



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 175 OF 2012**

**CHEMELIL SUGAR COMPANY LIMITED ..... PLAINTIFF**

**VERSUS**

**WEST KENYA SUGAR COMPANY LIMITED ..... DEFENDANT**

**JUDGMENT**

What is before me is the Plaintiff's Notice of Motion dated 25th June 2015 for orders:-

- “1. THAT this application be certified as urgent to be heard ex-parte in the first instance.***
- 2. THAT pending the hearing and determination of this application inter- parties, or further orders, this Honourable court be pleased to issue an interim order of stay of execution of the costs awarded to the Defendant/Respondent herein.***
- 3. THAT pending the hearing and determination of the Plaintiff/Applicant application dated 11th March 2015, there be a stay of execution of the costs awarded to the Defendant/Respondent herein.***
- 4. THAT this Honourable court be pleased to issue an order recalling and canceling the warrant of attachment dated 17th June 2015 issued to Eshikhoni Auctioneers.***
- 5. THAT the Honourable court be pleased to issue an order that the Auctioneers costs if any be borne by the Defendant/Respondent.***
- 6. THAT the costs of this application be provided in favour of the Plaintiff/Applicant.”***

The gist of the application is that whereas a stay of execution of the Defendant's taxed costs was granted to the Plaintiff by an order dated 12th March 2014 pursuant to a Chamber Summons dated 11th March 2014 the Defendant went ahead and took out warrants of attachment and proceeded to proclaim the Plaintiff's goods with a view to execute. The order for stay of execution, the decree, the impugned warrants of attachment, the proclamation and the warrant of sale of property in execution of decree for money are all annexed to the Supporting affidavit.

In opposition to the Notice of Motion the Defendant filed a replying affidavit sworn on 6th July 2015 by Raymond Olendo Advocate wherein he deposes that first, whereas the Plaintiff was on 11th March 2014 granted a stay of execution the same was to remain in place pending hearing of the application inter-parties. Secondly that thereafter it was agreed that the said application would be canvassed by way of written submissions and the Advocates were to go before the Court for highlighting but come that day the Court did not sit; That the Advocate for the Plaintiff did not on that day take the file before another court

for extension of the order and that therefore by the time the warrants of attachment were taken out there was no order for stay of execution in place. He also denies that the Plaintiff's Advocate did not fix the application for hearing for a period of more than one year. He also deposes that the Plaintiff has not demonstrated what irreparable loss he stands to suffer should the orders sought be refused and that no good grounds had been shown for stay of the costs and the present application is just an attempt to buy time.

This application was first scheduled for interpartes hearing on 29th June 2015 but Mr. Ogenjo required time to put in his reply and it was therefore adjourned to 9th July 2015. Come that day the Judge was away on other official duties and it was adjourned to 23rd September 2015. On 23rd September 2015 the Advocates agreed to canvass the application by way of written submissions and to return to court on 29th October 2015 to take a date for ruling. However on 29th October 2015 it transpired that the Defendant's submissions had not been filed hence prompting another adjournment. The matter next came before a Judge on 16th August 2016, on 1st September 2016, 10th October 2016, 9th November 2016 and finally on 2nd March 2017 when this court was informed that the Defendant had filed her submissions. Those submissions were filed on 20th December 2016. Unfortunately those submissions do not address the application that is presently before me for ruling. They address the Chamber Summons dated 11th March 2014 which is a reference to the taxation of costs for which the Plaintiff obtained a stay of execution which culminated in the current application.

Having considered the application by the Plaintiff, the grounds thereof, the supporting affidavit and submissions of her Advocate and having perused the record I am persuaded that the Notice of Motion before me has merit. The stay of execution, which even the Defendant's Advocate, has conceded was granted, was to last until the application dated 11th March 2014, which as I stated earlier was a reference to the taxation, was heard and determined. That is clearly indicated in the formal order issued by the Deputy Registrar on 14th March 2014. As admitted by Counsel for the Defendant that application has never been heard interpartes because although the Advocates for the parties agreed they would do so by way of written submissions neither of them did so. The record will bear me out that the nearest that was done was by the Defendant's Advocate filing submissions on 20th December 2016 which again as as I have stated were filed as if they were for this application. Counsel for the Defendant cannot therefore be heard to complain that the Advocate for the Plaintiff has delayed in prosecuting the reference. The Advocates for both parties are equally to blame for the delay. In any event Counsel ought to have moved this Court to dismiss that reference and to discharge the order for stay of execution before proceeding to execute. This Court finds that as there was a stay of execution in place pending the hearing and determination of the reference and the same is yet to be heard the impugned execution was irregular and unlawful and this application therefore has merit. It is allowed with costs to the Plaintiff. The Plaintiff shall within 14 days of this ruling file its submissions in respect of the reference dated 11th March 2014 whose ruling shall then be delivered on 4th April 2017. Notices to issue. It is so ordered.

**Signed, dated and delivered at Kisumu this 9th day of March 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

N/A for the Plaintiff

N/A for the Defendant

Court Assistant – Serah Sidera