



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. APPLN. NO. E100 OF 2018**

**IN THE MATTER OF THE ARBITRATION ACT, 1995 AND THE ARBITRATION RULES, 1997**

**AND**

**IN THE MATTER OF ENFORCEMENT OF AN ARBITRAL AWARD**

**BETWEEN**

**SUSAN WANJIRU MURITU.....APPLICANT**

**VERSUS**

**KILELE VENTURES LIMITED.....RESPONDENT**

**RULING**

1. By an Arbitral Award made on 19/12/2017, Hon (Rtd) Justice Havelock, Sole Arbitrator ordered that the applicant do refund the respondent Kshs. 17,160,000/- without interest within 30 days. The applicant was awarded the costs of the arbitration.
2. Vide a Summons in Chambers dated 3/10/2018, the respondent applied for the recognition and adoption of that Award by this Court. By a ruling delivered on 5/11/2019, Kasango J recognized the said Award as a judgment and decree of this Court. Then the process of execution commenced by the issuance of a prohibitory order over **LR No. 10823/5795** contained in title **IR 75702/1 (“the suit property”)**.
3. Later it turned out that the suit property had been sub-divided into various portions. On 8/9/2020, the respondent’s advocates appeared ex-parte before the Deputy Registrar of this Court and caused the variation of the prohibitory order to apply to the property known as **LR. No. 10823/5795 (Original No. 10823/53/3)** contained in a grant registered as **LR No. 177438/1**.
4. That provoked the application before me, being the Motion on Notice dated 9/2/2021. That application is brought under **Order 22 Rules 18, 55 – 58, Order 49 Rule 7 and Order 51 Rule of the Civil Procedure Rules, section 3A of the Civil Procedure Act and Article 165 (6) and (7) of the Constitution of Kenya**.
5. In the Motion, the applicant sought the enlargement of time from 15/9/2020 for the filing of a Memorandum of Appeal. The applicant also sought a stay of execution of the judgment on Award, the order of 8/11/2020 and the order on the settlement of the terms of sale of LR. No. 10823/5795.
6. The grounds for the application were set out in the Motion and the supporting affidavit of the applicant sworn on 9/2/2021. These were that; the respondent had sought to enforce the order of 5/11/2019 before the extraction of the decree, that the applicant had not been served with any decree contrary to **Article 50 of the Constitution**, that the prohibitory order of 8/9/2020 was made on a mention date contrary to law, that the proposed terms of sale contravene **rule 55 of the Civil Procedure Rules** which allow part of the property to be sold to settle a decretal amount. That the proposed terms of sale seek the sale of a property worth Kshs. 630 million for a mere debt of Kshs. 17,160,000/-.
7. The further grounds were that the valuation relied on by the respondent was fraudulent in so far as it indicated the value of the property to be Kshs.350 million while the property is valued at Kshs. 630 million since an acre in the general area of the property goes for Ksh.9 million and the property is 70 acres.
8. The application was opposed vide the replying affidavit of **Charles Karanja Mbugua** sworn on 16/2/2021. The respondent contended

that it had followed the due process in effecting the subject execution. That it had properly extracted the decree which was duly exhibited. That the application for a prohibitory order was properly made ex-parte as there was need to protect the property which is the subject of execution. That the respondent was hell bent in frustrating the execution process.

9. The Court directed the parties to file their written submissions on the application. As at the time of writing the ruling, only the applicant had filed hers. The respondent had filed none. The Court has considered the depositions on record and the submissions of the applicant.

10. The applicant was opposed in the manner in which the respondent had allegedly obtained ex-parte orders including the prohibitory order which she was challenging. That execution of the decree should not be ex-parte. That the principles of natural justice were disregarded in the way the prohibitory order was obtained. The cases of **Elegant Freighters Ltd v. Freight Consultants Ltd & 2 Others [2004] Eklr** and **Republic v. Chief Justice of Kenya & 6 Others Ex-Parte Moiwo Ole Keiwa [2010] Eklr**, were relied in support of those submissions.

11. That when an applicant seeks a stay, the Court should treat both the decree holder and judgment debtor equally and fairly. That the money to be given as security should be part of the decretal sum and not the whole. The cases of **African Safari Club v. Safe Rentals Ltd CA No. 53 of 2010 (UR)** and **Purity Gathoni Githae & Another v. Freight Transport Company Ltd [2012] Eklr**, were cited as authorities for those propositions.

12. This is an application for leave to appeal out of time and stay of execution. The principles applicable are well known.

13. On leave to appeal out of time, the length of the delay has to be considered, the reasons for the delay and the prejudice, if any to be suffered by the opposite party. As to the length of time. The order sought to be appealed against was made on 8/9/2020. The present application was made on 9/2/2021, a period of 5 months later. That was inordinate delay.

14. The reason given for the delay was that the order was made ex – parte. That the applicant was unaware until 8/2/2021. To that end, the reason for the delay is well founded. The applicant did not know the existence of the subject order.

15. As to the prejudice to be suffered by the respondent, the Award was made in its favour in November, 2017. The same was adopted as a judgement and decree of this Court in November, 2019. It is three years later and the respondent has not gotten the fruits of its judgment. There is no appeal to the Court of Appeal against the order adopting the Award as a judgment and decree of this Court.

16. In my view, the respondent has suffered enough waiting to enjoy the fruits of its judgment. More so, considering that both the Award and the decree did not award any interest on the judgment sum, the applicant continues to enjoy the sweetness of the said amount at no cost. In my view, the prejudice to be suffered by the respondent is monumental.

17. To begin with, the applicant's position is that the execution is being undertaken illegally as there was no decree extracted. That was shown to be incorrect as the respondent produced a duly extracted decree in this matter. That becomes a non-issue.

18. I have considered that what is sought to be appealed against is an interlocutory order. Although it was made ex-parte, I consider that it was for good reason. The same was meant to safeguard the property so that the process of execution is not frustrated. That was akin to an application for warrant of attachment. I have never known it to be a requirement that an application for warrants of attachment should be made inter partes.

19. I do not think the rights of the applicant to a fair hearing were breached. This is so because, this was only a peremptory order. The applicant is to be heard at the Settlement of Terms of Sale stage. At that stage, the applicant will be entitled to substitute the subject property which she claims to be worth Kshs.630 million for a mere debt of Kshs.17 million, with a property of a lesser sum. She would also test and dispute the valuation and raise the many other irregularities she has alleged.

20. It would seem that the applicant is hell bent in delaying as much as possible, the time when the respondent is to enjoy the fruits of its judgment. I have already noted that the decretal sum is not attracting interest although the Arbitral Tribunal found that the same was due from and payable by the applicant. She has not appealed against the Award nor the decree. All she is concerned with are little technicalities that will keep the respondent away from the fruits of its judgment as much as she can. That won't do.

21. In view of the foregoing, I decline to extend the time sought for preferring an appeal against the order of 8/9/2020.

22. Having declined to extend time for appeal, I do not think that there is any reason to consider the prayer for stay. However, since I am not the final Court, the appellate court may want to know my views on that prayer.

23. In an application for stay, the application must be made timeously, the applicant must demonstrate that he/she will suffer substantial loss if the stay sought is not granted and must also give security.

24. As regards the timeous filing of the application, that is not in dispute. The applicant knew of the order of 8/9/2020 on 8/2/2021 and the following day she made the present application. The first requirement for stay was, in the circumstances, satisfied.

25. As regards substantial loss, the applicant did not demonstrate that the loss she might suffer is substantial. I have already held that she still has the opportunity to raise the issues she would like to ventilate here before the honourable Deputy Registrar at the stage of Settlement of Terms of Sale. In this regard, no substantial loss was demonstrated.

26. Finally, the applicant did not offer any security for the due performance of the decree that might be ultimately be found to be binding on her. Any continued delay in this matter, in my view, will amount to an injustice. Justice delayed is justice denied.

27. In view of the foregoing, I find the application to be without merit and I dismiss the same in its entirety with costs to the respondent.

It is so ordered.

**DATED and DELIVERED at Nairobi this 11<sup>th</sup> day of March, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**