



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 272 OF 2009

BEATRICE MUTHIO NZIOKA.....PLAINTIFF

VERSUS

CHARLES AKELO ONG'WEN.....DEFENDANT

RULING

The Plaintiff filed the application dated 25/2/2020 seeking to have the sum of Kshs 1,000,000 which the Defendant/judgement debtor paid into court as security on 27/12/2018 vide deposit receipt number 0116657 dated 23/1/2019 in compliance with the court order of 13/12/2019 attached and paid out to her through the firm of Adera and Company Advocates in partial execution or satisfaction of the judgement and decree dated 8/12/2014.

The application was brought under Orders 22 and 27 of the Civil Procedure Rules as well as Sections 1A, 1B, 3A and 63(b) and (e) of the Civil Procedure Act. The Plaintiff also sought to have the court waive and dispense with the production and surrender of the original deposit receipt number 0116657 of 23/1/2019 in the name of the Defendant's advocate, Tito & Associates.

The application was made on the grounds that the judgement delivered by the court on 8/12/2014 directed the Defendant to vacate the Plaintiff's residential property being Nairobi/Block 140/40/70 and to pay damages of Kshs. 1,474,000/= in addition to a monthly sum of Kshs. 22,000/= from 8/12/2014 until when the Defendant gave vacant possession on 18/1/2020. The decree allowed the Plaintiff to set off the sum allowed from the Kshs. 1,566,654/= which the Plaintiff held on the Defendant's account. The Plaintiff stated that the costs were taxed and assessed on 20/2/2020 at Kshs. 489,973.67 in her favour. The Plaintiff computed the sum due to her from the Defendant as Kshs. 1,645,919.67/=.

Further, the Plaintiff contended that the court granted the Defendant stay of execution on 13/12/2018 on condition that he deposited into court security in the sum of Kshs. 1,000,000/= which he deposited on 27/12/2018. Parties recorded a consent on 19/3/2019 vide which the Defendant was to obtain an order for stay from the Court of Appeal within 30 days failing which the security deposited would be released to the Plaintiff. The Plaintiff contended that the Court of Appeal dismissed the Defendant's application for stay and confirmed that the deposit of Kshs. 1,000,000/= held by this court was the Defendant's property. The Plaintiff urged that the deposit was amenable to attachment and payment in favour of the decree holder. She added that she applied for execution of the decree she holds but was unable to secure payment of the sum deposited in court without first getting a court order since the Defendant was making attempts to get the funds back in order to frustrate her. The Plaintiff added that the Defendant had declined to sign for the release of funds to her and to surrender the original deposit receipt to facilitate payment of the sum held in court to the Plaintiff.

The application was supported by the Plaintiff's affidavit which she swore on the 25/2/2020, and to which she annexed a copy of the decree dated 18/12/2014, the order dated 21/12/2018, a copy of the deposit receipt for the sum of Kshs. 1,000,000/= and the application for execution which she filed in court on 15/7/2019 for the release of Kshs. 1,000,000/=.

The Defendant opposed the application and termed it misguided, misconceived, fatally incompetent and untenable. He averred that the Plaintiff's request to attach the security of Kshs. 1,000,000 deposited in court on 27/12/2018 was in bad faith. He added that, that sum was to be deposited in court pending the filing, hearing and determination of the appeal upon stay of execution of the judgement delivered on 8/12/2014. He contended that although the Court of Appeal dismissed his application for stay of execution, the appeal was yet to be heard and determined. He urged that it was only fair and just for the Plaintiff's claim for mesne profit to await the hearing and determination of the appeal while arguing that if the appeal were to be successful then it would be rendered an academic exercise if the Plaintiff were allowed to attach the sum of Kshs. 1,000,000 he deposited in this court.

The Defendant insisted that the Court of Appeal in its ruling of 19/7/2019 directed at paragraph 13 that he was to be refunded the security for costs of Kshs. 1,000,000/= which he deposited in court. He annexed a copy of the Court of Appeal ruling in which the court stated that "*on the deposit paid by the Applicant as security for costs that remains his to be refunded as the application for stay is unsuccessful*". The Defendant contended that any attempt to attach or pay out the sum of Kshs 1,000,000/= held as security for costs would be tantamount to this

court overturning a decision of the Court of Appeal which directed that he be refunded that sum.

He added that that sum was deposited by Monicah Atieno Ong'weno and that it ought to be refunded to her. He reckoned that there was no reason why this court should continue holding the security deposit of Kshs. 1,000,000/= after its purpose had been fulfilled. He urged the court to release this sum to Monicah Atieno Ong'weno.

Parties filed submissions which the court has considered. The Plaintiff submitted that the consent order of 18/3/2019 recorded before this court crystalized on 19/4/2019 when the Defendant failed to secure an order for stay of execution from the Court of Appeal. That since the consent order had not been set aside it was therefore binding on parities. She urged that she was seeking to enforce a monetary decree and urged the court to address the mischief on the part of the Defendant.

The Defendant urged that this court had no jurisdiction to make any determination relating to the Kshs. 1,000,000/= which he deposited in court as security for costs pending the hearing and determination of the appeal on the ground that the Court of Appeal being superior to this court, this court cannot sit on the matter that has already been determined by the Court of Appeal. He urged the court to reimburse the funds to him. The Defendant maintained that there were other appropriate and proper mechanisms that can be sought by the Plaintiff in execution proceedings and that the instant application was not one of them. The Defendant urged the court to reimburse the money to him as directed by the Court of Appeal and that the Plaintiff be ordered to seek other modes of execution.

The issue for determination is whether the court should grant the orders sought in the application dated 25/2/2020. Section 44 of the Civil Procedure Acts stipulates that all property belonging to a judgement debtor including property over which he has a disposing power which he may exercise for his own benefit shall be liable to attachment and sale in execution of a decree. The Section sets out what is not liable to attachment or sale. Looking at what the law excludes from attachment in that Section, the security for costs which the Court of Appeal determined was the property of the Defendant is liable to attachment in execution of the decree.

The court grants prayers 3 and 4 of the application dated 25/2/2020.

DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MARCH 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Michael Maweu for the Plaintiff

Mr. D. Mwasigwa holding brief for Mr. Tito for the Defendant

Mr. V. Owuor- Court Assistant