



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO. 93 OF 2011

IN THE MATTER OF: PARCEL OF LAND NOS. MN/1/13483; MN/1/15351 AND MN/1/15275

AND

IN THE MATTER OF: BANK ACCOUNT NUMBERS SV 1520400816 & TD 15267000443 – FINA BANK, MOMBASA, NKRUMAH ROAD BRANCH.

AND

IN THE MATTER OF: THE ANTI CORRUPTION & ECONOMIC CRIMES ACT NO. 3 OF 2003

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION...DECREE HOLDER/APPLICANT

VERSUS

JAMES MWATHE MULEWA.....1ST JUDGMENT DEBTOR/RESPONDENT

SHARKAT COMPANY LIMITED.....2ND JUDGMENT DEBTOR/RESPONDENT

GUARANTY BANK (KENYA) LIMITED.....3RD RESPONDENT

OLABOYO VERACRUZ.....4TH RESPONDENT

ANGELA CHEPKEMOI KOECH.....5TH RESPONDENT

SAIDA A.AL-AFIF.....6TH RESPONDENT

RULING

The Application

1. The Decree Holder/Applicant's application is contained in the Notice of Motion dated 23rd January, 2019 and brought under Section 1A, 1B, 3A, 28, 34, 38 (a) & (f), 40 (1), 42, 44(1) and 63 of the Civil Procedure Rules 2010. The motion prays for the following orders that:

1. This honourable Court be pleased to issue Notice to Show Cause against Olaboyo Veracruz, Angela Chepkemoi Koech, Saida A. Al-Afif, Guaranty Bank Limited and James Mwathethe Mulewa to why the decree should not be executed against them respectively for arrest and committal to civil jail for six months.

2. This Honourable Court be pleased to compel Olaboyo Veracruz, Angela Chepkemoi Koech, Saida A. Al-Afif, Guaranty Bank Limited to release funds held in bank account numbers: SV15204008167 and TD1526700443 at Guaranty Trust Bank (Kenya) Limited (Formerly FINA Bank), Nkrumah Road Branch, Mombasa to the Decree Holder (Ethics and Anti-Corruption Commission)

3. This Honourable Court be pleased to issue an order for attachment and sale of land reference numbers **MN/1/13483** and **MN/1/15351** in settlement of the decree issued on 21/03/2018.

4. This Honourable Court be pleased to issue an order for attachment and sale of land reference numbers **MN/1/7822**

Kwale/Shimoni/113, M/S Tiwi Beach/19-12 and Kilifi/Viriko "A"/22 be attached and sold in settlement of the Decree issued on 21/03/2018.

5. This Honourable Court be pleased to issue an order of prohibition against the 1st Judgment Debtor whether by himself or through his agents, servants or assigns from alienating, transferring, charging, further charging, leasing, sub dividing, disposing of, wasting any part thereof land reference numbers **MN/1/7822 Kwale/Shimoni/113, M/S Tiwi Beach/19-12 and Kilifi/Viriko "A"/22** or from howsoever dealing with the said property pending determination and execution proceedings by the Decree Holder and full settlement of the Decree issued on 21/03/2018.

6. This Honourable Court be pleased to compel the 1st Judgment Debtor/ Respondent to surrender to the Decree Holder original title documents of land reference numbers **MN/1/13483 and MN/1/15351** for purposes of execution of the Decree issued on 21/03/2018.

7. The cost of this application be borne by the Respondents.

2. The motion is premised on the grounds set out therein and is supported by a Supporting Affidavit sworn by **FRANCIS O. MAKORI**

3. The Applicant's case is that on 18th September Judgment was delivered in favour of the Applicant against 1st and 2nd Judgment Debtors/Respondents and the Applicant became A Decree Holder of Kshs. 74, 683, 794/= pursuant to a decree issued on 21/03/2018 and as such the Applicant has commenced execution proceedings against the Judgment Debtors.

4. That on or about 13th April, 2011 the Applicant preserved the funds in bank account numbers SV15204008167 and TD1526700443 at Guaranty Trust Bank (Kenya) Limited (Formerly FINA Bank), Nkrumah Road Branch, Mombasa pending determination of recovery proceedings against the holders of the account being 1st and 2nd Respondents (Judgment Debtors).

5. The Applicant avers that pursuant to Section 56 (c) of the Anti-Corruption and Economic Crimes Act, the Decree Holder intends to execute its decree against funds held in bank account numbers SV15204008167 and TD1526700443 at Guaranty Trust Bank (Kenya) Limited (Formerly FINA Bank), Nkrumah Road Branch, Mombasa as well as against properties known as land reference numbers **MN/1/13483 and MN/1/15351** and land reference numbers **MN/1/7822 Kwale/Shimoni/113, M/S Tiwi Beach/19-12 and Kilifi/Viriko "A"/22**.

6. The Applicant further states that it is in the interest of justice and public interest that the application is allowed.

The Response

The 1st and 2nd Respondents (Judgment Debtors) Response

7. The 1st Respondents opposed the Application through a Preliminary Objection filed on 5th March 2019. The 1st Respondent states that the application is defective, irrational and an abuse of due court process and is in total breach of Section 94 of the Civil Procedure Act. That the Application which is seeking the execution of the decree of this court is not only ambiguous on the mode of execution but it is inherently contradictory.

8. Further the 1st Respondent filed a Replying Affidavit on 26th March, 2019 sworn by his Counsel **WILLIAM O. WAMEYO** stating that executions are made in accordance with the provisions of the Civil Procedure Rules and in the form provided therein and that it is not true that the Plaintiff/Applicant has commenced execution proceedings. The 1st Respondent states that the application is fatally defective since it purports to re-open proceedings in a case that is concluded, that the Application is made against 3rd, 4th, 5th and 6th Respondents who are not parties to this suit and who have not been enjoined and finally that by virtue of this court having pronounced itself on judgment is *functus officio* and lacks jurisdiction to entertain this application.

9. The 1st Respondent contends that costs have not been taxed and thus the application is fatally defective by virtue of Section 94 of the Civil Procedure Act and that the Applicant has not taken cognizance of the fact that more than one year has lapsed since the Judgment date and execution cannot issue without a notice to show cause. Further that the Applicant has total disregard of the procedural rules set which is a fundamental flaw that goes to the root of the case and jurisdiction of the court. The 1st Respondent avers to have filed an Application in the Court of Appeal for stay of execution.

The 3rd to 6th Respondents

10. The 3rd to 6th Respondents responded to the Application by way of a Replying Affidavit filed on 22nd March, 2019 sworn by **JOSEPHINE WANJIRU GACHURU**. The 3rd to 6th Respondents aver that the 3rd Respondent holds two accounts in favour of the 1st Judgment Debtor at the 3rd Respondents Nkrumah Road Branch, Mombasa being savings account number 0215/0117452/001/000 which holds a credit balance of Kshs. 3,391.89 as at 8/03/2019 and Term Deposit Reference Number 0215/0117452/001/5212/012 holds a credit balance of Kshs. 18,403,059.87.

11. The 3rd to 6th Respondents aver that the 3rd Respondent furnished the Decree Holder with the bank statements relating to the 1st Judgment Debtor/Respondent account as well as account opening documents vide a letter dated 18th February, 2019. That after delivery of the Judgment in favour of the Applicant, a decree was served upon the 3rd Respondent but does not mention that the 3rd Respondent has to release the sums held in the Judgment Debtors Account and that this fact was brought to the attention of the Decree Holder/Applicant vide a

letter dated 7/12/2018.

12. The 3rd to 6th Respondents further aver that they are ready, able and willing to comply with the orders issued by the Court in as far as far as the 1st Judgment Debtor/Respondents accounts are concerned.

Analysis and determination

13. I have carefully considered the application and the submissions by the parties. The only issues that arise for determination are:

- a) Whether 3rd, 4th, 5th and 6th Respondents have been properly enjoined in this present application.
- b) Procedure for execution.

14. On whether the 3rd, 4th, 5th and 6th Respondents have been properly enjoined in this present Application, the Applicant submits that they have been properly enjoined and that they were given due notice and that the said joinder is merely to facilitate settlement of the Judgment debt and consequently ensure release of funds held by them on behalf of the 1st Respondent Judgment Debtor. The 1st Respondent/Judgment Debtor however submits that a Plaintiff can only enjoin a party to the suit before hearing and Judgment so that the party can be given a chance to participate in the proceedings before Judgment is rendered. That not only is the procedure unconstitutional and an affront to the Bill of rights but that it makes nonsense of the provisions of the Civil Procedure.

15. Judgment in this matter was entered on 18th September, 2017 against 1st and 2nd Respondent as the Decree Holders and in favour of the Plaintiff Applicant. The Application to enjoin the 3rd to 6th Respondent to me, has come late in the day as this is a matter pending before an Appeal Court. In the circumstances I do find that the orders prayed for would not be of any consequence to the 3rd to 6th Respondent as they are wrongfully enjoined. The only issue then would be as to whether the orders sought against the remaining parties being the 1st and 2nd Respondent/ Judgment Debtors are justifiable which is next limb of this Ruling.

16. On the procedure for execution, the provisions of the Civil Procedure Rules 2010 are clear. The applicant has based its Application on the following provisions Section 1A, 1B, 3A, 28, 34, 38 (a) & (f), 40 (1), 42, 44(1) and 63 of the Civil Procedure Rules 2010. The instant application seeks for the court to issue a Notice to Show Cause as to why the Respondents should not be committed to civil jail. The court in *Grand Creek LLC & Another vs. Nathan Chesangmoson* [2015] eKLR held that -

‘In all cases where Order 22 Rule 18(1) of the Civil Procedure Rules applies, a Notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. It should be noted, however, that there must have been an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor. And Order 22 rule 31 will come into play where the court, instead of issuing a warrant of arrest, decides to issue a notice calling upon the judgment-debtor to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison. But where the judgment-debtor does not appear as directed in the notice, the court will issue a warrant for his arrest. This rule follows after section 38 and 40 of the Civil Procedure Act. The warrant of arrest is to bring the judgment-debtor to court and it is not an automatic committal to prison because the court will still be required to satisfy itself of all the requirements of Order 22 rule 33 and rule 34 of the Civil Procedure Rules. The proceedings under Order 22 rule 34 act as the safeguard against denial of liberty in execution of a decree without due process. And courts have comprehensively pronounced themselves on the constitutionality of the procedure of arrest and committal to jail in execution of a decree in not one case. See the cases cited by the Respondents, especially National Bank of Kenya case (supra), Jayne Wangui Gachoka (supra), Braeburn Limited (supra), Beatrice Wanjiku and Ex parte Nassir Mwandithi (supra). This point is settled that arrest and committal to prison in execution of a decree under the Civil Procedure Act and Rules is not unconstitutional as long as all the safeguards provided in law are afforded to the judgment-debtor. I so hold in this matter.’

17. Further in *Solomon Muriithi Gitandu & Another vs. Jared Mainji Mburu* [2017] eKLR the court held that -

‘In the case of Braeburn Limited -V- Gachoka and another (2007); it was held inter alia;

“A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal.”

The Court further observed that: -

“Section 38 of the Civil Procedure Act however, provides a limitation of the courts’ power to order execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that.”

These limitations are further re-stated under Order 22 rule 31 (1) Civil Procedure Rules. A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued. In the case the Court found that the requirement for Notice to Show Cause is mandatory and whether the judgment appears for notice to show cause or under warrant of arrest, it is the duty of the decree holder to satisfy the court that the judgment debtor is not suffering from poverty, or any other sufficient cause and is able to pay the decretal sum or proof the provisions of Order 22 rule 35 Civil Procedure Rules, that is

examination of the debtor as to his property.

18. In this Application it is the finding of this Court that the Applicant has not followed the due process of execution under Order 22 Rule 18 of the Civil Procedure Rules considering that one year has lapsed since the issuance of the Decree in regard to the Judgment and in accordance to Form No. 5 Appendix D. The 3rd to 6th Respondents in their Replying affidavit have clearly stated their willingness to abide by the court orders, a clear indication that the approach in mode of execution by the Applicant is not procedural.

19. Consequently I find that the orders sought cannot be granted and that the Motion dated 23rd January, 2019 must be dismissed.

20. Costs shall be in the cause.

Dated, Signed and Delivered in Nairobi this 16th day of October, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Wameyo for 1st Respondent

No Appearance for Applicant

Mr. Kaunda Court Assistant