REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 47 of 2001

AMRIK SINGH KALSI (Suing as the Administrator

of the Estate of Ram Singh Kalsi (Deceased) .....…… PLAINTIFF

VERSUS

BHUPINDER SINGH KALSI .....…. ....DEFENDANT

R U L I N G

By a Chamber Summons dated 8th November 2010 and filed in court on 9th November 2010 expressed to be brought under the provisions of **Order 21 rules 19(2)** and **22** of the *Civil Procedure Rules* and **Section 3A** of the *Civil Procedure Act* as well as Rules of the Supreme Court and all enabling provisions of the Law, the Defendant/Applicant herein seeks the following orders:

"1. That this Honourable Court be pleased to certify this Application as urgent and that service thereof on the Plaintiff/Decree Holder/Respondent be dispensed with, in the first instance and that this Application be heard ex-parte.

2. That this honourable Court be pleased to grant a stay of execution of the Decree obtained herein and all consequential orders glowing therefrom in order to enable the Applicant herein to apply for setting aside the same and/or for discharging and/or vacating the said decree on grounds that the same has been fully satisfied by execution and by the action of the Plaintiff/Decree Holder/Respondent and his Agents, Auctioneers and others.

3. That this Honourable Court be pleased to grant orders setting aside the Decree obtained herein and all consequential Orders flowing therefrom on grounds that the same has been fully satisfied

by execution and by the action of the plaintiff/Decree Holder/Respondent and his Agents, Auctioneers and others.

4. That this Honourable Court be pleased to grant orders discharging and/or vacating the said decree on grounds that the same has been fully satisfied by execution and by the action of the Plaintiff/Decree Holder/Respondent and his Agents, Auctioneers and others.

5. That this Honourable Court be also pleased to issue and grant an injunction restraining the Plaintiff/ Decree/Holder/Respondent from continuing with execution of the Decree obtained herein on the grounds that the same has been fully satisfied by action of the Plaintiff and his Agents and Auctioneers and the whole decretal sum plus costs and interests due in respect thereof fully recovered.

6. That the costs of and incidental to this Application be provided for and be paid by the Plaintiff/Decree Holder/Respondent.

7. That such further or other Orders be made as to this Honourable Court may be just and expedient".

The application is supported by an affidavit sworn by **Odhiambo Marcellus Titus Adala**, the applicant's advocate, sworn on 8th November 2010.

According to the deponent, he has been authorised by the applicant who is currently out of the court's jurisdiction to swear the affidavit. The delay, according to the affidavit, was occasioned by the absence of the applicant within the court's jurisdiction. Although the plaintiff claimed Kshs. 3,390,000.00 in respect of outstanding rent arrears as well as eviction order plus costs and interests, the total amount indicated in the notice to show cause dated 25th November 2010 was Kshs. 5,218,734/=, which sum, the deponent contends, the plaintiff has failed to explain. It is further averred that the plaintiff failed to disclose that on two occasions he, through the auctioneers collected by way of unlawful attachment property worth Kshs. 5,250,000/= which property the plaintiff has failed to account for. According to the deponent, despite the defendant having fully settled the decretal sum herein, the plaintiff has continued to load onto the decree unwarranted amounts in respect of rents in respect of the period after the applicant had vacated the suit premises. In the applicant's view, the purported execution amounts to a flagrant abuse of the process of the court.

It is further deposed that the plaintiff through auctioneers took away two vehicles worth Kshs 2,300,000.00, two cheques worth Kshs. 2,700,000.00, assorted personal property worth Kshs. 1,200,000.00 as well as Kshs. 50,000.00 in cash which was never receipted. This is the amount according to the deponent whose total value adds up to Kshs. 5,250,000.00. It is further deposed that some of the properties taken away did not belong to the applicant and the applicant has had to repay the owners thereof their values by way of restitution. Therefore, it is contended that the plaintiff has no basis for proceeding with the execution process and the said action amounts to an abuse of the court process and is likely to occasion the applicant substantial damages and irreparable loss.

The plaintiff opposed the application by way of a replying affidavit sworn by **Amrik Singh Kalsi** on 9th August 2011. According to the said affidavit he filed this suit on behalf of the estate of Ram Sigh for Kshs. 3,390,000.00 as outstanding rent as well as vacant possession. Following the distress of rent, two vehicles were attached and sold at the sum of Kshs. 311,200.00 out which Kshs. 245,000.00 was remitted the difference being auctioneers costs. A cheque in the sum of Kshs. 1,500,000.00 issued by the defendant towards the settlement of the said outstanding rent was dishonoured and that apart from the said cheque there is no other cheque known to the deponent. According to the deponent, the household goods proclaimed were worth Kshs. 35,200.00.

Following the striking out of the defendant's defence on 7th October 2009 a decree was issued and the costs thereof were taxed at Kshs. 363,133.00. However, attempts to execute the decree did not yield any fruits since the auctioneers could not locate the applicant's assets and the warrants of attachment were

returned to court. Subsequently a Notice to show cause was issued by the court indicating the total sum due as Kshs 5,218,734.00 out of which Kshs. 311,000.00 had been recovered from the aforesaid distress leaving an outstanding balance of Kshs. 4,907, 734.00 as the deponent is unaware of the receipt of any other sum. According to the plaintiff the levying of distress for rent was lawful and any complaints against the auctioneer arising therefrom should have been channelled to the Auctioneers Board within one year. Accordingly this application, to the plaintiff, is an afterthought and is meant to obstruct and/or frustrate him from recovery of costs and is hence an abuse of the process of the court.

The application was prosecuted by way of written submissions and in his written submissions the plaintiff reiterated the contents of the replying affidavit. The applicant, however, had not filed his submissions by the time of writing of this ruling.

As already indicated the application is expressed to be brought under the provisions of **Order 21 rules 19(2)** and **22** of the *Civil Procedure Rules* and **Section 3A** of the *Civil Procedure Act* as well as Rules of the Supreme Court and all enabling provisions of the Law. Needless to say that **Order 21** is now **Order 22** of the *Civil Procedure Rules*. **Rule 19(2)** of the former **Order 21** deals with objections by a party to a notice to show cause why the decree should not be executed. It therefore has no application to the present case. **Rule 22** on the other hand (one of the most misquoted provisions in the *Civil Procedure Rules,* in my view) deals with applications for stay of execution in cases where the court transfers a decree to another court for execution by the later and that stay is for a limited period to enable the applicant apply to the court by which the decree was passed or to an appellate court. Accordingly, that provision is, similarly, inapplicable. **Section 3A** on the other hand is not an enabling provision in my view. It is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in very court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers. See **Ryan Investements Ltd & Another vs. The United States of America[1970] EA 675.**

In the circumstances of this case, the appropriate provision in my view should have been **section 34** of the *Civil Procedure Act* since the inherent jurisdiction of the court reserved under **section 3A** of the said Act should only be invoked where there is no express provision dealing with the matter. The oft recited phrase *"all enabling provisions of the law"* just like a prayer for *"any other and/or alternative remedy the court may deem fit and just to grant"* in the plaint rarely adds much to the proceedings apart from making the process appear attractive.

Having said that, the defendant's application is premised on the fact that he has settled the decretal sum hence the continued harassment by the plaintiff is unjustifiable. He has indeed suffered by having to restitute the value of third party's properties wrongfully attached by the plaintiff's agents. I must say at once that the law provides a clear machinery for obtaining redress by a person, not being a party to the suit but against whom a legal process has been put in motion and that is by way of objection proceedings. If the applicant decided to restitute persons whose properties were wrongly attached by the defendant, that was a gratuitous act on his part since he had no legal obligation to do so. On the allegation of settlement of the decree, there is no evidence at all in support thereof. Copies of the documents annexed are documents from auctioneers and a letter from the advocates. These, in my view, cannot be taken as proof of payment. On the contrary one of the cheques issued seems to have been dishonoured on the grounds that *"A/C Closed"*. The circumstances under which the said account was closed are not disclosed but if the cheque was issued with the knowledge that the account had been closed, that would not augur well for the applicant's case. The amount due is clearly indicated in the warrants of attachment and sale of property issued by the court. There is no specific prayer seeking to set aside the said warrants. Whereas one can claim that the order seeking the setting aside of the decree and the consequential orders encompasses the warrants, the setting aside of the warrants in that case would only be consequential to the setting aside of the decree. No reason has been advanced why the decree should be set aside. Even if the decretal sum had been settled, that per se, would not justify the setting aside of a decree that was validly issued by the court.

Before I conclude I wish to comment on the supporting affidavit filed in support of the application herein. That affidavit was sworn by the applicant's advocate and it is not in dispute that the issues raised therein

are disputed issues of fact. The law, as I understand it, is that an advocate is not competent to swear an affidavit on disputed facts. An advocate, as an officer of the court, should avoid as much as possible situations which may place him in the embarrassing circumstances of having to go into the witness box in a matter in which he is acting as an advocate and to swear an affidavit on issues of fact is one of the ways in which to invite such exposure. An advocate cannot be both counsel and witness in the same proceedings. In the case of **Yussuf Abdulgani vs. Fazal Garage (1953) 28 LRK 17** it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own. In the case of **Oyugi vs. Law Society Of Kenya & Another [2005] 1 KLR 463, Ojwang, J** (as he then was) stated as follows:

"It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso to order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs".

In this case, deponent states that the applicant was outside jurisdiction of this country. That is the same reason that is advanced for the delay in bringing the present application. One would have expected that after such a delay counsel would have secured an affidavit from the applicant from whatever part of the globe he was residing. In this age and era to expect one to do so is not to ask for too much. Such affidavits can easily be sworn before a notary public and transmitted for use in the proceedings locally rather than counsel subjecting himself to an uncomfortable risk of having to take the witness stand on matters he may very well be very unfamiliar with.

I must now bring this ruling to an end by doing what I am enjoined to do in the circumstances of the present application and that is to dismiss the Chamber Summons dated 8th November 2010 which I hereby do with costs to the plaintiff/respondent.

Ruling read, signed and delivered in court this 10th day of May 2012.

G.V. ODUNGA
JUDGE
In the presence of:
Mr. Odongo for Plaintiff
No appearance for Defendant