



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 436 OF 2017

BETWEEN

JOHN MUGAMBI T/A

MUGAMBI & COMPANY ADVOCATES.....1ST PLAINTIFF

BEATRICE KARIUKI T/A

BEATRICE KARIUKI & ASSOCIATES.....2ND PLAINTIFF

AND

SHOWCASE PROPERTIES LIMITED.....DEFENDANT

RULING NO. 10

1. This is the 10th Ruling in this matter. Before the court is the Defendant's Notice of Motion dated 22nd June 2021 filed under inter alia **Order 22 Rule 22 and Order 42 Rule 6** of the *Civil Procedure Rules, 2010* and **section 1A, 1B and 3A** of the *Civil Procedure Act* where it seeks, inter alia, an order of stay of execution of the default judgment and decree issued by the court on 13th November 2020 and all consequential orders thereto pending the hearing and determination of the appeal at the Court of Appeal.

2. The application is supported by the grounds on its face and the affidavit of Francis Muhoro Gachanja, a director of the Defendant, sworn on 22nd June 2021. It is opposed by the Plaintiffs through the replying affidavit of John N. Mugambi, an advocate in the 1st Plaintiff law firm sworn on 2nd July 2021.

3. The Defendant's application is grounded on the facts that it is aggrieved by the court's decision reinstating the default judgment that had been previously set aside and has already filed an appeal against the said ruling at the Court of Appeal. The Defendant laments that the decretal sum of KES. 55,690,065.00 is colossal and that the Plaintiffs have already begun execution proceedings and have so far been paid KShs. 5,000,000.00 pursuant to the court's order that affirmed the crystallized Bank Guarantee. The Defendant avers that there are no interim orders of stay currently in force in favour of the Defendant despite an appeal having been filed and that the appeal has high chances of success and will be rendered nugatory and futile unless the orders sought herein are granted. The Defendant also states that the Plaintiffs do not have the financial capacity to repay or refund the decretal amount of should the appeal succeed and it is in the interests of justice that the orders sought should be granted.

4. The Plaintiffs have opposed the application on the ground that its *res-judicata* and *res sub-judice*. Since this is the 10th ruling on this matter, I do not intend set out the history of the matter as it is well known to the parties but to state that the application to set aside judgment was allowed on conditions which were not complied with. This led to the reinstatement of the judgment and a decree was indeed issued thereafter. The Defendant has filed two applications dated 10th April 2021 and 6th May 2021 seeking orders of stay which are similar to the application herein.

5. Actually, going through the application dated 6th May 2021, I note that the Defendant has expressly sought an order of stay of the decree pending hearing and determination of the appeal at the court of appeal. In the application dated 10th April 2021, the Defendant is similarly seeking an order of stay of execution of the decree pending hearing and determination of the said application. I hold that the present

application offends the principle of *res sub judice* grounded on **section 6** of the ***Civil Procedure Act*** which provides as follows:

6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

6. The aforesaid provision commands that the suit or application filed earlier ought to be determined first. It follows that the present application, having been filed later, ought to be stayed to prevent an abuse of the court process.

7. In addition to the two applications, this court, by the ruling dated 13th May 2021 (Ruling No. 7) allowed the Plaintiffs to call in and liquidate the guarantee which had been provided as security as a condition for setting aside the default judgment. By the ruling dated 8th June 2021 (Ruling No. 8), I declined to stay the orders of 13th May 2021 which means that the Plaintiffs were at liberty to proceed with execution of part of the decree to the extent secured by the Guarantee for KES 5,000,000.00. The Plaintiffs now depones that the sum has since been recovered. What remains for execution for the balance of the decretal amount in the sum of KES. 50,690,065.00.

8. Apart from the present application being res-subjudice, it is a collateral attack of the orders rejecting the Defendant's attempt to stop liquidation of the Guarantee. By allowing the Plaintiffs to proceed with liquidation of the Guarantee, the court was in effect permitting them to proceed with execution. The court cannot now proceed to grant orders of stay.

9. For the reasons I have set out, the Notice of Motion dated 22nd June 2021 lacks merit is now dismissed with costs.

DATED and DELIVERED at NAIROBI this 5TH day of JULY 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mbobu with him Mr Otenyo instructed by Makhandia and Makhandia Advocates for the Plaintiffs.

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Defendant.