



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 201 of 2008

PAN AFRICAN CREDIT & FINANCE LTD.....PLAINTIFF/RESPONDENT

(In Liquidation)

- VERSUS -

NICHU INVEVSTMETNS LTD.....1ST DEFENDANT/APPLICANT

RAJNIKANT KHETSHI SHAH.....2ND DEFENDANT/APPLICANT

HASMUKH SUMARIA.....3RD DEFENDANT/APPLICANT

R U L I N G

- 1.** Before the court is a Notice of Motion dated **19th June 2012**. It is filed under **Section 3A, Civil Procedure Act, Order 42 Rule 6, Rules 20, 21 and 26 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006)** and **Articles 3, 19, 20, 21, 22, 23, 27, 28, 29, 31, 39, 40, 47, 50 and 159 of the Constitution of Kenya, 2010**.
- 2.** The application seeks as the substantive prayer an Order that the court be pleased to stay execution of the Decree of this court dated **20th April 2012** or any further proceedings herein pending the hearing and determination of the **Civil Appeal Number NAI 141 OF 2012 – UR 106/2012** now pending in the Court of Appeal, Nairobi.
- 3.** The application is supported by the annexed affidavit of **HASMUKH SUMARIA** sworn on **19th June 2012** together with its annextures. It is further supported by a further affidavit of the same person dated **10th July 2012** also with annexture. The application is based on the grounds stated therein, among them that the said decree is oppressive, unjust and against public policy, and that the Applicant, being aggrieved by it has filed an appeal in the Court of Appeal.
- 4.** The application is opposed vide a replying affidavit of **DORIS MWARI MUGAMBI** dated **2nd July 2012** with its annextures.
- 5.** The parties filed written submissions in response to the application.

6. The brief history of the application is that on **20th April 2012** I delivered a Judgement in this matter in favour of the Plaintiff in the following terms:-

1. An order directed specifically to the 1st, 2nd and 3rd Defendants, jointly and severally, directing them to execute, within a period of 45 days from the date of this Judgement, re-assignment of Mortgage(s), Replacement Mortgage(s) and any other necessary documents to facilitate conclusion of the process of renewal of lease of the Mortgaged Properties L.R. No. 209/21/3 Nairobi and L.R. No. 209/21/4 Nairobi.

2. An order that in the event of default on the part of the Defendants with respect to order (1) above, the Deputy Registrar of this court do execute re-assignment of mortgage(s), replacement mortgage(s), and any other necessary documents to facilitate conclusion of the process of renewal of lease of the Mortgaged Properties L.R. No. 209/21/3 Nairobi and LR. No. 209/21/4 Nairobi.

3. An order that if the 2nd and 3rd Defendants default with respect to Order (1) above, and notwithstanding the Deputy Registrar's compliance with Order (2) above, the 2nd and 3rd Defendants be arrested and put in civil jail at the Industrial Area Prison in Nairobi for a period commencing with their arrest, upto the time the Deputy Registrar shall have fully complied with Order 2 above and the required documentations are perfected and registered.

4. The costs of this suit shall be for the Plaintiff.

7. It is the above orders which the Defendants are aggrieved of and which the Defendants now seek to stay pending the finalization of the appeal which has been filed.

8. The Applicant's submissions are based mainly on two premises. Firstly, that they have appealed against the said orders, and secondly that the 3rd order is unjust, oppressive and unconstitutional, as its execution would deprive the Applicants of their constitutional rights under the Constitution.

9. Parties submitted widely on the application and supported their view with case law as appropriate. This court has power under Order 42 Rule 6 (1) (2) (a) and (b) to do justice in order to preserve the subject matter of the Appeal so that it is not rendered nugatory. The said discretion is fettered by four conditions namely:-

1. The Applicant must establish a sufficient cause.

2. The court must be satisfied that substantial loss would ensue from a refusal to grant a stay.

3. The Applicant must furnish security.

4. The application must be without unreasonable delay.

In **Carter & Sons Ltd. – Vs – Deposit Protection Fund Board Civil Appeal No. 291 of 1997** and **Vishram Ravji Halai & Another - Vs – Thornton & Turpin [1963]. Civil Appl. No. 15 of 1990** both quoted in **High Court Civil Case No. 1677 of 2000; Fidelity Commercial Bank – Vs – Agritools Ltd. & 2 others**, and also in **Civil Appl. No. NAI. 26 of 1989; Vallibhdas Raghavji Jethwa – Vs – Ghashikant Zaverchand Vaghji Singh**, where the Court of Appeal, in considering an application for stay of execution pending Appeal, stated that:-

“The purpose of an application such as this is to preserve the subject matter in dispute so that the rights of an Appellant who is exercising his undoubted right of appeal are safeguarded and the appeal, if successfully, is not rendered nugatory.”

10. The issue now is whether or not the Defendants/Applicants have met the four conditions under **Order 42 Rule 6**. In answer to this the Applicant has submitted that:-

(i) They have sufficient cause as they have filed an appeal from the decree of this court in Civil Appeal No. 109 of 2012 and that there is yet another appeal number 184 of 2006 over the same subject matter which appeals are arguable and have high chances of success and which will be compromised and rendered nugatory unless the order of stay is granted.

(ii) They have also submitted that they will suffer substantial loss since they believe the decree herein was made without or in excess of jurisdiction based on extraneous factors outside the pleadings.

(iii) They are willing to provide security by way of bond or undertaking under seal in the form acceptable to the Court for due performance of the decree that may be ultimately binding upon them.

(iv) That they have not delayed in bringing this application.

11. The Plaintiff/Respondent has countered all above submissions by submitting that the Applicants cannot suffer any loss since the documents to be executed by the Deputy Registrar are not Transfers which could convey land to a third party. The documents to be executed are merely to create a formal title which in the long run means that the Defendants shall have a document to call a title. The title will remain in the Defendant's name. It's like a free award. All the expenses towards its perfection will be paid by the Plaintiff/Respondent.

The Plaintiffs further submitted that under decree numbers 1 and 2, the Defendants do not need to do anything. They have already refused to execute the documents. The court cannot now be denied a chance to execute its work. The Deputy Registrar shall be fulfilling her/his duty by signing the documents to plug the gaps created by the Defendant's deliberate non action.

12. I have considered the application and submissions of the parties.

The decree made by this Honourable Court on **20/04/2012** is what is generally called an **UNLESS ORDER** i.e. it is an order of the last resort made to allow a party to put its house in order and if there is continued default, no more indulgence is granted by the court. This means that if the Defendants refused to execute and seal the security documents, then under decree number 2, the Honourable Deputy Registry is at liberty to execute the documents.

The "**Unless Order**" by the court in decree 1 and 2 implies that:-

"Unless you the Defendants sign the documents in 45 days, the court will sign them instead of you".

Staying the orders 1 and 2 of the decree amount to decapitating the ability of the court in delivering justice. Staying the orders 1 and 2 shall mean that:-

(i) The titles over the 2 properties shall continue being held in abeyance.

(ii) The rights of the Plaintiff as chargee shall be held in a vacuum.

By seeking stay, the Defendants are seeking to benefit from their own inaction. They are seeking to justify their continuous acts of contempt. In **Naboro Properties Ltd. – Vs – Sky Structures Ltd. & 2 others [2002] 2 KLR 299**; Gicheru J.A. (as he then was) at page 312 quoted Broome's Legal Maxims and stated that:-

"It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong: . . . We may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law."

It is not possible to understand the Defendant's perceived loss in prayer 1 and 2 of the decree. They have not been asked to bear registration fees or legal fees. They would simply be doing what was required of them under the mortgage contracts.

(iii) The Applicants are very oblivious to the plights of the Depositors in the Plaintiff's bank which collapsed in 1995. These are ordinary Kenyans who lost money through collapse of the Plaintiff's bank. The liquidator is enjoined to realize all securities to be able to pay creditors. Through hook and crook, the Defendants have escaped justice since 1995 to date i.e. 17 years. The legal process has reached the end of the tether. Any further delay in this matter is a delay of justice which should not be tolerated.

I am also not persuaded that the Applicant's can provide any security, considering their conduct in this matter. No assurance or security can be given in view of such nonchalant conduct on the part of the Defendants. It defeats sense to expect any security or assurance or guarantee.

As stated in paragraph 5 (f) at page 3 of the replying affidavit of Doris Mwari Mugambi, the 2nd Defendant has fled the country. Indeed all affidavits by the Defendants for this stay application have been sworn by the 3rd Defendant, Hasmukh Sumaria. The absence of the 2nd Defendant from jurisdiction is confirmed in a letter by the Defendant's advocates dated 7/06/2012 marked "DM 3" to Mrs. Mugambi's affidavit.

In other words the Defendants have been less than honest with the court and the Plaintiff. They have treated the Plaintiff very shabbily. Granting such parties stay pending appeal would amount to robbing the victim to pay the perpetrator. It would amount to rewarding the perpetrator of injustice.

The orders 1 and 2 in the decree are self executing. They do not require the Defendants to comply. They give the Defendants a chance to comply. The order being an unless order cannot be stayed because it was given to achieve justice.

The orders were given to fill a gap i.e. lack of a signature and a seal. Staying the same orders would mean that the non-execution of the security documents shall continue unabated.

In **Hytec Information Systems Ltd. Vs Coventry City Council 1 (WLR 1967)** Lord Justice Ward at page 1674 – 1675 captured what he understood to be the circumstances under which an "**Unless Order**" can be enforced by the court:-

“. . . it seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy.

(5) A sufficient exoneration will almost inevitably require that he satisfied the court that something beyond his control has caused his failure to comply with the order.

(6) The Judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice.

(7)The interests of justice require that justice be shown to the injured party. . . . The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party though never to be ignored, comes a long way behind the other two . . .”

In this case, the Plaintiff is the injured party and it should be shown justice which has been denied to it by the inequitable behavior of the Defendants for the last 17 years.

In making my decision I am enjoined to achieve substantive justice under **Sections 1A, 1B and 3A** of the **Civil Procedure Act**. The justice the Plaintiff sought was as follows:-

“Since the Defendants have refused to sign the documents, please ask the Deputy Registry to do so.”

I delivered that justice. I cannot stay it now.

In **Civil Application Number NAI. 6 OF 2010 (UR 3.2010); Hunker Trading Company Ltd. – Vs – Elf Oil Kenya Ltd.**, the court at page 10 of its ruling commented about the overriding objective principle and stated thus:-

“ . . . Disobedience of a court order that was intended for the same purposes being pursued by the Applicant in this court is a clear violation of the “O2 Principle” as demonstrated above and we hereby invoke the power vested in us under Section 3A to dismiss the application.”

In the case cited, the Applicant refused to comply with an order requiring it to deposit **50%** of the decretal sum as a condition of grant of stay in the High Court. With the same breath, it rushed to the Court of Appeal to seek stay of execution of the decree pending appeal to avoid complying with the High Court order to deposit **50%** of the decretal sum.

In this matter even though the Defendants had **45 days** running from **20/04/2012** to execute the documents they waited till the period run out to file the current application on **21/06/2012 60 days** later.

The Defendants are seeking to defeat the effect of the judgement completely having already refused to comply with it.

Lastly, I will consider a request to stay the order on arrest and detention of the Applicants.

Under **Order 3** of the court decree, the court ordered that the 2nd and 3rd Defendants be arrested and placed in prison custody. This order is challenged by the Defendants.

Contrary to the protestations by the Defendants, arrest and detention is allowed under **Section 40** of the **Civil Procedure Act**, **Section 63** of the **Civil Procedure Act** and **Order 22, Rules 31, 32, 33, 34** and **35** of the **Civil Procedure Rules**.

I believe the court has properly exercised its judicial power under Article 159 of the Constitution. The court, having given the Defendants a fair hearing, gave the 2nd and 3rd Defendants a chance to act and comply with the decree. In default, the arrest became the enforcement measure. Courts of law have power to enforce their orders.

Contempt invites sanctions. Arrest and civil jail is a legal sanction under the Civil Procedure Act and Rules.

Staying the orders contained in the decree effectively defeats the sanctioning process. Courts must be able to enforce their orders. Being arrested for disobeying a court order is a matter of personal choice. The Defendants have freely made their bed of roses. Let them lie on it.

13. I do not think the Applicants deserve the order stopping their arrest. That order is lawful and is meant to ensure that the Applicants obey the earlier orders.

However, in my discretion, I will allow the stay of this order.

14. In the upshot, save that there shall be a stay of execution of **order number three (3)** of the **Judgement** dated **20th April 2012** pending the determination of the aforesaid appeal, the **Notice of Motion** dated **19th June 2012** is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 31ST DAY OF JULY 2012

E. K. O. OGOLA

JUDGE

PRESENT:

Mutua H/B for Mwangi for the Plaintiff

Isindu for the Defendant

Teresia – Court Clerk