



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 6 OF 2011

KINGFISHER PROPERTIES LIMITED..... PLAINTIFF

V E R S U S

NANDLAL JIVRAJ SHAH 1ST DEFENDANT

VIMAL NANDLAL SHAH..... 2ND DEFENDANT

MEHUL NANDLAL SHAH (all trading as)

JIVACO AGENCIES 3RD DEFENDANT

RULING

1. There are two applications for consideration in this Ruling.

NOTICE OF MOTION DATED 17TH APRIL 2014

2. This is an application filed by the Defendants. The Defendants having filed a Notice of Appeal on 21st March 2014, against this Court's Ruling of 20th March 2014, now by that Notice of Motion seek stay pending that Appeal.

3. By the Ruling of 20th August 2013 this Court granted orders in favour of Plaintiff for-

i. **Defendant to give vacant possession of property Manyara**

Building/MBSA/BLOCK 1/351;

ii. **Judgment in favour of Plaintiff for Kshs. 232,000/- plus mesne**

profit at Kshs. 46,400/- from 3rd July 2010 until vacant possession is given of the property; and

iii. **Costs and interest**

4. Defendants filed a Notice of Appeal against that decision and by their application dated 20th September 2013 sought stay of execution pending appeal.

5. A Ruling to that application of 20th September 2013 was delivered on 20th March 2014. That application of the Defendants for stay pending appeal was dismissed.
6. It is that dismissal that is being appealed against by the Defendant by their Notice of Appeal filed on 21st March 2014.
7. The Defendants' Notice of Motion dated 17th April 2014 is in my view misconceived and incompetent. Why do I say so? It is because the Defendants do not have a right of appeal against this Court's dismissal of their application dated 20th September 2013 which application declined their prayer for stay pending appeal. The Defendants by virtue of Rule 41 of the Court of Appeal Rules ought instead to have approached the Court of Appeal with their application of stay pending appeal before that Court. Rule 41 so states as follows-

“41. The Court may in its discretion entertain an application for stay of execution or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court.”

In other words the Defendant had an option to apply, as they did before this Court for stay pending appeal. On that application being rejected they had a right to file an application before the Court of Appeal for stay pending appeal. The other option was to go straight to the Court of Appeal to seek such stay pending appeal even without having first to file the same before the High Court.

8. It follows that the fate of Defendant's Notice of Motion is one. It is dismissed with costs.

NOTICE OF MOTION DATED 16TH MAY 2014

9. This Notice of Motion is filed by Plaintiff. The Notice of Motion is brought seeking the following orders-
 - **The Honourable Court do order the immediate eviction of the Defendants from the suit property Msa/Block 1/351, with the assistance of the OCS Mombasa Central Police Station.**
 - **Any other order the Court deems fit to issue in the interest of justice.**
10. The Plaintiff essentially by the above seeks to execute the decree before taxation by obtaining immediate vacant possession of the property. This Court by its Ruling of 23rd August 2013 granted judgment in favour of Plaintiff for vacant possession, plus for rent arrears and mesne profit. To date, in the year 2015, the Plaintiff has not obtained possession of the property and there is no proof of payment either of rent arrears or mesne profit. In other words the Defendants have continued to date to occupy the Plaintiff's property, despite the order of 23rd August 2013 free of rent. The scale of justice should always be balanced. The Defendants although opposed the application and would wish to continue occupying the Plaintiff's property justice will not be served in their continued occupation at the expense of the Plaintiff who is not earning rental income from the property.
11. Section 94 of Cap 21 provides-

“94. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

The Court of Appeal considered this Section in the case **BAMBURI PORTLAND CEMENT CO. LTD v HUSSEIN (1995) LLR 1870 (CAK)** as follows-

“Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a Notice of Motion. The Motion must be served on the other party and heard inter partes. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the Registrar and Deputy Registrar the power specifically given to High Court under Section 94 of the Act. Rule 7(4) is clearly ultra vires Section 94 of the Act because the Section reserves that power exclusively to the High Court.”

This finding found favour in the judgment of the Court of Appeal in the case of **LAKELAND MOTORS LTD v SEMBI (1998)LLR 682 (CAK)**. The Court made the following finding:-

“The exercise of judicial discretion by the superior Court under Section 94 of the Act necessarily requires that parties to a decree passed by that Court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation. This, we think, is the spirit of the observation of Shah, J.A., with which we agree, in Bamburi Portland Cement Co Ltd v Abdulhussein (1995) LLR 2519 (CAK) in regard to the application of Section 94 of the Act.”

12.I find that the Plaintiff’s Notice of Motion dated 16th May 2014 is merited for the reasons stated above.

CONCLUSION

13.In the end the orders of the Court are -

- a. **The Notice of Motion dated 17th April 2014 is dismissed with costs to Plaintiff.**
- b. **The Notice of Motion dated 16th May 2014 is granted in that the Plaintiff is granted an order to evict the Defendants with the assistance of the Court Bailiff from the MANYARA BUILDING on MBSA/BLOCK 1/351 forth-with. The Police Station which is close to that building shall be present at such eviction to ensure that Law and Order is maintained.**
- c. **Plaintiff is granted costs of Notice of Motion dated 16th May 2014.**

It is so ordered.

DATED and DELIVERED at MOMBASA this 3RD day of MARCH, 2015.

MARY KASANGO

JUDGE