



**Nandebekwa v Industrial & Commercial Development Corporation (ICDC) Ltd
(Civil Suit 143 of 2005) [2009] KEHC 1933 (KLR) (Civ) (7 August 2009) (Ruling)**

*PAUL ETEMESI NANDEBEKWA v INDUSTRIAL & COMMERCIAL
DEVELOPMENT CORPORATION (ICDC) LTD [2009] eKLR*

Neutral citation: [2009] KEHC 1933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 143 OF 2005

MK KOOME, J

AUGUST 7, 2009

BETWEEN

PAUL ETEMESI NANDEBEKWA PLAINTIFF

AND

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION (ICDC)
LTD DEFENDANT**

RULING

1. By way of a Notice of Motion dated 4th June, 2009, the defendant/applicant seeks for several orders. However during the hearing, counsel for the defendant indicated that he was pursuing three principle orders; an order of stay of execution, an order declaring the attachment and sale of the movable property in execution of decree issued to Daystar Auctioneers a nullity and an order for the refund of the sum of Shs.479, 110/= paid to the auctioneers as their fees be ordered refunded.
2. This application is grounded on the fact that the defendant/applicant was never served with the proclamation notices. The execution was carried out without due regard to the law and defendant was compelled to pay Kshs.3, 353,178/= under duress. These grounds are further espoused in the matters deposed to in the supporting affidavit by Grace Mudora Muguga sworn on 4th June, 2009. M/s Muguga contends that no proclamation was issued and the allegation that proclamation was served upon a Mr. Langat is not true because the person who is described as Mr. Langat who was allegedly served with the proclamation notice was not authorized to receive court processes on behalf of the defendant. He also denied having been served with the notices. Furthermore the proclamation notices did not contain the valuation of the items proclaimed.



3. The other reason why the execution should be stopped is because the decretal sum is over exaggerated. The decree of the court referred to commercial interest rates to be applied to a sum of Kshs.700, 000/= . The computation of the commercial interest rates which was used by the decree holder was not the correct interest rates because between 1999 to the year 2004, the interest rates fluctuated between 25% and 10%. While from March 2001, to June 2004, the highest interest rate was 19% thus according to counsel for the defendant, the term commercial interest rates is a fairly elusive term and before any decree could be issued the issue of the interest rates ought to have been settled by both parties appearing before the Deputy Registrar.
4. Although counsel for the plaintiff wrote a letter to the defendant's counsel asking them to confirm the computation of the decretal sum as well as the application of 20% interest rate, and there was no response, that could not have licensed the decree holder to proceed with the execution unilaterally.
5. Counsel further argued that the defendant had fulfilled the conditions of granting a temporary order of stay of execution because the entire execution proceedings were illegal. Secondly the decretal sum is exaggerated due to the application of higher interest rates than the commercial rates prevailing at the time. Thirdly, although the judgment was delivered on 29th April, 2009, Miss. Maguga has detailed the difficulties they encountered in tracing the court file which was dealt with by Okwengu J at the central registry. It was not until 4th June, 2009, when they were able to file this application.
6. As regards substantial loss, the applicants have preferred an appeal and unless the stay is granted, they will suffer substantial loss. Although the plaintiff has deposed that he is a man of means, he has not been able to prove that he can settle the decretal sum should the appeal be successful. He claims to own a house in Buruburu estate in Nairobi but no documents to proof ownership are shown to this court. On security, counsel submitted that the entire decretal sum is deposited with the defendant's advocate and it can remain a security until the appeal is heard and determined.
7. Formidable opposition was put forth by counsel for the plaintiff/respondent. He relied on replying affidavit by Paul Etemesi Nandembekwa sworn on 22nd June, 2009. Counsel for the respondent submitted that the defendant has been indolent and did not care about this matter. During the hearing they provided no evidence. The evidence by the plaintiff was not controverted, after judgment was pronounced, the decree was sent to the defendant's counsel who refused to approve. The auctioneers received warrants of attachment and proclaimed the goods belonging to the defendants. The proclamation notice was duly served upon the defendant and was stamped with the defendant's stamp. If the defendants allege the stamp was a forgery, they should have reported the matter to the police.
8. Although the defendants claim that the file was not available, they made no attempts to write to the Deputy Registrar to locate the file. Due to their lack of interest in this matter, counsel urged the court not to grant the order of stay. On the calculation of the commercial interest rates, if the defendant was not happy with the application of the interest rates, they should have moved the court to settle the commercial rates of interests. The Deputy Registrar applied 20% and if the applicant was dissatisfied he could have moved the court under the provisions of Order 48 rule 1(b) to settle the issue of the applicable commercial interest rates.
9. Counsel urged the court not to deny the plaintiff the fruits of his litigation of a matter which started in 1999. The plaintiff following an advertisement by the defendant for the sale of property known as LR No.Bungoma/Kamaikoiwa/291 paid the defendants a sum of Kshs.700, 000/= as an innocent purchaser for value. The value of that money would have been much more and it is illogical for the defendant to argue now that the plaintiff cannot be in a position to refund the money should the



appeal be successful. The only problem by the defendant is the computation of interest over the sum of Kshs.700, 000/=.

10. I have considered the submissions for and against this application. Under Order 41 Rule 4(2) of the Civil Procedure Rules, it is provided as follows:-

- “(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

11. Applying the first test to this case whether the applicant will suffer substantial loss unless the order of stay of execution is issued. I appreciate the claim herein was a liquidated claim for costs incurred by the plaintiff as a result of the nullification by court of a sale by public auction which was staged by the defendants and which was found by the court to be irregular. The plaintiff had paid a sum of Kshs.700, 000/= to the defendant which was not refunded until four years later without interest. In this regard I am not persuaded that the defendant who had withheld the plaintiff's purchase price and who led the plaintiff to purchase a property before they had complied with the statutory provisions will suffer substantial loss if the order of stay is not granted.

12. The execution proceedings has also been challenged but going by the records, by a letter dated 15th June, 2009, the plaintiff's advocate wrote to the defendant's advocate. They sent a schedule of the decretal sum as well as a statement of the computation of interest as well as a schedule of the commercial bank's average interest rates from the year 1999 to 2004. The defendant's counsel did not respond to that letter. If the defendant had any reservations to the application of 20% per annum, nothing would have been easier than applying to court for the determination of the interest rates. Moreover the interest rates that they have challenged is on the sum of Kshs.700, 000/= which is calculated as Kshs.765, 973/=.

13. Even if that interest rate is erroneous, the error would involve a negligible amount. I am also not persuaded that the defendant would be unable to refund that sum should the appeal be successful. On the mode of execution, a proclamation was issued on 25th May, 2009 and it was signed for and stamped on 25th May, 2009. Although the defendants deny it was received by Mr. Langat it is not denied the stamp affixed on the proclamation belongs to the defendant. I find no justifiable reason why the execution should be declared a nullity.

14. The plaintiff should not be denied the fruits of its litigation which begun in 1999, when he paid Ksh 700,000/= to the defendant as purchase price. I find no merit in the application which is hereby dismissed with costs to the plaintiff/respondent.

RULING READ AND SIGNED AT NAIROBI THIS 07TH DAY OF AUGUST, 2009.

M. K. KOOME

JUDGE

