



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMINI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 360 OF 2011

W. KORDES SOHNE PLAINTIFF

VERSUS

KALKA FLOWERS LIMITED DEFENDANT

R U L I N G

1. When Mr. Karungo for the Plaintiff and holding brief for the Defendant, together with Mr. Okwirry holding brief for the Objector appeared before this Court on 30 May 2013, I noted that I considered it necessary that the Defendant's Notice of Motion dated 13 March 2013 be determined first before proceeding with the Objector's Application dated 3 April 2013. This was so more particularly as Mr. Karungo on behalf on both the Plaintiff and the Defendant had no objection to the interim orders granted in respect of the Objector's said Application being extended. The Defendant's Notice of Motion dated 13 March 2013 sought Orders that an order of temporary injunction do issue restraining the sale, disposition or any other interference with the Defendant's assets attached on 12 March 2013 by auctioneers on behalf of the Plaintiff. Further, the Application requested that this Court do reduce the monthly instalments by way of repayment to the Plaintiff from Shs. 600,000/- per month down to Shs. 450,000/- per month such to be paid on the first of each month.
2. The grounds upon which the Defendant's said Application was based are as follows:

“1. On or about 9th November 2011, this Honourable Court entered judgment against the Defendant in the sum of 149,734.46 Euros.

2. On or about 19th November 2012, this Court issued orders that the Defendant/Applicant repays the debt through monthly instalments of Kshs.600,000/= starting the month of December 2012.

3. Since then the Applicant has paid Kshs. 1.8 Million towards the debt repayment as ordered by this Honourable Court.

4. On or about 12th March 2013 Auctioneers trading as M/s Keysian Auctioneers carted away with Defendant/Applicants assets for having delayed in making payment of the 4th installment for the month of March 2013.

5. Indeed even 2 of the trucks attached does not even belong to the Applicant.

6. The said Auctioneers have this morning again gone to take away more of the Applicant's goods.

7. The said delay has been occasioned due to poor business in the flower industry.

8. The Applicant is willing and has not refused to pay the 4th installment, and as such seeks the protection of this court to stay the removal of the Applicant's property and the sale of the attached assets as it will destroy the Applicants business in the flower industry".

The Application was supported by the Affidavit of the Defendant's Manager one **John Gichia** dated 13 March 2013. The deponent noted in this Court's Orders made on 19 November 2013 that the Defendant do pay to the Plaintiff instalments of Shs. 600,000/- per month commencing 1 December 2012. The Defendant had complied with that Order for 2 months but for the instalment due on 1 February 2013, it had been unable to pay any more than Shs. 85,000/- to the Plaintiff on 1 February 2013, a further amount of Shs. 200,000/- was tendered by cheque dated 12 February 2013 and yet a further amount of Shs. 315,000/- was tendered by cheque dated 22 February 2013. However, the Plaintiff's appointed auctioneers had arrived at the Defendant's premises on 19 February 2013 and proclaimed a number of assets for sale by auction. Further, the said auctioneers had returned on 12 March 2013 together with over 15 police officers together with the District Officer for the area, with the intention of attaching the Defendant's assets. The auctioneers had carted away assets including the cold room refrigerator for storing flowers along with two vehicle registration numbers KBN 276N, Leyland truck, and KAZ 162J Mitsubishi pick-up. These vehicles did not belong to the Defendant. Further, the deponent noted that the Defendant, as at 25 February 2013, had paid Shs.1.8 million in reduction of its debt to the Plaintiff, a fact which had been acknowledged by the Plaintiff's advocates in correspondence. Mr. Gichia concluded his said Affidavit by detailing that if an injunction was not granted, the assets as already attached by the Plaintiff's appointed auctioneers would be sold thus crippling the business and operations of the Defendant, since the large part of the said assets were essential for the growing of flowers, the Defendant's business.

3. On 14th. March 2013, this Court issued an Order of temporary injunction restraining the sale and disposition of the attached assets pending the hearing of this Application *inter-partes*. It further ordered that the Defendant must comply with its Order and pay the March instalment due to the Plaintiff being Shs. 600,000/-within seven days. That Order was shortly followed by the Notice of Objection to Attachment filed by the Objector being the African Banking Corporation Ltd as regards motor vehicle registration number KAZ 162J. That asset is the subject of the Objector's said Application dated 3 April 2013. However as regards the Defendant's Application before this Court, the Plaintiff filed the Replying Affidavit of **Bas Smit** sworn on 3 April 2013. That Affidavit outlined the Plaintiff's grounds for opposing the Application in that the Defendant/Judgement Debtor had consistently failed to make payments when due in spite of this Court's Order dated 19 November 2012 requiring it to pay to the Plaintiff Shs. 600,000/-per month on the first day of each month. The deponent further noted that despite the Court's order made on 14 March 2013, that the Defendant/Judgement Debtor do pay the March instalment of Shs. 600,000/-within seven days, it had failed to do so until 23rd March 2013. Further, the instalment of Shs. 600,000/- as at 1 April 2013 had not been paid.
4. The Defendant filed its written submissions in support of the same dated 27 May 2013. It reiterated that the Orders it was seeking before Court was a reduction of the monthly instalments from Shs. 600,000/- to Shs. 450,000/-per month as well as the release of the attached goods forthwith and unconditionally. The Defendant then outlined the facts in relation to the Judgement of this Court dated 9 November 2011 and the Decree emanating therefrom. It detailed the facts surrounding the attachment of the Defendant's assets and the Plaintiff's appointed auctioneers carrying away such. Thereafter, it noted that the Decree herein was over one year old and thus it was necessary that the Plaintiff/Decree Holder as per **Order 22 Rule 18 (1)** of the *Civil Procedure Rules*, should apply for a Notice to Show Cause before execution could be issued. The

Defendant then made the surprising submission that the reason for the requirement under the Rules for Notice to Show Cause to be given was so as to give the Defendant/Judgement Debtor notice to pay the decretal sum in cases where as a result of the lapse of time, it may have forgotten about the existence of the Decree altogether. I say “surprising” in view of this Court’s Order in relation to instalment payments of the Decretal Amount detailed on 19 November 2012. The Defendant then noted that some of the assets that had been carted away by the auctioneers did not belong to the Defendant but rather to NIC Bank and ABC Bank. The submissions then continued by detailing facts that were not before this Court in the Affidavit in support of the Defendant’s Application. However the conclusion that the submissions seemed to arrive at was that the assets carted away had greatly affected the day-to-day activities and operations of the Defendant to the extent that the Defendant was no longer able to pay the instalments of Shs. 600,000/-per month as ordered by Court. However, the submissions did detail that the Applicant was willing to pay the decretal amount but only by payment of the amount of Shs. 450,000/-per month until payment in full.

5. The submissions of the Plaintiff were filed herein on 30 May 2013. They maintained that as a result of the Defendant/Judgement Debtor’s inability to pay Court orders it did not deserve any favours from this Court as it had not come before the same with clean hands. The Plaintiff referred the Court to the case of **Kaburu v M’ithinji M’Mburugu (2005) eKLR**. The Plaintiff further noted that the instalments of Shs. 600,000/- for April and May 2013 had not been paid by the Defendant/Judgement Debtor. The attachment of the assets by the Plaintiff’s appointed auctioneers which had been carted off for storage were accruing costs on a daily basis. The Plaintiff expressed incredulity that the Defendant/Judgement Debtor sought the release of its attached assets despite the fact that the decretal sum was outstanding, as were the auctioneers costs, the Plaintiff’s legal costs and the storage charges. It noted that the Defendant/ Judgement Debtor had many other debts and, as a result, the Plaintiff/Decree Holder was afraid that another creditor may end up auctioning the Defendant/Judgement Debtor’s assets, to its detriment. It further submitted that the Defendant/Judgement Debtor was not actually generating any income at all from its operations and was relying on loans from third parties to service its debts. Unfortunately for the Plaintiff/Decree Holder, it has not put any evidence before this Court in relation to those submissions. Finally, the Plaintiff/Decree Holder referred this court to the case of **Njeru v Minister of Finance & 3 Ors (2007) eKLR**, in which this Court had detailed that to delay a party from enjoying the fruits of its judgement would be doing an injustice to it. The Plaintiff/Decree Holder concluded that the Court had consistently accommodated the Defendant/Judgement Debtor to the extent of denying the Plaintiff/Decree Holder the immediate enjoyment of the fruits of its judgement and, it was of the opinion, that the Court should not indulge the Defendant any further.
6. **Order 22, rule 18** of the *Civil Procedure Rules, 2010* reads as follows:

“18. (1) Where an application for execution is made –

- a. **more than one year after the date of the decree;**
- b. **against the legal representative of a party to the decree; or**
- c. **for attachment of salary or allowance of any person under rule 43,**

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for

execution against the same person the court has ordered execution to issue against him:

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

Although quoting this Rule to this Court, the Defendant/Judgement Debtor, in detailing that there should be a Notice to Show Cause issued by this Court, seems to have overlooked **rule 18 (2) and (3)**. I don't see any reason why a Notice to Show Cause should be issued in this regard when one takes into account the Ruling of this Court made in relation to the Defendant's Notice of Motion dated 25 October 2012 as delivered on 19 November 2012. That Order of this Court gave the Defendant/Judgement Debtor the chance to redeem its position both in terms of its business of flower growing and in order to give it time to satisfy the debts that it owed at the time, more particularly the monies owed to the Plaintiff/Decree Holder.

7. When the Application of 25th October 2012 was argued before Court, the Defendant/Judgement Debtor put forward (even then) the proposition that it should pay only Shs. 450,000/-per month to the Plaintiff/Decree Holder whose counsel submitted that at that rate, the debt would take 35 months to pay. He expected the Defendant/Judgement Debtor to be able to repay the monies owed sooner than that, hence this Court's Order as to instalments of Shs. 600,000/-per month being reasonable. In the event, the Defendant/ Judgement Debtor has repeatedly been unable to meet its repayment obligations. I have perused the **Kaburu v M'Mburugu** case referred to this Court by the Plaintiff. That case considered the application made by the plaintiff therein for the granting of a stay pending appeal and I do not consider it to be of any great relevance to the matter before this Court. However, the Plaintiff/Decree Holder has underlined the observation of **Sitati J.** to the effect that the Applicant had not come to court with clean hands and consequently he did not deserve the exercise of the Court's discretion in his favour. On my part, I take seriously the Plaintiff/Decree Holder's real fear that if this Court does grant the Defendant/Judgement Debtor's Application before it, there is a real possibility that another creditor will obtain Judgement against the Defendant/Judgement Debtor and attach and sell its assets before the Plaintiff/Decree Holder can enjoy the fruits of its Judgement herein. This is particularly so when one sees the Application of the Objector which claims that the Mitsubishi lorry registration number KAZ 162J is charged to it and, indeed, the statement of the Defendant/Judgement Debtor that the other vehicle attached by the auctioneers being Leyland truck registration number KBN 276N is charged to NIC Bank Ltd.
8. As a result of all the above, it is my view that the Defendant/Judgement Debtor is not deserving of this Court granting its said Application dated 13 March 2013. I direct that the same stands dismissed with costs to the Plaintiff/Decree Holder. Further, I direct that the Objector's said Notice of Motion dated 3 April 2013 be set down for hearing at a date to be taken at the Registry. This Court's interim orders in favour of the Objector in relation to the motor vehicle registration number KAZ 162J being excluded from any sale arising under the said attachment will be extended until the hearing and determination of the Objector's said Application.

DATED and delivered at Nairobi this 13th day of June, 2013.

J. B. HAVELOCK

JUDGE