



SHEIKH ALI TAIB.....PLAINTIFF

VERSUS

GEORGE ELLAM WEKESA.....DEFENDANT

R U L I N G

This is an application dated 23rd March 2007 by the Interested Party for orders inter alia that:-

“1.

2. That there be a stay of execution of the interlocutory judgment and any other subsequent orders herein pending the hearing and determination of this application inter partes.

3. That there be a stay of proceedings in this matter and execution of the interlocutory judgment herein pending the hearing and determination of H.C.C. No. 454 of 2002 (O.S.); SELINA WEKESA –V- GEORGE ELLAM WEKESA & SHEIKH ALI TAIB BAJABER.

4. That costs of this application be provided for.

The application was supported by the affidavit of the applicant sworn on 23rd March 2007. The application was opposed through Grounds of Opposition dated 14th May, 2008.

I have considered the application. Supporting affidavit, grounds of opposition and the submissions by Counsel.

The position in this case is that judgment was entered in favour of the plaintiff as against the Defendant on 30th June, 2004 in default of the Defendant failing to file defence and the interested party having failed to file defence and undertaking within the time prescribed. The court decreed that:-

1. That the Defendant do vacate the premises known as Mombasa/Block X/97.

2. That judgment for specific performance of the agreement dated 14th November, 2002 be entered as prayed.

3. That the Defendant do pay to the plaintiff costs of this suit to be taxed and/or assessed by the Taxing Master of this suit...”

The applicant describing herself as “Interested Party” was on

22nd April 2005 given leave to be joined as a defendant and to file a defence to the suit on condition that she furnishes a banker’s guarantee in the sum of Kenya Shillings 2.5. million within the next 30 days and in default the application stands dismissed. It was ordered that upon filing the aforesaid undertaking the applicant be at liberty to file an application and statement of Defence within 14 days. The order was by the Hon. Justice Khaminwa.

The Applicant failed to furnish the banker's guarantee for Shs.2.5 m within the prescribed time. I do hold that it was a condition precedent for her to furnish the said guarantee and undertaking within the prescribed period – before she could be a party and defend the suit. She failed to do so and her application for joinder stood dismissed.

By an application dated 20th May 2005, the applicant herein sought an order to vacate the orders for her to furnish a bank guarantee and for her to defend unconditionally. The application was dismissed on 19th October, 2006 by Hon. Justice Sergon.

This aforesaid clearly and certainly means that the applicant is not a party to the suit herein. She did not become a party with the capacity to file any application or take any steps since her application to be enjoined stood dismissed when she failed to provide the banker's guarantee. The applicant cannot in law therefore apply for any stay of execution of the decree or setting aside of any judgment herein.

This court cannot ignore its own orders given and which the Applicant has defaulted in complying with. The court noted from the applicant's affidavit and statements by counsel that the defendant has since died. The applicant is therefore not supported in her quest by the Estate of the deceased. In fact the record shows that the defendant never challenged or questioned the judgment delivered against him. His then advocate Mr. Mokaya attended the hearing of this application and disclosed as much. He said his client never wished to defend the suit and that in fact the sale was complete and the sale proceeds received and/or secured.

It is my view that the application herein is an abuse of the court process and while the applicant seeks equitable remedies, she does not come to the court with clean hands. Her intended action is misplaced and only intended to deny the plaintiff and decree-holder the fruits of his judgment. To this extent the applicant's conduct amounts to vexation of the plaintiff as this court cannot even order costs against her.

I do hold that this suit is finalized save for the question of execution of the decree in accordance with the law. There is nothing that the applicant can litigate having lost all given opportunities by the court.

I therefore do hereby dismiss the application dated 23rd March 2007. Any interim orders, granted pending the determination of the application is hereby discharged. Sadly for the plaintiff there can be no order as to costs.

Dated and delivered at Mombasa this 9th day of October 2009.

M. K. IBRAHIM

J U D G E