



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER 241 OF 2011

CABRO EAST AFRICA LIMITED.....PLAINTIFF/ APPLICANT

VERSUS

ROSOGA INVESTMENTS LIMITED.....DEFENDANT/RESPONDENT

RULING

1. Before me is the Notice of Motion dated 24th September 2019. It seeks orders;

1. Spent

2. Spent

3. THAT the Honourable Court be pleased to order for cancellation of the warrants of attachments issued on 18th July 2019 and direct the plaintiff to give credit for the instalment payment for the sums of money that the defendant made during the stay period when the Ruling of the court was pending delivery.

4. THAT this court be pleased to review the instalments payable by the defendant to Kshs. 300,000/= to facilitate the sustainable payment of the balance of the decretal sum which is now basically interest.

5. THAT costs be provided for.

2. The application is premised on **Order 22 rule 22 and Order 51 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Order 22 rule 22 states:**

(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

3. It is supported by the affidavit of Ken Kipchirchir Ruto and grounds on its face, mainly that on 4th May 2017 judgment was entered in favour of the respondent for Kshs. 4,793,064/= + costs and interest. Thereafter the applicant sought orders to pay the sum in instalments, of Kshs. 500,000/= per month and was ordered to pay Kshs. 600,000/= per month with effect from the 15th day of each month vide ruling of 16th May 2019. That as at the time of this application the applicant had paid Kshs. 4,700,000/= but the respondent had proceeded to obtain warrants of attachment of sale for the recovery of Kshs. 6,222,300/=. The warrant given on 18th September 2019 indicated that Kshs. 6,222,300/= was balance of the decree and costs in HCC 241 of 2011. The applicant also disputed the auctioneer's costs amounting to Kshs. 201,937/=.

4. The applicant also pleaded with the court to reduce the monthly instalment to Kshs. 300,000/= due to its financial constraints.

5. The application is opposed vide the Replying Affidavit of Geoffrey Eric Odongo sworn on 9th October, 2019. That judgment of 4,793,064 plus costs and interest was entered on 4th May, 2017. That the applicant had only paid 4,399,192/= leaving a balance of Kshs. 5,451,097/= unpaid. That the applicant had been ordered by court to pay instalments of Kshs. 500,000/= on 5th August 2018 but began defaulting in January 2019 resulting in late payments till April 2019. That the request to reduce the monthly instalment to Kshs. 300,000/= was unreasonable, due to the outstanding sum which continues to attract interest. That the reason given for the alleged financial constraints was not tenable.

6. In submissions for the applicant it is argued that the applicant has paid Kshs. 4,700,000/= leaving only a balance of Kshs. 93,064 plus costs and interest. That the execution proceedings are unlawful as there is dispute over the outstanding amount, that the respondent concedes that Kshs. 4,349,192 has been paid, claims balance of Kshs. 5,541,097 and raised warrant for Kshs. 6,22,300/= a clear indication as to certainty of the amount owing. That the respondent in obtaining the warrants did not comply with **Order 22 rule 7(2) (e)** by giving the applicant credit for what it had paid. That the applicant had complied with requirements for review by availing evidence of sufficient cause.

7. Further, that the applicant has established sufficient cause for stay of execution, because an execution would lead to substantial loss as the applicant had paid most of the decretal sum, in addition to the dispute on what is due.

8. On costs that the respondent should bear the costs due to manner in which the execution was carried out.

9. For the respondent it is submitted that applicant did not deserve orders sought because it had not complied with the previous orders.

10. That the applicant had not demonstrated discovery of any new matter or evidence it was not aware of before the passing the order for payment of Kshs. 600,000/= per month.

11. Each party cited authorities which I have perused. The issues for determination are whether the application has merit, that is to say whether the applicant has established ground for the cancellation of the warrants of attachment, and who should pay costs.

12. The applicant made arguments for stay of execution, yet it was only intended for pending the hearing of the applicant, and that was spent.

13. Regarding the substantive application on the cancellation of the warrants, it is true that the applicant is in default, because in some of the months when it was supposed to pay Kshs. 600,000/= per month, it paid Kshs. 500,000/= or less. Hence it is not in doubt that the applicant is in default of the payments. However, it is also evident that the amount owing is in dispute, and that ought to have been clarified before the execution proceedings commenced.

14. The warrant of attachment indicates, that judgment was given for Kshs. 4,793,064 on 4th May 2017. As at 18th September 2019, the decretal sum is shown to be Kshs. 5,103,737/= and interest of Kshs. 1,117,788/= adding up to 6,222,300/=. There is no indication that any amount was paid, because at the column of "*Less paid on account*". It is vacant. The impression created by this warrant is that the applicant had paid nothing and the execution was for the whole decretal sum.

15. It is clear therefore that the applicant has a good reason to complain and to invoke **Order 22 rule 7(2) (e) of the Civil Procedure Rules provides:**

(2) Save as otherwise provided by sub rule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars —

(e) whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;"

16. The respondent did not in applying for the warrants give credit to the applicant's previous payments, hence the warrants are up for cancellation.

17. Does the applicant deserve an order for review? The applicant must establish the requisite grounds for review, and set out the new evidence or material that was not available to it at the time order sought to be reviewed was made.

18. The argument that the ban on logging is the new evidence cannot be because, as demonstrated by the respondent that was in place in 2018. The case relied on by the applicant **Freight Forwarders Limited vs Elsek & Elsek (k) Limited [2012] eKLR** is distinguishable and is not applicable in an application for review. That case dealt with a 'fresh' application for orders to pay in instalments.

19. Hence, the applicant herein has orders for paying in instalments those orders have not been complied with and no fresh or new ground has been placed before court to show why. In this case, the case cited by the respondent **Francis Njoroge v Stephen Maina Kamore [2018] eKLR** is applicable, and like the Judge therein, I agree, that in granting the order for payment in instalments of Kshs. 600,000/= the court herein had considered what was in place, including the applicant's financial difficulties.

20. The applicant waited until execution proceedings started, and that is when it came up with these explanations. They are not tenable in the circumstances of this case. Hence the application for review is not merited.

21. In the upshot the application succeeds in part;

1) The warrants issued on 28th September 2019 are hereby cancelled. The respondent to give credit to the applicant for the sums already paid.

2) The prayer for review is denied.

3) Each party was at fault in their own way, each party to bear its own costs.

Dated, delivered and signed at Nakuru this 13th day of July 2020.

Mumbua T. Matheka

Judge

In the presence of VIA ZOOM

Court Assistant Joseph

Mr. Jeji holding brief for Mr. Odongo for the Plaintiff Respondent

Ameli Inyangi & Partners Advocates

Mr. Kisila for defendant applicant

Sheth Wathigo & Company Advocates