



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 20 OF 2004

ROSSLYN DEVELOPMENT LIMITED.....PLAINTIFF

VERSUS

BIDCO OIL REFINERIES LIMITED.....DEFENDANT

RULING

The application before this Court is a Notice of Motion dated 10.7.13 brought under Order 21 Rule 8, Order 22 Rule 6, 11 and 18, Order 51 of Civil Procedure Rules, 2010 and Sections 1A, 1B, & 3A OF Civil Procedure Act. The applicant seeks the following orders;

- i. **THAT** the execution of Warrants of Attachment and Sale be stayed pending further Orders of this Honorable Court.
- ii. **THAT** the Proclaimed and attached goods be released to the Defendant unconditionally.
- iii. **THAT** the execution of the Decree dated 4th October, 2011 be stayed upon such terms as this Honorable Court may deem appropriate, in the circumstances.
- iv. **THAT** execution of warrants of attachment and sale be stayed pending further orders of this Honorable Court.
- v. **THAT** the warrants of attachment and sale be delivered up to the Registrar of this Honorable Court and cancelled.
- vi. **THAT** there be stay of execution pending the inter-parte hearing and determination of this application.
- vii. **THAT** the costs of this application be borne by the Plaintiff/Respondent.

The application is premised on the grounds that;

- a. This application has been presented in Court without undue delay in the circumstances.
- b. The Applicant has already paid up the Plaintiff/Decree-Holder's cost taxed at **Kshs.713,227.00** and further there is a pending Appeal being **NAIROBI C.A. NO. 258 OF 2001** against the decretal amount which is pending for hearing and determination at the Court of Appeal.
- c. The Decree herein was issued on 4th October, 2011 and as such, the Execution herein is

- WRONGFUL** for want of Notice to Show Cause as to why Execution should not be issued.
- d. The Applicant is ready and willing to abide by any condition this Honorable Court may deem just and expedient in the circumstances.
 - e. The Defendant/Applicant stands to suffer irreparable loss as the attached goods which are tools of trade of the Defendant are at risk of damage and the pending Civil Appeal No. 2580 of 2001 will be rendered nugatory if no stay of execution is granted.

The application is supported by the sworn affidavit of Esther W. Muiruri, the Legal Officer of the applicant. She deponed that the Plaintiff obtained Judgment against the defendant on 4th October 2010 after the Defendant's Defence dated 17th February 2004 was struck out. The defendant being dissatisfied with the Court's Ruling filed a Notice of appeal and requested for copies of proceedings and Ruling delivered by the Honorable Lady Justice R.N. Sitati. The Plaintiff filed its Bill of Costs and the Taxing Officer vide a ruling on 5th June, 2013 awarded it costs of Kshs.713,277/=. The plaintiff's advocates wrote to the defendants vide a letter dated 14th June, 2013, confirmed to the Defendant's Advocates that a thirty (30) days stay of execution period had been granted. The defendant subsequently on 1st July, 2013 sent their taxed costs vide cheque number 028374 dated 28th June, 2013. On 3rd July 2013 the Plaintiff applied for and were supplied with Warrant of Attachment of movable property and even engaged the services of **Clear Real Traders – a firm of Auctioneers** who on 8th July, 2013 moved to the Defendant's premises and proclaimed various defendants' tools of trade. The Plaintiff argue that the Decree was issued on 4th October, 2011, more than a year and therefore execution ought to have been by way of Notice to Show Cause why execution as provided under Order 22 Rule 18 Rule of the Civil Procedure Rules, 2010. It was deponed that Warrants of Attachment are therefore irregular and the Defendant stands to suffer, embarrassment, irreparable loss and damage to it's the properties as the attached properties are inclusive of tools of trade are at risk of damage rendering its business to a standstill and untold embarrassment; that the defendant has a pending Appeal **NAIROBI C.A. NO. 258 OF 2001** which has high chances of success and pleads to Court to exercise its discretion in its favour and grant the defendant applicant orders sought for Stay of Execution.

The application was opposed. The plaintiff/ respondent filed a replying affidavit dated the 29th day of July sworn by David Muthee Michuki, he reiterated the facts as raised by the applicant but deponed that after the respondent filed a Notice of Appeal, the applicant took no steps to file an application for stay of execution and therefore the application herein is belated and offends the provisions of Order 41 Rule 6 (2); that the matter was last in Court on 5th June 2013 when the court delivered its ruling on taxation of the Bill of Costs; that the Applicant was aware that execution process was eminent and requested for stay of execution which the Plaintiff granted for a period of thirty (30) days allowing the Defendant to settle the full decretal sum that the Defendant subjected itself to execution and it is therefore untenable for it to now fault the same process in the pretext that a Notice to Show Cause was not issued; that the Defendant is only trying to delay what is inevitable as it does not propose how to settle the decretal sum at all and has come to this Court with tainted hands since it has not obeyed even these parts of the Court's judgment that it is not contesting; that the Applicant is in contempt of Court and the Plaintiff intends to bring a relevant application shortly to cite the Directors of the Defendant for contempt of Court and has also failed to show what irreparable damage it stands to suffer if the execution proceeds against it; that the plaintiff is of sound financial standing capable of refunding the decretal sum if the Applicant's Appeal succeeds; that what is in contention is a piece of land belonging to the Plaintiff which the Applicant converts upon which it has continued to trespass and that the value of the said land is more than adequate to meet the decretal sum in the event that the Applicant's Appeal succeeds; that the application is merely an attempt to delay the Plaintiff from enjoying the fruits of tis judgment without a justifiable cause and that the objection raised by the Applicant is a merely a technicality which the Court countenance to delay or deny a substantive right. He urged the Court to dismiss the application and the Plaintiff proceeds with execution.

Parties filed written submissions Miss Thuo for the applicant and Mr. Kimanthi for the respondent sought to rely on their affidavits and written submissions. The applicant submitted that the execution of the decree was over 1 year old from the date of judgment; that judgment was delivered on 4th October, 2010

and execution was done on 8th July, 2013 hence the same should have been executed by way of a Notice to Show Cause as provided for under Order 22 rule 18(1) of the Civil Procedure Rules. It was further submitted that if stay of execution is not granted pending the hearing and determination of the Civil Appeal 258 of 2011 filed by the defendant the same would be rendered nugatory and the defendant would suffer prejudice, and substantial loss as the decretal amount of Kshs. Kshs. 15,715,727.00 out of which Kshs. 713,277.00 has been paid as taxed costs; that the plaintiff's advocate alleges that the plaintiff is sound financially capable of refunding the decretal amount but the same is not supported by any evidence e.g. bank statements.

2. The defendant /respondent referred the Court to Order 42 rule 6(2) which provides that “*no order of stay of execution can be made unless (2) No order for stay of execution shall be made under sub rule*

(1) unless—

(a) *the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

(b) *such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

Respondent argued that there is no application brought under Order 42 rule 6 but Order 21 and 22 of the Civil Procedure Code and as such the applicant is seeking other orders apart from stay of execution. Further that the applicant has filed the application after 3 years which is unreasonable delay and that the applicant has also failed to prove how they stand to suffer substantial loss. Counsel relied on the case of **Constantious Wambu Migwi vs Gichugu Water & Sanitisation Trust & Anor (2014) eKLR**, where it was held that;

“Substantial loss is the corner stone for granting stay. It is therefore clear that apart from bringing such an application without unreasonable delay; the applicant must also demonstrate to the satisfaction of the Court that substantial loss will ensue if the order is not granted, stay order will not be granted as a matter of course.”

Further

In the case of **Teresia Kimani vs Githere Investment Ltd HCCA No. 944/2003**, where it was held that;

“A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused. There is no evidence of substantial loss demonstrated in the application.”

The respondent submitted that should the Court be inclined to grant stay orders the Applicant/ defendant should be ordered to furnish security by depositing the decretal amount in a joint interest earning account. Counsel relied on the case of **Esther Wanjiru –vs- Jackline Arege (2014) eKLR** and **Halai & Anor vs. Thornton & Turnip (1963) Ltd KLR**. Further it was submitted that the defendant had failed in seeking equitable remedy should do so with clean hands in that the applicant had failed to comply with the order of judgment which it is not contesting on appeal.

The application under consideration is brought under Order 21 rule 8 which deal with the preparation and dating of the decrees and orders. It is also brought under order 22 rules 6,11 and 18, rule 6 deals with applications for execution of a decree, rule 11 deals with application for execution by joint decree-holders , rule 18 deals with Notice to show cause against execution in certain cases. The applicant's application is centered on this latter Rule. The applicant argument is that the applicant cannot execute using the warrants that were taken out as the decree they purport to execute was issued on the 4th of October 2011 and since then it has been more than a year. The stay sought is not under order 42 rule 6 (2)

but under order 22 rule 18. The provisions of the said order are clear it provides that, **where an application for execution is made more than one year after the date of decree the court executing the decree shall issue a notice to the person against who execution is applied for requiring him to show cause , on a date to be fixed, why the decree should not be executed against him.** The issue therefore is when was the decree issued? The applicant does not deny that there is judgment against it, it has filed an appeal in C.A. 258 of 2001. I have perused the court file and this is what I find; the Ruling that struck out the defendant's defense was read on the 4th of October 2010 by Justice Sitati. The decree the subject of this application was drawn on the 11th of November 2011 as per the warrants of attachment. The warrants of attachment and sale were issued on the 3rd July 2013. This a period over a year from the date the decree was issued, the decree-holder should have moved under order 22 rule 18 (1) (a) and caused the court to issue a notice to show cause against the judgment debtor/ applicant. Having not complied with the said provision, then it is only in order that the warrants of attachment and sale be cancelled. Any goods that could have been attached shall be released to the defendants unconditionally. The Respondent has a right to execute but only after it has complied with the relevant provisions of the law as provided in the Civil Procedure Rules. The order granted is that the warrants of attachment and sale be delivered to the Registrar for cancellation. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 8th day of October 2014.

R.E. OUGO

JUDGE

In the presence of:-

.....**For the Plaintiff/Respondent**

.....**For the Defendants/Applicant**

.....**Court clerk**