



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

**Civil Case 1406 of 1999**

**KENYA COMMERCIAL FINANCE CO. LTD.....  
PLAINTIFF**

**VERSUS**

**DANIEL OMBACHI MOGENI .....1<sup>ST</sup> DEFENDANT**

**JOYCE NYABOKE MOGENI.....2<sup>ND</sup> DEFENDANT**

**RULING**

On 26<sup>th</sup> August 2005, the defendants moved this court by way of Notice of Motion. The said application was filed under a certificate of urgency and was so certified by the court.

By this application, the defendants seek the following two substantive orders:

**“2. THAT this Honourable Court be pleased to order a temporary stay of execution of the decree made on the 30<sup>th</sup> day of January 2004, pending the hearing and determination of the application herein.**

**3. THAT this Honourable Court be pleased to declare irregular the process of execution herein being carried out by Sadique Enterprises, and direct the plaintiff/respondent to realise the security property prior to attaching the defendant/applicant’s household goods irregularly.”**

Before the application could proceed to hearing, the plaintiff put forward a preliminary objection. The said objection was premised on the following three grounds:

**“(a) THAT, the application is incurably incompetent as a stay of execution cannot be properly granted pending the hearing and determination of the same application seeking it.**

**(b) THAT, a declaration cannot be competently issued by this Honourable Court in the form sought by the first judgement debtor.**

**(c) THAT the issue of the decree holder’s obligation to realise its security first was fully compromised by the consent judgement dated 30<sup>th</sup> day of January 2004.”**

When canvassing the preliminary objection, the plaintiff submitted that the prayer numbered (2) above

is spent as soon as the application commences.

On the other hand, the defendants feel that it was important for them to seek an interim stay of execution which would remain in force until the application herein was determined.

It is instructive to note that this application was filed on 26<sup>th</sup> August 2005. When it first came up for hearing on that same date, the application was certified urgent, and the court also directed that an interim order for stay would issue forthwith. That first order for stay of execution was made *ex parte*, and the court ordered that it would remain in force until 6<sup>th</sup> September 2005, when the application was scheduled for hearing *inter partes*.

Thereafter, when the matter came up on 6<sup>th</sup> September 2005, the plaintiff's advocates sought an adjournment but indicated to the court that the interim orders, for stay of execution, could be extended. Accordingly, the court did extend the said orders, upto 7<sup>th</sup> October 2005, when the application was due to be heard.

The court records show that the interim orders for stay of execution were extended on 15<sup>th</sup> November 2005, 15<sup>th</sup> December 2005, and on 7<sup>th</sup> March 2006.

I have set out the foregoing history of the interim orders for stay, as I believe it helps to illustrate the fact that the interim prayers set out in prayer (2) of the application did not become spent as soon as the hearing of the application commenced.

In any event, the wording of the said prayer is such that if it were granted as prayed, the orders so granted would remain in force until the substantive application was heard and determined.

Meanwhile, as this issue has been raised as a preliminary objection, it is important that I emphasize the fact, that in my understanding this first issue could not constitute a legitimate preliminary objection. I say so because even if the court were to accept the plaintiff's contention on prayer (2) of the application, that alone would not have disposed of the application.

On the second issue raised by the plaintiff, it was asserted that a declaration could not be made on an application. The plaintiff submitted that even if the execution process were irregular, a declaration could not be made on an application.

The reason advanced for that contention was that a declaration is a substantive prayer, which can only be granted by the court after a trial in the normal manner. The plaintiff's contention was that a declaration was an independent cause of action, which would have to be pursued in another suit which was independent of this case. That being the case, the plaintiff submitted that the parties to that other independent suit would have to lead evidence, which would then be subjected to cross-examination, before the court could be in a position to determine whether or not the claim for a declaration was proved.

First and foremost, I wish to point out that the plaintiff did not cite any authority to back its legal assertion. No provisions of any statute were cited to back the proposition; and there were also no precedents quoted. Therefore, all that the court has to go by is the plaintiff's word, on that point.

Secondly, I note that the defendants' position is that they were not pursuing a declaratory relief, in the sense of substantive prayers sought in a suit. If that were the position, could the defendants' application be arguable? In other words, I asked myself if the proposition put forward by the defendants were possible or not.

As this matter was still being dealt with at the stage of the preliminary objection, it would be improper for the court to delve into the substance of the application itself.

Therefore, without commenting on the merits of the defendants' application, all I can say for now is

that it does appear that the defendants have an arguable point. I say so because there is a possibility that they may persuade the court that it should make a finding, to the effect that the process of execution herein was irregular. If such a finding was made (or not made), the defendants believe that the court would have made a declaration.

In my considered opinion there is no legal justification for depriving the defendants the opportunity to canvass their application dated 20<sup>th</sup> August 2005. Whether or not the application will succeed is another question altogether. But, the weakness, if any, of the application is not a proper reason to summarily dispose of it through a preliminary objection.

To my mind, the grounds set out in the plaintiff's Notice of Preliminary Objection, are best utilised as a basis for opposing the application.

For those reasons, I find no merit in the Preliminary Objection, and do therefore overrule the same. The costs of the said preliminary objection are awarded to the defendants.

Meanwhile, there shall be a stay of execution until the next hearing of the application dated 26<sup>th</sup> August 2005.

Dated and Delivered at Nairobi this 26th day of June 2006.

FRED A. OCHIENG

JUDGE