



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.....1ST DEFENDANT

SHAH MUNGE & PARTNERS LIMITED.....2ND DEFENDANT

BEN MTUWETA3RD DEFENDANT

AND

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

AND

NAIROBI SECURITIES EXCHANGE LIMITED.....GARNISHEE

RULING

1. The Notice of Motion dated 30th September 2016 that is brought in Execution Proceedings is uncommon. It seeks the following Orders:-

1. THAT the Decree herein be executed by the sale of the 2nd 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 Market 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:

a) Judgement debt Kshs. 258,133,333.00

b) Interest thereon @ 12% from 6.11.2002 upto 6.11.2016	Kshs.433,633,993.00
c) taxed costs	Kshs.22,520,607.00
Total	<u>Kshs.714,317,933.00</u>

4. THAT upon the sale of the shares, the proceeds of sale be distributed and disbursed by the said NIC Capital Limited as follows:

a) Payment of the brokerage fees to NIC Capital Limited as prescribed under the said Capital Markets Authority Act:

b) Kshs.22,520,607.00 to M/s Shapley Barret& Co. towards payment of the taxed costs as taxed by this Honourable Court in the Certificate of Taxation dated 29th September 2016;

c) The balance to the decree holder, National Social Security Fund

d) The balance, if any, to the judgment debtor.

5) THAT upon conclusion of the execution of the decree as aforesaid, NIC Capital Limited do file a Certificate of Sale or Report in the Court file.

2. There is Judgement in favour of the Plaintiff against Shah Munge& Partners Limited (The 2nd Defendant) for the sum of Kshs.258,133.333/= together with interest thereon at 12% p.a from 6th November 2002 until payment in full. That Judgment is dated 23rd October 2009 and was delivered on 27th October 2009. A further Order was that the 2nd Defendant would pay the Plaintiff its costs of the suit and Counterclaim. Subsequently the Plaintiffs costs were taxed on 22nd September 2016 in the sum of Kshs.22,520,607/=. It is common ground the Judgment debt and costs are unpaid todate.

3. In a Supporting Affidavit sworn on 30th September 2016, Austin Ouko, the Acting General Manager of the Plaintiff Corporation states that it has information that the 2nd Defendant holds 5,250,000 Shares in a Public listed Company known as Nairobi Securities Exchange Limited (NSE Ltd). Annexed to that Affidavit is what is said to be a copy of a page from the Annual Financial Statement of the Company as proof of this information.

4. The Plaintiff is desirous of selling those Shares in Execution of the Decree herein and it is explained that the Shares are regulated by the Capital Markets Authority Act(Cap 485A) which require the shares to be sold at the Nairobi Stock Exchange, and the sale to be conducted by a duly licensed Stock Broker. The Plaintiff has identified and appointed NIC Capital Limited as the Licensed Stock Broker to conduct the sale and now seeks the sanction of Court to proceed.

5. Through a Replying Affidavit of John Munge sworn on 11th October 2016, the 2nd Defendant resists the Application. He states that the 2nd Defendant has filed an appeal against the Judgment of this Court and an Objection to the Taxation of Costs. In respect to the former, it is said that its progress is held back because of lack of typed proceedings. As to the latter, the Plaintiff is still awaiting reasons from the Deputy Registrar so as to proceed.

6. Mr. Munge avers that to allow the Execution by sale of the Applicant's Shares would paralyze and cripple the 2nd Defendant who will suffer irreparable damage.

7. Brought to the attention of this Court is an Application dated 23rd September, 2016 to the Court of Appeal in which the 2nd Defendant seeks an Order of Injunction to restrain the Plaintiff from Executing the Decree herein pending the hearing and determination of the Intended Appeal. In it, Mr. Munge avers

that the 2nd Defendant is willing to offer its Shares in NSE Ltd as security for a Stay Order at the Court of Appeal and beseeches this Court to temporarily Stay Execution herein. Presumably, as its application is being processed before the Court of Appeal.

8. Also brought to my attention is a Notice of Motion dated 11th October, 2016 in which the 2nd Defendant seeks Stay of Execution of the Decree herein pending:-

(i) The filing, hearing and determination of an Intended Objection to the Taxation of Costs.

(ii) The hearing and determination of the Application for Stay before the Court of Appeal.

This Application is yet to be canvassed.

9. This matter was argued by way of written Submissions which this Court has read, understood and considered.

10. It is common ground that the Plaintiff holds a Decree for a substantial amount against the 2nd Defendant. The Plaintiff works that amount (inclusive of interest and taxed costs) to be Kshs.714,317,933 as at the date of filing the present Application on 30th September 2016. There is no contention that the Decree remains unsatisfied. The Plaintiff thinks that this Application would have been a run of the mill Execution matter had it not been that the nature of assets sought to be sold are Shares regulated by statute, the Capital Markets Authority Act.

11. An immediate argument that confronted the Application is that the Decree sought to be executed is more than a year old and that the Applicant ought first to have filed a Notice to Show Cause before the Deputy Registrar. This Preliminary issue will be determined at once.

12. Order 22 Rule 18(1) of the Civil Procedure Rules provides:-

“ Where an application for execution is made—

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor

Having changed his employment since a previous order for attachment.”

This Court has little difficulty accepting the Plaintiff's proposition that the purpose and object of the Rule is to give the Judgment Debtor the opportunity to Show Cause why the Decree should not be executed in certain cases. Although the Plaintiff had moved Court through an Exparte Application (see the Application itself), the Court directed that the Application be served on the Judgement Debtor to give the Judgment Debtor an opportunity to answer to it. And indeed the Judgment Debtor has responded to the Application by opposing it. The effect of the Court's Directive that the Application be heard interparties is that the Judgment Debtor has been afforded an opportunity to Show Cause why Execution should not proceed as proposed. In effect the provisions of Order 22 Rule 18(1) have been satisfied and there is no infraction of those Provisions. Mr. Oyatsi for the Plaintiff must now concede that the Court's insistence that the matter be heard interparties was not without foundation!

13. Should the pendency of the Application for Stay dated 11th October 2016 and /or the Application for Stay on the Court of Appeal distract this Court from entertaining the instant Application? I think not. For now there is no Order Staying Execution herein as an earlier request for the Stay by the 2nd Defendant was dismissed on 25th September, 2015. But whether the Application of 11th October 2016 is Res judicata that Ruling is a discussion I would rather avoid for now as I do not want to prejudge the said Application which is still pending. It is sufficient, however, for me to observe that as there are no Orders for Stay, either here or at the Court of Appeal, and the Court can properly hear and determine the Plaintiffs' request for assistance to execute the Decree.

14. I now turn to the heart of the matter. It is accepted by both sides the judgment Debtor holds 5,250,000 shares in a Company listed at the Nairobi Securities Exchange and by dint of Section 31(6) of the Capital Markets Authority Act, the disposition of such Shares must be done in compliance with the trading procedures adopted by the Securities Exchange. Section 31(6) provides:-

“No person holding shares in a public company listed on an approved securities exchange, shall sell or transfer such shares except in compliance with the trading procedures adopted by such securities exchange.”

15. Section 23(1) of The Act then states:-

“No person shall carry on business as a stockbroker,

Derivatives broker, REIT manager, trustee, dealer, investment adviser, fund manager, investment bank, central depository, authorized securities dealer, authorized depository, or hold himself out as carrying on such a business unless he holds a valid licence issued under this Act or under the authority of this Act.”

The only persons allowed to trade in Shares of approved Securities are licensed persons, Brokers or Dealers. That is the basis of the request by the Plaintiff.

16. Just like the Plaintiff, this Court was unable to follow the argument that the present application does not lie because the authority of the Capital Markets Authority is required before the Shares are sold to members of Public by way of Public Auction. No specific provisions of legislation (primary or subsidiary) were pointed out to support this argument. It seems to the Court, that because the Shares are listed, they can be traded freely as long as it is done in compliance with the trading procedures adopted by the Nairobi Stock Exchange and with the Capital Markets Authority Act.

17. In finding merit in the Application before Court, the Court observes that it has inherent power to make such Orders in Execution that may be necessary for the ends of Justice. If it is demonstrated, as here, that the only assets of a Judgment Debtor are listed Shares then the Court can sanction the sale of those Shares in Execution of the Decree. If, because of the strictures of Statute, the sale can only be carried out in a certain manner and by certain persons, then the Court can and should allow a request for the Execution to proceed in compliance with the law. To argue, like the 2nd Defendant, that Execution of a Decree can only be carried out by a licensed Court Officer or Broker is to fail to recognize that there exists other modes in which a Court Decree can be executed other than the proverbial attachment and sale of property,

committal to Civil Jail or the appointment of a Receiver. Indeed Order 22 Rule 7(2) on applications for Execution of a Decree contemplates that the categories of modes for Execution are not closed. Order 22 Rule 7 (2) reads,

“Save as otherwise provided by Subrule (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,

a) ,,,,,,,,,,,,,,

b) ,,,,,,,,,,,,,,

c) ,,,,,,,,,,,,,,

d) ,,,,,,,,,,,,,,

e) ,,,,,,,,,,,,,,

f) ,,,,,,,,,,,,,,

g) ,,,,,,,,,,,,,,

h) ,,,,,,,,,,,,,,

i) ,,,,,,,,,,,,,,

J) The mode in which the assistance of the Court is required whether:-

(i) By the delivery of any property specifically decreed;

(ii) By the attachment and sale, or by the sale without attachment, of any property;

(iii) By the arrest and detention in prison of any person;

(iv) By the appointment of a receiver;

(v) Otherwise as the nature of the relief granted may require. (my emphasis)

What the Court must ensure is that, whatever the mode, the Execution is carried out under its supervision and any outcome accounted for.

18. I now need to make an observation on Prayer (4) of the Application. It reads:-

4. THAT upon the sale of the shares, the proceeds of sale be distributed and disbursed by the said NIC Capital Limited as follows:

e. Payment of the brokerage fees to NIC Capital Limited as prescribed under the said Capital Markets Authority Act:

f. Kshs.22,520,607.00 to M/s Shapley Barret& Co. towards payment of the taxed costs as taxed by this Honourable Court in the Certificate of Taxation dated 29th September 2016;

g. The balance to the decree holder, National Social Security Fund

h. The balance, if any, to the judgment debtor.

Ordinarily, it is not the business of Court to state how much, if any, of party and party costs ought to be paid to an Advocate as Legal Fees. And so I would not have granted Order 4(b) had it not been that the proposed payment is supported by an Affidavit of the General Manager of the Client Corporation (The Plaintiff).

19. The upshot, I allow the Notice of Motion dated 30th September 2016 as prayed. Costs to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 1st day of December, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Onsongo h/b for Kilonzo for 2nd Defendant

Oduol for 1st Defendant

Akello h/b for Oyatsi for Plaintiff

Alex - Court clerk