



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 31 of 2007

DILBAGH SINGH BROTHERS (INVESTMENTS) LIMITED.....PLAINTIFF

VERSUS

ALVI AUTO SPARES LIMITED.....DEFENDANT

RULING

The present ruling is the subject of two applications. The first application is dated 23rd July 2012 and seeks orders that there be a stay of execution against the Defendant/Applicant pending the reference to the High Court on the decision of the taxing master dated 16th March 2012. The second application is dated 9th October 2012 seeking that the proclamation and attachment of the Plaintiff/Applicant's goods pursuant to a proclamation made on 8th October 2012 by be stayed pending the determination of the present application and the application dated 23rd July 2012. On 12th October 2012 I directed that since both applications seek similar orders, the same be disposed of together. I am of the view that the disposal of the application dated 23rd July 2012 would render the hearing and determination of the application dated 9th October 2012 unnecessary. I accordingly will determine the former application first.

According to the applicant, the taxing master having taxed the defendant's bill of costs dated 5th February 2008 against the applicant in the sum of Kshs. 263,526.00 on 17th July 2012, he instructed his advocates to file notice of objection thereto pursuant to the provisions of paragraph 11(1)(2) of the Advocates (Remuneration) Order and he is still waiting for the reasons thereof to enable him make a reference to this Court. The taxing master has, however, declined to grant a stay of execution and in his belief the defendant is likely to proceed and execute against him hence it is fair and just that there be stay of execution against the plaintiff awaiting the said reasons. In the applicant's view, the respondents will not be prejudiced in any way if the orders sought are granted.

In opposition to the said application, the defendant filed grounds of opposition dated 27th July 2012 in which it was stated that the plaintiff's application is misconceived, incompetent, fatally defective and bad in law as the plaintiff has failed to satisfy the test for the grant of stay of execution by failing to demonstrate sufficient or any cause at all for grant of a stay of execution; a substantial or any loss it stands to suffer in the event of a stay of execution is not granted; the plaintiff has not offered any security for the due performance in the event its intended reference is unsuccessful; that the said application fails to meet the mandatory provisions of the law and that the same is an abuse of the process of the Court.

In the applicant's submissions, the intended reference has high chances of success given that the taxing officer considered extraneous factors leading him to arrive at a wrong decision. If supplied with the reasons, it is submitted the applicant will be in a position to file the reference. If the application is not

allowed the applicant stand to suffer irreparable damages as their tools of trade are the subject of the proclamation and attachment. It is further submitted that the execution herein are premature, irregular for the reasons that upon issuance of the certificate of costs by the Deputy Registrar to the respondent it proceeded to procure warrants of attachment and sale without an order being made on the file for the issuance of the warrants. Nor was there judgement entered against the applicant for the taxed costs or any decree issued contrary to the provisions of section 51(2) of the Advocates Remuneration Order. According to the applicant this was highly irregular and the cases of **Kenya Sugar Board vs. Ndungu Gathinji & 2 Others HCCC No. 558 of 2005 (Milimani Commercial Courts)** and **Margaret Anindo T/A Igare Auctions vs. Harambee SACCO Society & 2 others HC Misc. Appl. No. 1665 of 2007 (Milimani Commercial Courts)**. In the applicant's view, it is only fair and just that a party who has moved with speed to file the reference to the Court and reliance is placed on **Evans Thiga Gaturu Advocate vs. Kenya Commercial Bank Limited HCMiscAppl. No. 343 of 2011**. On security, the Court is urged to exercise its discretion and require reasonable and manageable security pending the intended reference since the applicant is willing to deposit security by way of a bank guarantee pending the reference and the applicant has cited **Eunice Auma Odiero & 4 Others vs. Migori Teachers Savings & Credit Co-operative Society Ltd HCC Civil Appl. No 150 of 2008** and **Ouma Njoga & Co. Advocates vs. Kisumu Teachers Co-operative Savings & Credit Society Ltd Kisumu HCC Misc. Appl. No. 150 of 2008** as well as **Mereka and Company Advocates vs. National Bank of Kenya HCC Misc. App No. 111 of 2004**.

On the part of the respondent, it is submitted in so far as it is relevant to the application under consideration that based on **Halai & Another vs. Thornton & Turpin [1963] Ltd [1990] KLR 365** that the High Court's discretion to order stay of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security as well as the fact that the application must be made without unreasonable delay. It is submitted that the applicant has not made any attempt to give the Court what sufficient cause there is to it being granted a stay of execution. The sum in question, it is submitted is an amount of Kshs. 263,526 which is a relatively paltry figure considering the fact that the plaintiff will not be adversely affected if it does pay this sum which is neither exorbitant nor excessive taking into account the fact the fact that the plaintiff owns the premises the subject of the suit and the making of the sum herein is unlikely to put it out of business. Further it has not been alleged that the defendant may not be in a position to reply it should the intended reference be successful hence there is no risk of substantial loss moreso in cases of money decree such as this case. It is further submitted that there is no offer of security at all made save for the submissions. It is further submitted that whereas the application was made on 24th July 2012 no attempt was made to list the same for a period in excess of two months which is a blatant unreasonable delay in acting and therefore the fourth limb is not satisfied. In the respondent's view the application ought to be dismissed.

The first issue for determination is under what circumstances do the Courts grant stay of execution of costs pending the hearing and determination of a reference. There is no specific provision under the Advocates Remuneration Order as far as the Court is aware that provides for stay of execution in such circumstances. The applicant has however sought to rely on the provisions of Section 3A, 63(e) of the Civil Procedure Act, Order 22 rule 22 of the Civil Procedure Rules and any other provisions of the law. Section 3A of the Civil Procedure Act, it has been stated time and again does not give the Court jurisdiction but only reserves the Courts inherent jurisdiction to ensure that the ends of justice are achieved and to prevent abuse of the court's process. The law is not that the High Court is only vested with inherent power and jurisdiction to prevent abuse of the Court process or to further the ends of justice only in matters falling within the Civil Procedure Act and rules. The Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court's inherent power does not lie in section 3A of the Civil Procedure Act but in the nature of the High Court as a Superior Court of judicature. See **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65**.

In other words the inspiration for the exercise of the use of inherent powers in civil matters is section 3A of the Civil Procedure Act (Cap. 21) which preserves the inherent powers 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. The establishment of Courts of justice, of course, implies that they will mete out justice tempered by rules, which, it is hoped, will preserve parity between all persons for whom the Courts have been established. See **Savings & Loan Kenya Limited vs. H. Odongo & 6 Others Civil Appeal No. 22 of 1987 [1987] KLR 294; [1988] KLR 224.**

The other provisions of the Civil Procedure Act, it has been held, do not apply to taxation under the Advocates Remuneration Order. I, agree with the decision of **Kasango, J in Nyamogo and Nyamogo Advocates vs. Mwangi [2008] 1 EA 281**, where the learned Judge held that whereas the Court is entitled to invoke its inherent jurisdiction, the Civil Procedure Act does not apply to matters relating to the Advocates Act since the Advocates Remuneration Order has elaborate procedures laid down for objecting to taxed costs. A similar view was taken in the case of **Machira & Co. Advocates vs. Arthur K. Magugu & Another Nairobi (Milimani) HCMISC. Appl. No. 358 of 2001[2002] 2 EA 428**

However, the Court may in appropriate case invoke its said inherent jurisdiction in cases where there is no relevant provision and where to fail to do so would amount to the court being unable to ensure the ends of justice are attained and to prevent abuse of its process. That the High Court has power to order a stay of execution in the exercise of its inherent jurisdiction cannot therefore be doubted. See **Ujagar Singh vs. Runda Coffee Estates Ltd. [1966] EA 263.**

Accordingly, it has been held that the Court does have the residual jurisdiction under its inherent powers to grant a stay of execution pending a reference. See **Standard Chartered Bank vs. The Law Society Of Kenya & The Administrators of The Estate of Maxwell Maurice Ombogo Nairobi (Milimani) HCCC No. 520 of 1997 [2001] 2 EA 550.**

Again in **Elkana Mukundi Gatimu & Another vs. John B. Muya & 3 Others Nairobi (Milimani) HCCC Case No. 471 of 2004 Azangalala, J** was the view, which view I subscribe to that the jurisdiction to order a stay of execution with respect to costs is one of discretion and has its foundation in the Court's inherent powers and this is in view of the fact that there are occasions when the costs involved are astronomical normally referred to as manifestly excessive in which case the Court should still retain the jurisdiction to stay execution in the interest of justice irrespective of whether or not the execution is being levied to recover costs.

On the principles guiding the exercise of discretion whether or not to grant stay in such circumstances, the learned Judge held that whereas the court may be guided by the conditions set in Order 42 Rule 4(1) of the Civil Procedure Rules, and take an analogy therefrom, the said provisions have no application at all to an application for stay of execution pending the hearing and determination of an intended reference. The conditions enumerated therein may however offer useful guidelines to the exercise of such discretion. The first condition is whether the applicant has demonstrated substantial loss. As rightly submitted by the respondent, no attempt has been made to show the nature of loss the applicant stands to suffer if the application is not granted. That an applicant's reference has high chances of success does not necessarily amount to substantial loss since parties are only expected to file reference where the reference has chances of success. It has not for example been alleged that the amount involved is such that if the applicant is made to pay it up it will bring the applicant's operation to a standstill. Neither has been contended that the respondent is unlikely to "cough up" the said amount if the same is paid over to the respondent. Accordingly, I am not satisfied that the applicant stands to suffer substantial loss unless the stay sought is granted. Whereas the applicant's counsel has offered some form of security in the submissions, no such security has been offered in the supporting affidavit. However, the form of security is in the discretion of the Court and the mere fact that there is no offer of security may not necessarily lead to the dismissal of the application although the Court is perfectly entitled to take it into account. With respect to the issue whether sufficient cause has been shown I am not satisfied that that is the position since no such cause has been alluded to.

It was also contended that there is no decree entered in this matter. In a party and party costs as opposed to advocate/client costs, it is my view and I so hold that it is not necessary to have the certificate of costs translated into a decree or judgement before execution therefor may ensue.

One issue however, has been raised by the applicant which, in my considered view, is crucial and this is whether execution may issue on a formal application for execution without a Court order directing the execution to proceed and the manner of such execution.

In Kimani Karoki vs Justus Makumi Gachunga Nairobi Commercial & Admiralty Division High Court Civil Suit No. 815 of 2010 I expressed myself as follows:

“On receipt of an application for execution, the court should make an order pursuant thereto as required under the provisions of Order 22 Rule 13(4) of the Civil Procedure Rules. In the case of Mandavia vs. Rattan Singh Civil Appeal No. 27 of 1967 [1968] EA 146Duffus, JA stated that:

‘ The words “formal order for attachment and sale of property may be made by the Registrar” in Order 48, rule 3 must mean that the Registrar has to actually consider the application before him and then make the necessary orders to effect the attachment of the sale. Formal order here does not mean that the registrar has only to prepare and issue a formal order which has in fact already been made by the judge, as for instance whether he draws and signs a decree after the judgement or as in this case an order after the judge has decided an application. In such cases, the registrar does not “make” the order, he only prepares the order already “made” by the judge. Rule 3 must empower the Registrar to consider the proceedings before him and then in his discretion himself make an order. In a sense this will usually only be a formal order as a judgement has already been obtained and, if not settled, execution against the judgement debtor’s property will follow as a matter of course without dispute, and the rule goes on to make it clear that if any dispute arise, then on the objection being taken in the manner provided, the matter will be taken over and dealt with by a judge. Order 48, rule 4 provides that for the purposes of rules 2 and 3 the registrar shall be deemed a civil court, so that in effect a registrar sitting to deal with applications or proceedings under rule 3 would be the presiding officer of a civil court, and a civil court here must mean a tribunal where civil issues are settled and not just a body that is only going to put into formal phraseology an order already made on an issue tried and disposed of by a judge. Form 27 in Appendix D of the schedule to the rules sets out the form of the notification of sale under rule 61 and this does provide for the signature by “judge” but in this connection it is to be noted that judge is defined in section 2 of the Civil Procedure Act as meaning “the presiding officer of a civil court” and this would include the deputy registrar when he is acting under the provisions of Order 48 rule 3...It is clear that Order 48 rule 3 confers on the registrar not merely the power to make formal orders of attachment and sale, but also to conduct ‘proceedings thereunder’, at any rate until some formal objection is taken by motion on notice whereupon all further proceedings are to be before a judge. This must be the position here since the intention of this rule is to allow the registrar to conduct the necessary proceedings, and issue the appropriate directions and orders so as to carry out an execution by way of attachment and sale of property, provided that the proceedings are not contested. Therefore the expression “formal orders for attachment and sale of property” include not only the actual orders for the attachment and sale but any other consequential orders, which are necessary to effect this purpose, and this includes an order made under rule 61’.

In my view the expression in Rule 13(4) of Order 22 as read with Order 49 rule 5 of the Civil Procedure Rules must empower the registrar to consider the proceedings before him and then in his discretion himself make an order. Since the registrar acts as a court in these proceedings he should judicially consider the application by either allowing it or rejecting it. He should then make a formal order authorising the execution. This was a very serious omission on the part of the registrar since it was his duty to consider and give directions as to how the execution is to be carried out. He would conclude by making a formal order before issuing warrant of attachment to the bailiff/auctioneer. The Registrar has supervisory powers over the court bailiffs/auctioneers and has to oversee execution proceedings since he is the one who issues the orders and directions. Section 48 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provides that where any Act or Decree confers on any person to do or enforce the doing of any act or thing all such powers shall be understood to be also given as reasonably necessary to enable the person to do or enforce the doing of the act or thing. Accordingly, the registrar has to act reasonably in ensuring that the directions he has given are carried out, if they are flouted, he can legitimately intervene

except where the execution proceedings are themselves challenged and when this happens, the matter goes to the judge”.

It follows that without a minute made on the Court file by a Deputy Registrar pursuant to a formal application for execution, any warrants issued pursuant thereto are in my view null and void and the execution that proceeds pursuant thereto is bound to be set aside.

It follows that whereas I decline to grant stay of execution sought herein pending the reference, I however, set aside any execution commenced in breach of the aforesaid provisions.

In the premises, each party to bear own costs.

Dated at Nairobi this 5th day of November 2012

G.V ODUNGA
JUDGE

Delivered in the presence of:

Mr. Odhiambo Mr. Mangerere for the Plaintiff/Applicant

Mr Ahmed for the Defendant/Respondent