



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC APPLIC NO 91 OF 2013

WAMBUA & MASENO ADVOCATES.....APPLICANT

VERSUS

AFRITRACK INVESTMENTS (EA) LIMITED.....RESPONDENT

RULING

1. This file was transferred to the Environment and Land Court from the High Court upon establishment of the court pursuant to Article 162(2)(b) of the Constitution. On 27/2/2014, Hon Wachira, Taxing Officer, rendered a decision in which she taxed the advocates' bill of costs at Kshs. 4,697,835 against the client. A reference to the High Court by the client was dismissed by Nyamweya J on 1/10/2014 for lack of merit. Subsequent to that, the advocate filed an application for entry of judgment in terms of the certificate of taxation dated 10/3/14. Gacheru J heard the application and rendered a ruling dated 29/5/2015 through which she entered judgment in favour of the advocate in terms of the award of the taxing officer. The client's appeal against the decision of Nyamweya J was marked withdrawn on 7/2/2020 after the client failed to file a record of appeal.

2. Against the above background, the advocate brought a notice of motion dated 30/6/2020 seeking the following verbatim orders: -

(a) That this application be heard ex-parte in the first instance owing to the urgency thereof.

(b) That pending the hearing and determination of this application inter-partes, a prohibitory order be issued stopping the registration or any further dealings in respect of all that property known as Land Reference Number 12715/9890 and registered in the names of the respondent herein.

(c) That the subject property namely Land Reference Number 12715/9890 to be advertised and sold by Public auction to recover the total outstanding decretal sum of Kshs 4,697,835 together with interest at court rats from 27/2/14.

(d) That the respondent be ordered to grant free and unlimited access to the subject property for the purposes of inspection and valuation.

(e) That this honourable court be pleased to issue a notice of motion to the Respondent to show cause why the execution by way of attachment and sale of the property should not be proceed against them failure of which the attachment and public auction to proceed and be completed (sic).

(f) That the court to allocate a convenient date for the settlement of the terms and conditions of sale of the property.

(g) That costs of the valuation, auctioneers fees and other related expenses to be paid from the proceeds of the sale herein.

(h) That costs of the application be borne by the Respondents herein.

3. Subsequently, the advocate brought another application dated 2/12/2020 under certificate of urgency few days prior to the date scheduled for ruling, seeking amendments to correct the Land Reference Number to read LR No 14902/18 instead of LR No 12715/9890. The application was by consent granted earlier today.

4. The application dated 30/6/2020 was supported by an affidavit sworn by Prisca Nzula Wambua. It was canvassed through written submissions dated 5/11/2020 and further submissions dated 10/11/2020. In summary, the advocate's case was that they were awarded costs in the sum of Kshs 4,697,835. The client's reference challenging the taxing officer's award was rejected by Nyamweya J. Subsequently, the

court entered judgment in their favour and a decree was extracted. As a condition for stay of execution of the decree, the Court of Appeal in **Nairobi Misc. Appeal No. 90 of 2015** ordered the client to deposit Kshs 2,500,000 in a joint interest earning account. The client declined to avail or make the deposit. Further, the client neglected to pursue the appeal in the Court of Appeal, leading to the decision of the Court of Appeal marking the appeal as withdrawn. The client had failed to pay the decretal sum together with interest.

5. The applicant further contented that the client was the registered proprietor of Land Reference Number 14902/18 and the said land was the only known asset of the client within the jurisdiction of this court. They added that they were apprehensive that the client would dispose its only asset in a bid to render the decree herein nugatory. They urged the court to grant the orders.

6. The application was opposed through grounds of opposition dated 29/10/2020 and written submissions dated 9/11/2020. The case of the client was that the advocate was placing the cart before the horse because they had not initiated execution proceedings in terms of Order 22 rules 6, 18 and 19 of the Civil Procedure Rules. Counsel for the client argued that the application was premature because the advocate had not issued to the client a notice to show cause as contemplated under Order 22 rule (8) (1) of the Civil Procedure Rules. Counsel for the client urged the court to dismiss the application.

7. I have considered the application, the grounds of opposition, and the parties' respective submissions. Parties did not frame a common statement of issues or questions falling for determination in the application. In my view, the key question falling for determination in this application is whether the orders sought in the notice of motion dated 30/6/2020 are merited at this stage.

8. What I discern from the application is that the advocate is apprehensive that the client is about to dispose their only known asset in Kenya with a view to frustrate the satisfaction of the decree in this matter. Consequently, they seek preservatory orders. Also discernible from the application is that there are attempts by the advocate to circumvent the execution procedure laid down in the Civil Procedure Rules and use this application as a platform to fast-track the execution process

9. Taking into account the applicant's uncontroverted evidence and the submissions before court, I see no legitimate reason why the client has failed to honour their legal obligation to satisfy the decree after the Court of Appeal marked their appeal as withdrawn. Secondly, there is uncontroverted evidence that the client is intent on disposing their only known asset with a view to frustrating the satisfaction of the decree in favour of the advocate. In the absence of a replying affidavit controverting the affidavit evidence presented by the advocate, I will preserve the suit property in terms that accord with the due process set out under the Civil Procedure Rules.

10. I will not grant the other orders sought by the advocate because the Civil Procedure Rules contain an elaborate legal framework on how a decree-holder is supposed to execute a decree which is more than one year old, regardless of whether the execution relates to immovable property or not.

Disposal Orders

11. In light of the foregoing, the advocate's notice of motion dated 30/6/2020 is disposed in the following terms: -

(a) A prohibitory order is hereby issued prohibiting the registration of any dealings in Land Reference Number 14902/18 pending the initiation and conclusion of execution proceedings by the advocate against the client within the existing legal framework.

(b) Unless expressly extended by the court, the above prohibitory order shall lapse after twelve (12) months from today.

(c) The advocate shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF DECEMBER 2020.

B. M. EBOSO

JUDGE

In the presence of:-

Mr Ogembo for the Advocate/Applicant

Mr Manyara for the Respondent

Court Clerk – June Nafula