



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO.624 OF 2012

**PAUL OTIENO MUNGLA T/A PAUL MUNGLA & CO.ADVOCATES
.....APPLICANT**

VERSUS

**ANNE ACHIENG AJANJA.....
.....RESPONDENT**

RULING

Before me are two applications, one by the client/respondent Anne Achieng Ajanja dated 24th March 2014 supported by her affidavit sworn on the same day, and filed on 24th April 2014, brought under the provisions of Order 22 Rule 22, Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Article 159 of the Constitution of Kenya and all other enabling provisions of the law.

This application seeks for orders

- a.
- b.
- c.
- d.
- e. That this Honourable court does bring into court the decree issued to the client/judgment debtor/applicant in HCC133 of 2007 and order that out of the same, the sum of kshs 347,125 be remitted to the advocate/decree holder in satisfaction of the decree issued herein.
- f. That this honourable court do order a stay of execution of the judgment and order made by this honourable court pursuant to the advocate/respondent’s application dated 4th April 2013.
- g. Those costs of this application be provided for.

The application is premised on the grounds that:

- 1. The client/ judgment debtor/applicant has a decree for costs issued against her in favour of the advocate =/decree holder herein.
- 2. The client/judgment debtor/applicant has no known sources of income and the intended execution will only visit anguish since she is in no position and has no other known means of settling the present decree.
- 3. That the only available income that the Judgment debtor possesses is the decree issued in her favour in HCC No. 133/2007.
- 4. That if the said stay of execution is not granted, the judgment debtor will suffer immensely since the intended execution will not attain its intended purpose of funds for the advocate/decree holder

- but will visit anguish upon the judgment debtor.
5. The client/judgment debtor has never refused to pay the advocate but is facing serious financial constraints and is willing to offset a part of her decree in satisfaction of whatever sums that she may owe the advocate.
 6. That unless the application is granted, the advocate decree holder threatens to levy execution against the client judgment /debtor.
 7. That substantial loss will result to the client judgment/

Debtor unless the order sought is granted.

8. The application has been made without any unreasonable delay.
9. The application ought to be granted in the interest of equity and justice.

The supporting affidavit by the applicant/client/judgment debtor

expounds on the above grounds, with emphasis that the advocate had initially agreed to indulge her to settle decree for costs by installments but he reneged and threatened to execute and that no prejudice will be occasioned to him as the amount of taxed costs in her other suit HCC 133/2007 will be paid to him once called into this court.

This application is opposed by the advocate vide his replying affidavit sworn on 1st August 2014 and filed on 4th August 2014 wherein he deposes that after successfully representing the client herein in ELC 133/2007 and securing her a judgment of Ksh 9.03 million plus costs and interest, she did not pay him his fees and he subsequently filed and had his advocate client bill of costs assessed and allowed at Ksh 347,125.00 only and judgment entered on 4th April 2013 but that the client vigorously opposed the advocate's bill of costs through her advocate on record but that she had since only paid him Ksh 70,000.00.

It is further deposed that she has had periodic contacts of employment with the United Nation during the pendency of these proceedings hence, she could not be genuine in her averments that she is of no other means of settling the balance. It is further deposed that the client owns and operates a private saloon car KBA 172E Toyota station wagon which ownership is inconsistent with her allegations that she is impecunious and unable to settle the decretal sum herein.

It is further deposed that it is the client who is the tenant in Nyayo Embakasi estate house No. 13 Court 292 and not her daughter in the objection proceedings hereto.

That the said motor vehicle KBA 172E was one of the items proclaimed by auctioneers and that t advocate has no interest in her decree in HC ELC 133/2007.

The second application is by the objector, Laura Akinyi Odhiambo file by a Notice of Motion dated 24th March 2014 brought under the provisions of Order 22 Rule 51(2) of the Civil Procedure Rules 2010 and all other enabling provisions of the law seeking for:

1.
2.
3. That the attachment with respect to the objector's chattels found at Nyayo Estate Embakasi House No. 13 Court No. 292 and attached on account of a warrant of proclamation dated 17th March 2014 be lifted.
4. That costs of the application be awarded to the objector.

The application by the objector is supported by the grounds that the proclaimed chattels belong to the objector who has never been a party to the proceedings herein. The said application is further supported by the sworn affidavit of Laura Akinyi Odhiambo who deposed that she is a tenant to the mentioned premises and pays rent dutifully and that her chattels as listed in the attached proclamation by Keysian

Auctioneers dated 17th March 2014. That she has never been a party to this suit and that the auctioneer had threatened to attach items that fall outside the ambit of the attachable chattels and that it is in the interest of justice that the orders sought are granted.

The above application by the objector was equally opposed by the advocate/decree holder.

The two applications by the client/judgment debtor and objector were agreed to be heard and argued together, with one response from the respondent/advocate decree holder. When the said twin applications came up for hearing on 13th November 2014, Mr Kandere advocate submitted on behalf of the client/judgment debtor, Mr Makori appeared and submitted on behalf of the objector/applicant and Mr Mungla advocate submitted on his own behalf for his law firm as the advocate/decree holder.

In support of the judgment/debtor's application, Mr Kandere submitted that what the judgment debtor was seeking from this court was extreme indulgence to be allowed to bring into this court a decree to offset the advocate's taxed costs, pursuant to the principles of equity, justice and good conscience. That the judgment debtor was in possession of a decree in a suit ELC 133/2007 where the advocate decree holder was representing her and after its successful conclusion, advocates costs were taxed after a dispute with the client but that since she is not in a sound financial position to settle the taxed and decretal costs, in the absence of any other known law allowing decree in another court to be brought into the proceedings to settle the claim, this court should exercise equity and good conscience to allow this application and allow the client/judgment debtor to liquidate the decree using another decree as she has been settling by installments.

On the part of the objector, it was submitted by Mr Makori that the attached goods do not belong to the judgment debtor but to the objector who is a lawful tenant in the premises wherein the items were proclaimed and that she is only a tenant to the judgment debtor and a daughter to her. Further, that the objector has an equitable interest and a right to the attached property hence the judgment debtor has no justiciable claims to the same.

In opposition to both the applications by the judgment debtor –client and the objector, Mr Mungla advocate –decree-holder submitted, urging the court to dismiss both applications with costs that justice in the case demands that this court must act within the established legal framework and not in a vacuum. That as he was not a party to the ELC 133/2007, the court cannot grant the prayer for calling into this court a decree passed in another suit and as he has no interest in her decree in the ELC 133/2007.

He further submitted that the judgment debtor does not deserve the mercy of this court as she is a total liar, to the effect that she is impecunious yet she owns motor vehicle registration No. KBA 172 E as shown by copy of records, which motor vehicle was available for attachment in execution of decree herein. That the judgment debtor has come to court with unclean hands and has remained silent on that issue and neither has she rebutted the contention that she is employed by the United Nations on periodic assignments.

In opposing the objector's application to the proclamation levied by Keysian Auctioneers on 17th March 2014, the advocate/decree holder submitted that the objector is the daughter to the judgment/debtor /client and that although she alleges that all the household goods as proclaimed were hers, she laid no claim to the motor vehicle registration No. KBA 172F.

That the objector is equally a liar as the purported lease/ tenancy agreement exhibited had expired on 1st May 2013 at the time of the proclamation and that albeit the said purported lease/tenancy agreements commands that all payments be made in the landlord's account, there is no single deposit slip by the objector into the landlord's account. That the objector was personally known to the decree/holder and that she had personally approached the decree holder and informed him that she was a student at Kenya polytechnic living with her aunt in Kileleshwa and that in the absence of evidence that she was in any employment to earn a living and afford such rent of Ksh 28,000.00 and in the absence of evidence from the receipts as to who the recipients of rent were, the objector was less

than candid with the court.

Further, Mr Mungla submitted that the judgment/debtor and objector had displayed out right dishonestly before the court hence they could not benefit from the equity of the court. He urged the court to dismiss the two applications with costs.

In response, Mr Kandere submitted that he had provided the provisions of the law under which the judgment debtor's application was brought and that the Constitution had given the court power to make any orders within its jurisdiction. In addition that HCC 133/2007 was relevant to this matter as the decree therein is what had given rise to this matter maintaining that the judgment /debtor was not in a financial position to liquidate the claim as he was currently unemployed and was only seeking for more time to settle decree herein after enforcement of decree in HCC 133/2007.

Mr Makori advocate on behalf of the objector responded that Order 51 Rule 1 is clear as to what the objection is required to demonstrate before court to wit an interest whether legal or equitable and urged the court to find that the receipts filed were genuinely issued by the landlord.

I have carefully considered the two applications by the judgment debtor and the objector, supported by the affidavits sworn by the respective applicants, the annexures thereto and the replying affidavits opposing the said applications as separately filed and argued.

I have also carefully considered the rival oral submissions by counsels for the respective parties. The relevant law as cited has also been considered in writing this ruling.

None of the parties to the two applications cited any case law to support their propositions/opposition

On the application by the judgment debtor, from the provisions of the law relied on, the only issue for consideration is whether the application for stay and for calling of decree in ELC 133/ 2007 is merited.

The power to grant such an order as sought is purely in the discretion of the court, which discretion, however, must be exercised judiciously.

Sections 1A and 1B of the Civil Procedure Act enjoin the court to apply the overriding objectives of the Act to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. And for purposes of furthering the overriding objective specified in Sections 1A of the Act, Section 1B mandates the court to handle all matters presented before it for the purposes of attaining the aims of:

- a. The just determination of the proceedings;
- b. The efficient disposal of the business of the court;
- c. The efficient use of the available judicial and administrative resources.
- d. The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and
- e. The use of suitable technology.

Under Section 3A, nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Order 22 Rule 22 of the Civil Procedure Rules gives this court discretion to stay execution of decree pending any application.

On the other hand, Order 40 Rule 1 and 2 refer to temporary injunction and interlocutory orders which I find irrelevant in the circumstances of this case as it is a clear case of stay of execution of decree and invocation of the orders of injunction is far-fetched.

Under Section 69(e) of the Civil Procedure Act, does not exist hence, the provisions as cited is equally irrelevant and inapplicable. The Section 69 of the Civil Procedure Act has no Sub Section and it concerns decision where appeal is heard by two or more judges.

However, Section 63 (e) of the Civil Procedure Act provides that in order to prevent the ends of justice from being defeated in the court may, if it is so prescribed (e) make such other interlocutory orders as may appear to the court to be just and convenient.

Article 159 of the Constitution of Kenya, 2010 is on judicial authority of the courts and tribunals established under the Constitution; and in exercising such authority, the courts and tribunals are enjoined to be guided by the principles that :-

- a. Justice shall be done to all, irrespective of status;
- b. Justice shall not be delayed;
- c. Promotion of ADR;
- d. Administer justice without undue regard to procedural technicalities; and
- e. The purposes and principles of the Constitution are protected and promoted, among other principles.

Order 50 Rule 1 of the Civil Procedure Rules is the procedure for making all applications to court and gives the court the discretion to direct on whether an application shall be heard in chambers or in open court.

Having set out the law as relied on by the judgment /debtor /client/applicant, the issue for determination in her application is whether she deserves the exercise of the discretionary power of the court to grant her the orders sought.

Although in his submissions, Mr Kandere did not delve into the relevant provisions of the law as cited, he urged this court to apply the principles of equity, justice and good conscience to grant the orders sought. This court can only apply those principles if there are no specific provisions of law providing of the prayers being sought. As I have exposed the provisions of the law, Sections 1A and 1B, 3A and 63(e) of the Civil Procedure Act are clear on what this court is enjoined to do, in the determination of disputes under the Act. And even where there is no specific provision to the contrary, Section 3 of the Civil Procedure Act provides that: Nothing in the Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

In other words, although Mr Mungla submitted that this court must base its decision on the prayers sought on sound legal principles and not in a vacuum, and whereas I agree with him, I do not find that the orders being sought can be granted in a vacuum, with the relevant Sections of the law and the Constitution having been cited and even if there were no such provisions cited, that in itself would not render the application void as Section 3, 1A and 1B of the Civil Procedure Act would come in handy.

The only question for this court's determination is whether, in the circumstances of this case as submitted, the judgment/debtor /applicant's application should be granted.

Section 38 of the Civil Procedure Act provides that:

“38 subject to such conditions and limitation as may be prescribed, the court may, on the application, of the decree holder, order the execution of the decree

- a. ***By delivery of any property specifically decreed;***
- b. ***By attachment and sale, or by sale without attachment of property;***
- c. ***By attachment of debts;***
- d. ***By arrest and detention in prison of any person.***

- e. *By appointment of a receiver; or*
- f. *Such other manner as the nature of the relief granted may require.”*

The decree subject of this suit is a monetary one for payment of money by the judgment debtor to the decree holder. The latter has many options available under Section 38 of the Civil Procedure Act to enforce the said decree. When he exercised his option to attach the judgment debtor's property, he was met with resistance in two ways-

- i. An objector who is the judgment debtor's daughter claiming that the attached chattels belong to her; and
- ii. The application by the judgment debtor urging this court to stay execution herein until decree in ELC 133/2007 wherein the advocate/decree holder herein successfully represented the judgment debtor /client is called into this court to settle this decree as the amount in ELC 133/2007 is higher.

This court notes that although the judgment debtor has cited HCC 133/2007, the annexures disclose an ELC 133/2007 decree issued on 21st March 2014 and given on 20th April 2012. The corresponding certificate of costs in that matter is for Ksh 643,110.00 being party and party costs as per certificate issued on 18th March 2014 and taxed on 11th February 2014. The parties to that case are Dickson Elkana Sese vs Attorney General, Commissioner of Lands, Registrar of Lands, Nancy Wambui Kamau and Ann Achieng Ajanja the judgment debtor herein, who was the successful party in ELC 133/2007 and in whose favour the decree and certificate of costs were given.

In his submissions, Mr Kandere however seeks for time to settle the decretal sum whereas in the body of the application, the judgment debtor seeks for an order to bring into this court the decree issued to the client/judgment debtor in HCC 133/2007 and order for the sum of Ksh 347,125.00 to be remitted to the advocate/decree holder herein in satisfaction of the decree issued herein; which two positions are quite distinct, contradictory and inconsistent.

In my view, this court cannot and has no power to order for the decree passed in an Environment and Land Court to be brought into this court for settlement of the decree herein, other than in a manner provided for under Section 38(c) and order 23 of the Civil Procedure Act and Rules on attachment of debts or Garnishee proceedings which have to be commenced by the decree holder. The judgment debtor in this case is however, selecting the mode of execution of decree herein for the decree holder and that mode is that ***“please, attach my decree in ELC 133/2007 which is not yet due for settlement but take it and enforce it, take your money and give me the balance.”***

In my considered view, the application herein is the reverse mode of Section 38 (c) and Order 23 of the Civil Procedure Act and Rules which is an abuse of the process of court and is therefore misconceived.

In addition, to call for the decree in ELC 133/2007 is to interfere with the process of the Environment and Land Court, which is a superior court of the same status as the High Court, but not subordinate to this court. The Environment and Land Court is an independent superior court, as established under Article 162 (2) (b) of the Constitution. It is a Court that operates independent of the High Court and its decrees cannot be enforced by this court (High Court). The execution of decree herein by the decree holder by way of attachment is a legal process hence the principle of legality is fulfilled.

On whether it is appropriate to enforce decree by way of attachment, I find in the affirmative for reasons that the decree holder has chosen the most appropriate mode of execution of decree and should it not bear any fruits, he has other options available under Section 38 of the Civil Procedure Act. It cannot be stated that attachment of property subjects the judgment debtor to anguish as the judgment debtor has not demonstrated any anguish that she is likely to suffer. In any event, she states that she is unemployed and that she has no attachable property, which allegations have been counteracted by the decree holder.

The decree holder has exhibited evidence of a motor vehicle KBA 172E as belonging to the judgment debtor who has not controverted that fact. The judgment debtor has not shown that if that motor vehicle is sold, it will not fetch the decretal sum claimed or that its attachment and sale will subject her to untold hardship.

In my view, the judgment debtor only intends to stretch and postpone the payment of the decretal sum so long as she is able to engage the decree holder in endless legal gymnastics which I find, are clearly intended to delay justice and abuse the process of court.

The judgment debtor displayed dishonesty by citing HCC 133/2007 while knowing that the matter is an Environment and Land Court matter ELC 133/2007 and which decree can only be enforced by the ELC and not by the High Court. The Judgment debtor also stated that she was unemployed but does not disclose where she got the Ksh 70,000/- which she paid to the decree holder. She claimed that she has tried to plead with decree holder to be patient and wait until she sorts out her financial issues but that he has adamantly refused which plea was only made on 13th March 2014 after the decree holder had written on 13th March 2014 asking for timelines of settlement and to date 12th May, 2015, there is no indications as to when those financial issues would or are likely to be sorted out.

The judgment debtor has not demonstrated that she is even in the process of executing that decree in ELC 133/2007 to recover the costs as awarded to her yet the decree was passed on 20th April 2012 and it appears from the annexure AAJJ that she only extracted the said decree in ELC 133/2007 after the proclamation by Keysian Auctioneers on 17th March 2014 and equally, she only had her bill of costs taxed in the same ELC 133/2007 on 11th February 2014 against the Attorney General and extracted the certificate of costs on 18th March 2014. This was only after the decree holder herein sought to enforce his decree against her by the proclamation of 17th March 2014. No doubt, the judgment debtor is not interested in expeditious justice but inside shows and cannot earn this court's consideration. Justice is for both parties to a dispute. The decree holder has a legitimate expectation to expeditiously recover his fees as decreed by the court, yet the judgment debtor does not seem interested in pursuing her own claim against the judgment debtor in ELC 133/2007 and wants to offload that burden to the decree holder herein. That is not permissible. This court finds that it would be unfair and unjust to allow the judgment debtor delegate her own role of battling out with the Attorney General over costs to the decree holder advocate who is not a party to those proceedings in the ELC matter. She must bear her own burden.

In the circumstances, I find no merit in the judgment debtor's application and submissions and I accordingly dismiss it with costs to the respondent /decree holder.

Turning on to the objector's application and objection to the proclamation of attachment of movable property dated 17th March 2014 by Keysian Auctioneers, I have carefully considered the application, supporting affidavit of Laura Akinyi Odhiambo, the replying affidavit by the decree holder and the oral submissions by counsels on the same. The only issue for determination is whether the objection proceedings herein are meritorious.

Under Order 22 Rule 51(1) of the Civil Procedure Rules 2010,

“51 (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree holder of this objection to the attachment of such property.

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.”

Under Rule 52, the objector is entitled to an automatic stay of execution upon complying with Rule 51 and under Rule 53, if the judgment debtor after receipt of notice of objection to attachment fails to

reply to the court within the period prescribed by the Notice the attachment shall be raised.

The objector contends that she has an equitable interest in the chattels as listed in the proclamation dated 17th March 2014. The decree holder on the other hand states that he is personally known to both the judgment debtor and objector herein who are mother and daughter respectively, and that the house from which the chattels were proclaimed is rented by the judgment debtor and not the objector who is a student at Kenya Polytechnic, and who did not demonstrate that the items proclaimed belonged to her.

I have carefully examined the rival submissions and contentious and the annexures including the tenancy agreement exhibited by the objector. No doubt, the lease agreement annexed is a document that expired at midnight on 1st May 2013 and there is no demonstration that the same was renewed in her favour, assuming as deposed in her affidavit, that she is the tenant in Nyayo Embakasi Estate, Court 292 House No. 013, and not her mother the judgment debtor herein. Even assuming that she was a tenant by way of an oral agreement, the objector did not display any evidence that she was paying for any water or electricity as a consumer thereof and or resident of the said premises which would have persuaded this court to believe her. There is no evidence that the rent payable was inclusive of water and electricity charges. She did not even avail evidence of deposit of Kshs 27,000.00 allegedly paid and held by the landlord as required by the lease agreement annexed to her affidavit.

The attached receipts for rent dated 22/1/2014 and 18/2/2014 respectively do not even state for which specific months the rent was being paid and or received by whom. In addition, clause 4.3 of the annexed tenancy agreement is clear that rent was payable monthly in advance on or before 5th of each month. The receipts attached are in my view a creation by the objector and do not appear genuine and I reject them.

Further, the objector did not exhibit any evidence or receipt showing that any of the items contained in the schedule of movable property belonged to her. The schedule shows that all the 11 items were old. With affidavit evidence from the decree holder that the objector is a student at Kenya Polytechnic University and that she had personally approached him requesting for more time to be given to her mother to settle the claim, it is surprising that a college student could suddenly have become a proud owner of:

- old sofa sets
- old colour television,
- old floor carpets
- old music system, old assorted curtains
- old cooker and a cylinder
- old fridge
- and a microwave
- an old television cabinet
- old wall picture
- old coffee table and old stools
- old dining table and old chairs
- old assorted puffs

All valued at about 120,000/- which items, according to the said attached proclamation were left in the custody of the judgment debtor Ann Achieng for attachment after the expiry of the period in the notice of proclamation of attachment. The objector, on the other hand said nothing concerning those clear facts of old household goods, her being a student and the fact that the goods were left in the custody of her mother after proclamation. She did not claim to be housing her mother. The objector did not deny that she was the daughter to the judgment debtor and that she was a university student. She had nothing to comment as to when and how she acquired all the old chattels that were attached and or proclaimed.

This court is indeed inclined to believe the decree holder that the annexed expired lease tenancy agreement is suspect as there is no rent deposit in the purported landlord's bank account as provided for in clause 4.3 thereof. In addition, it is common ground that a university student who is

unemployed (as it was never disclosed that the objector is employed) living with her parents, cannot, as a matter of fact be the owner of her parent's chattels in as much as she may be the user thereof.

From the decree holder's replying affidavit at paragraph's 9,10, which depositions have not been controverted in any way by the objector, I am persuaded that the objector and her mother the judgment debtor are well known to the decree holder and that the objection proceedings herein are a red herring and a smoke screen intended to deceive this court to aid the judgment debtor escape justice at that.

For those reasons, I dismiss the objector's Notice of Motion dated 24th March 2014 and order her to pay to the decree holder costs of the objection proceedings for allowing herself to be used by her less than candid mother to steal a match on the decree holder.

In the same breath, I dismiss the judgment debtor's application dated 24th March 2014 with costs to the advocate/decree holder.

Dated, signed and delivered in open court at Nairobi this 12th day of May, 2015.

R.E. ABURILI

JUDGE

12/5/2015

Coram Aburili J.

C.C. Kavata

Mr Mungla for the applicant/respondent advocate.

No appearance for objector/applicant

No appearance for respondent /client

COURT- Ruling read and pronounced in open court. The ruling was scheduled for delivery on 22nd January 2015 but was inadvertently omitted from the cause listing for that day

R.E. ABURILI

JUDGE

12/5/2015