



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 105 OF 1996**

**KIPROTICH BORE.....APPELLANT**

**VERSUS**

**JOSEPH TUEI KOECH.....1ST RESPONDENT**

**JOEL KIPRONO MBEI.....2ND RESPONDENT**

**RULING**

The notice of motion dated 29th January, 2014 seeks stay of execution of the judgment and decree, which is the subject matter of this appeal and/or an order allowing the appellant to satisfy the decree hereto by equal monthly installments of Kshs.10,000/=.

The application is brought under **Order 22 Rule 22 (1)** of the **Civil Procedure Rules**. The motion is premised on the grounds that the respondent (decree holder) has instructed an auctioneer (M/S Legacy Auctioneers) to attach and sell his movable properties to recover Kshs.120,894/= being the value of the respondent's taxed bill of costs; that on 24/1/2014, the auctioneer served him with a proclamation requiring him to pay Kshs.120,894/= plus the auctioneer's charges within seven days; that, although willing to pay, he cannot raise the decretal sum at once; that his ability to pay is as proposed in the application; and that no prejudice will be occasioned on the respondent if the application is allowed.

The application is supported by the affidavit of the appellant, in which the grounds therein are reiterated.

In opposition to the application the respondent (John Kiprono Mibei) filed the replying affidavit sworn on 10th February, 2014. In that affidavit, the respondent has, inter alia, deposed:-

1. that the respondent is a man of means, capable of paying the decretal sum;
2. that this is a very old matter that must be finalized;
3. that the proposed payment is unreasonable and is meant to delay the payment of the costs and deny him the fruits his judgment;
4. that the appellant has not come to court with clean hands as he has not moved out of the suit property;
5. that before the orders sought can issue in favour of the applicant, the applicant must first comply with the court order by vacating the suit property;
6. that the application is fatally defective for want of procedure; and

7. that the applicant's supporting affidavit has been drawn by an unqualified person.

In reply to the issues raised in the respondent's replying affidavit, the appellant swore the affidavit filed in court on 11/2/2014. In that affidavit, the appellant has reiterated that, being a subsistent farmer, his ability to pay is as contained in his proposal herein, that neither he nor his family members was served with the certificate of costs hereto; that the affidavit of service by Arasa Kinara is false and misleading; that no judgment has ever been made in favour of the respondent; that the respondent not having been a party in the lower court proceedings should not benefit from the orders made in respect thereof.

Regarding the contention that he has refused to move out of the suit property, the appellant has deposed that he has reached an agreement with the beneficial owner (Joseph Tuwei Koech) that he remains on the suit property.

The appellant has also explained that the indication that his affidavit was drawn by Chuma Mburu & Co. Advocates is a typing error. He contends that such an error is curable in law.

When the application came up for hearing on 26/2/2014, counsel for the appellant, submitted that the appellant has admitted the debt and paid Kshs.50,000/= leaving a balance of Kshs.70,000/= which she proposes to pay by monthly installments of Kshs.10,000/=.

As for the affidavit sworn in support of the application being drawn by an unqualified person, she explained the difference between the application and the affidavit sworn thereof is a technical error and urged the court to allow the application.

Counsel for the respondent, Mrs. Wanderi, opposed the application submitting that the orders sought are discretionally. In this regard, she argued that the appellant cannot dictate to the court what order to give.

Reiterating, the contents of the affidavit sworn in opposition to the application, Mrs. Wanderi submitted that the fact that the appellant was able to pay Kshs. 50,000/= within one month, as ordered by Mshila J., means he can pay the entire sum.

Pointing out that some property belonging to the appellant had already been attached, counsel suggested that if the appellant is unwilling to pay; those goods can be sold to realize what is outstanding.

Maintaining that the affidavit sworn in support of the application is defective she submitted that the affidavit should be expunged; and that once that is done,, it will leave the application will be without a leg on which to stand on.

Regarding the affidavit sworn in reply to the respondent's replying affidavit, it is submitted that it had been filed without leave of the court and that it ought to have been a further affidavit as opposed to a reply to a replying affidavit. For the foregoing reasons, the court is urged to dismiss the application and allow the respondent to proceed with the execution.

I have read and considered the arguments advanced in this application. The issues for consideration are:-

1. Whether the application is defective? If not,
2. Whether the court should exercise its discretion in favour of the appellant? If yes,
3. What orders should the court make?

### **Is the application defective?**

It is not in dispute that the affidavit sworn in support of the appellant's application offends the law in that it appears to have been drawn by a person not permitted by law to draw such a document. The affidavit is indicated to have been drawn by Chuma Mburu & Company Advocates. The status of the proprietor of

that firm, as can be deciphered from the document attached to the respondent's reply, is inactive. That means the proprietor had not taken a practicing certificate for the period in question (2014). That being the case, he was not a qualified person, for purposes of the Advocates Act, Cap 16 Laws of Kenya. See **Sections 2, 9 and 34** of the **Advocates Act**.

It is submitted that the indication that the affidavit was drawn by the impugned advocate is a technical error which is curable in law.

I have considered the submission by the advocates for the respective parties and the purported explanation given by the appellant, as to circumstances that led to the name of the impugned advocate to appear in the affidavit. The application is not clear – what is this technical error that does not have a specific name?

I have also considered the submission of the respondents advocate concerning the affidavit sworn in reply to the respondent's affidavit.

While I agree with the respondent's advocate that, in as far as the affidavit was drawn by an unqualified advocate, it is incompetent, subsequently that affidavit is improperly entitled, and should be struck off. Thus, as concerns the initial affidavit, I am persuaded that the same is incompetent having been drawn by an unqualified advocate. In this regard see **Obura v Koome [2001] 1 EA 175** where the Court Appeal held:-

**“In these circumstances, the memorandum of appeal is incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this Court or in any other court.”**

The appellant subsequent affidavit is also challenged for having been filed out of the time ordered by the court, without the leave of the court.

Although counsel for the respondent's contends that the appellant's reply was filed out of time ordered by the court, upon review of the record, I find as a fact that the court did not make any order concerning the appellant's application for leave to amend the supporting affidavit and to file a further affidavit. If the court is to turn a blind eye to the impugned affidavit, then it will encourage mischief by counsel who have not been licenced, to draw documents, earn a fee and get away with it under the guise of technicalities.

It is submitted that without the supporting affidavit the appellant's application has no leg on which to stand on. Regarding this contention, it is important to consider what the law on applications is. In this regard, Order 51 Rule 4 provides:-

**“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”**

Clearly, the law contemplates that there are instances when an application can be filed without a supporting affidavit. No leave was obtained before filing the subsequent affidavit nor has the court been requested to deem it as properly filed.

In the instant application, the application is expressed to be grounded on, inter alia, the sworn affidavit of Kiprotich Bore. Whereas arguments have been presented relying on that subsequent affidavit and although justice should not be hampered by undue technicalities under Article 159 (2) (d) of the Constitution, in this instance I think failure to obtain leave is not a mere technicality. The affidavit is thus expunged.

In view of the fact that it is not a mandatory requirement of the law that an application be supported by an affidavit, and bearing in mind that the affidavit herein merely expressed to be one of the grounds upon which the appellant's application is premised. I find and hold that expunging of the supporting affidavit, does not render the application fatally defective. I will therefore proceed to consider the merit of the application without reference to the affidavits.

**Exercise of the court's discretion**

It is not in dispute that this court has discretion to issue the orders sought. Concerning the exercise of the court's discretion where there is no appeal, like in the instant application, the Court of Appeal in **Industrial & Commercial Development Corporation V. Onyango (1983) KLR 416**, *inter alia*, observed:-

**“Where there is no appeal pending but there are circumstances existing that call for the court to exercise that discretion, an order for stay of execution may be granted.....**

**The rules in order XXI would appear to be carefully designed to do justice between the decree-holder and the judgment debtor. There may be occasions when a judge might properly supplement those rules by invoking his inherent powers in order to do justice to the parties.”**

In the current application, the appellant has admitted being indebted to the respondent to the tune of Kshs.70,000/=. Contending that he has no ability to pay the debt at once, the appellant prays that he be allowed to pay the balance of the decretal sum by equal monthly installments of Kshs.10,000/=. That proposal is opposed by the respondent who terms it unreasonable.

It is not disclosed to this court, what makes it so difficult for the respondent to pay the outstanding Kshs.70,000/= at once. He does not for instance state what he earns from the substantive farming. This is a matter celebrating its 18<sup>th</sup> year in this court – to allow payment by installments of Kshs.10,000/= per month will only contribute towards prolonging its life to make a full circle of its 18<sup>th</sup> year. I decline to endorse that. Consequently, the application is dismissed with costs to the respondent.

**Delivered and dated this 16<sup>th</sup> day of May, 2014 at Nakuru.**

**H.A. OMONDI**

**JUDGE**