

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.643 OF 2005

FINA BANK LTD. PLAINTIFF/APPLICANT

VERSUS

DINESH KUMAR ZAVERCHAND JETHA DEFENDANT

RULING

1. The Application for determination is the Plaintiff's Notice of Motion dated 17th December 2012 and brought under the provisions of **Sections 1A, 1B, 3A and 98** of the *Civil Procedure Act, 2010*. The applicant seeks for orders *inter alia* that the Deputy Registrar of this Court do be directed to execute Charge documents over Flat Number 1, Block C, situate on Land Reference No. 991/13 Nairobi in favour of the Plaintiff. The Application is premised on the grounds that the Defendant has, despite several reminders, refused to execute the Charge without any reason being forthcoming and that the Defendant, having refused to execute the Charge documents, is in breach of the Amended Decree dated 15th November, 2012.
2. The Application is supported by the Affidavit of Allen Waiyaki Gichuhi. It is contended that the Plaintiff/Decree Holder's advocates sent a legal Charge to the Defendant's advocates for execution on 30th November, 2011. It was also contended that despite follow up and reminders, the Defendant's advocates have not made any response thereto.
3. The Defendant/Judgement Debtor in opposing the application filed Grounds of Opposition and a Replying Affidavit, sworn on 12th February, 2013. It is contended that the Plaintiff, in spite of its Application dated 7th November, 2011 being dismissed, filed a fresh application dated 28th September, 2012 seeking to have the Decree obtained on 13th December, 2011 amended. It is also contended that the Defendant has filed for an appeal against the ruling of Khaminwa, J delivered on her behalf by Musinga, J on 4th November, 2011 and my Ruling of 15th November, 2012. It is the Defendant's contention that the matter ought to be stayed pending the hearing and determination of its appeal in **C.A No. Nai 26 of 2013**.
4. On 13 February 2013, counsel for the Defendant/Judgement Debtor made a verbal Application that the Plaintiff/Decree Holder's said Application dated 17th December 2012 should be stayed pending the Defendant/Judgement Debtor's application for stay, so that the Appeal in the Court of Appeal should be heard and determined first. This was opposed by counsel for the Plaintiff/Decree Holder as there had been no such stay application filed. Indeed, at that stage, the Court had not seen the Notice of Motion filed by the Defendant/Judgement Debtor on 13 February 2013, in which the hearing of the Plaintiff's/Decree Holder's Application before court be stayed pending the hearing of the *Civil Appeal No. NAI 26 of 2013*. Accordingly, later in the morning, the Court heard the Plaintiff/Decree Holder's said Notice of Motion dated 17 December 2012, which sought the principal Order for the Deputy Registrar to execute, on behalf of the Defendant/Judgement Debtor, a Charge over the suit premises as per the Amended Decree. This Court detailed that it would deliver its Ruling on the Decree Holder's Application before it on 27th February, 2013. As regards the Defendant/Judgement Debtor's said Notice of Motion for stay, this Court directed that it would hear the same but only after it had delivered its Ruling as regards the Plaintiff/Decree Holder's Application. In this regard, Mr. Gichuhi, advocate for the Plaintiff/Decree Holder undertook not to take any steps towards the execution of the Amended Decree until the determination of the present application.

5. The large part of the issues raised herein by Mr. Singh Gitau were similar to the ones that he raised as regards the Plaintiff's Applications dated 22nd February, 2012 and 28th September, 2012 in respect to the issue of a Decree from the Judgement of Khaminwa, J dated 4th November, 2011, delivered by Musinga, J. The gist of the matter is with regard to the Decree that was extracted following the Ruling, it had been contended by the Plaintiff/Decree Holder in its application dated 28th September, 2012 that the Decree could not be effectively executed given the accidental omission of the true description of the suit property. This court in its Ruling of 15 November 2012 allowed the amendment of the Decree to reflect the true description of the suit property. This has given rise to the present Application, in which the Plaintiff/Decree Holder seeks to enforce the Decree as amended by the Court on 15th November, 2012.
6. The Court has, on two previous occasions, dealt with the issues canvassed by the parties during the hearing of the Application on 13th February, 2013. The first issue that had been dealt with was with regard to the delayed judgment. That matter had effectively and conclusively been heard and determined by this Court which delivered its Ruling on the same on 25th September, 2012. The matter is therefore, *res judicata* and for the Court to have to make a determination of the same would be tantamount to reviewing its Ruling *sui moto*, and/or sitting on appeal thereof. The matter having been determined pursuant to **Section 7** of the *Civil Procedure Act*, the same is put to rest.
7. The second issue raised by counsel for the Defendant/Judgement Debtor that had previously been dealt with, was with regard to the Decree that had been extracted from the Judgment of Khaminwa, J dated 4th November, 2011. Although the same issue as regards the delayed judgment had also been raised in the Application dated 28th September, 2012, the Court made a determination that the Decree should be amended to capture the true description of the suit premises and the proper interpretation of the Judgment delivered on 4th November, 2011. However, on 13th February, 2013 during the hearing of the Plaintiff's said Application, Mr. Singh Gitau, learned counsel for the Defendant, stated that the Charge document had certain provisions which had to be explained to the Defendant in relation to the Advocate's Certificate thereto. As such, the execution of the Charge document could not be assigned to the Deputy Registrar. He further contended that the Charge Instrument had been drawn pursuant to the provisions of the *Registration of Titles Act* which had been repealed by the *Land Act 2012*.
8. In response, Mr. Gichuhi stated that the transitional provisions pursuant to **Section 152** of the *Land Act* and **Section 107** of the *Land Registration Act* covered the format of the Charge document that was required to be executed. He also submitted that the Court had, during its determination of 15th November, 2012, taken into account similar concerns that were now being raised afresh by Mr. Singh Gitau. He further submitted that **Section 98** of the *Civil Procedure Act*, provided for the execution of a Charge where there is a refusal by the Defendant to execute the same. The Plaintiff, being aggrieved by the long delay in executing the Charge Instrument, seeks for the Court's intervention to have the same executed as the Plaintiff/Decree Holder has been and continues to be exposed to considerable risk.
9. As stated earlier, it is the determination by this Court made by its Ruling delivered on 15th November, 2012, that has necessitated the present Application. In that Ruling, the amendment which the Plaintiff sought was with regard to the true description of the suit premises i.e. Flat Number 1 Block C situate on Land Reference Number 991/13 Riverside Drive, Nairobi. The anomaly that the Applicant sought to amend was the specification of Flat Number 1, Block C which property belongs to the Defendant. That having been conclusively settled by amending the Decree, it was only to follow logic that the Plaintiff/Decree Holder would serve the Defendant with copies of the Charge instrument to be executed. The Affidavit in support of the Application detailed that on 30th November, 2011 the Plaintiff/Decree Holder's advocates sent the Charge documents for execution to the Defendant/Judgement Debtor's advocates. There being no response to the same, the Plaintiff/Decree Holder's advocates had sent reminders on 9th and 31st January, 2012 but neither the Defendant/Judgement Debtor nor his advocates on record seem to have responded to the same. Following the fact that the document was never executed, the Plaintiff/Decree Holder filed the present Application to enforce the Amended Decree and for execution of the Charge over the suit premises by the Deputy Registrar of this Court.
10. The Defendant/Judgement Debtor has purportedly filed an appeal, as against the Judgment of

Khaminwa, J as well as my Ruling delivered on 15th November, 2012. I directed as to the hearing of the Defendant/Judgement Debtor's application for stay pending appeal during the hearing of the Plaintiff/Decree Holder's current Application on 13th February, 2013. My Ruling of 15th November, 2012 allowed for the amendment of the Decree to reflect the true description of the suit premises. By extension and by inference, therefore, once the Decree was amended, the Plaintiff/Decree Holder was at liberty to execute the same, which it basically is seeking by the present Application.

11. This Court made an observation in its previous Ruling which it intends to abide by. As of today, the Judgement of Khaminwa, J has not been, in any event, appealed and as such stands as a valid judgment. The Application to amend the Decree has been determined. Finally, in my opinion, the Defendant/Judgement Debtor has not shown any good or sufficient reason as to why the Charge should not be executed by the Deputy Registrar of this Court. There has been no reason afforded by the Defendant/Judgement Debtor in the Replying Affidavit to the current Application as to the unwarranted and inexplicable delay in executing the Charge by the Defendant/Judgement Debtor. I do not find that the point made by counsel for the Defendant/Judgement Debtor as to the Certificate of the Advocate being signed, so that the Defendant/Judgement Debtor is made aware of the provisions in relation to the Charge so far as the same affects him as Chargor, to be of any significance. By his refusal to execute the Charge document in defiance of this Court's Order, the Defendant/Judgement Debtor would be deemed to waive such requirement. In any event, the Defendant/Judgement Debtor has his advocates on record available to explain to him everything that he ought to know in that regard. Further, I also find no merit in the Defendant/Judgement Debtor's counsel's submission that the Charge document is wrongly brought before this court for the Deputy Registrar to execute. Although it is drawn under the provisions of the Registration of Titles Act, which has been repealed by the *Land Act, 2012*. I concur with Mr. Gichuhi's submission that the point is covered by the transitional provisions of **section 152** of the Land Act and **section 107** of the *Land Registration Act*. Both 2012.

12. In conclusion therefore, the Plaintiff's Application dated 17th December, 2012 is with merit and I would therefore allow the same with costs to the Plaintiff/Decree Holder.

DATED and delivered at Nairobi this 8th day of March 2013.

J. B. HAVELOCK

JUDGE