REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 493 OF 2004

HASSAN A.A. ZUBEIDI …….....PLAINTIFF

VERSUS

THIKA MUSLIM HOUSING CO-OPERATIVE SOCIETY LIMITED.....DEFENDANT

RULING

1. The defendant, **THIKA MUSLIM HOUSING CO-OPRATIVE SOCIETY LIMITED,** has move the court by way of a Notice of Motion, through which it seeks two substantive reliefs, as follows;

> *"3. **THAT** the Hounouarble Court do order a stay of execution of the Ruling and subsequent decree made by this Honourable Court on the 6th day of July 2011.*
>
> *4. **THAT** the Honourable Court do set aside the prohibitory order granted by the Honouarable Court vide a Ruling delivered on the 17th day of March 2014 pending the hearing and determination of this application".*

2. The application was filed under a Certificate of Urgency, and it first came up for hearing ex-parte on 6th August 2014, before Honourable Havelock J. Having given due consideration to the application, the Learned Judge certified it urgent and granted the relief sought in prayer 4 of the application. He did so by ordering thus;

> *"2. **THAT** a stay of execution of the Ruling and subsequent decree made by this Honouarable Court on the 6th day of July 2011 be and is hereby granted pending the hearing and determination of this application".*

3. In effect, the court had already dealt conclusively with that prayer in the application.

4. However, the parties appear to have been labouring under the notion that the defendant had sought an order of stay of execution pending the hearing and determination of the defendant's appeal. The court will therefore presume that it was the desire of the parties to have me adjudicate on the issue as to whether or not there should be a stay of execution until the defendant's appeal was heard and determined.

5. A brief history of this matter shows that on 10th September 2004 the plaintiff filed suit seeking the sum of Kshs. 14,600,000/- which it had lent to the defendant in April 1999. The plaintiff's further claim was for interest at the rate of 30% per annum, with effect from 7th April 1999.

6. On 3rd July 2009, the plaintiff filed an application for summary judgment.

7. On 20th December 2010 Muga Apondi J. granted judgment in favour of the plaintiff. The learned Judge awarded interest at 30% per annum between 10th September 2004 and 20th December 2010. He further ordered that interest would be calculated at court rates from 20th December 2010, until payment in full.

8. The defendant filed a Notice of Appeal on 23rd of February 2011.

9. In response to that Notice of Appeal, the plaintiff filed on application dated 22nd March 2011, seeking to have the Notice of Appeal struck out. That application was still pending by the time this matter came up before me.

10. The defendant has submitted that because the Decree herein was more than a year old by the time the plaintiff sought to have it executed, the plaintiff was obliged to proceed by way of a Notice To Show Cause. That procedure is said to be mandatory, pursuant to the Provisions Order 22 Rule 18 (1) of the Civil Procedure Rules.

11. Instead of proceeding by way of a Notice to Show Cause, the plaintiff went ahead through a Notice of Motion. Therefore, the defendant submitted that the whole process of execution was irregular.

12. Furthermore, the Notice of Motion pursuant to which the court granted orders for the issuance of the prohibitory order, had already been withdrawn prior to the court's determination of it: That is what the defendant says.

13. If the Notice of Motion was already withdrawn then there would have been no basis upon which the court could have issued the prohibitory order.

14. In the case of **POSTAL CORPORATIN OF KENYA VS DONALD KIPKORIR & 2 OTHERS HCC NO. 658 OF 2004 (OS)** Waweru J. expressed himself thus on the need for Notice to Show Cause when a Decree-Holder was seeking to execute a Decree which was more than 12 months old;

> *"Clearly, therefore, notice to show cause why the decree should not be executed ought to have been issued and served upon the defendants when the new application for execution of the decree was filed on 23rd February, 2007. Without such notice to show cause the warrants of attachment and sale issued on 6th March, 2007 were irregular. They must be set aside to enable notice to show cause be served upon the defendants as required by law".*

15. The law that the Learned Judge was alluding to was Order 21 Rule 18 (1) of the Civil Procedure Rules.

16. In the case of **JOHN MUHANDA MUYA & ANOTHER VS STANLEY K. KURIA & ANOTHER (NAKURU) HCCC NO. 223 OF 2000,** Wendoh J. spelt out the rationale for the requirement that Notice needs to be issued to a person against whom it is sought to execute a decree after the lapse of 12 months from the time the decree was issued. The Learned Judge said that;

> *"…. the notice to show cause serves two purposes i.e To give notice to the Judgment Debtor to pay the decretal sum in the case where due to the lapse of time he may have forgotten about the existence of the decree, and, secondly, the requirement of notice is meant to put the Decree Holder on notice that if he delays in pursuing his rights, the process of execution will be subjected to the notice and that delay in execution results in escalation of costs and interest".*

17. Wendoh J proceeded to declare as irregular the execution process which had not gone by way of Notice to Show Cause.

18. However, it is equally instructive to note that the Learned Judge gave a conditional order for stay of execution. She ordered the defendant to pay Kshs. 800,000/- out of the decretal sum of Kshs. 1,580,817/-. The payment was to be made within 21 days.

19. But I am also alive to the fact that in that case the defendant had only sought to challenge the execution because it had been irregular. That defendant had not lodged an appeal to challenge the judgment.

20. In answer to the application, the plaintiff submitted that this court lacks jurisdiction to set aside its own decision.

21. The decision in issue was made by Kimondo J, a Judge of concurrent jurisdiction to me. Therefore, I hold the considered view that if I were to be persuaded that the said Learned Judge acted erroneously by granting the prohibitory order, I would have sat in judgment over my learned brother. I have no jurisdiction to determine the correctness or otherwise of another Judge of concurrent jurisdiction.

22. I do agree with the plaintiff that if the defendant wished to challenge the correctness of the decision by Kimondo J, then the only avenue open to the defendant, to enable it do so, is through an appeal to the Court of Appeal.

23. And the defendant appears to appreciate the fact that they can only challenge the issuance of the prohibitory order, through their intended appeal. I say so because the defendant has already filed a Notice of Appeal.

24. On the other hand, the plaintiff contends that because the Notice of Appeal was filed late, there was no appeal which was pending.

25. I find that whether or not the Notice of Appeal was filed late, it remains in place. If the said Notice of Appeal was a nullity, as suggested by the plaintiff, then there would have been no need for the plaintiff to apply to the Court of Appeal to strike it out.

26. But is not the defendant guilty of inordinate delay, and thus undeserving of the court's discretion?

27. It is true that the Decree whose execution is sought to be executed was issued on 6th July 2011. Thereafter, it was not until 4th August 2014 when the defendant filed the application for stay.

28. A period of more than 3 years had lapsed before the defendant applied for stay.

29. During that period of time, the defendant's lawyer suggests that the defendant was so consumed by wrangles and criminal cases that it found itself unable to give proper instructions to its lawyers. That explanation was not put forward by the defendant. It is an explanation which was first made in the submissions filed by the defendant's lawyers.

30. To the extent that the alleged explanation was founded upon facts, the same ought to have been brought to the court's attention through an affidavit filed by the defendant. An advocate cannot be permitted to introduce evidence through his submissions. And when submissions touching on facts are made without corresponding factual evidence, the said submissions would be deemed to be lacking any foundation upon which they could be anchored.

31. Reverting to the issue of delay, it is noted that the defendant was prompted to action when they learnt that the land belonging to them was due to be sold.

32. The defendant had not been served with either a Notice To Show Cause or with the application for a Prohibitory Order. Therefore, the defendant had no reason to anticipate that a Decree which had not been executed since the year 2011, would suddenly be executed in 2014.

33. But it is equally true that the defendant could have filed the application for stay of execution earlier.

34. In practical terms however, it is appreciated that when a judgment – Debtor moves to court very soon after a Decree is issued, and seeks to stay execution, he may well be faced with the question as to what had prompted that application.

35. Ordinarily, execution of decrees cannot take place before Taxation of the party and party costs. A Decree Holder who wishes to execute a Decree before taxation must seek the leave of the court. Therefore, before taxation, a Judgment – Debtor may presume that execution was not imminent.

36. In this case the Ruling on taxation was delivered on 2nd February 2012.

37. Thereafter, it was not until 30th January 2013 when the Certificate of Taxation was issued.

38. In my considered view, the defendant had reason to expect that execution could be levied at any time after the taxation, and more particularly so, after the issuance of the Certificate of Taxation.

39. The defendant did not apply for stay of execution at that time. But it is equally true that the plaintiff also did not take steps to execute the decree soon after taxation or after getting the Certificate of Taxation.

40. The inaction may have lulled the defendant into a false sense of security. And when the plaintiff's inaction persisted for more than a year from the date the decree was issued, that may well have given rise to an expectation, on the part of the defendant, that if thereafter the plaintiff wanted to execute the Decree, the plaintiff would first be given notice.

41. In the circumstances of this case, I therefore find that although there was a delay, it did not in any manner prejudice the plaintiff.

42. And as soon as the defendant became aware of the imminent execution process, they acted fast.

43. The defendant is a Housing Co-operative Society. It says that its members were in the process of developing their respective plots, which have been curved out from the property that has been "attached" through the prohibitory order.

44. The continued alienation of that property or any part thereof is an express violation of the prohibitory order. It must be put to an end forthwith.

45. The defendant concedes that the land in issue is the only asset it owns. Therefore, if it is not conserved, the plaintiff may never realize the fruits of the judgment it had obtained.

46. I find and hold that the interests of justice demand that the subject matter of the prohibitory order be conserved. By so doing none of the parties would be prejudiced because the prohibitory order remains in place, to secure the interests of the plaintiff. Meanwhile, the withholding of the sale, secures the defendant's interests. However, the defendant must ensure that no steps are taken on the property, by its members or on their behalf, because otherwise, the whole situation would only become more complicated.

47. This order of stay of execution will remain in force until the defendant's appeal is determined. And for the avoidance of any doubt, the determination of the appeal may include the striking out of the Notice of Appeal.

48. As it is the Court of Appeal that will determine the propriety or otherwise of the Prohibitory Order, the said Order will remain in place until that issue is determined.

49. As regards the costs of the application, the same shall abide the outcome of the Appeal. If the appeal is allowed, the costs of the application shall go to the defendant. But if the appeal is dismissed or is stuck

out, the costs of the application shall go to the plaintiff.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **3rd day** of **November** 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of Otieno for Njoroge Kugwa for the Plaintiff

Kipng'eno for the Defendant.

Mr. C. Odhiambo, Court clerk.