



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 559 OF 2006**

**JAZIRA AGENCIES LTD .....PLAINTIFF**

**VERSUS**

**HASSAN AHMED ZUBEDI .....DEFENDANT**

**Coram: Mwera J**

**Odipo for plaintiff**

**Kipngeno for defendant**

**Njoroge court clerk**

**RULING**

On 19.1.11 the plaintiff moved the court under Sections 3, 3A, 63 (e) of the Civil Procedure Act for the order:

i) that the order of 21.6.10 staying execution on condition that the decretal sum be deposited within 30 days be vacated/set aside to allow proceeding with execution.

It was stated in the grounds that the defendant had neglected/failed to honour the court's orders of 21.6.10, regarding depositing the decretal sum, plus the consequential orders made up to 16.12.10. Will that neglect or disregard to comply, the plaintiff had suffered prejudice. The supporting affidavit sworn by one Iqbal Kanji, a director of the plaintiff company deponed that the decretal sum awarded after orders of summary judgement was sh. 4,097,500/= to be paid in 30 days. The defendant applied for and got stay orders on 23.3.10 on condition that the decretal sum be deposited in joint income –earning account of lawyers of both parties. The defendant has since defaulted and appears to have no intention to comply. That state of things was prejudicing the plaintiff.

The defendant filed grounds opposing the present mention arguing that this court had no jurisdiction to grant the orders sought. That the application was incompetent, vexatious and fatally defective in law. It had been brought in bad faith and without disclosure of vital material.

Directed to submit the plaintiff maintained its position that the defendant had gotten a conditional stay but failed to deposit the decretal sum in 30 days wef 21.6.10. The matter went back and forth until 18/10/10 when the defendant at last cooperated and a joint bank account was opened. But ever since, the defendant has not made the deposit in it. Orders sought ought to be granted and whether the execution was to proceed before taxation of costs was not in issue because the court order to pay up in 30 days was given and that was all.

On its part the defendant argued that since the court had on 21.6.10 directed that it deposit the decretal sum in a joint income – earning account of both counsel in 30 days, it has no jurisdiction now, without vacating that order so as to allow for execution. The plaintiff cannot execute without leave of the court. (see Section 94 of Civil procedure Act). And that the supporting affidavit was defective because it predated the motion.

To begin with the last argument by the defendant, it may be agreed that both the motion and the supporting affidavit bear the date 12.1.10. But that is obviously a typing error considering the history of the matter. Both ought to bear 12.1.11.

On the substantive issue herein, on 23.3.10 the court found that the plaintiff was entitled to the total sum in the 2 cheques nos. 050991 and 050992 to be paid in 30 days.

On 21.6.10, the defendant filed a motion to seek stay of execution. Mr. Kipngeno told the court that the defendant had offered a bank guarantee from M/s Dubai Bank in the sum of the sum decreed on 23.3.10. The plaintiff for reasons recorded preferred a deposit made in a joint income – earning account of both counsel. The court then ordered that there could be an interim stay conditional on that the deposit be made. This was extended on 25.6.10 to enable the parties to open the deposit account. On 22.7.10 the parties agreed before Rawal J that they would open such an account with the Cooperative Bank. That was not done even by 17.8.10 and Dulu J yet extended the orders. It was the same case on the subsequent mention dates, extending the orders until 27.10.10 when the parties agreed to open the deposit account in 10 days with Barclays Bank. Again that was not to be and after several mentions on 16.12.10 Mr. Odipo for the plaintiff informed the court that the defendant had gone quiet on the issue of the deposit account. He desired the interim stay order to be vacated but the court advised that a formal application be filed and that led to the present application.

Having heard counsel and particularly retraced the history of the matter, the court is left with the impression that the defendant is handling this case in an extremely cunning and deceitful manner. He did not appeal the orders of 23.3.10 about paying up the sum borne in the 2 cheques (above), in 30 days. Then he came up with an application to stay execution and offered a banker's guarantee. Needless to say after the ruling of 23.3.10 the plaintiff had in its hand a partial decree as the rest of the claim awaited trial. The court did direct that instead the defendant do deposit the decretal sum in the joint account of the lawyers. The lawyers initially agreed to do so with Cooperative Bank and later with Barclays Bank. It was

like this all the while – avoiding the deposit. By that the defendant was not being sincere in the whole matter and he does not claim that it was the plaintiff's side that caused all the delay. Then he went quiet. He did not even seek to argue the stay application *inter partes* upon which a condition had been put.

In the circumstance of this case, this court vacates the interim orders plus such other orders that followed it. Indeed with the court having directed that the defendant do pay up the judgement sum in 30 days from 23.3.10, that is clear that the plaintiff had a partial decree capable of being executed. It cannot be argued by the defendant that section 94 Civil Procedure Act had to be complied with first ie getting leave of the court to execute that decree before the costs were taxed. It was unnecessary to think of that course since the whole suit is yet to be tried at the end of which costs will be ascertained.

Thus the defendant's argument has no merit on this count neither on the claim that his court has no jurisdiction to grant the orders sought. No basis was laid for that claim made obviously in ignorance of the constitutional mandate placed on this court regarding its unlimited jurisdiction in matters criminal and civil.

In sum the orders sought are granted with costs.

Delivered on 2.3.11.

**J. W. MWERA**

**JUDGE**