



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**CIVIL CASE 5081 OF 1987**

**TOM MOGAKA.....PLAINTIFF**

**- VERSUS-**

**NATIONAL BANK OF  
KENYA .....DEFENDANT**

**RULING**

Before me is an application by the plaintiff purportedly made under the provisions of **sections 3A and 38** of the **Civil Procedure Act** and **Order XXI Rules 22, 25 and 91** of the **Civil Procedure Rules** seeking to stay execution of the decree and the resultant warrant of arrest pending the hearing and determination by this court of **HCCC No. 646 of 2003**. In the alternative, the plaintiff prayed for an order of the court to set aside the warrant of arrest that was issued against him by the court. The grounds in support of the application are on the face of the application. The plaintiff states that there is a pending suit between the defendant and the plaintiff arising out of the sale of a property that was charged to the defendant by the plaintiff i.e. **Nairobi HCCC No. 646 of 2003 Thomas Mogaka vs. National Bank of Kenya Limited & 2 others**. The plaintiff contends that the defendant had purported to sell the charged property for the sum of Kshs.11million which amount had not been factored in when the defendant made the application to execute the decree against the plaintiff. It was the plaintiff's view that the defendant having exercised its statutory power of sale by selling the charged property cannot at the same time be allowed to execute the decree issued in this case. The plaintiff contends that the notice to show cause issued herein and the warrant of arrest that was subsequently issued was mischievous and an abuse of the due process of the court. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. Zipporah Mogaka, the general manager in charge of legal and remedial department of the defendant swore a replying affidavit in opposition to the application. In the said affidavit, she deponed that judgment was entered in favour of the defendant in terms of the counterclaim in the present suit. The plaintiff's suit against the defendant was dismissed with costs. She deponed that since the entry of judgment, the plaintiff had evaded execution and had in fact filed several suits in a bid to frustrate the defendant from either realizing the security charged or executing the decree of the court. She deponed that the plaintiff had on several occasions abused the process of the court, especially when he was called upon to show cause why execution should not be levied against him. She swore that the suit which the plaintiff is claiming that a sum of Kshs.11 million had been paid to the defendant was still pending determination by this court. She deponed that the plaintiff, in the present application, was abusing the process of the court with a view to frustrating the defendant from executing against him.

At the hearing of the application, I heard rival arguments made by Mr. Mose on behalf of the plaintiff and by Mr. Ojiambo on behalf of the defendant. I have carefully considered the matters in issue in this application. The issue for determination by this court is whether the plaintiff established a case to entitle this court stay execution of the decree of this court. Certain facts are not in dispute in this case. It is not disputed that judgment was entered in favour of the defendant as against the plaintiff on 4<sup>th</sup> December 1998. The court entered judgment in favour of the defendant for the principal sum of Kshs.9,183,690/80. The court awarded the defendant interest at the rate of 30% per annum from the date of the judgment until payment in full. The plaintiff's suit against the defendant was dismissed with costs. According to the

defendant, the plaintiff has not satisfied the decree. The outstanding amount to date is Kshs.41,792,000/=. The plaintiff does not dispute that he owes this amount that was decreed in favour of the defendant. From the submissions made, it was evident that the plaintiff did not appeal against the said decision of the court.

It was the plaintiff's application that the defendant should not have been allowed to execute against him because there is a pending suit in which the defendant has been paid a sum of Kshs.11million after the defendant sold the property that was charged in exercise of its statutory power of sale. I had occasion to read the ruling of Waweru J made in regard to the plaintiff's application for interlocutory orders of injunction as against the defendant in **Nairobi HCCC No. 646 of 2003 Thomas Mogaka vs. National Bank of Kenya Ltd & 2 others.** Waweru J allowed the plaintiff's application for injunction and restrained the defendant from proceeding with the sale of the charged property. Although the plaintiff alleges that the defendant had received the sum of Kshs.11 million as proceeds of the sale of the charged property, it was clear that with the grant of the injunction by the court, the defendant could not appropriate the sum received as purchase consideration to offset the outstanding loan of the plaintiff. Such application of the purchase consideration would only be undertaken by the defendant upon conclusion of the said pending suit. It was evident to this court that the plaintiff was approbating and reprobating. The plaintiff cannot on one hand allege that the sale of the charged property by the defendant was tainted by fraud and on the other hand claim that the sale transaction had been completed.

The court's impression of the plaintiff's application is that it appears that the plaintiff has made a decision not to pay the decretal amount owed to the defendant. The plaintiff is prepared to use all means possible, including abusing the due process of the court to achieve his objective of not being held accountable to satisfy the decree of this court. The decree of this court has to date not been satisfied. The pendency of another suit between the plaintiff and the defendant that is unrelated to the judgment entered in favour of the defendant in this suit cannot be a bar to the defendant executing the decree against the plaintiff. The allegation by the plaintiff to the effect that he was not served with the notice to show cause before this court issued a warrant for his arrest is not supported by evidence. Upon perusal of affidavits of service filed by the defendant, I am satisfied that the plaintiff was properly served with notice to show cause before the said warrant of arrest was issued.

The upshot of the above reasons is that I find no merit with the plaintiff's application. The plaintiff failed to persuade this court that he has sufficient legal grounds to challenge the defendant from executing the decree issued in its favour by this court. The application by the plaintiff dated 2<sup>nd</sup> February, 2009 is hereby dismissed with costs. In view of the past conduct by the plaintiff in filing multifarious applications to frustrate the defendant from executing the decree of this court, to prevent the abuse of the due process of the court, I hereby direct that before the plaintiff files any further application in this suit in relation to execution process, he must first seek the leave of this court.

It is so ordered.

**DATED AT NAIROBI this 10<sup>th</sup> day of JUNE 2009**

**L. KIMARU**

**JUDGE**