



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL SUIT NO 189 OF 2004

KIAHURA PROPERTIES LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

JAMES KAMAU THIMBA.....2ND DEFENDANT

RULING

INTRODUCTION

1. The 2nd Defendant's Notice of Motion application dated 16th December 2014 and filed on 18th December 2014 was brought under the provisions of Order 22 Rule 18(1) and Order 51 Rule 1 of the Civil Procedure Rules. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-
 - a. **Spent.**
 - b. **Spent.**
 - c. **THAT there be no execution against the applicant or his property.**
 - d. **THAT the costs of this application be provided for.**

THE 2ND DEFENDANT'S CASE

2. The application was supported by the Affidavits of James Kamau Thimba that were sworn on 16th December 2014 and 23rd February 2015. His Written Submission were dated 2nd April 2015 and filed on 15th April 2015.
3. He contended that sometime in 2002, he was informed by the Registrar of Companies that the Plaintiff Company was struck off the Companies register for non-compliance with the provisions of the Companies Act but that there were no available records at the said Registry as the same were obliterated after the Plaintiff Company ceased to exist.
4. It was also his further averment that during the said period, the existing directors of the Plaintiff Company died leaving no successors to the defunct Company. His argument was that the Plaintiff's advocates had continued to act for a non-existent person and could not have obtained any instructions to commence execution proceedings against him. He also contended that decree was issued on 27th January 2012 and having been over a year, the Plaintiff was required to serve

- him with a Notice to Show Cause as provided in the Civil Procedure Rules.
5. He was apprehensive that he was likely to suffer irreparable loss in the event execution proceeded against him for the reason that he would not be able to have any recourse from the non-existent Plaintiff Company. He therefore urged the court to grant him the prayers that he had sought.

PLAINTIFF'S CASE

6. In response to the said application, Charles Kibiku Kimani, a Director of the Plaintiff Company swore a Replying, Further Affidavit and an Affidavit in Reply on behalf of the Plaintiff Company on 20th January 2015, 15th May 2015 and 23rd July 2015 respectively. The Plaintiff Company's Written Submissions were dated and filed on 18th May 2015.
7. The deponent denied that all the Directors of the Plaintiff Company had died as he was still alive together with his Co-directors namely James K. Thairu and E. Kamau Mbugua and that he was the Director who testified on behalf of the Plaintiff Company in the suit herein whereupon the court awarded costs to the Plaintiff and the 1st Defendant Companies that were to be borne by the 2nd Defendant herein. The Plaintiff Company's costs were, on 10th September 2014, taxed at Kshs 672,519/=.
8. The Plaintiff Company averred that the 2nd Defendant had raised similar issues about its non-existence before the Taxing Master but he had been unable to provide proof of the same. In fact it was its argument that the Plaintiff Company had never been struck off the Register of Companies. It further contended that the present application was incurably defective, baseless and devoid of merit as the 2nd Defendant neither filed an appeal nor sought a review of the judgment that had been delivered herein nor filed a reference to challenge the Taxing Master's decision.
9. It therefore urged the court to dismiss the 2nd Defendant's present application with costs to it.

LEGAL ANALYSIS

10. The 2nd Defendant's main arguments could be broadly categorised as follows:-
 - a. **THAT the Plaintiff Company's advocates could not purport to act for it for the reasons that the said Company was no longer in existence.**
 - b. **THAT the purported execution against him by the Plaintiff was unlawful as he had not been served with any Notice to Show Cause Why Execution Should Not Issue the decree having been issued more than (12) months before the said execution proceedings.**
11. The court dealt with the said issues under the following heads.

I. NON-EXISTENCE OF THE PLAINTIFF COMPANY

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12. The 2nd Defendant was adamant that no execution proceedings could ensue against him for the reason that the Plaintiff Company did not exist at the Company's Registry. He relied heavily on a copy of a letter dated 18th February 2015 from the Registrar of Companies to his advocates which was annexed to his Affidavit in Reply that was sworn and filed on 23rd February 2015, Exhibit marked "JKT 1& 2".
 13. In the said letter, it had been indicated that the business/company name did not appear in the data base of the Registrar of Companies. It had sought to have the 2nd Defendant's advocates furnish it with the registration number for its further action. There was, however, no indication that the said advocates responded to the said letter.
 14. What was discernible from the said advocates letter dated 12th February 2015 to which the Registrar of Companies was responding to, was that there was no Certificate of Incorporation Number that would have assisted the said Registrar of Companies conduct a proper search of the Plaintiff Company.
 15. Notably, in copies of the Plaintiff's advocates letter of 7th April 2015 and receipt for payment of

- the search attached to the Plaintiff's Further Affidavit and marked Exhibit "CKK", the Plaintiff's advocates had clearly indicated that the Certificate of Incorporation Number as C. 14915. The response from the Registrar of Companies also bore the said Number.
16. Undoubtedly, a response from the Registrar of the Companies was sufficient reason for this court to have accepted the Plaintiff Company's assertions that its Company file was available at the Companies Registry. Indeed, the letter of 18th February 2015 from the Registrar of Companies did not say that the Plaintiff Company did not exist. However, the court could not conclusively state who the current Directors/Shareholders of the Plaintiff Company were as the information was based on the Company's Annual Returns for the year 1980.
 17. What the court could, however, conclusively confirm was that Paragraph 14 of the judgment that was delivered by Musinga J (as he then was) on 27th January 2012 shows that the 2nd Defendant neither filed his Statement of Defence herein nor participated in the proceedings herein that culminated in the said judgment.
 18. It was also evident from the Ruling of the Taxing Master dated 10th September 2014 that the 2nd Defendant never opposed the Plaintiff's Party & Party Bill of Costs dated 22nd April 2013. However, the 2nd Defendant was present at the time the Taxing Master rendered her decision.
 19. There were very many gaping holes in the 2nd Defendant's case. The onus was on him to demonstrate that the Plaintiff Company was not in existence or that its directors had died. The issue ought to have been raised right at the outset. The court was therefore in agreement with the Plaintiff Company's submissions that in the absence of any evidence that it had been struck off from the Companies Register, there was no basis on the part of the 2nd Defendant to allude to the fact that the Plaintiff Company did not exist.
 20. In addition, in the absence of any proof of death of the Plaintiff Company's Directors, the court was more persuaded to find that the Plaintiff's advocates had proper instructions to act for the Plaintiff Company herein and that its claim against the 2nd Defendant was legitimate and enforceable.

II. NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE

21. It was not necessary for the Plaintiff Company to have served the 2nd Defendant with a Notice To Show Cause Why Execution Should Not Issue as he had been contended for the reason that the Plaintiff Company had commenced execution proceedings against the 2nd Defendant for its costs that were taxed on 10th September 2014.

III. COMPLAINT WITH COURT'S DIRECTIONS

22. Having said so, the court concurred with the Plaintiff Company's arguments that from the moment the 2nd Defendant failed to comply with the court's directions of 19th December 2014 to furnish security by way of deposit of the taxed costs and the auctioneers fees in the sum of Kshs 95,200/=, which sums were to be deposited in a joint interest earning account within forty five (45) days of the said order, he had lost the audience of the court.
23. However, in view of the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to technicalities, the court elected to consider the application herein on merit.
24. Having considered the pleadings, the affidavit evidence and the written submissions in respect of the parties' cases, the court was not persuaded at all that it should stay the execution herein. In any event, stay of execution ought to be pending a particular event, which in this case was lacking. Appreciably, an order for stay of execution can never be permanent. It is granted to safeguard a party's interest while the court makes a determination.
25. The Plaintiff Company was not required to serve the 2nd Defendant with a Notice To Show Cause Why Execution Should Issue. Hence his application under the provisions of Order 22 Rule 18 (1) of the Civil Procedure Rules, 2010 was misplaced and unsustainable.

DISPOSITION

20. For the foregoing reasons, the court found that the 2nd Defendant's Notice of Motion application dated 16th December 2014 and filed on 18th December 2014 was not merited and the same is hereby dismissed with costs to the Plaintiff Company.

21. For the avoidance of doubt, the status quo order that was granted by the court on 2nd June 2015 pursuant to the consent of the parties is herewith vacated, lifted and/or set aside.

22. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of July 2015

J. KAMAU

JUDGE