the enjoyment of the fruits of her judgment. In that regard Plaintiff relied on three cases. The case of **RADIO AFRICA LTD –Vs- LINGAM ENTERPRISES & 4 OTHERS (2011)eKLR** where the Court stated-

> **"8. The Applicants have maintained that they will suffer substantial loss if the order of stay is not issued because they are unlikely to recover the decretal sum if their appeal is successful. The applicants have however not laid any basis to justify this apprehension. Nor have the applicants provided anything to demonstrate that the Respondent will not be able to refund the decretal sum if required to do so. The applicants' main fear appears to be the fact that in their view the amount of the decree is substantial. However, the amount on the decree on its own is not a sufficient excuse to justify an order for stay of execution or proceedings. Therefore, the applicants have not provided any plausible reason as to why the court should order a stay of execution or proceedings.**
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> **8. The Court has a responsibility to balance the interest of both litigants. It would not be fair nor just to deny a successful litigant the fruits of his judgment unless there is a good reason for doing so."**

The second case was **GEOFFREY KAMAU NJATHI –Vs- NAIVAS LTD (2013)eKLR** where the Court stated-

> **"I would agree that the applicant's fear of non recovery of the amounts paid in execution thereof is not convincing. Neither is the contention that this would curtail the respondents operations is as (sic) the Respondent is a large establishment that would readily meet her obligations and easily satiate (sic) the decretal amount.**
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> **The applicant has again not demonstrated that the claimant is a miserable person as alleged. Even if this was the position, the doctrine of equality before the law would come in handy and in favour of the claimant/respondent. The respondent/applicant should let go. She has miserably failed to establish a case for stay of execution and continues to linger on the interim orders for the same. This is not fair."**

The third case was **JOSEPHINE SERAPHINE WADEGU –Vs- KENYA POWER & LIGHTING COMPANY LTD (2013)eKLR** where the Court also stated-

> **"Where a decree for payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory this (sic) had to be considered within the circumstances of each particular case ….**
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> **In the circumstances of this case, the respondent claimant avers that is not true that she is a woman of straw and that this has not been established. She contends that the respondent has means of recovering their money if the appeal is allowed. Unless the applicants demonstrate this inability, it would be speculative for this court to rule that indeed the respondent claimant cannot refund the respondents applicants if the appeal succeeds."**

COURT'S ASSESSMENT AND FINDINGS

15. An application for stay of execution is considered in the light of the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules. The provisions of that Rule are discussed inn the case of **UNIVERSITY ACADEMIC STAFF UNION –Vs- MASENO UNIVERSITY** (Supra). But the deliberations of that Rule, in this particular case are underpinned by the special circumstances set out above in this Ruling regarding Plaintiff's representation.

16. The question is; was the execution validly carried out on behalf of the Plaintiff? There are glaring anomalies in respect of the representation of the Plaintiff. As clearly set out above the Plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on 31st July 2012. Once judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submissions in support of the Plaintiff's Bill of Costs, and was represented by Kinyua Njagi & Co. Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff's case. Much more Shikely Advocate was not property on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff's case. In this regard I am in agreement with finding of the Court in the case **JOHN LANGAT –Vs- KIPKEMOI TERER & 2 OTHERS (2013)eKLR** where Justice A. O. Muchelule faced with similar circumstances stated-

> **"There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates**
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> **"without an order of the court."**
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> **No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent."**

17. It follows that the execution application filed by Mr. Kinyua Njagi & Co. Advocates was therefore filed by a firm not on record and that application is therefore hereby expunged from the record.

18. It follows that execution that flowed from that execution application was irregular and without legal basis. The Court will order the costs of the auctioneer be paid by the firm of Kinyua Njagi & Co. Advocates.

19. Further Order 22 Rule 18(a) of the Civil Procedure Rules requires that a party executing a judgment passed more a year previously a notice to show cause be issued to the judgment debtor. Judgment entered here was entered on 31st July 2012. The firm of Kinyua Njagi & Co. Advocates filed for execution of the decree on 10th October 2013. That was a year after the decree was passed and the Plaintiff ought to have applied for notice to show cause to issue against the Defendant.

20. In response to the submission by the Plaintiff that the Defendant had not demonstrated Plaintiff can repay the decretal sum if the appeal is successful I would respond by statement that the burden of proof that the Plaintiff would refund lay with the Plaintiff. This indeed was the holding in the case **NAIROBI CIVIL APPLICATION NO. 238 OF 2005 NATIONAL INDUSTRIAL CREDIT BANK LTD –Vs- AQUINAS FRANCIS WASIKE & ANOTHER (UR)** where the Court of Appeal stated-

> **"This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya."**

The Plaintiff had a burden, which she did not shift to prove that she would be in a position to refund the Defendant if the appeal was successful.

21.For the reasons stated above I grant the following orders-

a) A stay of execution of the judgment herein is granted pending determination of the Defendant's appeal.

b) The Bank guarantee filed by the Defendant on 7th November 2013 shall remain as the Defendant's security until the determination of the Defendant's appeal.

c) The Defendant is granted costs of the Notice of Motion dated 28th and 29th October, 2013.

d) The costs of Murphy Merchants Auctioneers shall be paid by the firm of Kinyua Njagi & Co. Advocates.

It is so ordered.

DATED and DELIVERED at MOMBASA this 3RD day of APRIL, 2014.

MARY KASANGO

JUDGE