REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 74 OF 1996

IN THE MATTER OF THE ESTATE OF EZEKIAH M'INOTI NKUBITU ALIAS

M'INOTI S/O NKUBITU (DECEASED)

RULING

The application before me is dated 27.5.2004 being chamber summons brought under Rule 73 of the Probate and Administration Rules, section 3A of the Civil Procedure Rules and Order 20 Rule 11(2) of the civil Procedure Rules. The application seeks the following orders:-

1. That the application be certified urgent and the same be heard exparte in the first instance.

2. That there be a stay of execution of the decree herein pending the hearing and determination of this application.

3. That the warrants of attachment and sale issued herein be recalled, cancelled and the decretal sum sought thereby be reduced by the amount purported to be interest.

4. That the applicant be allowed to liquidate the net sum due by quarterly instalments of Kshs. 20,000/= till payment in full.

5. That costs be provided for.

The application is supported by four grounds on the face thereof and an affidavit sworn by the applicant who is also the objector and judgment debtor. The grounds are that:-

a) The applicant's household goods have already been proclaimed and may be seized any time after 28.5.2004.

b) Warrants issued purport to charge interest on costs without a specific order therefor;

c) Costs do not attract interest without a specific order.

d) Judgment debtor is a peasant who cannot afford to pay the entire quantum of costs in a lump sum.

The supporting affidavit reiterates the grounds on the face of the application and asks this court to recall the warrants so as to rectify the error of computing interest without an order of the court.

The application is opposed on 6 grounds, which are that:-

1. The advocates herein on record for the applicant are not properly on record as he never sought

leave of the court to act over the applicant as the matter is concluded and there is judgment.

2. The interest awarding is a discretion of court and the inclusion of the same does not bar the execution herein.

3. The costs were assessed some time in 1998 or thereabout and the applicant has not seen even a cent for the last 6 years or thereabout without any justification and she has a lot of properties and has been a headmistress/teacher.

4. The applicant should make reasonable offers but to be liquidated within 6 months or less as it is her own refusal which has prompted execution she had over 6 years to do so but she waited till execution.

5. If she should pay by instalments, the court should order same outstanding amount to attract compound interest to avoid default.

Both Mr. Akwalu for the applicant and Mr. C. Kariuki for the respondent did not provide the court with any authorities in support of their respective positions in the matter.

The first issue to deal with is one of representation – whether the firm of Mwenda Mwarania, Akwalu & Co. Advocates is properly on record for the applicant. The notice of appointment filed by the said firm says that they have been appointed to appear for the applicant in the matter jointly with M/S ROSEMARY MWENJA & CO. ADVOCATES, NAIROBI. The notice is shown to be served only upon the firm of CHARLES KARIUKI & CO. ADVOCATES and not on ROSEMARY MWENJA & CO. ADVOCATES at all. During his submissions in reply to the first ground of opposition, Mr. Akwalu submitted that the provisions of order 3 Rule 9 (a) do not apply in this case since he is acting alongside the previous firm of advocates. He also submitted that infact he had not let the said firm know that he had filed the notice of appointment to act alongside that firm of ROSEMARY MWENJA & CO. ADVOCATES.

Order 3 Rule 9(A) of the Civil Procedure rules provides as follows:-

“9A – When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record.”

There is no doubt that this case was concluded and costs taxed way back in 1998 and the advocates on record today are ROSEMARY MWENJA & CO. ADVOCATES. It would seem clear from the submissions by Mr. Akwalu that having not notified the said firm of advocates of their “acting alongside” appointment then the firm of Mwenda Mwarania Akwalu & Co. Advocates intended to fully come on record in this matter to act for the applicant on the issue of costs and the warrants of attachment. The notice of appointment was not even served on the said firm. That being the case and in view of the provisions of order 3 Rule 9A which are mandatory, the court finds that the advocate appearing for the applicant in this case is improperly on record. This finding not \ withstanding, I believe I can still deal with the other prayers of the applicant’s application.

In prayer 2 of the application the applicant seeks a stay of execution pending the hearing and determination of this application. The stay has already been granted since on 31.5.2004 while reserving the ruling on this application, the status quo was to be maintained until the ruling was delivered. Apart from that I am not persuaded that the applicant is entitled to a stay. The bill of costs were taxed way back in 1998 and since then she has made no effort whatsoever to pay any amount of the decretal sum. There has been inordinate delay in bringing this application to the court and as such I see no good reasons as would warrant the exercise of the court’s discretion in favour of the applicant. The applicant has not assisted the course of justice in this case. Her prayer for stay therefore fails on these grounds.

By prayer 3 of the application, the applicant seeks recalling and cancellation of the warrants of attachment. I have already stated above that the applicant had not come to court with clean hands, having made no effort in 6 years to pay any part of the undisputed taxed costs of Kshs. 174,000/= plus further costs. The respondent is quite right in pursuing the applicant for payment of this amount using whatever method deems reasonable. There is no doubt that if the applicant had even voluntarily made the quarterly instalments of Kshs. 20,000/= she would have completed those payments by now. For this reason, I see no justification for recalling and/or canceling the warrants of attachment.

In the same prayer 3, the applicant prays that the amount due and payable be reduced by the sum of Kshs. 81,000/= being interest on costs. The applicable principle is that where the court has made no order that interest is to be paid on the costs, then such interest cannot be claimed and therefore is not payable. Under Section 27(2) of the Civil Procedure Act, the law provides:-

> **"27 (2) – the court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."**

The wording of this sub section makes the granting of interest on costs a matter of discretion for the judge, so that where there is no order as to the payment of interest on costs, then such interest is not payable. This position was well expounded in the case of SANTANA FERNANDES V. KARA ARJAN & SONS and others (1962) E.A. 473 (Mosdell J at page 476) is a case in which the judge followed the dictum in the earlier case of SHADI RAM MEHINDRA BC MOHINDRA 1957 Ex. 708 where it was held that costs do not carry interest without special order. In the present case, there is no evidence that the court made on order as to the payment of interest on the costs. In his grounds of opposition to the application, the respondent also rightly stated that the interest awarding on costs is a matter of discretion for the judge and/or court but I hasten to add that its inclusion without an order of the court is not a basis for charging interest and should not be honoured. In light of these findings the decretal sum due to the respondent shall accordingly be reduced by the sum of Kshs. 81,200/= as shown on the warrant of attachment dated 17.5.2004.

The applicant seeks an order allowing her to pay the decretal sum in quarterly instalments of Kshs. 20,000/= until payment in full. What this means is that she will require 2 years plus to liquidate the amount. Already, the applicant has had 6 years within which she could have made some payment but which time she has literally thrown away. It is my considered view that the applicant has not shown good cause why she should be given this length of time to pay the amount. She has already for 6 years denied the respondent the benefit of the decretal sum and the court will not aid her in perpetrating injustice against the respondent. I therefore direct that the decretal sum of Kshs. 174,000/= be paid in then equal monthly instalments with effect from 31.7.2004 until payment in full and in default of any one instalment on its due date execution to issue.

Costs of this application shall go to the respondent and same to be paid together with the decretal sum.

Dated and delivered at Meru this 9th day of July, 2004 in the presence of Mr. Mokua for C. Kariuki for the respondent.

RUTH N. SITATI

JUDGE

9.7.2004