



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 580 OF 1990

GILBERT CHEGE NJOROGE.....APPLICANT

VERSUS

CHARLES KAMAU MUNGAI.....1ST RESPONDENT

JOSEPH MUCHIRI MUNGAI.....2ND RESPONDENT

RULING.

1. The applicants Notice of Motion dated 21st May 2020 prays for the following reliefs.

a) The honourable court be pleased to make an order declaring the proceedings in NYAHURURU CMCC NO.304 OF 2017 a nullity pursuant to section 6 of the Judicature Act Cap 8 since the action complained of emanates from execution of lawful orders and warrants of this honourable court.

b) That in the alternative the court be pleased to make an order of set off of the respondent's decree in NYAHURURU CMCC NO. 304 OF 2017 for the sum of Kshs. 1,332,937.50 against the applicant's decree of Kshs. 1,537, 254 as taxed on 11th March 2020.

2. The applicant has also prayed for the costs of the application. The application is supported by the applicant's affidavit sworn on the even date and the grounds on the face of the application.

3. The issues raised in the said affidavit and on the face of the application are clear and straight forward. The applicant obtained judgement and decree from this court on **4th May 2012** in which the respondents were ordered to vacate land parcel number **NYANDARUA /OL'KALOU SOUTH /8**. The applicant thereafter taxed his bill where the court awarded him the sum of **Kshs. 1,537,254** in **11th March 2020**.

4. From the history of the matter which again is not disputed even in the replying affidavit of the respondent dated **10th June 2020**, the respondent filed suit at namely **NYAHURURU CMCC NO. 304 OF 2017** against the applicant and the auctioneer who carried out the eviction exercise. Judgement was given in favour of the respondents and was as well awarded costs.

5. The applicant's efforts to appeal vide **NYAHURURU ELC APPEAL NO. 10 OF 2019** did not succeed and hence what subsist now is the lower court judgement which awarded the respondents damages of Kshs. 1,332,937.50. The same remains unpaid to date.

6. It is the contention of the applicant that the respondent is in the process of executing against him for the above damages. He therefore prayed that there be stay of execution and that the same be set off against the decree of this court which is in his favour.

7. The parties were then directed to file written submissions which the court has perused. There are weighty legal issues raised therein especially on the question of jurisdiction. It is true that the matter at Nyahururu was filed before the ELC court which deals with land issues as per the constitution. The matter herein was concluded by this court since it had been commenced here and way before the new constitution.

8. All the above issues are subject to serious analysis. However what I find germane in the application is the willingness to reach a compromise on both decrees. Each of them is carrying a decree in their favour and against each other. The respondent in his replying affidavit has not opposed setting off the two decrees something which the applicant is also eager to pursue.

9. Taking the interest of the parties and guided by the provisions of **Article 159 of our Constitution**, namely expeditious disposal of matters as well as the **Provisions of Section 3 and 3A of the Civil Procedure Act** this court is bound to go by the wishes of the parties. In any case

the matter before this court touches only on the execution process as the substantive issues have been dealt with by the parties. The court does not see any prejudice to be suffered by either of them.

10. This court is also guided by the **Provisions of Order 22 rule 14** which states that;

(1) Where applications are made to a court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such court, then—

a) If the two sums are equal, satisfaction shall be entered upon both decrees; and

b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply, unless—

a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

b) the sums under the decree are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

11. Reading the above portion of the law wholesomely the court is persuaded that this is a clear case where the two decrees should be set off as per the wishes of the parties. The amount involved is ascertainable and the parties are holders of valid decrees against each other. Each has the liberty to execute against the other if so wishes.

CONCLUSION.

12. **In the premises prayer 4 of the said application is hereby allowed as prayed. The balance of the decretal amount, if any, and due to the applicant be paid by the respondents within 45 days from the date herein.**

13. **Pending compliance with this order there be stay of execution against each other for the next 14 days from the date herein.**

14. **The respondents shall have the costs of this application.**

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 17TH DAY OF JUNE 2021.

H. K. CHEMITEI

JUDGE.