

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 253 OF 199

JOTHAM MUIRURI KIBARU.....PLAINTIFF

VERSUS

SIMON TOWETT MARITIM.....DEFENDANT

RULING

The Defendant, Simon Towett Martim, has moved this Court by Notice of Motion made under **Section 3A and 63(e) of the Civil Procedure Act and Order XXI Rule 22(2) of the Civil Procedure Rules** seeking the orders of the Court to compel the Plaintiff John Muiruri Kibaru, his servants or agents to release and restitute to the Defendant the properties that were attached from his residence. The grounds in support of the application as stated on the face of the application are that this Court issued an order staying execution of the decree on the 21st of July 2004 pending the hearing and determination of the Application. The Defendant submitted that at the time the application was filed the Plaintiff had commenced execution process against him. The Defendant stated that the Plaintiff had continued to retain the Defendants property in spite of the fact that he (the Defendant) required the same for his daily use. The Defendant contended that he would suffer irreparably if the Plaintiff continued to retain the said attached property. The Defendant further stated that the continued detention of his property would defeat the purpose of the orders of stay of execution orders which was granted on the 21st of July 2004. The application is supported by the annexed affidavit of Simon Towett Martim, the Defendant. The application is opposed. The Plaintiff has sworn a lengthy replying affidavit in opposition to the Defendant's application. In the said replying affidavit, the Plaintiff has deponed that he followed the proper procedure of the law in executing against the Defendant. The Plaintiff contended that the application filed by the Defendant was meant to deny him the enjoyment of the fruits of his judgment. The Plaintiff further deponed that the Defendant's application had been overtaken by events as the execution process had been finalised by the time the Defendant filed his application before Court.

At the hearing of the application, Mrs Odhiambo Learned Counsel for the Defendant submitted that the Defendant had made an application before this Court seeking the extension of time to file Notice of Appeal out of time. The said application filed was Nakuru HC. Misc. Application No. 172 of 2004. The Defendant submitted that pending the hearing and determination of the said application the Defendant should be granted stay of execution of the decree of this Court. The Defendant submitted that he obtained temporary orders of stay of execution from this Court but in spite of the Plaintiff being served, he proceeded and attached the Defendant's property. The Defendant contended that the said attachment was illegal as it was undertaken in contravention of an existing court order. The Defendant submitted that the Plaintiff should therefore be compelled to release the property which were taken away pursuant to an illegal execution process. The Defendant submitted that if this Court were to find that the High Court did not have jurisdiction to extend time upon which the Defendant was to file a Notice of Intention to Appeal to the Court of Appeal, he should be granted time to make an appropriate application before the Court of Appeal.

Mr Karanja, Learned Counsel for the Plaintiff opposed the application. He submitted that the Plaintiff had executed against the Defendant after following the laid down procedure. The Plaintiff submitted that the decree issued by the Court was for eviction of the Defendant from the suit. The Plaintiff further submitted that the same decree issued also related to the costs which were awarded to the Plaintiff. Learned Counsel for the Plaintiff submitted that the decree had been extracted and served upon the Defendant's Counsel who had approved the same. It was his submission that the said decree was approved more than eight months prior to the filing of the Application. The Plaintiff further argued that

the Defendant had been guilty of laches in bringing this application before Court. He submitted that the Defendant was not entitled to the orders of stay of execution sought as no satisfactory reasons has been given as to why the Defendant did not make the application for extension of time and for stay of execution with a shorter period that he did. The Plaintiff argued that the Defendant only came to Court when execution had been levied against him. The Plaintiff was of the view that the Defendant only came to Court to frustrate him from reaping the fruits of his judgment. The Plaintiff further submitted that the orders sought by the Defendant would serve no purpose as execution had already been levied and the attached goods sold. The Plaintiff therefore urged this Court order the application filed by the Defendant to be dismissed.

I have considered the rival arguments made by counsel for the Plaintiff and counsel for the Defendant. I have also read the pleadings filed in Court by both parties in respect of the application before me. It is not in dispute that the Plaintiff obtained judgment in his favour and against the Defendant on the 7th of July 2003. It was further been conceded by both parties that subsequent to the delivery of the said judgment, the Court file in respect of this case “*disappeared*”. The Plaintiff could not move the Court to enforce the judgment entered in his favour in the absence of a Court file. Likewise, the Defendant could not file a Notice of Appeal or make an application for stay of execution without the said Court first being reconstructed. The Plaintiff duly made an application to reconstruct the court file, which application was allowed. He then extracted the decree from the said judgment and served the draft decree for the approval of the Defendant, through his counsel on record. The said decree was duly approved. The Plaintiff then obtained an order of this Court for the auctioneers to be given police assistance to execute the decree of this Court. The auctioneers then executed against the Defendant. The Defendant appears to have been partially evicted from the suit land. His loose assets were however attached in satisfaction of the costs which were awarded to the Plaintiff.

It is after the said execution that the Defendant made the application to stay further execution. The Defendant appeared before this court on the 21st of July 2004. The Defendant sought the orders of this Court, *inter alia* , to stay further execution pending the hearing and determination of Nakuru HC. Misc. Civil Application No. 172 of 2004 in which the Defendant had applied to be granted extension of time to file Notice of Appeal out of time. This Court granted temporary stay of execution pending the hearing and determination of the application *inter partes* . Meanwhile on the 27th of July 2004, in utter contempt of the orders of this Court staying further execution, the Auctioneers, Mssrs. Tango Auctioneers & General Merchants sold the Defendant’s properties which had been attached, in a public auction. It is this auction by the Plaintiff that moved the Defendant to make another application before this Court to seek the orders of this Court for an order that the said attached goods be released to him.

It is the finding of this Court that in selling the said attached properties belonging to the Defendant in spite of the Plaintiff being aware that orders had been issued by this Court staying the sale of the said property, the Plaintiff was trying to frustrate the Defendant from having an opportunity to ventilate his application. This Court takes a very dim view of the Plaintiff’s action. This Court cannot now make an order that the said property be restituted to the Defendant in view of the fact that the said property was sold in a public auction. The Plaintiff and the auctioneer will not however escape lightly for blatantly breaching the orders of this Court. I do find that the Plaintiff and the auctioneer illegally sold the said properties contrary to the orders of this Court. The Plaintiff will be liable to the Defendant in damages for conversion of said property pursuant to unlawful public auction. The Defendant will be at liberty to file suit for damages against the Plaintiff and the auctioneer.

Reverting to the matters at hand, this Court ruled in the Application filed by the Defendant in Nakuru HC. Misc. Civil Application No. 172 of 2004 that this Court did not have jurisdiction to grant extension of time for the Defendant to file Notice of Appeal against the judgment of this Court. This Court ruled that the Defendant ought to have filed the said application before the Court of Appeal. In view of the Plaintiff’s conduct in this matter, and in view of the said decision given in the said application, the interest of justice demands that the Defendant be given time to file an appropriate application for extension of time before the Court of Appeal. The Defendant is therefore granted forty-five (45) days to file an appropriate application before the Court of Appeal. The Defendant is granted stay of execution of the decree of this Court pending the hearing and determination, by the Court of Appeal, of the

Defendant's application to extend time to file a Notice of Appeal.

This order is issued, without prejudice, to the Defendant's right to sue the Plaintiff and the Auctioneer for unlawful sale by public auction of the Defendant's property. The Defendant shall have the costs of this application. Should the Defendant fail to file the said application to the Court of Appeal as ordered the stay of execution granted by this Court shall automatically lapse.

It is so ordered.

DATED at NAKURU this 30th day of November 2004.

L. KIMARU

AG. JUDGE