



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Suit 140 of 1999
MAWJI PATEL.....PLAINTIFF
VERSUS
TONY KETER.....DEFENDANT

RULING

This is an application by the Plaintiff wherein he prays for the judgment debtor to be ordered to deposit the sum of Kenya shillings thirty million (30,000,000) in court or any other security of an equal value to the decretal amount in court at such time as the court may be pleased to order. The grounds upon which the application is based are that this court dismissed the judgment debtor's application for payment of the decretal sum by installments and directed the sale of his property known as LR. No. 7741/149 situated in Kitsuru Estate in Nairobi. That the security held in court being a Title Deed to the parcel of land known as LR. No.9399/29 Nandi South District was ordered released to the judgment debtor which property the judgment debtor quickly disposed off and left for South Africa and Angola where he now resides only making occasional visits to this country in view of the many debts he owes many institutions. That ordering the giving of security will meet the ends of justice by securing the final decree and so as to bring litigation to a close.

The Plaintiff/Applicant swore the supporting Affidavit in which he stated that on 4th December 2002 this court granted him judgment and an appeal to the court of Appeal failed and so did an application for review. That the judgment debtor, in a bid to avoid satisfying the decree filed a Bankruptcy Cause in the Commercial court at Milimani High Court, obtained a receiving order which was lifted after the applicant challenged the same and the court found the judgment debtor had concealed material facts. In that Bankruptcy cause the Applicant states that the judgment debtor attached a list of debtors whose debt exceeded Kshs.18, 000,000 as appears from the annexure marked "MS/3" which is the statement of Affairs filed by the judgment debtor in the said Bankruptcy Cause No.143 of 2003. The deponent has also annexed various cases to wit Nairobi HC. Misc.No.776/2003 – sum claimed against judgment – debtor herein Kshs.3, 013, 07441, Nairobi HC.CC. No.369 OF 2004 Judgment debtor being one of the Defendants in a claim of Kshs.20, 498,759.40, among others. The deponent further swears that the judgment debtor has no intention of bringing this matter to a close and has together with one Salim Suleiman filed applications to set aside the sale of the one security that was sold.

A Replying Affidavit was filed in opposition to the application and the judgment debtor swore in it that the

application is made in extreme bad faith as the security sold realized an amount in excess of the amount now sought as security and the Applicant holds a sum in excess of the decretal amount. He adds that there is held by the court a sum in excess of Kshs.20,000,000/00 from the proceeds of the sale and therefore there is no basis upon which the order sought can be made and the application should be dismissed. His further averment is that his other cases/debts are irrelevant to the matters in issue here and that the application is an attempt to stop him from pursuing his application to set aside the wrongful sale of the security which he states that he had sold before the auction.

I have considered this application. That the Applicant holds certain monies from the realization of the security was not denied. That the court holds further monies from such realization of security in excess of Kshs.20 million is also not denied. That the judgment debtor and another person have pending applications challenging such realization is not a disputed fact. What is also clear is that the outcome of such applications cannot at this stage be ascertained and no meaningful order can be made in anticipation of an order that may or may not be made in some such future application. It is true that if the judgment debtor and the other objector were to succeed in their applications then the decree holder would have to refund whatever proceeds of the sale he now holds. But that is a big if. It cannot be the basis upon which in the circumstances of this case an order for security may be made, in my humble view. Another if is that if the sale were to be set aside then the decree holder would be left holding air in his hands. However, again that is no basis to make an order for security at this stage.

This court clearly understands the frustrations of the Plaintiff/Applicant of not being able to enjoy the proceeds of his decree and being subjected to endless litigation. The court empathises with him. Unfortunately such frustrations and empathy are not basis for granting the orders now sought. The application must fail and it is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF JUNE 2010.

P.M.MWILU
JUDGE

IN THE PRESENCE OF

Gicheru - Advocate for Plaintiff/Applicant

Momanyi - Advocate for Defendant/Respondent

Andrew Omwenga - Court clerk

P.M.MWILU
JUDGE