



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NARIOBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 575 OF 2003

JAMES KARIUKI NG'ANG'A T/A NDARUGU MERCHANTS.....PLAINTIFF

VERSUS

JOSEPH NGAE NJUGUNA.....1ST DEFENDANT

CROSSBOW LIMITED.....2ND DEFENDANT

RULING

This Ruling relates to an application by way of a Notice of Motion dated and filed in Court on 5.07.2004 in which the Plaintiff decree holder sought six (6) orders but only two of which are material to this Ruling. They are:-

- (a) – (d) not material to this ruling
- (e) the stay of execution order dated 7.05.2004 be set aside and/or be discharged forthwith,
- (f) the costs of this application be provided for.

This application is based on the grounds and the Supporting Affidavit of James Kariuki Nganga, the Plaintiff herein. The grounds that:-

- (a) the Respondent has obtained an ex-parte stay of extension order pursuant to the provisions of Order XXI of the Civil Procedure Rules, and
- (b) the Respondent has then fixed its application for confirmation of those orders on 28.10.2004, a far-off date for extraneous reasons.

The Supporting Affidavit of the Plaintiff sets out the background to this application, and I will adopt it for the purpose of this Ruling as it is unchallenged. The Plaintiff obtained judgment against the Defendant on 10.02.2004 in the sum of Kshs. 8,820,000/= a decree to that effect was issued on 17.02.2004. It appears that under apprehension of execution, the Defendant Judgement-Debtor (JD), filed an application dated 19.02.2004 for a stay of execution. The Defendant Decree-Holder (DH), sent in Auctioneers who proclaimed the JD's property, including motor vehicles, and household goods. The application of

19.02.2004 (for stay of execution) was dismissed with costs on 27.04.2004. Left without the Court's shield of protection, the JD received Kenya Shield Auctioneers at his Karen residence (without his invitation), who carted away his motor vehicles, and household goods. To redeem his goods and motor vehicles, the JD issued a cheque for shs. 200,000/= for the Auctioneer's costs the cheque was returned unpaid.

In the meantime on 7.05.2004, the Objector, who later turned out to be the JD's spouse, filed Objection proceedings to the attachment, claiming that the goods including the motor vehicles attached belonged to her. The Objector obtained orders staying the attachment and sale of the motor vehicles, and fixed a hearing date for 28.10.2004. So in retaliation, the DH's Advocates filed the application, the subject of this Ruling on 5.07.2004, and the Court, while granting some of the orders sought, agreed with the submissions of the DH Advocates that it was improper for a party who comes to Court under a Certificate of Urgency to fix a hearing date five months hence, for the hearing interparties of his substantive application. The Court therefore ordered that the DH application of (5.07.2004) be heard on 12.07.2004.

On 12.07.2004, the reasons for fixing a distant date were explained to the Court. It was a date convenient to the JD's then Advocates as he/she would be out of the country and would return about that date. This state of affairs was unacceptable to both the JD who appointed the firm of Ndambiri & Co. Advocates to act on his behalf in place of the former Advocates. The parties then also entered into a consent order that the Objector be present for cross-examination on 26.07.2004 and to attend Court for the purpose. In the event, on 26.07.2004, Counsel for the parties took out the matter in the Registry, and fixed it for hearing of DH application of 5.07.2004 on 28.07.2004.

On 28.07.2004, the Court ruled that the stay of execution for the household goods be maintained, but that the Plaintiff (DH) be at liberty to execute in respect of the proclaimed motor vehicles, and directed that the Plaintiff (DH's) application of 5.07.2004 be heard on 24.09.2004.

So much for the history of the application at hand. On 24.09.2004, after verbal skirmishes between the parties Advocates, at one stage between the Objector's Advocates supported the Defendant's (JD's Advocates) and the Court, the real issue may be reduced down to whether the household goods are the property of the Objector, or those of the 1st Defendant. (the JD) who is the Objector's husband. I believe it to be common knowledge that matters of apparel, jewellery and items of personal hygiene are things that usually belong to individual members of a household, husband and wife, and living-in adult members of a family, sons and daughters and the extended kin of a Kenya, culturally oriented African.

If we are to agree that major items of furniture including dressing tables and mirrors and cutlery generally in a household belong to a particular individual of or in that household, then this must call for strict proof of that state of affairs in the household. Such proof will include particulars showing in the case of married persons, or persons living-in with each or such other partners in similar situations, that before marriage, or living-in together (not necessarily co-habiting), the husband or wife, or partner, brought in, or purchased the household goods, including a motor vehicle, which can readily be said to belong to her, him them or are theirs. The modern de-enthicised black African male may also execute a deed of settlement vesting particular goods in his wife usually, but perhaps his modern African wife may do likewise.

In this case, the Objector has made a statement on oath that:-

- (i) the items and goods within the Residential house are mine (para. 13),
- (ii) the goods taken away, threatened to be taken away, and/or proclaimed by the Applicant's Auctioneers on 28.04.2004 belong to me (para 19).
- (iii) That the Order staying execution of the decree only relates to those assets which belong to me, and which I have a right of ownership to (para.21)

AND (Joseph Ngae, Njuguna, the 1st Defendant herein in his lengthy Replying Affidavit sworn and filed

on 19.07.2004 says:-

(i) " the goods attached and carried away by the **Auctioneers on 28.04.2004 and which goods are identified in Exhibit JNN – I are not mine as alleged in paragraph 19 of the Affidavit of James Kariuki Nganga) and that the same belong to the Objector (para.27)**

(ii) that at one time I stayed at a house along Kabesirian Road..... But I vehemently deny that I bought the goods and items alleged to have been proclaimed while living there (para 28)

(iv) the two motor vehicles alleged to have been proclaimed are not mine and the order staying execution granted to the Objector does not stop them from proceeding to execute the decree on the basis of the said vehicles (para 30)"

The averments by Mrs Jane Wangui Njuguna (the Objector), and Joseph Ngae Njuguna that the goods proclaimed belong to the Objector fall far short and below the requisite standard of proof I have tried to lay down in preceding paragraphs of this Ruling. To attach a list of previous" and "**current** " "**costing**" of major household furniture and addressing it to Mrs Jane Njuguna (the Objector) showing costings of furniture purchased "**approximately five years ago**" does not say or prove that they were purchased by Jane Njuguna or by Mr. Joseph Ngae Njuguna. It is not a receipt issued by Italian Design Furniture Ltd in acknowledgment of moneys paid for the purchase of those items by Mrs. Jane Wangui Njuguna (the Objector). A firm of the reputation of Italian Design Furniture Ltd would keep records of "approximately five years ago."

In support of his **Intention to Proceed with Execution** pursuant to Order XXI, rule 54 of the Civil Procedure Rules, the Plaintiff, James Kariuki Ng'ang'a - also the (DH) has made statements on oath that:-

(i) the Defendant filed an application for stay of Execution of the subject decree in the Court of Appeal (para 10.)

(ii) the Application for stay of Execution was dismissed with costs by the Court of Appeal on 25.06.2004 (para 11)

(iii) the Objector in obtaining ex parte orders for stay of execution has not been candid with the court, has concealed material facts, and misrepresented matters to the Court (para. 18)

(iv) the goods alleged to belong to her belonged to the 1st Defendant herein (para 19),

(v) the 1st Defendant resided originally in Lavington near Lavington Primary School divorced his then wife (one Maryanne Njuguna) sold the matrimonial home with all furniture, and moved to a house at Kabesirian Avenue off Waiyaki Way where he resided as a bachelor (paras 21, 22, 23).

(vi) It is during that time (1995 – 1996) that he purchased the proclaimed household properties the 1st Defendant and I were friends (paras 24, and 25)

(vii) I am the one who brokered the sale of the Lavington property and subsequently assisted in furnishing the Kabesirian drive property (para 26).

(viii) At the material time, the 1st Defendant had not married the Objector whom he subsequently met and married (para. 27)

(ix) The proclaimed motor vehicles do not belong to the Objector (para 28).

There is also the annexed Affidavit of one Simon Madali sworn on 31.05.2004. He says on oath that:-

- (i) the contents of para. 6 of the Affidavit of the Objector sworn on 20.05.2004 (claiming ownership of the proclaimed goods including household furniture) are not true (para 4)
- (ii) the said furniture was brought (bought?) from Italian and Design Furniture Ltd that was located in Museum Hill by Joseph Njuguna Ngae between the year 1996 and 1997 (para. 5)
- (iii) the said furniture was then taken to where Njuguna Ngae was staying at that time on Kabesirian Road, off Waiyaki Way on LR No. 209/7767 (para. 6),
- (iv) he was divorced at that time and had not moved in with the Objector herein, whom he got married to towards the end of 1998 when the 1st Defendant and the Objector moved to the Karen House where they stay towards the end of 2002 (paras. 7 & 8).
- (v) From April 1996 to early this year (2004) I was employed by Joseph Njuguna Ngae as initially, an office messenger, and subsequently as his driver (para 3).

A close scrutiny of the Affidavit evidence of the Decree-Holder (the Plaintiff), Simon Madali, the 1st Defendant's erstwhile office messenger, and driver, shows clearly that the Objector, Jane Wangui Njuguna, has been saved both from the effects grueling and rigorous cross-examination on the contents of her Affidavit, and possible perjury and the consequences thereof. The Objector was not candid regarding the ownership of the motor vehicles which a search at the Registrar of Motor Vehicles has revealed that she was not, and is not the owner of any of the motor vehicles proclaimed and attached, but the 1st Defendant and another limited liability company probably associated with the 1st Defendant, are the owners of the two respective vehicles.

The Objector and her Supporting consent have not only failed the requisite standard of proof of ownership of goods in Objector Proceedings to stay execution, but have also deliberately on oath been misleading and less than candid in refusing to disclose pertinent and material facts to the Court, and have similarly sworn and peddled falsehoods. The consequences of such conduct are well settled in law. Any advantage gained by such non-disclosure (the stay of execution) will be taken away from the offending party. In the case of RUAHA CONCRETE COMPANY LTD AND 2 OTHERS vs. PARAMOUNT UNIVERSAL BANK LTD & 2 OTHERS (Milimani Commercial Courts, H.C.C.C. No. 430 of 2002) at p. 32 – 33 I set out at length, the principles of non-disclosure and the consequences which will follow as a result of such non-disclosure.

The duty is not make full and fair disclosure of all material facts, the material facts are those which is material for the judge to know in dealing with the application as made, materiality is to be decided by the Court, and not by assessment of the applicant, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including:-

- (a) the nature of the case the applicant is making when he makes the application.
- (b) The order for which the application is made and the probable effect of the order on the Defendant or the Plaintiff.
- (c) The degree of the legitimate urgency and the time available for the making of the inquiries.

In the instant case, both the Objector and the 1st Defendant knew, and have deliberately sworn falsehoods that the household goods and motor vehicles in issue did not belong to the 1st Defendant but belonged to the objector. They refused to disclose those facts to the court and obtained ex-parte orders staying execution of those particular items and property. That was material non-disclosure. Where material non-disclosure is established like in this case, the court will be **“astute enough to ensure that a Plaintiff**

(or Defendant or Objector) who obtains an order without full disclosure is deprived of all advantage he may have derived by breach of that duty.”

Before I bring this Ruling to its conclusion I shall deal with one last point raised in paragraph 32 of the **Replying Affidavit of Joseph Ngae Njuguna, that**

“that the application herein is fatally defective, does not lie and is an abuse of the court process in that it is based upon the wrong provisions of the law and has not met the legal requirements on service of pleadings on Objector proceedings.”

This Plaintiff’s Intention to Proceed with Execution is premised upon Order XXI, rule 54 of the Civil Procedure Rules. The said rule says:-

“54, Upon receipt of a valid notice given under rule 53, the court shall order a stay of the execution proceedings and shall call upon the attaching creditor by notice in writing within 15 days or such other period as the said notice may prescribe to intimate to the court and to the objectorwhether he proposes to proceed with the attachment and execution thereunder wholly or in part”.

The Notice of Objection under Order XXI, rule 53 of the Civil Procedure Rules was issued to the Plaintiff’s (Decree Holder) Advocates on 7.5.2004, and was filed in court on the same day. On the same 7.5.2004 the court issued a Notice of Stay of Execution pursuant to the said rule 54, commanding the attaching Auctioneers not to take any further steps as regards the said attached goods until further order of court.

On 10.5.2004, that is a period well within the requirements of the 15 day limit under the rule, the Plaintiff’s (Decree Holder) Advocates filed a **Notice of Intention to Proceed with Execution**. This is all that the attaching Creditor is required to do at instance of Objector proceedings under rule 53. In the circumstances therefore, the averments in the paragraph 32 of the Replying Affidavit of the 1st Defendant, has no basis in law and the same is rejected.

The Plaintiff’s Intention to proceed with the Execution is also premised upon the provisions of Order XVIII rule 2, Order XXI, rules 56, 57, 58, 59 and Order L Rules 1 and 17 of the Civil Procedure Rules and Sections 3A and 63 (e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, the inherent powers of the court and all enabling provisions of the law.

I have observed in previous Rulings that Section 3A is merely a codification of the court’s inherent power to make orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court.

Section 63 (e) empowers the court to make such other interlocutory orders as may appear to the court to be just and convenient, in order to prevent the ends of justice from being defeated.

Order L, rules 1 provides that save where otherwise expressly provided for under the Rules, all applications to the court shall be by motion and shall be heard in open court. This is the case in this matter. There is no provision otherwise under the relevant rules of Order XXI. Rule 17 of Order L (50) enables the court to set aside an order made ex-parte.

Order XVIII, rule 2 provides that upon any application, evidence may be given by affidavit but the court may, at the instance of either party, order the attendance for cross-examination of the deponent. The parties forfeited this right when the Plaintiff’s Counsel urged that Plaintiff’s application be heard, and the Court so directed. So the Respondents too forfeited the opportunity to cross-examine one Simon Madali on his affidavit. I do not however think that any of the parties is the worse of for forfeiting opportunity to cross-examine either the Objector or the said Simon Madali. I think that all that was necessary to have on record was contained in the various Affidavits of the dramatis personae.

Rules 56, 57, 58 and 59 respectively provide as follows:-

“56. Should the attaching creditor, in pursuance of a notice issued under rule 54 intimate to the Court and the Objector that he proposes to proceed with the attachment; the Objector shall take proceedings to establish his claim within 10 days of service upon him of such intention,”

And Rule 57, merely provides that proceedings in pursuance of rule 56 shall be by Summons in Chambers supported by affidavit in the suit in which the application for attachment was made and require that the summons shall be served on the attaching creditor, and that unless the Court otherwise directs on the judgment-debtor. A summons under this rule operates as a stay of attachment unless the Court otherwise directs.

Rule 58 provides as follows:-

“58 (1) Should the Objector fail to file proceedings to establish his claim within the time specified in the notice issued under rule 56, his objections shall be deemed to be waived and the attachment and consequential execution shall proceed;

(2) Unless the Court otherwise orders the judgment creditor may enter judgment against the Objector for the costs occasioned by the objection.

Rule 59 says:-

“59. Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof shall be paid to the party entitled under the decree to receive the same”

For purpose of Rule 56 of Order XXI, the attaching creditor (the Plaintiff), served the Notice of Intention to Proceed with the Execution (under rule 54 of Order XXI), on 10.05.2004. The Objector was required to take proceedings to establish his claim within 10 days of service upon him of such intention. The Objector did on 20.05.2004 (within the 10 days), file an application and sought orders to lift or set aside the proclamation and/or attachment of the household furniture, but instead of prosecuting it with the urgency it deserved chose to prosecute it on 28.10.2004 a date fixed by the ex-parte orders of 7.05.2004. This was a poor gamble, as the judgement creditor filed the application, the subject of this ruling on 5.07.2004 after no doubt realising that the Objector sought to reap the maximum benefit of the ex-parte order of 7.05.2004 to the prejudice of the judgment-creditor.

Clearly, the Objector's Advocates in fixing a date nearly five (5) months from the date of filing objection proceedings under rule 53, overlooked or deliberately ignored (at the objector's peril) the intention behind rule 56 of Order XXI, that objection proceedings be commenced and prosecuted with expedition, as the rule admits of no discretion on the part of the Court. It is mandatory in its terms. The Objector shall take proceedings **to establish his claim within 10 days of service upon him of such intention to proceed with the execution**. Instead, the Objector's and the Defendants' Advocates decided to rely upon the ex-parte orders of 7.05.2004, which indeed, as envisaged under rule 57(3) operate as a stay of attachment unless the Court otherwise directs.

The Court did not direct otherwise so the notice of objection to the attachment did take effect as a stay of execution. The stay of execution was however only good provided the objector prosecuted his claim within 10 days of the judgement-creditor's intimation under rule 56 above of his intention to proceed with the execution.

Having filed her application on the last day of 10 days (period) (on 20.05.2004) and subsequently failed to establish her claim within the said period, her objections were deemed to be waived and the attachment and consequential execution was to proceed,. Again this is a mandatory provision, and I doubt, in view of the mandatory nature of those provisions, that the Objector would have been granted nearly 5 (five) months (7.05.2004 to 28.10.2004) to establish her claim instead of the mandatory 10 days as no discretion is vested in the Court by those rules.

In the all the circumstances of this application therefore, I find the following:-

- (1) the Respondents (Defendants) obtained an ex-parte order for stay of execution pursuant to the provisions of Order XXI rule 53,
- (2) the Respondent fixed its application (of 7.05.2004) for the confirmation of the said ex-parte orders for hearing on 28.10.2004, a far off date for the convenience of the Respondents and their Advocates.
- (3) the said orders were obtained in concealment of pertinent and material facts as to the ownership of the property or goods proclaimed and attached;
- (4) the Objector failed to prosecute and establish her claim, to the property in accordance with the requirements of rule 56 aforesaid;
- (5) the judgment-creditor (the Plaintiff) is entitled in terms of rule 59 aforesaid to proceed to sell any property attached;

For these reasons and other reasons set out in the foregoing passages of this Ruling, the Plaintiff/judgement creditor's application dated and filed in Court on 5.07.2004 succeeds, and the Orders of 7.05.2004 are set aside and discharged.

There shall also be judgement for the judgement-creditor (the Plaintiff) against the Objector for the costs occasioned by the objection proceedings together with interest thereon at Court rates.

There shall be orders accordingly.

Dated and delivered at Nairobi this 18th day of October 2004.

ANYARA EMUKULE

AG. JUDGE