



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC. NO. 1175 OF 2002**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEE.....PLAINTIFF**

**VERSUS**

**CENTRAL BANK OF KENYA.....1<sup>ST</sup> DEFENDANT**

**SHAH MUNGE & PARTNERS LIMITED.....2<sup>ND</sup> DEFENDANT**

**BEN MTUWETA.....3<sup>RD</sup> DEFENDANT**

**AND**

**EURO BANK LIMITED (In Liquidation).....Third party**

**AND**

**NAIROBI SECURITIES EXCHANGE LIMITED.....GARNISHEE**

**RULING**

1. On 1<sup>st</sup> December 2016, this Court made certain Orders in respect to Execution of a Decree in this suit.
2. Those Orders were:-
  1. THAT the Decree herein be and is hereby executed by the sale of the 2<sup>nd</sup> Defendant's 5,250,000 shares in the Nairobi Securities Exchange, a public listed company in the said Nairobi Securities Exchange.
  2. THAT in accordance with the law concerning the sale of shares in a public listed company as enacted in the Capital markets Authority Act Chapter 485A Laws of Kenya, the sale of the said shares be conducted by NIC Capital Limited, a stock broker duly licensed under the said Act to sell the shares.
  3. THAT NIC Capital Limited executes the decree as above for and on behalf of the Court in the sum of Kshs. 714,317,933.00 made up as follows:
    - d) Judgement debt - Kshs. 258,133,333.00

e) Interest thereon @ 12% from 6.11.2002

upto 6.11.2006- Kshs. 433,6333,993.00

f) Taxed costs - Kshs.22,520,607.00

TOTAL- Kshs. 714,317,933.00

3. There is now a Notice of Motion dated 27<sup>th</sup> February, 2017 seeking further Orders in respect to the said Orders. The Application prays that:-

1. THAT this Honourable Court's Order made on 1<sup>st</sup> December 2016, and issued on 7<sup>th</sup> December, 2016 be varied.

2. THAT the said order be varied to include a further order that the assets of the 2<sup>nd</sup> Defendant to be sold in execution of the decree to include all, or any additional bonus shares acquired by the 2<sup>nd</sup> Defendant, Shah Munge & Partners Limited, in the Nairobi Securities Exchange Limited over and above the shares referred to in the said Order of 1<sup>st</sup> December, 2016, together with all the dividends accrued on the said shares from the date of attachment of the shares to the date of sale.

3. THAT save as aforesaid, the Order of 1<sup>st</sup> December, 2016 shall remain in force and binding on the parties.

4. In an Affidavit by Caroline Rakama sworn on 27<sup>th</sup> February 2017, the Applicant explains that pursuant to the Court Order, the shares held by the Judgement Debtor in Nairobi Securities Exchange Ltd (NSE ltd) were attached. In a letter annexed to the Affidavit of Counsel, Desterio Oyatsi sworn on 23<sup>rd</sup> March 2017 (as Supplementary to the Affidavit of Caroline Rakama), NSE Ltd informs Counsel that the attached shares had been sold and they were awaiting funds from sale so as to facilitate distribution in accordance with the Court Order.

5. It is said, on behalf of the Applicant, that in the course of the Sale of the shares, the Stock Broker established that between the time when the said shares were attached by Court and the time when the Stock Brokers were appointed to execute, the Judgement Debtor was issued with additional 1,750,000 shares by NSE Ltd being bonus shares. There is a letter from the Company to this effect.

6. This Court is asked to grant the Orders for purposes of completing the process and for perfecting the Order earlier made by Court.

7. The Application is resisted and Mr. John Munge of the Judgement Debtor Company sworn an Affidavit on 23<sup>rd</sup> March 2017 in opposition. First, he states that on 15<sup>th</sup> February 2017, the Court of Appeal heard an Application seeking to stay the Decision of this Court made on 1<sup>st</sup> December 2016 and the Ruling has been reserved for 12<sup>th</sup> May 2017. In his view this application should await the outcome of that Application.

8. In addition, the Judgement debtor argues that the letter from the Stock Broker is not proof of any additional shares, bonus shares or dividends owned by the Judgement Debtor.

9. Mr. Munge then makes some Legal arguments, some of which were rehashed by Counsel in her address to Court and all of which will be considered in this Decision.

10. This Court does straight away agree with the Judgement Debtor that an application of this nature cannot be brought under the auspices of Section 99 of The Civil Procedure Act. It is not the case by the Applicant that my Order of 1<sup>st</sup> December 2016 had clerical or arithmetical mistakes or errors arising from an accidental slip or omissions. Without doubt the Applicants' attempt to domicile the application under

that provision is erroneous.

11. Yet, the Application also invokes the inherent jurisdiction of this Court which is saved by Section 3A of The Act.

12. It is common ground that there is a money decree in favour of the Applicant as against the judgement Debtor. That Decree and interest is for a substantial sum which the Applicant puts at Kshs.714,317,933.00 as at 6<sup>th</sup> November 2016. It is said that on this sum is an additional amount of Kshs.258,133,333 made up of interest at Court rates. Neither figures were controverted by the Judgement Debtor.

13. The effect of my order of 1<sup>st</sup> December 2016 was to facilitate sale of some 5,250,000 shares of the Judgement Debtor in NSE Limited. Those shares have been attached and sold. The applicant tells Court that the Sale of shares will raise no more than Kshs.67,462,500/=. This, also, is not controverted by the Judgement Debtor. Although the sale has raised a substantial amount, it is a paltry sum in the face of what remains outstanding.

14. For as long as the debt remains due and the execution of the Decree is not caught up with a stay or Statute of Limitation or any other restraint, the Judgement Creditor is permitted to execute against the Judgement Debtor's property if and when they are discovered, traced or found. Of course, the Judgement Creditor will not be allowed to execute in installments if it is motivated by malice or bad faith or in a way intended to embarrass or cause hardship to the Judgement Debtor.

15. In the instance case, there is a letter from NSE limited informing the Lawyer for the Applicant that 1,750,000 bonus shares were issued to the Judgement Debtor. This letter is dated 2<sup>nd</sup> March 2017. This would be three months after the Court made its Order on 1<sup>st</sup> December 2016. Although there is no evidence that the Stock Broker itself learnt of this additional shares only after the attachment order was given, this Court is willing to accept that the Applicant only came to learn of this through the letter of 2<sup>nd</sup> March 2017. This is because there is no evidence to the Contrary or any other reason put forward for this Court to disbelieve the Applicant.

16. The stance by Mr. Munge, as at 23<sup>rd</sup> March, 2017, when he swore his affidavit was that the Decree holder had not proved that the Judgement Debtor holds the additional/bonus shares sought to be attached. He was right. But a Supplementary Affidavit of 23<sup>rd</sup> March 2017 now annexed the information of the additional shares from NSE Ltd itself. It seems to Court that, on a balance, the Judgement Debtor indeed benefited from the bonus share issue. But if it is true that it does not own the shares then it should not have reason to worry as an order for further attachment would be futile.

17. Certainly, and this Court agrees with the Judgment Debtor, the Application before Court is not a typical application for Review. Yet, the Court has a duty to lend its assistance to a Party which seeks to implement a legitimate Court order. If the Court cannot locate such power in any specific provision of The Civil Procedure Act or Rules, then it would be in its inherent power.

18. The Application is reasonable and brought without delay. It is merited. And in so far as there is no stay of Execution of the Decree or my Ruling of 1<sup>st</sup> December, 2016, herein, the same is grantable.

19. The Application of 27<sup>th</sup> February 2017 is hereby granted. Costs in the cause.

**Dated, Signed and Delivered in Court at Nairobi this 11<sup>th</sup> day of May, 2017.**

**F. TUIYOTT**

Onsongo for 2<sup>nd</sup> Defendant

Muhonga for Oyatsi for Plaintiff

Alex – Court clerk