



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 786 OF 2007

MOHAMED INAYAT JAMADAR APPLICANT

VERSUS

DILSHAD AMANULLA SUBEDAR.....RESPONDENT

RULING

The Defendant/Judgment Debtor vide a Notice of Motion Application dated 28th July 2014 seeks orders that the court do grant a stay of proceedings herein pending the interpartes hearing and determination of the Defendant's application to set aside the exparte orders made pursuant to the application for Notice to show cause herein. The Applicant also prays that the court set aside the exparte order made herein pursuant to the plaintiff's application for Notice to show cause.

The application is supported on the grounds set out on the face of the application and on the facts set out on the affidavit sworn by **Odhiambo M.T. Adala Advocate** for the Defendant on 28th July 2014. Inter alia the Defendant basis his application on the following grounds:-

- a. The court is engaged in the process of settling terms of sale of the jointly owned property pursuant to court order granting judgment to the plaintiff for Kshs.8,000,000/-.
- b. The Defendant has Kshs.8,000,000/- which she has through other Advocates offered to pay to the plaintiff's Advocates who said they were taking instructions before accepting payment.
- c. The Defendant's son **SUHEL AMANULLA SUBEDAR** is and has been critically sick with cancer and the Defendant herself has also been unwell and these facts are well known to the plaintiff/Decree holder as the grounds for delay in prosecuting these applications.
- d. The Defendant had every reason to believe that the other Advocate had already paid to the plaintiff's Advocates the sum of Kshs.8,000,000/- but it now transpires that the fault lay at the door step of the plaintiff and his Advocates who have not confirmed to the said other Advocates that they are ready to accept payment of Kshs.8,000,000/-.
- e. The said sum of Kshs.8,000,000/- is ready and available and can be paid to the plaintiff's Advocates instantly so long as the plaintiff delivers the original certificate of title of the subject property to those Advocates and signs the Transfer of one half share to the Defendant's which conditions are normal and reasonable and are neither oppressive nor cumbersome.
- f. The order pursuant to the Notice to show cause was irregular and illegal on the grounds that the

said Notice was not properly served on the Defendant and the whole process is flawed and legally untenable.

- g. The judgment ordering the Defendant to pay Kshs.8,000,000/- to the plaintiff did not have a default clause directing that the property in dispute or half share thereof be sold in default of payment of Kshs.8,000,000/-.

The judgment debtor through his Advocate swore a supporting affidavit that reiterates the grounds set out on the face of the application. The judgment debtor acknowledges she was adjudged in the judgment entered on 8th March 2011 to pay to the plaintiff the sum of Kshs.8,000,000/- which the court held then to be the reasonable economic market value of the plaintiff's half share of the property **L.R.NO.209/3773** which was registered jointly in the names of the plaintiff and the Defendant's late husband and was held in equal shares. The judgment debtor was ordered to pay the said sum of Kshs.8,000,000/- to the plaintiff within 60 days of the date of judgment. This was not done and the plaintiff/Decree holder applied for execution of the judgment/decreed by way of a Notice to show cause why a prohibitory order should not issue against the judgment debtor's half share of **L.R.NO.209/3773 Sadi Road, South 'B' Nairobi**.

The judgment debtor takes issue that the NTSC was not appropriately served upon the judgment debtor and therefore contends that the same is liable to be set aside together with all the consequential orders flowing there from. The NTSC issued by the court on 19th July 2013 required the judgment debtor to appear in court on the 16th September 2013 for the hearing of the NTSC either in person or by an Advocate or agent duly authorized and instructed to show cause if any why execution should not be granted. The record shows that this NTSC was served upon the firm of **M/S Odhiambo M.T. Adala** who were on record for the Judgment/debtor on 29th July 2013 as per the affidavit of service dated 13th September 2013 and filed in court on 16th September 2013.

The record of the court on 16th September 2013 shows **Mr. Mwangi Advocate** appeared for the plaintiff/Decree holder Applicant before **Hon. Makori D/R** apparently in the absence of **Mr. Adala Advocate** and the court issued the orders as prayed in the NTSC. On the same date the record shows **Mr. Adala Advocate** appeared later before the D/R at 9.30 a.m. after the order had been made and is recorded to have apologized for attending late. As the court had already made the order **Mr. Adala Advocate** indicated he would require to set aside the order. **Mr. Adala** did not make the application to set aside the order and only surfaced in court on 2nd July 2014 during the hearing of the plaintiff judgment creditor's application for settlement of terms of sale of the suit property that the NTSC allowed to be sold in execution of the decree against the judgment debtor. On the 2/7/2014 **Mr. Adala Advocate** sought an adjournment of the hearing of the application for settlement of terms of sale which was by consent adjourned and fixed for hearing on 30th July 2014. **Mr. Adala Advocate** did not attend court on 30th July 2014 though the application was adjourned to be heard on 7th August 2014 before the D/R.

In the meantime the judgment debtor filed the present application on 31st July 2014 where she seeks the setting aside of the ex parte court order made on 16th September 2013 pursuant to the plaintiffs application for NTSC. The judgment debtor's contention is that the NTSC was not properly served on the judgment debtor and further that the judgment debtor has been ready and willing to pay the sum of Kshs.8,000,000/- as ordered to pay but the plaintiff has frustrated that effort by failing to confirm their readiness and willingness to accept the payment.

Although the application ought to properly have been made before the D/R who made the order on the NTSC this court has supervisory authority over what the D/R does and can therefore deal with the application. I have reviewed the application and I see no basis upon which the D/R'S order on the NTSC can be set aside. **Mr. Adala Advocate** was on record for the judgment debtor and as a duly authorized agent of the judgment debtor he could properly be served with any process intended for the judgment debtor. **Mr. Adala Advocate** did not protest that he had no instructions to receive the NTSC on behalf of the judgment debtor. Indeed he appeared in court for the judgment debtor albeit late on 16th September 2013. The essence of serving a NTSC on a judgment debtor where a decree is over 1 year is to bring to the attention of judgment debtor that execution proceedings of the decree had been initiated and to afford

the judgment debtor an opportunity to show cause if any, why execution should not be authorized in the manner proposed. I am satisfied that the judgment debtor in this case was properly served with the NTSC through his Advocate on record.

The judgment debtor has further not brought this application without unreasonable delay. The judgment debtor was aware the same day on the 16th September 2013 that an order to sell the property registered jointly with the plaintiff had been ordered. There was no reason to wait until the plaintiff decree holder had filed the application to settle the terms of the sale of the property nearly 10 months later in order to apply to set aside the earlier order. I see the judgment debtor's application as aimed at frustrating the judgment creditor's recovery effort which would amount to abuse of the court process. At any rate my view is that there was inordinate and inexcusable delay in bringing the present application which would militate against the court exercising its discretion in favour of the judgment debtor.

At the time **Hon. Justice Mbogholi Msagha** entered judgment the parties were agreed the market value of the house they jointly owned was about Kshs.16,000,000/- and hence each party's share was about Kshs.8,000,000/-. The judgment debtor was keen to keep the house and thus it made sense for the Judge to order her to pay the judgment creditor his portion of Kshs.8,000,000/- within a time frame of 60 days. The judgment debtor did not honour that commitment and it is now nearly 4 years since the judgment was entered. In essence of the judgment creditor remains entitled to half share of the proceeds of the house if it was sold. The judgment debtor's assertion that the plaintiff has frustrated her efforts to pay the sum of Kshs.8,000,000/- is not borne out by the facts. There was a time limit fixed for the payment of the amount which was not honoured. There was nothing to prevent the judgment debtor from tendering the deposit in court. In the present application infact the Judgment debtor acknowledges she does not have the money as she is praying to be allowed a reasonable time within which to raise the money. I do not think that it would be reasonable and/or fair to the judgment creditor if the judgment debtor is only to pay the adjudged sum of Kshs.8,000,000/-. The judgment debtor is entitled to the fruits of the favourable judgment that he got.

The value of properties keep on escalating and appreciating. The value of the jointly owned property cannot be the same as it was in March 2011 when judgment was entered. The judgment debtor has referred to the judgment debtor having offered to sell the property to a third party for Kshs.24,000,000/- and the same property being presently valued at Kshs.30,000,000/- as per the valuation report by paragon property valuers Ltd dated 7th May 2014 annexed to the plaintiff's replying affidavit. In case the Defendant/judgment debtor wishes to retain the house which the judgment creditor is a co-owner of then she must be ready to buy off his interest in the property.

Following failure by the judgment debtor to pay the decreed amount as ordered by **Hon. Justice Mbogholi Msagha** the plaintiff judgment creditor is entitled to proceed with execution of the decree and in the event the property which is jointly owned by the plaintiff and the judgment debtor is sold each party would be entitled to a 50% share of the proceeds of sale net of any expenses incurred in procuring the sale.

In the premises and for the reasons canvassed herein above I find no merit in the Defendant's application dated 28th July 2014 and the same is ordered dismissed with costs to the plaintiff.

Ruling dated, signed and delivered this 12th day of **March** 2015.

J. M. MUTUNGI

JUDGE

In the presence of:-

..... For the Applicant

.....For the Respondent