



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Commercial Civil Case 147 of 2006

NATIONAL BANK OF KENYA.....PLAINTIFF/RESPONDENT

-VERSUS-

AZIZUDEEN RAHEMTULAKASSIM LAKHA..... DEFENDANT/APPLICANT

RULING

The defendant moved the Court by Notice of Motion dated 30th June, 2009 filed on 9th July, 2009 and brought under Order L rule 1 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The applicant prays for an order that “the Honourable Court do stay any further proceedings and executions in this matter”.

The applicant, in his supporting affidavit, depones as follows: due to accruing interest, the decretal amount now due and owing is well in excess of Kshs. 9,000,000/=; the suit premises has been invaded by squatters, and the loaned amount cannot be realised from the security; the deponent risks a warrant of arrest being sought against him; the deponent is in ill-health and cannot raise money to satisfy the decree; the deponent has had heart attacks and has been treated locally and abroad and has undergone a coronary artery bypass surgery and is now placed under lifelong medication; the deponent is aged 77 years , and currently has no source of income; he asks the Court to stay any execution against him.

In response to the application, the plaintiff/respondent filed grounds of opposition dated 18th August, 2009. These grounds are, firstly, that the application is frivolous and otherwise an abuse of Court process; and secondly, that there are no good grounds set out in support of the prayer sought.

Learned counsel **Mr. Kioko**, in his submissions, said that the defendant is seeking to stop any form of execution against him, as his state of health cannot stand the rigours of execution earlier adopted by the plaintiff/respondent by way of arrest and detention in civil jail. Counsel notes the content of the defendant’s affidavit and its annexures – health documents showing that he has had to undergo a heart operation. Counsel notes that these averments by the defendant/applicant have not been disputed by the plaintiff/respondent. So it is submitted that “there being no challenge to issues raised on [defendant’s] health, the Notice of Motion application be allowed as if it is unchallenged.”

Learned counsel **Mr. Mogaka**, in response, submitted that “the Notice of Motion dated 30th June, [2009] is an afterthought and amounts to an abuse of Court Process”.

Counsel proposes that the Court should give specific consideration to certain matters –

(a) that, judgment was entered on 11th December, 2002;

(b) that, no appeal was filed against the decree of the Court;

(c) that, the interim orders of stay granted on 18th August, 2006 were discharged, pursuant to an application dated 20th December, 2006;

(d) that, the defendant’s affidavit confirms that there is still an outstanding, unpaid sum in excess of Kshs. 9,000,000/=;

(e) that, in law, ill-health cannot be a bar to attachment and sale of a judgment-debtor’s assets – but can only be a ground for postponing detention in civil jail and/or release from prison/custody pursuant to s.43 of the Civil Procedure Act (Cap. 21, Laws of Kenya);

(f) that, ill-health cannot be a ground of a blanket stay of proceedings or execution; for any other form of attachment allowed by law (save detention in civil jail) can proceed so as to satisfy the decree.

Counsel urged that the application be dismissed with costs to the plaintiff/decree-holder.

It is not disputed that there already is in place a judgment and decree in favour of the plaintiff/respondent and against the defendant/applicant. In the design of the law, the said decree is for **execution** – and execution need not necessarily involve committing the judgment-debtor to civil jail. If, however, the judgment-debtor is committed to civil jail, then the safeguards for an ailing judgment-debtor, under s.43 of the Civil Procedure Act, would come into effect, and the judgment-debtor may be kept out of custody.

In the instant case the execution of the decree is not said to have led to the judgment-debtor being held in civil jail; indeed, he is at large and has come before this Court only in anticipation.

Clearly, the applicant’s claim for this Court’s intervention has not yet fallen due; and he cannot very well ask the Court at this stage to hold the hands of the execution process. I will, therefore, dismiss the application.

I have noticed, however, that the factual statements deponed by the defendant have not been contested; so I will take it that he is a 77-year-old man who is in a state of ill-health and who, in the ideal situation, should not be locked up in jail. This lies some removes from the imperatives of the execution of a decree of the Court; but I will direct that the plaintiff do assess and ascertain the defendant’s property – situation, and attempt to arrive at an understanding with the defendant on how the decree can most conveniently be given effect. The subject- property should be examined, to ascertain the extent to which it provides security for the payment of the decretal sums.

I will make orders as follows:

(1) The defendant’s prayers in the Notice of

Motion of 30th June, 2009 are refused.

(2) The defendant shall pay the plaintiff’s costs

for the application.

***(3) This matter be listed for mention on the
expiry of a two-month period.***

DATED and DELIVERED at MOMBASA this 26th day of November, 2009.

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the Defendant/Applicant: ***Mr. Kiume Kioko***

For the Plaintiff/Respondent: ***Mr. Mogaka***