



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 357 of 2005

DAVID GEORGE BELL 1ST PLAINTIFF
ESTHER GLORIA MWIHAKI BELL.....2ND PLAINTIFF
VERSUS
ASHUTOSH BHASIN DEFENDANT

RULING

1. The Notice of Motion dated 4th April 2009 seeks for leave to execute the decree before taxation of costs; it is brought under the provisions of **Sections 3A, 63 & 94** of the **Civil Procedure Act**. The applicant seeks *inter alia* for orders that warrant of eviction against the defendant or any other tenant in possession of apartment no. RH001 L.R. No. 1830/V/185 Connaught apartments Nairobi be issued and there be an order that the decretal sum amounting Kshs.2,849,424 held in a joint account No. 00100344655001 in the names of **Mbugua V. W and Company Advocates** and **Singh Gitau & Company Advocates** at I&M Bank Kenyatta Avenue Branch be released to the plaintiffs.
2. This application is based on the grounds stipulated on the body thereto and the matters deposed to in the supporting affidavit sworn by the 1st Plaintiff. The brief summary of this matter is; judgment was entered in favor of the plaintiff on 31st July 2009 by Warsame J. The Defendant applied for a stay of execution and they were granted forty (45) days stay of execution within which to file an appeal.
3. The dispute in this matter involves the rent for the premises known as No. RH001 L.R. No. 1830/V/185 Connaught apartments Nairobi. In the judgment by **Warsame, J**, it was determined that the suit premises belongs to the plaintiff who were entitled to rent of Kshs.2,849,425 due from May 2005 to 30th July 2009 at the rate of 65,000/= per month. Prior to the hearing, the court had directed the defendant to deposit money as security in the joint account held by both advocates.

4. After judgment was delivered in favor of the plaintiff, the advocate for the plaintiffs sought for the release of the decretal money from the bank, but the bank failed to release because there was no authority by Singh Gitau & Co. Advocates for the Defendants who held the money in joint account. The plaintiffs contend that they require the funds urgently because they have not received rent for the last three (3) years and they have financial obligations to discharge.
5. The applicant also sought for orders that the defendant and his family be evicted from the premises because they have refused to vacate from the premises voluntarily. The Defendant's advocate also refused to return the title documents handed to him on his professional undertaking. The trial judge noted in his judgment that the defendant had engaged in a systemic pattern of abuse of the court process, and used every effort to derail and scuttle the hearing and conclusion of this matter.
6. This application was opposed, Counsel for the defendant filed grounds of opposition although he did not state the grounds of law he was raising in opposition of the motion. It was argued that the application was not served upon the firm of **Singh Gitau** who are the advocates on record for the Defendants. Mr. Gitau contended that the application was served on **M/s. Majanja & Luseno Co. Advocates** who are not recognized agents of the defendant.
7. Further he argued that the Bill of Costs should be taxed to ascertain the Plaintiff's costs before execution. The Defendant should proceed with taxation and the money held in the joint account operated by lawyers, can only be released by a way of garnishee proceedings. Finally, there is an application pending before the Court of Appeal under **Rules 5(2) (b) of the Court of Appeal Rules** and this court should await the outcome.
8. Under **Section 94 of the Civil Procedure Act**, it is provided that execution of a decree issued by the High Court can be executed with the leave of the court before the ascertainment of the costs. The issue raised by the Defendant/Respondent is that the application seeking for execution before the ascertainment of costs was not served upon Messrs Singh Gitau who are the advocates on record for the Defendant. On perusal of the affidavit of service filed by the Plaintiff, it is shown that the application was served upon Messrs Singh Gitau & Co. Advocates on 11th November 2009 out of abundant caution. The plaintiff also served the application upon the offices of Messrs Majanja Luseno & Co. Advocates because there was a notice of change for advocates although Messrs Singh Gitau continued to act for the Defendant, such that it was not clear whether they were holding brief for Majanja Luseno & Co. Advocates.

10. It is apparent from the record that the suit herein has had a chequered history from the time the suit was filed up to the completion. The trial Judge made the following orders:

- “(1) A declaration that the sale agreement between the Plaintiffs and the defendant were duly terminated on 15th April 2005. Any subsequent transaction conducted after that day is a nullity and void *ab initio*. No party can and should be allowed to derive right from an act of outright illegality.**
- (2) A declaration that purported transfer of the suit property and plaintiffs shares totaling 170 shares in Maple Management Limited to the defendant was and is illegal null and void.**
- (3) An order that entry No. 4 in the Grant L.R. No. 84990/1 in the land register be and is hereby cancelled. The property shall be restored to the Plaintiffs with immediate effect.**
- (4) An order of eviction directed against any tenant or person in possession or residing in the suit premises with immediate effect but not later than 7 days from the date of this judgment.**
- (5) An order that the defendant or his advocate shall deliver to the Registrar of Titles the original title documents in respect of L.R. No. 1870/VI/85 for purposes of cancellation and rectification of the register. In the event that the Defendant or his advocate fail to surrender the documents in their possession concerning the suit property an order of this court directed at the Registrar of Titles shall ensure that the Plaintiffs are granted new title documents and the ones in possession of the defendant or his advocate shall stand cancelled by virtue of this order.**
- (6) I enter judgment for the plaintiffs against the defendant for the sum of Kshs.2,849,425/= plus the cost of this suit.”**

What is being asked of this court is to order execution before the ascertainment of costs as prayed for in number 4 and 6 and also the release of the money which was held as security.

11. Although the applicant has filed an appeal there is no order staying execution, merely filing an appeal does not operate as a stay. Secondly, the sum which was deposited in the joint names of the advocates was held as security, thus it is not necessary to take out garnishee proceedings. I see no justifiable reason why the plaintiff should be kept away from their fruits of litigation; they should be allowed to execute the decree before the ascertainment of costs.

The application dated 4th November 2009 is allowed with costs to the Plaintiff.

RULING READ AND SIGNED ON **11th December 2009** AT NAIROBI.

M.K. KOOME
JUDGE