



# **REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 378 OF 2008**

**EXCLUSIVE AFRICAN TREASURES LIMITED ::::::::::::::: PLAINTIFF**

**VERSUS**

**AFRICA ECO-CAMPS LTD. ::::::::::::::: DEFENDANT**

## **R U L I N G**

1. The Notice of Motion before me is dated **11<sup>th</sup> April 2014** and filed in Court on **even date**. It is expressed to be brought under **Order 42 Rule 6 and Order 21 Rule 8** of the **Civil Procedure Rules** as well as **Sections 1A, 1B and 3A** of the **Civil Procedure Act**.
2. The Applicant/Defendant seeks for one main order that there be an order for stay of execution of the Decree and Warrants of attachment of movable property and sale issued herein on **4<sup>th</sup> April 2014** and on **7<sup>th</sup> April 2014** respectively pending the hearing and determination of the Defendant's intended appeal.
3. The application is based on the grounds stated on the face of the application and is supported by the affidavit of **Azim Jiwa Rajwani** sworn on **11<sup>th</sup> April 2014**.
4. The following are the brief facts leading to the current application for stay of execution. The court vide its ruling delivered on 5<sup>th</sup> March 2014, dismissed the Defendant's Notice of Motion dated **24<sup>th</sup> May 2012**. In the said Motion the Defendant had sought to set aside and/or review the Judgment of the said Court dated 18<sup>th</sup> January 2012. The Defendant being aggrieved with the said ruling and order has filed and served a Notice of Appeal against the said ruling. The Notice of Appeal was filed on **19<sup>th</sup> March 2014**.
5. Subsequently, on **4<sup>th</sup> April 2014** and **7<sup>th</sup> April 2014**, two sets of warrants of attachment and sale of property in execution of the Decree were issued to Jenen Auctioneers to execute against the Defendant. The 1<sup>st</sup> set of warrant was for **Kshs. 1,665,173/=** and the second one was for **Kshs. 2,733,669.40**. I believe these are the circumstances that prompted the Defendant to file the current application.
6. It is the Defendant's position that the issuance of the two different sets of warrants of attachment and sale of property arising from the same Decree is irregular, unlawful, and a flagrant abuse of the Court process.
7. It is averred for the Defendant that the Decree issued in this Court on **22<sup>nd</sup> February 2012**, which is the basis upon which the warrants of attachment and sale were issued, is irregular and in contravention of **Order 21 Rule 8 (2), (3) and (4)** of the **Civil Procedure Rules**. The reason given is that the Plaintiff did not avail any draft copy of the said Decree to the Defendant for approval

- before it was extracted.
8. It is the Defendant's case that if the order for stay of execution is not granted, the intended appeal will be rendered nugatory. The Defendant is apprehensive that if execution is levied upon them and in the event the intended appeal is successful, it will not be possible to recover the decretal sum from the Plaintiff whose financial status is unknown.
  9. It is further the Defendant's case that the intended Appeal has overwhelming chances of success. It is averred for the Defendant that it is capable and willing to deposit the security for costs in a joint interest account of the Plaintiff's and Defendant's Advocates Bank Account. It is further averred that the Plaintiff will not suffer any prejudice if the orders sought herein are granted. It is also the Defendant's case that the application has been made without unreasonable delay.
  10. The application is opposed vide the Replying affidavit of **Deepa Darbar**, a Director of the Plaintiff Company and sworn on **28<sup>th</sup> April 2014**.
  11. The deponent avers that the current application is incurably defective having been filed by a firm of Advocates who are not properly on record as representing the Defendant. The Defendant however abandoned this ground in its submissions.
  12. On the merits of the application, it is averred by the deponent that following the ruling delivered by this Court on **5<sup>th</sup> March 2014**, the Plaintiff's Advocates duly applied for execution of the Decree dated **22<sup>nd</sup> February 2012**. The total amount set out in the application for execution was **Kshs. 2,630,817/=**. To explain the issue of the two sets of warrants it was averred by the deponent that the Court registry initially prepared warrants for a sum of Kshs. 1,665,173/= which was erroneous. Subsequently, after the Plaintiff had pointed out the error, the Court registry prepared and issued fresh warrants for a sum of Kshs. 2,773,609/=.
  13. The deponent points out that the fresh warrants are also erroneous as they are not in accordance with the application for execution as prepared by the Plaintiff's Advocates.
  14. It is the Plaintiff's case that the errors in the warrants are not their own making but have been committed by the Court's registry. The Plaintiff urges this Court to give directions to the registry to prepare and issue correct warrants that conform to the Decree and the Plaintiff's application for execution. It is also the Plaintiff's case that the said errors in the warrants cannot be a ground for stay of execution.
  15. With regard to the Decree issued on **22<sup>nd</sup> February 2012**, it is averred for the Plaintiff that the same conforms and is in accordance with the terms of Judgment delivered on **18<sup>th</sup> January 2012**. It is further averred that since the Defendant's Advocates were not present at the hearing of the suit and delivery of Judgment, the Court registry directed the Plaintiff's Advocates to forward to it the Draft decree for approval.
  16. With regard to the Plaintiff's financial position, the deponent averred that the Plaintiff is a well established Company which has been successfully operating in Kenya. According to the deponent, the Plaintiff conducts business totalling over USD 350,000 annually. Therefore, it is averred that the Plaintiff is capable of refunding the decretal amount in the event that the Defendant's appeal is successful.
  17. It is the Plaintiff's case that there is no proposed appeal against the judgment given by the Court in this matter. According to the Plaintiff, there is no Notice of Appeal in respect of the Judgment delivered on **18<sup>th</sup> January 2012**. It is the deponent's assertion that the current Notice of Appeal is in relation to the ruling delivered on **5<sup>th</sup> March 2014**.
  18. The Plaintiff's position is that if the order of stay of execution is granted they will be prejudiced. It is the Plaintiff's concern that the Defendant has been very evasive of the execution proceedings and that they are not certain of the Defendant's financial stability.
  19. It is also the Plaintiff's case that the Defendant's intended appeal will not be rendered nugatory if the orders of stay of execution are not granted. According to the Plaintiff, the Decree herein is a money decree which can easily be refunded in the event that the intended appeal is successful.
  20. The application was prosecuted by way of written submission which I have considered in this ruling.

### **ANALYSIS**

21. I have considered the application herein as well as the affidavits on record. Having done so, I take

the following view of the matter.

22. With regard to the Decree issued on **22<sup>nd</sup> February 2012**, it is not in dispute that the same is in conformity with the Judgment delivered on **18<sup>th</sup> January 2012**. The Defendant has not alleged that the terms of the decree are not in variance with the relevant Judgment. The only contention is that the same was not forwarded to them for their approval.
23. **Order 21 rule 8(2)** of the CPR which provides for the same is not couched in mandatory terms. The Decree was approved by the Registrar of this Court making it *prima facie* a valid Decree. In any case, the contents of the said Decree have not been disputed by the Defendant. Therefore, the dispute that the same was not served upon them for approval cannot be reason enough to render the Decree irregular.
24. I will not say more in regard to the Decree since the main issue herein is whether the Court should grant the orders for stay of execution pending the Defendant's intended appeal. For the Applicant to succeed in this application, it must fulfil the following conditions which are set out under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**:-
- a. ***That the Applicant may suffer substantial loss unless an order of stay is granted; and***
  - b. ***That the application for stay must be brought without unreasonable delay; and***
  - c. ***That the applicant must give an undertaking as to security.***
25. On the first condition, the argument put forth by the Defendant is that if an execution is issued, the Plaintiff will not be in a financial position to refund the colossal amount to the Defendant in the event that the intended appeal succeeds. To this end, the Defendant referred to an email attached to their application and marked as **AJR 4**. The relevant part of the said email reads as follows:-
- “.....need to make a payment to you for Kshs. 68,850 which would relate to accommodation alone. In view of our very tight position, is it ok we apply this credit against your outstanding account with us?”***
- In view of the above and in particular the phrase “**very tight position**” it was the Defendant's submission that the Plaintiff's financial situation was unstable.
26. I have perused the said email, and by all standards the same cannot be used as a measure of the Plaintiff's financial stability. The use of the term “very tight position” does not strictly apply to finances alone. The same is not an unequivocal representation of the Plaintiff's financial position.
27. It is also the Defendant's case that the financial statements produced by the Plaintiff are for the year 2012 and in that case its current financial situation is unknown. That may be the case, however the only Financial Statements missing are for only one year, which is 2013. In that case the financial position for the year 2012 can appropriately be used as a prospective indicator of the Plaintiff's current financial position. In relation to the said financial statements it is evident that the Plaintiff is in a stable financial position.
28. In the circumstances the Defendant has not substantiated the claim that it will suffer substantial loss if stay of execution is not granted.
29. The second condition is that, the Applicant must demonstrate that the application has been made without unreasonable delay. The Ruling from which the Defendant is seeking an appeal was delivered on **5<sup>th</sup> March 2014**. The application herein was filed in Court on **11<sup>th</sup> April 2014** which is twenty-six (26) working days from the date of the Ruling. I note that the Notice of Appeal was filed on **19<sup>th</sup> March 2014**. The current application was filed sixteen days later (16). Those may not look like many days but to wait for that long to make an application for stay of execution which must be made in time is not appropriate. The Defendant did not offer any explanation as to why it had to wait for that long. If anything, it seems to me that the current application was triggered by the fact that the Plaintiff issued the Defendant with warrants of attachment of moveable property on **4<sup>th</sup> April** and **7<sup>th</sup> April 2014**. As a result I am not satisfied that the current

application was made without unreasonable delay.

30. On the third and last condition, the Defendant's position is that it is capable and willing to deposit the security for costs in a joint interest account of the Plaintiff's and Defendant's Advocates Bank Account. That may be the case. However the same cannot be sufficient reason to deny the Plaintiff its entitlement to the fruits of its judgment. As was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63**:

*“The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.*

31. In view of the foregoing, this court is not inclined to grant the stay of execution orders pending appeal as prayed by the Defendant. In the upshot, the Notice of Motion dated **11<sup>th</sup> April 2014** is hereby dismissed with no order as to costs.

32. I further direct the Plaintiff to follow up with the Court registry to prepare and issue correct warrants that conform to the Decree for execution.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 27<sup>TH</sup> DAY OF JUNE 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

No appearance for Plaintiff

Otieno for Defendant

Jason – Court Clerk