



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 530 OF 2013

NYANGENYA ISABOKE MANIGA (Suing through his Attorney

Joel Maniga).....**PLAINTIFF**

VERSUS

DR. ANDREW M I OCHOKI.....DEFENDANT

BARAKA MATERNITY &

NURSING HOME LTD.....APPLICANT/INTERESTED PARTY

R U L I N G

1. This ruling is in respect of two applications. The first application is by Notice of Motion dated 25th September 2020 by **M/s Baraka Maternity & Nursing Home Ltd** (intended interested party). The application expressed to be brought under Order 51 Rule 1 & 2 and Order 40 (1) (a) & (b) of the Civil Procedure Rules, and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeks the following orders:-

(a) Spent.

(b) That an injunction restraining the plaintiff either by himself, his agents, servants from proclaiming, attaching the applicants surgical, patient beds and/or all the applicant's hospital equipment which are used by patients at the applicant's place of business known as Baraka Maternity and Nursing Home Limited pending hearing and determination of this application.

(c) The firm of Ochoki & Ochoki Associates (advs) be allowed to come on record for the applicant, Baraka Maternity & Nursing Home limited.

(d) That the applicant be allowed to file substantive application as an Interested party.

(e) That the Notice of appointment filed by the firm of Ochoki & Ochoki Associates (advs) be allowed to be properly on record for the applicant.

(f) That the proclamation by Direct "O" Auctioneers be declared void ab initio for want of procedure.

(g) That cost of this application be provided for.

2. The second application is by the defendant judgment debtor and is dated 1st October 2020. The application is expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 21 Rule 12 and 52 Rule 7 of the Civil Procedure Rules. By the application the defendant prays for the following orders:-

1. Spent

2. That this honourable court be pleased to order for a stay of execution of the judgment/Decree herein pending the hearing and determination inter-parties and or further orders of this court.

3. That the warrant of attachment given herein on 16th September 2020 be set aside, and or varied on the amount of interest and cost payable.

4. This honorable court do assess the costs and interest afresh.

5. The plaintiff/respondent be restrained from charging interest for the period he has been sitting on the Decree and or the period he was pursuing Appeal and other proceedings against the judgment dated 12th October 2018.

6. The defendant/respondent be granted leave to liquidate the judgment herein by equal monthly installments of Kshs30,000/= till payment in full.

7. That the honourable Court be pleased to restrain the plaintiff/respondent from levying execution herein for as long as the defendant/applicant has started to pay the proposed monthly installments.

8. The honourable court be pleased to issue any other orders as my deem fit.

3. The plaintiff/respondent filed grounds of opposition and a replying affidavit in opposition to the applications. The plaintiff/respondent averred that the applications were not made in good faith and that they lacked any merit and were merely intended to frustrate the plaintiff in reaping the fruits of his judgment/decree to the prejudice of the plaintiff.

4. I propose to deal with the applications sequentially. The intended applicant's application in regard to the first application is premised on the grounds set out on the body of the application and the affidavit sworn in support of the application by one Wilfred Maoso Isoe who states he is a director and shareholder of the applicant. It is alleged the goods/ assets proclaimed in execution of the decree by the plaintiff do not belong to the defendant judgment/debtor but to the applicant. It is further averred that the defendant is only an employee of the applicant and that his liability cannot be presumed to be the applicant's. The applicant thus contends the attachment of its assets was misdirected and was therefore *void abinitio* and should be set aside and /or lifted. The Applicant has annexed a copy of the certificate of incorporation for Baraka Maternity & Nursing Home Ltd and it is averred that the applicant operates a maternity and nursing home and handles both inpatients and outpatients and that the defendant was one of the employees at the facility.

5. The plaintiff/Decree holder in his replying affidavit has averred that Wilfred Maoso Isoe who has deponed the replying affidavit in support of the applicant's application is neither a director or shareholder of the applicant and has annexed a CR12 in respect of the applicant company which shows the defendant and one Phillis Nyakerario Kimwei were the only directors and shareholders of the applicant company.

6. I have considered the applicants application, the affidavit in support and in opposition and it is evident that the applicant company is indeed an incorporated company and it is not in dispute that a business of a maternity hospital and a nursing home is carried out under its name. The defendant apparently offers services at this facility as a doctor. It is true that he is a shareholder and director of the company and is therefore a co-owner of the company. The equipment and assets that are within the facility and are being utilized for the operation of the facility can rightfully and properly be deemed to be owned by the company. The company was not a party in these proceedings and its properties and assets cannot thereof be attached in execution of a decree that was obtained against the defendant in his personal name unless leave to attach the company's assets in satisfaction of the decree had been sought and obtained. In other words an application to lift the corporate veil of the company so as to attach its assets to satisfy the judgment debt by the defendant would have required to have been made by the plaintiff/decree holder. No such an application was made to the Court prior to the proclamation and attachment.

7. In the premises therefore, the attachment to the extent that it was directed as per the proclamation dated 22nd September 2020 item (1) against **" All items/equipment at the defendants place of business"** in as far as that place of business is the place where Baraka Maternity & Nursing Home Ltd is operating a maternity and nursing home is ordered lifted. The plaintiff is however at liberty to proceed with execution of the decree against the assets that belong to the defendant/decree holder.

8. I am conscious that the applicant's application was not brought as an objection to attachment which I think should have been the case under Order 22 rules 51,52 and 53 but I have nonetheless proceeded to consider the application on its substantive merits without paying undue regard to procedural technicalities as the court is enjoined to do under Article 159 (2) (d) of the Constitution and section 19 of the Environment and Land Court Act. Sections 1A and 1B of the Civil Procedure Act and Section 3 of the Environment and Land Court Act provide that the courts should endeavor to achieve the overriding objective which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes that come before them. I have consequently invoked and relied on these provisions with a view of doing substantive justice to the parties rather than be shackled by technicalities of procedure.

9. I make no order for costs in regard to the application dated 25th September 2020.

10. Turning to the application dated 1st October 2020, it is clear the application is omnibus as it seeks various orders. The judgment debtor seeks stay of execution; setting aside of warrants of attachment and/or variation of the interest payable; re- assessment of costs; order for settlement of the decretal sum by monthly installment of Kshs.30,000/= until payment in full; and suspension of execution of the decree. The defendant judgment debtor basically wants the execution that has been commenced lifted and he be allowed to settle the decretal sum by installment of Kshs.30,000/= monthly as suggested by him.

11. The record shows judgment in the matter was entered in favour of the plaintiff on 12th October 2018; and the plaintiff was awarded a sum of Kshs1,500,000/= together with interest from the date of filing the suit until payment was made in full. The plaintiff was also awarded the costs of the suit. A decree was consequently issued and the costs were taxed at Kshs237,235/= on 21st January 2020. The defendant's reference respecting the taxed costs dated 6th February 2020 was dismissed by the Court on 19th February 2020.

12. I have considered the judgment debtor's Notice of Motion application dated 1st October 2020 and I am satisfied the prayers for variation of interest payable is without any basis. The judgment was clear that interest was payable from the date of filing of the suit until payment was made in full. Equally, the prayer for the court to re assess the costs and interest afresh lacks any foundation and/or basis. The Deputy Registrar of the Court duly assessed and taxed the costs of the suit payable by the defendant to the plaintiff. The reference made by the defendant against the taxed costs was duly considered and was dismissed by the court on the basis that it lacked any merit. The prayers sought by the defendant respecting variation of interest and re assessment of costs clearly lack any merit and are hereby dismissed.

13. The defendant has sought to be allowed to settle the decretal sum in instalments. He states he has made some payments to the plaintiff and seeks to be allowed to settle the outstanding balance by monthly installments of Kshs30,000/=.

14. Settlement of decretal sum in instalments is provided for under Order 21 Rule 12 of the Civil Procedure Rules which provides as follows:-

12. Decree may direct payment by instalments [Order 21, rule 12.]

(1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After passing of any such judgment or decree, the court may on the application of the judgment-debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.

15. From the above provisions, it is clear that a Court has discretion to order payment of the decretal sum in instalments. However such discretion must be exercised judiciously and not arbitrarily. In the case of **A Rajabali Alidina -vs- Remtulla Alidina & Another (1961) EA 565** Law, JA stated:-

“ All commentators on the Civil Procedure code agree that a court's discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the defendant to show that he is entitled to indulgence under this rule”.

16. For an applicant to be allowed to settle the decretal sum in instalments he/she must demonstrate good effort and bonafides. A judgment creditor is entitled to the benefits of a judgment given in his favor and a judgment debtor cannot properly be allowed to settle the decretal sum on his terms. That is why the law permits a judgment creditor to execute a judgment that he holds in his favour. However where a judgment debtor on application satisfied the court he is not in a position to pay the decretal sum in a lumpsum and in good faith offers to settle the decretal sum in reasonable instalment, the court in exercise of its discretion may order the settlement of the decretal sum in instalments.

17. Having considered the application by the defendant, I am not persuaded the offer to settle the decretal sum by instalments of Kshs30,000/= is reasonable considering the outstanding amount may well be over Kshs3,000,000/=. During the course of hearing the twin applications, the subject of this ruling I had implored upon the parties to strike an amicable settlement on payment terms. They failed to do so and urged the court to rule on the applications.

18. Nonetheless to give the judgment debtor the benefit of doubt that he is indeed keen to pay the decretal sum, albeit, in instalments, I will allow the application on the following conditions/ terms:-

1. There shall be a stay of execution of the decree herein subject to the following further orders.

2. The defendant/judgment debtor shall pay to the plaintiff a down payment of Kshs.500,000/= on or before 28th February 2021.

3. The defendant/judgment debtor shall thereafter pay monthly instalments of Kshs150,000/= with effect from 1st April 2021 and thereafter on or before 1st of each succeeding month until payment in full.

4. In default of any one payment on its due date execution to issue without further reference to the Court.

5. Costs of the application to the plaintiff/Decreeholder.

19. Orders accordingly

Ruling dated signed and delivered virtually at Nakuru this 11th day of February 2021

J M MUTUNGI

JUDGE