



1. Civil Practice and procedure
2. Application dated 5 September 2006
  - a) Stay of execution
  - b) Orders to set aside the sale of property LR Baringo/Tirimionin/50
  - c) That the plaintiff/respondents be ordered to execute the decree in terms of guarantee of 2<sup>nd</sup> November 1992 and filed 8 December 1992 by M/s Agro-Complex Kenya Ltd in favour of 2<sup>nd</sup> defendant
3. Subject of main suit
  - i) Loan
  - ii) Moneys borrowed by the 1<sup>st</sup> defendant M/s MPS Ltd and guaranteed by the 2<sup>nd</sup> defendant Hon. Henry Runguno Cheboiwo
  - iii) Plaintiff sues for a momentary claim of Ksh.1,341,462/90 against the 1<sup>st</sup> defendant  
Ksh.1,000,000/- against the 2<sup>nd</sup> defendant as guarantor.
  - iv) Suit against 1 and 2 defendant filed when they defaulted to pay monetary sum. Both defendants fail to enter appearance and file defence.
  - v) Interlocutory judgment entered by Deputy Registrar  
1<sup>st</sup> defendant ..... 7 November 1984  
2<sup>nd</sup> defendant ..... 28 August 1984
  - vi) NOTE: under order 9a r 4 Civil Procedure Rules no formal proof is required as the claim is a momentary demand. Once judgment has been entered execution thereafter issues.
4. Execution proceeding begins in 1985
  - a) Warrant of arrest against 2<sup>nd</sup> defendant issued (6.10.92, 4.12.90)
  - b) Committal to civil jail
  - c) 2<sup>nd</sup> defendant released on bond and undertakes to give guarantee of the decretal sum
  - d) 1992 guarantee given by M/s Agro-Complex Kenya Ltd to sell LR 1511,1512,1513,1514 allocated to the plaintiff on 1.3.90 but registered in the name of M/s Agro Complex Kenya Ltd.”

- e) All directors including the plaintiff sign guarantee and file same to court. The properties were to be sold and funds given to the plaintiff for sum of Ksh.1 million until suit is settled.
- f) Between 1992 to 2006 no action had been taken.
- g) In 2006 the plaintiff advertises the 2<sup>nd</sup> defendant ancestral land for sale
- h) 2<sup>nd</sup> defendant files application to stay the sale of LR Baringo/Tirimionin/50 to be held on 20.9.06.

5. Inter parties hearing

- a) Arguments by the defendant/application
  - i) As a guarantee had been duly given the plaintiff ought to first execute against the said M/s Agro-complex Kenya Ltd.
- b) Arguments by the plaintiff/respondent
  - ii) There are no pending case. The plaintiff can go for any property belonging to the 2<sup>nd</sup> defendant and not necessary those who guaranteed the defendant No.2.

5. Held:

6.1. There were guarantors duly given to the plaintiff by M/s Agro-Complex Kenya Ltd. The said company should be required to pay the decretal sum as agreed by parties.

6.2. The application dated 5.9.06 be and is hereby granted:-

That there be a stay of sale of the 2<sup>nd</sup> defendant property LR Baringo/Tirimionin/50 which sale is duly set aside.

For ease of clarity there is no stay of execution and the plaintiff/respondent ought to proceed against the guarantors.

7. Case law

Advocates:-

N. Anambo for Anambo & Co. Advocates for the defendant/applicant

C.N. Githii for Hamilton Harrison & Mathews Advocates for the plaintiff/respondent

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Case 1392 of 1984**

**KENYA NATIONAL CAPITAL CORPORATION LTD.....PLAINTIFF**

**VERSUS**

**MPS (KENYA) LTD E.A.....DEFENDANT**

**RULING**

**I: BACKGROUND**

1. By an application dated 5 September 2006, the 2<sup>nd</sup> defendant/applicant seeks for orders of stay of execution. That the orders be set aside for the sale of his ancestral home LR Baringo/ Tirimionim/50. It further seeks that the plaintiff/respondent be ordered to execute the decree in terms of a guarantee given on 2 November 1992 and filed in court on 8 December 1992 by M/s Agro-complex Kenya Ltd in favour of the 2<sup>nd</sup> defendant.

2. The plaintiff, a financial institution had loaned and advanced money (in 1983) to the 1<sup>st</sup> defendant M/s MPS Ltd. At the time of filing suit this loan stood at Ksh.1,341,462/90. The said sum had been guaranteed by Hon. Henry Runguno Cheboiwo for Ksh.1.000,000/- only. The two defendants defaulted in payment. Both were jointly sued in the main suit before me. Both failed to enter appearance and file defence.

3. By order 48 Civil Procedure Rules the Deputy Registrar entered an interlocutory judgment against the 1<sup>st</sup> defendant on 7 November 1984 and against the 2<sup>nd</sup> defendant on 28 August 1984.

4. The effect of this judgment under order 9 a r 4 Civil Procedure Rules is that there is no formal proof unless otherwise ordered by court it being a momentary demand claim. The plaintiff after taxation required to proceed to execution.

5. The execution proceeding commenced in 1985. There were warrant of arrests issued against the 2<sup>nd</sup> defendant (4.12.90, 6.10.92), to make good the decretal sum. He was committed to civil jail. The 2<sup>nd</sup> defendant was nonetheless released on bond when he undertook through a third party to make good the decretal sum.

6. In 1992 M/s Agro-Complex Kenya Ltd gave a guarantee in which they stated that the plaintiff had been allocated land in Embakasi being LR/1511,1512,1513 and 1514 on 1.3.90. These plots were registered in the name of M/s Agro-complex. All the directors including the plaintiffs agreed to have the land sold and proceeds given to the plaintiff.

7. Between 1992 to 2006 there was no action taken by either parties. The plaintiff in 2006 advertised the sale of the 2<sup>nd</sup> defendants ancestral home to be held on 20.9.06. The 2<sup>nd</sup> defendant filed the present application of 5.9.06.

**II: Application seeking a stay of the sale**

**A) Arguments by defendant/applicant**

9. When parties came before me for inter-parties hearing, the advocate for the defendant No.2/applicant stated that by the agreement of

M/s Agro-complex Kenya Ltd to sell the plot land and give proceeds to the plaintiff or alternative guarantee the defendant till finalization of the settlement of the decretal sum, the plaintiff had failed to take action. Indeed the defendant has changed advocates.

B) Arguments by plaintiff/respondent

9. The plaintiff/respondent on the other hand stated there was no pending case to grant a stay of the sale of the property. The plaintiff may go after any another property of the defendant No.2.

III: Finding

10. I hereby confirm that the defendant No.2 gave a guarantee through M/s Agro-Complex Kenya Ltd to liquidate the decretal sum which has now risen to over Ksh.5 million.

11. That the plaintiff pursued the guarantors to release the money.

12. I would hereby allow the application in the following terms.

i) That there be a stay of execution and the sale order of the 2<sup>nd</sup> defendant property LR. Baringo Tirimionin/50 and the suit be and is hereby set aside.

ii) That the court hereby orders the plaintiff/respondent to execute the decree in terms of the guarantee dated 2 November 1992 and filed to court on 8 December 1992 by M/s Agro-complex Kenya Ltd in favour of the 2<sup>nd</sup> defendant/applicant

iii) The costs of this application will be in the cause. For ease of clarity there is no stay of execution and plaintiff/respondent proceeded can proceed against the guarantor.

b) There be liberty to apply by both parties.

Dated this 31<sup>st</sup> day of January 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

**N. Anambo for Anambo & Co. Advocates for the defendant/applicant**

**C.N. Githii for Hamilton Harrison & Mathews Advocates for the plaintiff/respondent**