



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CAUSE NO. 87 OF 2017**

**SAVICHEM AFRICA LTD.....PLAINTIFF**

**-VERSUS-**

**GENERAL PRINTERS LTD.....DEFENDANT**

**RULING**

1. This Court delivered Judgment in this matter on 8<sup>th</sup> May 2019. **General Printers Limited** (the Defendant) being aggrieved by that Judgment filed an appeal before the Court of Appeal. The Defendant has filed a Notice of Motion application dated 13<sup>th</sup> June 2019. This is the application under consideration.

2. The application is brought under Order 42 Rule 6 and 7 of the Civil Procedure Rules and under Section 3 and 3A of the Civil Procedure Act. By that application the Defendant seeks for stay of execution of this Court's Judgment of 8<sup>th</sup> May 2019. The Defendant also seeks for setting aside of the warrants of attachment issued to the auctioneer for being fatally defective.

3. The grounds upon which the Defendant based the aforesaid prayers are that; the warrants of attachment issued herein were defective because they made reference to James Mwaniki Maina, a person who is not in this action, as the Defendant Judgment Debtor; that execution of the Judgment proceeded before the decree was extracted or not approved by the Defendant; that the Defendant has preferred an appeal against this Court's Judgment; that the Defendant has an application for stay of execution pending before the Court of Appeal, which application has been certified as urgent; and that the Defendant stands to suffer because the amount of the Judgment is substantial which cannot be compensated if the Court of Appeal allows the application of stay.

4. **Savichem Africa Limited** (the Plaintiff) opposed the application. The Director of the Plaintiff, Ritu A. Bhattessa, deponed in her Replying Affidavit that the Court made an error in processing the warrants of attachment by indicating that the Judgment Debtor, to whom the warrants were directed, was James Mwaniki Maina and not the Defendant. She further deponed that the fact the Defendant had filed an appeal did not automatically give the Defendant a stay of execution. It was also the Plaintiff's view that the Defendant had failed to satisfy the conditions of granting stay of execution and had failed to provide security for such stay.

**ANALYSIS AND DETERMINATION**

5. It is important to state that the Plaintiff, quite rightly, began by submitting that it filed an application for execution of the Judgment hereof and in so doing correctly addressed execution to be against the Defendant Judgment Debtor. The Court, however, in error issued warrants of attachment to be executed against James Mwaniki Maina, a non-party in this case. The Plaintiff's Learned Advocate prayed that those warrants be withdrawn and that warrants be issued against the Defendant.

6. I have perused the Court file and I have noted that the Plaintiff filed an execution application on 4<sup>th</sup> June 2018 and thereof indicated that the Judgment Debtor is the Defendant. The warrant that were issued by the Court, following that application, indicated that the Judgment Debtor was James Mwaniki Maina, a non party in this action. I can confirm from the documents in the Court file that the error of issuing warrants of attachment against James Mwaniki Maina was solely of the Court. It therefore cannot be held against the Plaintiff.

7. Getting back to the Defendant's application; the Defendant seeks stay of execution pending the hearing and determination of the application for stay of execution before the Court of Appeal. I repeat just for emphasis; the Defendant seeks this Court to grant stay of execution pending the hearing before Court of Appeal of another application, before that Court, for stay of execution.

8. It is very clear in my mind that the Defendant in filing an application for stay of execution in the Court of Appeal, which application was first in time, could not return to the High Court to seek exactly the same prayers, of stay of execution. That in my view is tantamount to an abuse of the Court process. Order 42 Rule 6(1) provides as follows:

**“1)No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside. (Underlining mine).**

9. In my view that Rule clearly provide that it is only after an application for stay of execution, pending appeal, has been either allowed or declined by the Court appealed from that a party would be at liberty to go to the Court appealed to, to seek stay of execution. The Rule does not permit a party to move backwards – that is from Court of Appeal back to high Court. Most certainly that Rule does not permit two similar applications to be filed in the Court of Appeal and in the high Court. That in my view is undoubted abuse of the Court process. That is akin to a party playing Russian roulette with the Courts. It cannot be permitted. It is for that reason that the Defendant’s application dated 13<sup>th</sup> June 2019 fails and is dismissed.

10. In conclusion I grant the following orders:

**a. The Notice of Motion dated 13<sup>th</sup> June 2019 is dismissed with costs to the Plaintiff.**

**b. The warrants of attachment issued by the Court dated 6<sup>th</sup> June 2019 are hereby withdrawn and the Deputy Registrar of this Court is hereby directed to issue fresh warrants of attachment, without further payment of fees by the Plaintiff, directed at the Judgment Debtor, namely General Printers Limited.**

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>TH</sup> day of JULY, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT