



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CIVIL SUIT NO. 87 OF 2007**  
**IN THE MATTER OF MARRIED WOMAN PROPERTY ACT (1882)**

**BETWEEN**

**M.J.B.....PLAINTIFF**

**-VERSUS-**

**K.B.....RESPONDENT**

**RULING**

The Notice of Motion dated 9<sup>th</sup> July 2010 is made pursuant to the provisions of section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, seeking that temporary stay of execution and/judgement and/or decree, do issue pending the determination of HCCC`s Application No. 19 of 2007 K.B v KIBIRU EMPORIUM and 2 Others, and/or alternatively, the status quo be maintained pending the determination of the said Misc. Appl. No. 19 of 2007. Further, that costs of this application do abide the outcome of the Misc. Appl. 19 of 2007. The application is premised on grounds that;-

1. There is pending before this court, a judgement in favour of the Plaintiff herein, who has already issued demand for its satisfaction.
2. The Plaintiff is intent on execution of the judgement/decree and has even initiated secretive and unorthodox means to achieve his desired end.
3. The Plaintiff and Defendant were involved in arbitration proceedings being Arbitration NO. 6 of 2006 together with two others and an Arbitral Award was delivered where the Plaintiff and two others were ordered on 30<sup>th</sup> March 2007, to jointly and severally pay the Defendant/Applicant sums which now exceed Kshs.24 million(Twenty four million).
4. The Plaintiff/Respondent and the other two respondents decline and continue to so decline satisfying the Award.
5. The Judgment sums herein are the sole known sums of the Plaintiff to the Defendant, and if the same is ordered to be released to him and the Defendant eventually succeeds in enforcement proceedings, then such execution will be in futility.

6. The Plaintiff/Respondent is a man of straw who is heavily indebted such that if execution proceeds prior to the determination of the enforcement application there will be nothing left for execution.

7. Since the sums due to the Plaintiff/Respondent are lesser, compared to those due from the Plaintiff to the Defendant in the said Misc. Appl. NO. 9 of 2007, then it is only fair and just that execution be stayed.

8. The Defendant/Applicant would have taken garnishee proceedings against the Plaintiff/Respondent's judgement herein, but for the leave of Court which a ruling thereof will be delivered.

9. It is only fair that this court stays the execution of this judgement whose consequences have a far reaching effect including the sale of the Defendant's house at Kilifi, which would make the Defendant/Applicant homeless.

10. The whereabouts of the other respondents in the arbitral award are unknown to the Defendant/Applicant hence the real apprehension that she may not be able to execute the award of this court grants leave.

11. The Plaintiff/Respondent should not be allowed to use the legal process to aid him in a situation where he has refused to obey a Handling legal award against him, since he who seeks equity must do equity.

The application is supported by the affidavit sworn by K. B in which she states that the court delivered judgement on 28<sup>th</sup> October 2009 in which it ordered that Plaintiff/Respondent was entitled to 10% of the value of the joint bond held at AXA Man of Isle and 20% of the value of the matrimonial property at Kilifi. Sometimes in 2006, applicant instituted proceedings against the Plaintiff/Respondent and two others for the recovery of her money which she had loaned a business, and the said proceedings were before the Arbitral Award which eventually delivered an award on 30<sup>th</sup> May 2007 and orders were made inter alia that Plaintiff do jointly and severally pay her Kshs.15,241,935/- together with interest at 12% from 25<sup>th</sup> September 2006, until payment in full together with costs of the reference which are now in excess of Kshs.24,000,000/-, a copy of the award is annexed as LKB4. The arbitral award remains unsatisfied and applicant has now taken enforcement proceedings as per annexure LKB1A.

An attempt to set aside the arbitral award failed and the same was dismissed on 7<sup>th</sup> May 2009, thereafter the Respondent have sought leave to appeal. The Respondent/Plaintiff is described as a habitual drunkard who can no longer afford beer and has resorted to the local palm wine known as "*mnazi*", and being a person of no means, he now survives on well wishers and friends, and if the court sanctions, execution of the arbitral award, then the only property applicant can lay her hands on is what the court decreed to Respondent. It is due to this that applicant is very apprehensive saying if execution takes place then she is unlikely to recover her entitlement in the award. The Respondent is said to have no known assets in Kenya or the United Kingdom and the company where Respondent was director is said to have collapsed.

The application is opposed, and in a replying affidavit sworn by the Respondent M.J.B, he states that the arbitral award was with regard to money loaned to a company and not to him as an individual. He further states that how he lives and manages his lifestyle should not be any of applicant's business and cannot be used to determine the issuance of orders sought. While not denying that the award was made, he says he was neither a guarantor to GLADWELL KIBIRU OR KIBIRU EMPORIUM LTD he should not be held personally liable for debts owing by the two. As far as he is concerned, the draft decree has been prepared, and he has yet to proceed with execution. Further that this application has no basis because execution of decree is yet to be approved, no proclamation done, so there is nothing to be stayed.

The applicant in response, filed a further affidavit saying the arbitral award was entered against Plaintiff jointly and severally with other two parties thereat. She further depones that steps taken by Respondent involving a letter from his counsel forwarding a draft decree for approval, are a clear demonstration that his is preparing to execute the decree.

The matter was disposed of by way of written submission, Mr Mrima for the applicant, in his submissions pointed out that despite the Respondents averments that there are no execution proceedings going on, the Plaintiff/Respondent secretly attempted to have this court issue a Decree without involving the Defendant/applicant at all and the process was only halted when the court ordered Respondent/Defendant to effect proper service. Secondly, a draft decree has already been served on the applicant's counsel, and these are obviously a prelude to execution.

Further to that, the Respondent has demanded by a letter dated 28<sup>th</sup> June 2010, for payment of the decretal sum failure to which execution process will issue. Mr Mrima wonders why Respondent expects applicant to wait until execution is carried out before stay is sought, saying the stay is intended to preserve the status quo and is required to be made in a timely fashion.

His argument is that, it will be unfair to allow the Respondent to execute for a lesser sum against applicant, yet he owes applicant a huge amount as a result of the arbitral award and he has not even paid the sum owing in that award. So it remains unsatisfied. Mr Mrima's contention is that Respondent is out to defeat justice by attempting to execute the judgement in his favour without mentioning how he intends to settle the arbitral award.

The Plaintiff/Respondent counsel filed written submission and supplementary submissions saying that the application is misconceived. The submissions dated 6<sup>th</sup> December 2010 were simply a reproduction of the Respondent's replying affidavit – it had no arguments or analysis. The supplementary affidavit is replicate of the earlier submissions.

Basically what is sought here is an order for temporary stay of execution **BUT** not pending appeal or review – it is sought pending applicant pursuing realization of an award in another matter which involves the same parties here and in which the applicant has been awarded a sum much higher than the sum due to the Respondent. The reason behind seeking the order stems from a desire by the applicant to have the current existing status quo maintained, because to leave it otherwise may result in execution involving sale of her residential property. Her fear is that even if she were to pay the applicant the sum owing, he has no other means which he could use to satisfy the arbitral award. One would ask, why not just take out garnishee proceedings???? Applicant explains she sought leave to do so from this court and ruling is yet to be delivered.

The arbitral award has never been satisfied, the same is annexed and shows the parties involved in ARBITRATION AWARD NO. 4 of 2006 were K.B V KIBIRU EMPORIUM LTD, GLADWELL WANGECI KIBIRU and M.B. The award was against the three respondents jointly and severally, so there is no basis upon which Respondent can turn around and say it was merely against the company. The Respondent's financial status and ability has been queried – I have the advantage of having heard this matter and written the judgement, and it is on record that Respondent has no financial means, that was a fact he stated in court in his testimony, and he made it clear to this court that for the period he lived with applicant as husband and wife, he was basically a dependant – I cannot ignore that. The applicant's fear are well founded, that to allow the Respondent to proceed to execute against her for a far lesser amount than he owes her, when he has taken absolutely no steps to satisfy the arbitral award, is in my view giving him undue and unfair advantage, indeed he does not even offer to make a fraction of payment of that award. Should the execution process proceed then the Justice system will only have aided the respondent to reap from a situation where he has failed to honour the award issued against him. The applicant has a genuine basis for her apprehension, and I am persuaded that in the interest of justice, stay orders do issue. The applicant must however demonstrate steps taken towards executing the arbitral award as the Respondents entitlement cannot also be held at abeyance eternally. To that extent this matter must be mentioned within 3 (three months) for the court to establish what steps applicant has taken. The application for temporary stay orders is granted to last for ninety (90) days from today.

**Delivered and dated this 16th day of June 2011.**

**H A OMONDI**

**JUDGE**

Mr Mutua holding brief for Mrima for Applicant  
Miss Chepkwony for Respondent