REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 643 of 2005

FINA BANK LIMITED ……. PLAINTIFF

VERSUS

DINESH KUMAR ZAVERCHAND JETHA ……..…..……. DEFENDANT

R U L I N G

1. The Plaintiff\'s Notice of Motion dated 22nd of February 2012 seeks an order that the Deputy Registrar of this court be directed to execute the Charge Documents in the form exhibited to the Affidavit in support of the Application as regards Flat No. 1 Block C situate on Land Reference No. 991/13 Nairobi. The execution on behalf of the Defendant is in order to facilitate the registration of the Charge over the said property in favour of the Plaintiff. The grounds upon which the Application has been brought is that the Defendant has refused to execute the Charge documents in breach of this court\'s Decree of 4 November 2011. Further, despite several reminders, the Defendant\'s advocates have refused to respond to enquiries to explain why their client has refused to execute the Charge documents. According to the affidavit in support, the Plaintiff needs to register the charge documents in order thereafter to proceed to exercise its statutory power of sale in the event that the Defendant does not redeem the suit property.

2. The Application is supported by the affidavit sworn by Allen Waiyaki Gichuhi and dated 22nd of February 2012. The deponent, who is a partner in the firm of advocates having the conduct of the suit on the behalf of the Plaintiff, detailed that Judgement was entered against the Defendant on 4 November 2011. Thereafter on 30 November 2011, Mr. Gichuhi’s firm had forwarded the Legal Charge to the Defendant\'s advocates for the Defendant to execute. He stated that despite reminders sent on 9th and 31st of January 2012, the Defendant\'s advocates never responded to any of his firm\'s letters. Finally, the deponent noted that the Decree dated fourth of November 2011 had not been stayed.

3. The advocates for the Defendant filed Grounds of Opposition to the Plaintiff\'s Application on 23rd of March 2012. Simply, the Grounds noted that the Defendant herein would oppose the Plaintiff\'s Application dated 22nd of January 2012 on grounds of law. When the parties\' advocates appeared before me on 23rd of March 2012, Mr. Gachuhi appearing for the Plaintiff, submitted that the Plaintiff had a Decree of this court that the Defendant should execute the Charge documents as attached to the Affidavit in support of the Application. He referred me to the case of **Hunker Training Company Ltd v Elf Oil Kenya Limited (2010)e KLR.** In response, Mr. Singh Gitau stated that the Application was opposed and the matter had been heard before Khaminwa J. early in 2008, Judgement supposedly being delivered in December 2008. He noted that the Judgement was not ready and not read until November 2011 by my learned brother Musinga J. He referred to the court to **Order 21 Rule 1** of the *Civil Procedure Rules*,

2010. He noted that the Rule detailed that Judgement is to be delivered within 60 days of the conclusion, of the hearing of the case. He noted that the language in the Rule was mandatory and no leeway was given to the Judge. Mr. Singh Gitau maintained that the Judgement herein was a nullity in law incapable of effect. To this end, he referred the court to the English Chancery Court of Appeal case of **Rex Goose v Wilson Sandford & Co. & another (1998)** (unreported). He also referred this court to the local case of **Braganza v Tysons Habenga Limited** *Civil Appeal No. 285 of 1997*(unreported). Mr. Singh Gitau continued his submissions by stating that apart from the two cases to which he had referred the court, it should note the provisions of *Article 47 (1)* of the Constitution. He maintained that once one has moved outside the time limits of the Constitution, the process was invalidated. This has been covered by **section 1A** of the *Civil Procedure Act*. Further, he maintained that if one looks at the Charge instrument, in addition to the mere execution of the Charge, there is a requirement of a Certificate to be issued pursuant to **section 100** of the *Indian Transfer of Property Act* requiring the Chargor to appear before advocates and this, Counsel maintained, could not be assigned to a third party or at all. Finally, Counsel noted that the Order sought in the Application specifically did not deal with Flat No. 1, Block C of L. R. No. 991/13, Nairobi. A glance at the Decree would show that what was sought therein was an Order for specific performance to execute documents over L. R. No. 991/13, Nairobi. There was no reference to Flat No. 1 Block C. In that regard, Counsel detailed to court, **Order 21 Rule 10** which provides that where the subject matter is immovable property, the Decree will identify the same sufficiently. From the draft Charge document, the property L. R. No.991/13 Nairobi belongs to a company called Lorimar Apartments Limited and is not in the name of the Defendant. In his opinion, Counsel submitted that the Charge as drawn cannot be executed and it would be up to the Plaintiff to find another way to deal with its "illegal" Judgement.

4. Mr. Gachuhi, in response, wondered why no explanation had been offered by the Defendant as to why he had refused to comply with the Decree other than the technicalities submitted by Mr. Singh Gitau. As far as the execution of the Charge document was concerned, Counsel referred court to the provisions of **section 98** of the *Civil Procedure Act* which was also expressed in mandatory terms. As regards the specific flat number, such was extensively covered in evidence at the trial and the Plaintiff was now being asked to reopen a defended trial. As far as the company, Lorimar Apartments Limited, Counsel noted that such was a management company in which the Defendant has a share. Counsel maintained that there was no valid explanation offered as to why the Defendant had refused to comply with the Court Order.

5. Technicalities or not, this court must take cognizance not only of precedent but also as regards mandatory provisions in the statutes. It has been all too easy in the last couple of years for counsel to point at the provision *of* Article XXX of the *Kenya Constitution 2010*. I have perused this court\'s record and note that the hearing of the case was completed on 25 March 2009 before Khaminwa J. We are all aware that the learned Judge suffered health problems which kept her out of her court for a considerable period of time. The original Judgement on the court file was handwritten in a total of 25 pages but there is no date thereon. Thereafter, the Judgement was typed and the record details that it was delivered on behalf of Khaminwa J. on 4 November 2011 by my learned brother Musinga J. That was some two years and seven months after the close of the hearing.

6. In the **Rex Goose** case (supra), the hearing ended on 13 July 1994. It appears from the transcript of that case that numerous attempts were made by the Plaintiff\'s solicitors to ascertain when the Judge in the case would deliver his Judgement but eventually such was handed down, with much apology from the Judge, on 1 April 1996, over 20 months after the end of the hearing. At paragraph 112 of the its Judgement, the English Chancery Court of Appeal had this to say:

"A judge\'s tardiness in completing his judicial task after the trial is over denies justice to the winning party during the period of the delay. It also undermines the loser\'s confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, that people to have to endure while a trial is going on. Compelling them to await judgement for an indefinite extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated. A situation like this must never occur again."

The finding of the English Chancery Court of Appeal in the **Rex Goose** case is also significant if not downright persuasive:

"In our judgement, the appeal must be allowed and the action must be re-tried. The Court is driven to take this exceptional course on the ground that a substantial miscarriage of justice would be occasioned to Mr. Goose by allowing the judge\'s decision to stand and it is not possible to rectify that miscarriage of justice without a re-trial. We are satisfied, for the reasons we have already given, that the flaws in the judgement are such that Mr. Goose has lost a chance of success which was fairly open to him on a substantial part of his case: see RSC Order 59 Rule 11 (2) and the notes at 59/11/2 and 59/11/8. The errors in the judge\'s treatment of evidence and his failure to make findings of fact on other aspects of the case which might have enabled this court, for example, to conclude that some or all of the claims were statute-barred, make a new trial unavoidable. This course will unfortunately inflict upon the parties additional expense and stress, which the court was anxious to avoid, if it possibly could."

It seems to me that the English Chancery Court of Appeal in the above detailed finding in the **Rex Goose** Case ordered that the same to be re-tried not directly as a result of the Judge's inordinate delay in handing down his Judgement but in relation to the fact that in his Judgement there had been other failings in his conclusions, to make a new trial unavoidable.

7. The **Rex Goose** case was referred to and extensively quoted from in the Kenya and the Court of Appeal case to which the Counsel for the Defendant referred me to being **Braganza v Tysons Habenga Ltd** (supra). In that appeal, **Shah J A** (as he then was) noted that submissions were recorded as being on the Court file as at 17 June 1996 but that judgement was not delivered until 16th of October 1997. The learned Judge of Appeal had this to say on the point:

"It is clear that the judgement was delivered some 16 months after the date when the learned judge (on 17 June, 1996) stated that she would deliver judgement on 17 July, 1996. I am afraid this state of affairs cannot be tolerated……. Such a delay in delivery of judgement was recently considered by the Court of Appeal in England and as a result of comments by that Court the judge in the High Court resigned……. He took some 20 months to deliver a reserved judgement in a case filed by a farmer bankrupted by a confidence trickster. The farmer\'s counsel became so frustrated by the delay he considered taking out a life insurance on the judge in case he died before delivering judgement."

Shah JA then detailed in his judgement those passages that I have quoted above from the **Rex Goose** case. He continued:

"I take this opportunity of reiterating the well-worn adage – "justice delayed is justice denied". I fully embrace the aforesaid remarks of the judges of appeal in England."

Thereafter the learned Justice of Appeal stated that he would have allowed the sixth ground of appeal which was that the learned Judge took nearly 15 months to deliver the judgement and delivered the same after some more than 30 attendances by the appellant\'s advocates, if he had not found for the appellant on the first five grounds of appeal. To this end he stated:

"I went into the sixth ground of appeal as there has been, what I believe, a public outcry on the delays in completion of cases in the courts below so much so that there is at this very moment a high-powered judicial committee of enquiry into (amongst other matters) the issues of delays in the administration of justice."

8. I believe that the aforementioned judicial committee of enquiry completed its task which is why we now have the *2010 Civil Procedure Rules*. **Order 21 Rule 1** is a redrafting of the old **Order XX Rule** one which was inserted by way of *Legal Notice No. 36 of 2000* in that the court was required to pronounce judgement within 42 days from the conclusion of the trial. Previous to the year 2000, **rule 1** read as follows:

"In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgement in open court, either at once or on some future date, of which due notice shall be given to the parties or their advocates."

It seems that the days of delayed judgements are well and truly over! In this regard, I have taken note of the **Hunker Trading** case to which I was referred to by the Plaintiff. That Court of Appeal case reflected upon the then fairly new provisions of **sections 3 A and 3 B** of the *Appellate Jurisdiction Act*, and as read in the context of the High Court, **sections 1 A and 1 B** of the *Civil Procedure Act*. It was in that appeal case that the Court recognized what it called the **"O2 or the oxygen principle"**. That was because under **section 1 A (3)** of the *Civil Procedure Act* the courts\' processes were intended to be re-energized in order to encourage good management of cases and appeals. The Court noted in its own decision in **Caltex Oil Limited v Evanson Wanjihia** *Civil Application No.Nai 190 of 2009*(unreported) of the following:

"The overriding objective provides that the purpose of the two Acts and the rule is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Although the overriding objective has several aims, the principal aim is for the Court to act justly in every situation either when interpreting the law or exercising its power. The Court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective."

Further on in the **Hunker** judgement the Court observed:

"The advent of the "O2 principle" in our opinion, ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings; insures the efficient use of the available judicial and administrative resources of the courts; and results in the timely disposal of the proceedings at a cost affordable by the respective parties. That culture must include where appropriate, the use of suitable technology. It follows therefore that all provisions and rules in the relevant Acts must be "O_2" compliant because they exist for no other purpose. The "O_2 principle" poses a great challenge to the courts in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice."

What the Court of Appeal eventually ruled in the **Hunker Trading** case was that the breach of a court order was a clear violation of the **"O2 principle"** and thus the Court invokes the power vested in it under **section 3 A** so as to dismiss the application. It seems to me therefore that even if this matter was to go on appeal, then it would be highly unlikely that the Appeal Court would rely on the provisions of **section 3 A** of the Appellate *Jurisdiction Act* to perhaps override the technicality that my learned sister Khaminwa J. long delayed in the pronouncement of her Judgement herein. After all, the hearing process in a suit can be long drawn out, expensive and a considerable waste of the court\'s time. However, I am not here to sit on appeal as regards the findings of my learned sister Judge. All I would say is that I find the Defendant\'s objection to the Application all the more unfortunate bearing in mind that my learned sister\'s Judgement was delivered on 4 November 2011 and the time is long past for the proffering an appeal despite the Defendant\'s advocates having applied for certified copies of the proceedings and the Judgement herein.

9. Having said all the above, it would be lapse of me indeed if I failed to take cognizance of Khaminwa J's finding in her Judgement, although delivered late. The learned Judge noted that the Defendant herein denied having agreed to charge as security, his property Flat No. 1 of Block C situated on L. R. No. 991/13, Riverside Drive, Nairobi. However, he admitted that he had been a director of the company, Maizena Millers Limited, which was the principal debtor of the Plaintiff and that the company had created a debenture to secure its indebtedness with the Plaintiff Bank. The Defendant had stated quite clearly in his Defence that he was not prepared to charge his property to the Plaintiff. The learned judge found that this was where the doctrine of estoppel applied and that it was true that he could not charge the property which he did not own. The judge noted that the lessees in the Lorimar Apartments development could transfer, charge and deal with property upon obtaining the consent of the owner which in this case, was Lorimar Apartments Ltd. In the end, the learned judge found that the Defendant was obliged to create a Charge in favour of the Plaintiff and if he was not willing so to do, the court had to make an order in the interests of justice. Accordingly, the learned Judge entered judgement for the Plaintiff for specific

performance as prayed for in the Plaint. She went further and ordered that in the event that the Defendant failed to execute the Charge, then prayer (b) of the Plaint would come into effect. Prayer (b) reads:

"An Order that the Deputy Registrar of this Honourable Court do execute the Charge documents over Land Reference Number 991/13 – Nairobi on behalf of the Defendant to facilitate the registration of the Charge over the said property created in favour of the Plaintiff."

10. One of the mainstays of the Kenya Constitution, 2010 is the protection given to judicial process. There are two subsections of *Article 159* thereof which affect judicial process relevant to this Application before court. The first is *Article 159 (b)* which reads:

> **"Justice shall not be delayed"**.

The second is Article 159 (d) which reads:

"Justice shall be administered without undue regard to procedural technicalities".

The complaint of the Defendant clearly falls within the ambit of *Article 159 (b)*. On the other hand, the submission of the Plaintiff would obviously come under the aegis of *Article 159 (d)*. Counsel for the Defendant on the basis of the **Rex Goose** case as well as the **Braganza** authority seeks that the Application before court be struck out because of the obvious delay in the pronouncement of Judgement. Counsel for the Plaintiff relied upon the provisions of **section 98** of the *Civil Procedure Act* which reads:

"where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed <u>shall</u> operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it." (Underlining mine).

Although I have not had the opportunity of being closely associated with the case before court, it is quite apparent to me that the Defendant herein does not own the whole property being L.R. No. 991/13, Riverside Drive, Nairobi. He owns Flat No. 1, Block C which, I presume, is only one flat amongst many in the development along Riverside Drive, the title of which is held in the name of Lorimar Apartments Limited. Indeed, this would seem to be the position as per the draft Charge attached to the Affidavit in support of the Application. Unfortunately for the Plaintiff, the wording of prayer No.2 of the Decree herein makes no mention of Flat No. 1, Block C but in fact details the whole of the property along Riverside Drive. Similarly, in her Judgement, Khaminwa J detailed that she granted prayer No. 2 as detailed in the Plaint. That prayer in the Plaint is termed in the same wording as the Decree. To my mind, this is not a mere technicality in that the words Flat No. 1, Block C had been inadvertently omitted. There must be quite a number of leases to various leaseholders in the Lorimar Apartments development. The Defendant is but one of such lessees. As both the Plaint and the Decree read, it is the whole development that is being charged by the Defendant not just Flat No. 1 Block C. To my mind and taking into account the Defendant\'s counsel's submissions, that is fatal to the Plaintiff\'s Application before this court.

11. Accordingly, there is no doubt in my mind that the Decree herein requires amendment and the Plaintiff\'s Application cannot be allowed in its present format. The same is dismissed but I make no order as to costs.

DATED and delivered at Nairobi this 25th day of September, 2012.

J. B. HAVELOCK
JUDGE