



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 2384 OF 1999

TITUS TIEGO.....PLAINTIFF

VERSUS

ELIZABETH KADENGE MLESHE.....DEFENDANT

RULING

This ruling is delivered in the Judgment debtors' Notice of Motion dated 28th July 2011 and said to have been brought under the provisions of **Section 3A** of the **Civil Procedure Act, Cap 21, Order XX11 Rule 22** of the **Civil Procedure Rules**. In it the Applicant seeks inter alia, the following orders:

1. That the execution of the decree obtained by the Respondent on 5th February 2009, whether through attachment of the Defendant's movable or immovable property or otherwise be stayed .
2. That this Honourable court be pleased to set aside the orders for warrant of attachment and sale of the Applicant's movable property in execution of the said decree and proclamation of the Defendant's goods by M/s Galaxy Auctioneers.
3. That the costs of this application be provided for.

The application is supported by the affidavit of the Judgment/Debtor, Elizabeth Kadenge Mleshe, and is premised mainly, on the following grounds:

1. That the Decree Holder/Respondent is executing a decree which discloses an incorrect judgment date with the result that the interest claimed in respect of the judgment debt is grossly exaggerated .
2. That the Decree Holder/Respondent threatens and intends, to proceed with the attachment and sale of Applicant's property.

3. That the Applicant herein is suffering from TERMINAL DISEASE and her health and mental wellbeing are seriously compromised by the threat that her property shall be sold in execution of this Honourable court's decree and is willing to discharge the decretal amount by instalments once it is correctly computed.

5. That the Decree Holder/Respondent shall suffer no harm if the prayers sought are granted.

To oppose the application the Decree holder/Respondent has filed a Replying Affidavit wherein he deposes that the judgment in this matter was entered on 5th February 2009, over 2 years and 5 months at the time the application was filed. The judgment has never been appealed against. The Decree holder/Respondent deposes also that his Bill of Costs was subsequently taxed on 22nd November 2010, in his favour and that the Judgment-debtor/Applicant was represented by counsel at the taxation. Also that the ruling on taxation was made more than 8 months prior to the filing of the application and despite the same having not been challenged, the Applicant has refused to settle the decretal amount, and ignored the demand notice to do so.

The Applicant contends that, under an application lodged in court on 3rd June 2011, the Respondent sought to recover a sum of KShs. 1,187,971/= and the warrants issued directly to the Auctioneers, commending them to execute the decree to recover a sum of KShs. 1,917,331.

The Respondent contends that his advocates correctly computed the decretal sum and that any alleged error in respect thereto is attributable to the court and not him. He has asked the court to dismiss the application citing it as an afterthought and an abuse of the process of the court.

Oral submissions were tendered in the application. Counsel for the Defendant has submitted that the Plaintiff is executing a decree, which is founded on an incorrect judgment date with the result that the sum provided for as interest is grossly exaggerated.

It is clear that the warrant of attachment (annexed to the Supporting Affidavit, exhibit "EKM-2") states that the decree of this court was passed on the 5th day of February 1999, and that the interest on the decretal sum is given as KShs. 1,002,822/=, with the sum due and payable in respect of the decree being shown as KShs. 1,917,331/=. A copy of the proclamation served by Galaxy Auctioneers and citing the decree date as 5th February 1999, is also attached to "EKM- 2".

That compensation in the sum of KShs. 750,000/= was awarded to the Decree Holder is not in dispute. Neither is the fact that costs and interest on the sums were awarded at court rates. The judgment in favour of the Respondent having been delivered on the 5th day of February 2009, it appears totally inconceivable that interest on the decretal sum would exceed the award in the circumstances. Annexure "TT1" of the Replying Affidavit shows quite clearly that the interest on the decretal sum upto and including 4th May 2011, was KShs. 235,890.40/= with interest on costs being given as KShs. 39,222/=.

The issue for determination by this court is whether execution should proceed on the basis of the warrant of attachment (annexture "EKM-2") and the proclamation sought by the Decree holder or whether the process should be stopped by setting aside of the orders with the warrant of attachment and proclamation being declared null and void.

In view of the obvious error on the face of the record, as presented by the warrant of attachment exhibited as annexure "EKM-2", I am persuaded that the attempts by the Decree Holder/Respondent to execute for the sum shown therein is greatly prejudicial to the Applicant. There is no doubt that the same would

unjustly enrich the Decree Holder.

In exercise of my discretion and the inherent power of this court the order for attachment is hereby set aside and the proclamation declared null and void. The matter is hereby remitted to the Deputy Registrar with directions that a fresh warrant do issue, reflecting the correct amount of interest on the decretal sum in accordance with the application for execution presented on 2nd June 2011 which, the court notes, had actually requested that the warrants be executed by LEAKY AUCTIONEERS and not GALAXY AUCTIONEERS.

That the Applicant desires to liquidate the decretal sum by instalments is not an issue presently before court as is evident from the prayers sought. I therefore make no orders in that regard.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH DAY OF SEPTEMBER, 2011.

M. G. MUGO

JUDGE

In the presence :

Mr. Kariuki holding brief for Gitonga **For the Applicant**

Mr. Imende holding brief for Mr. Tiego **For the Respondent**