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

Civil Case 393 of 2003

CALEB GULAM (Suing as the Executor of the

Estate of Sadrudin Shamsudin Esmail Nurani) …...…..1ST PLAINTIFF/1ST RESPONDENT

ELDOMART HOLDINGS LIMITED……..2ND PLAINTIFF/2ND RESPONDENT

VERSUS

CYRUS SHAKHALAGA KWAH JIRONGO…….....…….DEFENDANT/APPLICANT

R U L I N G

The defendant has moved this court by a chamber summons dated 27th March 2006. He seeks a stay of execution for the period that it takes him to prosecute his prayer for the lifting or setting aside of the proclamation and attachment of his assets.

Essentially, therefore, the substantive application is for the setting aside of the attachment of the defendants assets.

The grounds set out on the face of the application are very pertinent to the case, as will become apparent in due course. For that reason, I deem it necessary to set out, verbatim, the said grounds, which are as follows:

"**(a) The Plaintiff/Decree holder has purported to obtain warrants of execution against the Defendant for the sum of KShs. 66,259,640.50.**

(b) The Plaintiff/Decree holder has already purported to sell the Defendant/Applicant's property to wit L.R. No. 1160/230 valued at KShs. 40,000,000/= albeit, fraudulently and unlawfully to a 3rd party allegedly by auction at a gross undervalue.

(c) The Applicant herein has challenged the said sale.

(d) There had been no account of the proceeds of the purported sale.

(e) Unless there is a stay of execution of the said warrants in the terms of this application, the defendant stands to suffer irreparable loss and damage.

(f) All the matters set out in the annexed affidavit of Cyrus Shakhalaga Khwa Jirongo."

Some of the significant depositions in Mr. Jirongo's affidavit include the assertions that the auction of the property cited in (b) above, had realised the sum of KShs. 20 million, at the purported auction conducted on 29th July 2005.

The affidavit also states that the applicant was not given any credit for the proceeds of sale, when the plaintiff drew up its execution application.

In any event, the applicant states that he had filed an application to set aside the sale of the property. That application is said to have come up for hearing on several occasions, but its prosecution was delayed due to the plaintiff's applications for adjournments.

When faced with the application, the plaintiff not only filed grounds of opposition but also sought and was granted leave to cross-examine Mr. Jirongo.

During the said cross-examination, it became clear that a significant portion of the grounds upon which the application was founded, were inaccurate, to say the least.

For instance, a perusal of the execution application which the plaintiff filed in court on 15th March 2006, clearly shows that the plaintiff had credited the applicant with the sum of Kshs. 25 million, which was ascribed to the proceeds of the auction of sub-division No. 1677 Section 1 Mainland North Ziwani Road, Nyali, Mombasa.

Therefore, when Mr. Jirongo stated in his affidavit that the plaintiff had failed to give him credit, that was erroneous.

Mr. Jirongo was also mistaken when he deponed that the application to set aside the sale was scheduled for hearing on 8th May 2006, and that the delays in hearing the application were attributable to the plaintiff's applications for adjournment. During cross-examination, it transpired that the said application to set aside the sale had been set down for hearing on 5th December 2005, and also that the plaintiff had never caused the adjournment of that application.

Mr. Jirongo also conceded, during cross-examination, that he erred, when he deponed that the sale of the real property in Mombasa was for a sum of KShs. 20 million. That particular concession is significant, if placed within its proper perspective. By that I mean that the court needs to bear in mind the timing of the current affidavit, and to compare it to other times when the defendant cited what he deemed to be the price for which the property was sold.

The starting point is to be found at paragraph 6 of the defendant's affidavit which was sworn on 27th March 2006. It is then that the defendant said that the property had been sold for KShs. 20 million.

Prior to that, the defendant had sworn another affidavit on 22nd August 2005, when he had brought an application for an injunction, to restrain the plaintiffs from transferring or disposing of L.R. NO. 1160/230 and sub-division No. 1677, Section 1 Mainland North Ziwani Road, Nyali.

As at that date, the defendant deponed that the property had been sold for KShs. 24,000,000/=.

When faced with the discrepancies between the various figures, as well as the dates given by the defendant, his advocate, Mr. Wandabwa submitted that the errors in Mr. Jirongo's affidavit were not material to the application which was before the court. As far as the advocate was concerned, Mr. Jirongo had not made any attempt to mislead the court.

In all this, it must be noted that during his cross-examination, Mr. Jirongo conceded having given different figures to the court, at different times. And when I talk of figures, I am making reference to the price for which the plaintiff is said to have caused the property to be sold. Though the defendant's advocate contended that his client did not intend to mislead the court, he did not take the next logical step,

which would have been to tell the court what exactly Mr. Jirongo's intentions were.

But at least Mr. Jirongo willingly admitted that in view of the inconsistent figures, he had no idea what the court was supposed to believe. He then added that nobody had told him the price at which the property was sold.

In my considered opinion, Mr. Jirongo must be deemed to have had little or any regard for the seriousness that ought to be attached to an affidavit. I say so because to swear an affidavit, within which somebody gives facts about which the person is not sure, is wrong. And when the same person swears more than one affidavit, in which he gives different facts, about any particular issue, that person must be deemed to be having no regard for the sanctity of the oath administered by a Commissioner for Oaths.

It does appear to me that the grounds set out on the face of the application, as well as the depositions in Mr. Jirongo's affidavit were calculated to persuade the court to grant the orders sought. In the process, the plaintiff was portrayed as having delayed the hearing of the defendant's application to set aside the sale. The plaintiff was also portrayed as having failed to give credit to the defendant for the sums which had been realised upon the sale of the property in Mombasa.

But as has transpired, those portrayals of the plaintiff were anything but accurate. Therefore, that leads me to the inescapable conclusion that the defendant had conducted himself in an unbecoming manner.

In the circumstances, if the application was determinable on the basis of the court's discretion alone, I would have had no hesitation at all, in telling the defendant that he was not worthy of the court discretion.

For now, I must also take into account the defendant's contention that the whole execution process was unfounded, because the Decree had been compromised.

In that regard, the defendant relies on the contents of the order numbered 2 (I) of the Decree issued on 14th March 2005. That order reads as follows:

"**THAT the property known as sub-division No. 1677 Section 1, Mainland North, Ziwani Road, Nyali Mombasa, shall at the expiry of 90 days from the date hereof be auctioned by a recognised Court Broker appointed by the Plaintiffs. The proceeds thereof shall be applied as follows:-**

(i) In satisfaction of the decretal amount herein under clause 1 above and clause 3 hereinafter.

(ii) If there is surplus over and above the said sum, the same shall be paid over to the Defendant."

For the sake of completeness, it is pointed out that clause 1 basically granted judgement in favour of the plaintiff for Kshs. 45,848,750/= together with interest thereon at 15% per annum, from 1st July 2003, until payment in full. And clause 3 stipulated that the defendant would pay the costs of the suit.

In the face of that line of submissions, the plaintiff pointed at clause 4 of the Decree. That clause provided as follows;

"**THAT in the event that the Defendant pays to the plaintiff the sum of Kshs. 25,000,000/= on or before 30th April 2005, the same shall be accepted in full and final settlement of the Decree herein. In such an event the plaintiff shall transfer the said immovable property to the Defendant and/or his nominee as directed by him, the cost of which shall be borne by the Defendant. Further in this event each party shall bear its own costs."**

Another issue which was raised by the defendant was that the execution process was irregular, in so far as the same was not commenced by way of a Notice to Show Cause.

The defendant pointed out that the Decree was more than one year old, as at 15th arch 2006, and that thereafter, it could only have been lawfully executed through a Notice to Show Cause.

In answer, the plaintiff submitted that in calculating the period of one year, as envisaged under Order 21 rule 18 of the Civil Procedure Rules, the period between the 21st of December and the 6th of January in the year next following, must be excluded.

In order to have a better understanding of the rule, it is hereby set out. It reads;

"**18 (1) Where an application for execution is made –**

(a) more than one year after the date of the decree; or

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43,

the court executing the decree shall issue a notice to the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him……."

On the face of it, the rule appears straightforward. In other words, provided the execution was being undertaken, such as in this case, on a date which was more than one year after the date of the decree, the defendant should have been served with a Notice to show cause why the execution should not issue against him.

The reason why there would appear to have been need for that Notice is that the decree was issued on 14th March 2005, whilst the execution application was filed in court on 15th March 2006.

But, the plaintiff contends that regard must be had to the provisions of Order 49 rule 3A of the Civil Procedure Rules, when calculating the period of one year. That rule stipulates as follows;

"**Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the sixth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleadings or the doing of any other act:**

Provided that this rule shall not apply to any application in respect of a temporary injunction."

Whereas, the reasoning advanced by the plaintiff appears attractive, I hold the view that it is inaccurate. I say so because I believe that where the language of any statutory provision, rule or regulation is clear, the court should not look beyond the ordinary meaning thereof.

As Order 21 rule 18 is clear, I find that there is no need to carry out any process of computation, in order to determine whether or not the application for execution had been filed more than one year after the date of the decree. To my mind, there can be no room for any doubt that 15th March 2006 was more than one year after the 14th of March 2005, when the decree was issued.

My said reasoning easily fits in with the provisions such as those in the Limitation of Action Act, wherein the calculations of the limitation periods are based on the actual dates, as opposed to computation.

Furthermore, the plaintiff did not demonstrate to me why the provisions of Order 21 rule 18 should be subject to those of Order 49 rule 3A. Therefore, I see no basis for holding that in applying the provisions

of O. 21 rule 18, the court is obliged to carry out a computation in accordance with O. 49 rule 3A.

Being of that persuasion, I find that the plaintiff should have made an application by way of a Notice to show cause. As they did not do so, the proclamation and attachment pursuant to the execution application filed on 15th March 2006 was irregular. It is therefore hereby lifted or set aside.

Having reached that verdict, it implies that the plaintiff will have to file fresh execution proceedings, if it is still minded to pursue the matter. For that reason, I decline to express any views on the question as to whether or not the whole execution process should have begun, on the grounds that the decree had been compromised. I believe that if called upon to show cause why execution should not issue, the defendant will advance such arguments before the court which will be dealing with the Notice to show cause.

Finally, I hold the view that each party should bear its own costs. I say so, firstly because as I already indicated, the defendant has conducted himself in such manner as to render himself unworthy of the court's discretion in this application.

Secondly, I hold the view that the plaintiff is not responsible for the issuance of the warrants which were executed against the defendant. The plaintiff only made an application to the court. The said application could have been rejected or allowed. The decision to issue the warrants rested squarely with the court. Therefore, if there was an error, the plaintiff ought not to bear the blame for it.

For those reasons, each party will bear his own costs.

FRED A OCHIENG

JUDGE

Dated and Delivered at Nairobi by Azangalala J. this 7th day of November 2006.

F. AZANGALALA

JUDGE