



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC NO. 384 OF 2012**

**ALLAN GEORGE NJOGU.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

This ruling is in respect of an application dated 20<sup>th</sup> September 2018 brought by way of notice of motion by the plaintiff/applicant for orders:

a. Spent

b. THAT there be a stay of execution in this suit pending the hearing and determination of this application.

c. THAT the Honourable Court be pleased in the exercise of its jurisdiction under section 34 of the **Civil Procedure Act**, Cap. 21 to determine the following questions relating to execution:

i. **WHETHER** the defendant can proceed to execute without having on record a formal and duly extracted decree of this Honourable Court in tandem with order 21 rule 8 of the **Civil Procedure Rules**, 2010?

ii. **WHAT** is the applicable rate of interest to be charged on the sum of kshs. 5,000,000 taking into account that the judgment of the Court of Appeal dated 26<sup>th</sup> July, 2017 is silent and having due regard to section 26 (2) of the **Civil Procedure Act**, Cap. 21?

iii. **WHETHER** the defendant has a right to proceed with execution without complying with rule 34(2) of the **Court of Appeal Rules**, 2010 in terms of settlement of the order arising from the judgment of the Court of Appeal in Eldoret Civil Appeal no. 290 of 2013 — **National Bank of Kenya Limited v Allan George Njogu Residences Limited?**

**WHETHER** taking into account that the judgment of the Court of Appeal in Eldoret Civil Appeal No. 290 of 2013 — **National Bank of Kenya**

**Limited v Allan George Njogu Residences Limited** was delivered on the 26<sup>th</sup> July, 2017 and 1 year having elapsed since then the defendant is duty bound to invite the plaintiff to first show cause why execution should not issue as provided for in order 22 rule 18 of the **Civil**

**Procedure Rules**, 2010?

v. **WHETHER** the defendant can commence execution without first having made an application for restitution under section 91 of the **Civil Procedure Act**, Cap. 21 and the court having rendered a determination on the same?

d) THAT the costs of this application be awarded to the plaintiff to be sourced by the defendant.

Counsel agreed to canvass the application by way of written submissions which were duly filed.

**PLAINTIFF'S/APPLICANT'S SUBMISSIONS**

Counsel for the applicant relied on the grounds on the face of the application that the Superior court delivered judgment in favour of the plaintiff but the same was reversed by the Court of Appeal and that the defendant is threatening to execute for alleged interest in the sum of Kshs. 2,520,000/-. The plaintiff therefore filed this application urging the court in exercise of its jurisdiction to determine the defendant's right to execute and the parameters of its exercise.

Counsel gave the background of the case that the High court delivered a judgment on 16<sup>th</sup> April 2013 in favour of the plaintiff as follows:

- a. The defendant was to forthwith return to the plaintiff through its counsel on record, the certificate of title and any other title document that it may have been holding for the land parcel known as ELDORET MUNICIPALITY/BLOCK 6/308 and this was to be done forthwith and not later than 7 days from the date of the judgment.
- b. The caution that had been registered in the register of the land parcel known as ELDORET MUNICIPALITY/BLOCK 6/308 was ordered to be removed and to that effect the District Land Registrar — Uasin Gishu was directed to forthwith remove the caution upon being served with the judgment and/or decree.
- c. The plaintiff was awarded damages in the sum of Kshs. 5,000,000/ to accrue interest at court rates from the date of the judgment until settlement in full.
- d. The plaintiff was awarded the costs of the suit.

Counsel submitted that the defendant lodged an appeal being Eldoret Court of Appeal Civil Appeal no.290 of 2013 - National Bank of Kenya Limited — V- Allan George Njogu Residences Limited which was heard and judgment delivered on the 26<sup>th</sup> July, 2017. The Court of Appeal allowed the appeal and set aside the judgment delivered on the 16<sup>th</sup> April, 2013 and ordered that the sum of kshs.5,000,000/ together with interest be repaid to the defendant in terms of the superior court's ruling delivered on 28<sup>th</sup> May, 2013. The defendant was also awarded the costs of the appeal.

Counsel further submitted that the defendant through Rachuonyo & Rachuonyo Advocates on the 31<sup>st</sup> August, 2018 delivered a letter to the appellant dated the 29<sup>th</sup> August, 2018 which by its contents requires the plaintiff to pay Kshs. 2,520,000/ being on account of alleged accrued interest on the sum of Kshs. 5,000,000/.

It was Mr. Kigamwa's submission that the letter claims interests at 12 % p.a. on the sum of Kshs. 5,000,000/ from the 16<sup>th</sup> September, 2013 when the deposit was made to the 26<sup>th</sup> September, 2017 when the refund was made being an alleged period of 48 months and 10 days (1471 days). Counsel also submitted that the defendant attached to the letter a copy of part of the order by the Court of Appeal that was incomplete in its contents.

Counsel submitted that the plaintiff became apprehensive that the defendant intended to carry out an unlawful execution and invoked the court's jurisdiction under section 34 of the Civil Procedure Act, Cap. 21 for the determination by the court questions relating to execution which provides:

"questions arising between parties to the suit in which the decree was passed...and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit. "

Mr. Kigamwa further submitted that the Court of Appeal having set aside the original decree of this Honourable Court by its judgment delivered on the 26<sup>th</sup> July, 2017, therefore there is no decree on record that has been extracted by the defendant and as such the defendant cannot proceed to execute without a formal decree extracted in-tandem with the stipulations under order 21 rule 8 of the Civil Procedure Rules, 2010.

Further that the defendant has not established that a decree that tallies with the findings of the appellate court is on record before this court. Counsel stated that the decree annexed to the replying affidavit relates to the Court of Appeal and which would be invalid as the decisions of the court are embodied in orders in tandem with rule 33 of the Court of Appeal Rules, 2010.

Counsel submitted that the Court of Appeal in its judgment delivered on the 26<sup>th</sup> July, 2017 directed that the sum of kshs. 5,000,000/ together with interest be repaid to the defendant in-terms of the High Court's ruling dated 28<sup>th</sup> May, 2013 and that the Court did not specify the applicable rate of interest. Counsel submitted that the interest would thus be charged in terms of section 26 (2) of the Civil Procedure Act, Cap. 21 thus, the applicable rate of interest is 6% p.a. The same provides,

**"Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."**

It was Counsel's submission that the defendant in its letter dated the 29<sup>th</sup> August, 2018 despite being prompted on the requirements of extraction and settlement of the terms of the order of the Court of Appeal seems to have opted to ignore the same. The provisions of rule 34 of the Court of Appeal Rules, 2010 lay down the procedure for the defendant to follow in causing the order of the court to be drawn up. The plaintiff prays that the defendant be directed to comply with the said law prior to resorting to any execution and in any event the 14 days period specified in the law have since elapsed.

Counsel finally submitted that the Court of Appeal judgment was delivered on the 26<sup>th</sup> July, 2017 and the defendant did not execute within

one year as per the requirement of order 22 rule 18 of the Civil Procedure Rules, 2010 which obliges the defendant to invite the plaintiff to show cause why execution should not issue.

Order 22 rule 18 of the Civil Procedure Rules, 2010 provides for notice to show cause against execution in certain cases as follows;

**"18 (1) Where an application for execution is made— (a) more than one year after the date of the decree;**

**(b) against the legal representative of a party to the decree; or (c) for attachment of salary or allowance of any person under rule 43 the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him..."**

Counsel relied on the case of Mini Bakeries (K) Ltd v George Ondieki Nyamanga [2014] eKLR in which the Hon. Justice Ruth N. Sitati observed,

" What I can discern from the above provisions is that a notice to show cause is issued where an application for execution is made more than one year after the date of the decree. In the instant case, the decree was issued on 1<sup>st</sup> February 2013 and the warrants of attachment were taken out on 8<sup>th</sup> February 2013 before the trial court issued the conditional stay on 3<sup>rd</sup> April 2014. Then on 30<sup>th</sup> May 2014, the respondents proceeded to attach the appellant's motor vehicle. Clearly, 30<sup>th</sup> May 2014 was more than a year since the decree was issued on 1<sup>st</sup> February 2014 and it was therefore necessary for the respondent to ask the court executing the decree to issue a notice to the appellant requiring it to show cause why the decree should not be executed against it. Having failed to do so, the respondent was clearly in breach of Order 22 Rule 1 (a).

The record does not show that the trial court made any other order after 3<sup>rd</sup> April 2014 which would have negated the requirement for a notice to show cause to be issued to the appellant/applicant."

Counsel further raised the issue of restitution submitting that the defendant cannot move to execute without applying for restitution as per section 91 (1) of the Civil

Procedure Act, which provides that:

"Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

Counsel therefore urged the court to allow the application as prayed.

### DEFENDANT'S SUBMISSIONS

The defendant opposed the application and relied on the Replying Affidavit sworn by Mr. Chelang'a on 26<sup>th</sup> November 2018. Counsel submitted that the application lacks merit and is an abuse of the court process.

On the issue raised by Counsel for the plaintiff as to whether the Defendant is executing without a formal and procedurally extracted decree, Counsel for the defendant submitted that it is not in dispute that the Defendant has extracted a decree of this Court on 26<sup>th</sup> October 2018 as attached to the replying affidavit. He stated that the decree has been duly extracted from the final Order of the Court of Appeal, in Eldoret Civil Appeal No. 290 of 2013

Counsel further submitted that the Plaintiff has not challenged the Final Order of the Court of Appeal by either a review or an appeal. Similarly, that the Plaintiff has not challenged the express clear and binding terms of the Order by an application for settlement of terms, before the Court of Appeal, under Rule 34 of the Court of Appeal Rules (2010). Counsel therefore submitted that it is too late in the day for the Plaintiff to belatedly challenge the Final Order and the decree in the absence of an application for settlement of terms filed in the Court of Appeal, being the Court with competent jurisdiction.

Further that the Plaintiff has unequivocally acquiesced to the express and binding terms of the Final Order and decree, following the unconditional release of the decretal sum of Kshs.5 million held by it. Counsel for the defendant/respondent submitted that the duty of the Court, in resealing the Final Order, was to check for its compliance with the express terms of the Judgment and Order of the Court of Appeal, before its final extraction and sealing and therefore, Counsel submitted that in the premises, the Plaintiff has wrongly invoked Order 21 Rule 8 of the Civil Procedure Rules (2010) which is inapplicable to a matter conclusively settled by the Appellate Court, being a Court with Superior Jurisdiction.

Counsel also submitted that this Court lacks jurisdiction, constitutionally or legislatively, to countermand or supervise the actions of the Court of Appeal in extracting the Final Order.

On the issue of applicable interest rate, Counsel submitted that the decree in Order No. 3, expressly states as follows:-

"THAT the Respondent be and is hereby ordered to pay Kenya Shillings Five Million (Kshs.5,000,000/=) together with interest at

Court rates to the Appellant in terms of the Ruling in the Eldoret and Land Court Number 384 of 2012 dated 28<sup>th</sup> May 2013".

Counsel submitted that what is important to note is, when the decretal sum was placed in the hands of the Plaintiff, being the period between 6<sup>th</sup> September 2017 and 26<sup>th</sup> September 2017 when the refund was made under the terms of the decree. Counsel stated that it is settled law, that the interest rate at court rate is 12%, and the Plaintiff therefore cannot escape its obligation to satisfy the decree on interest earned, while the decretal sum was in its sole custody, and invested by it and thus to hold otherwise, will constitute an unjust enrichment, contrary to the aforesaid express terms of the binding decree of this Court. Lastly on the issue as to whether the defendant is at liberty to execute the decree without first issuing a Notice to Show Cause, Counsel submitted that the issue is prematurely raised as the defendant has not yet commenced the execution process. Counsel therefore urged the court to dismiss the application with costs.

### **Analysis and determination**

This application is brought by the plaintiff applicant urging the court to determine whether the defendant can proceed with execution without following the laid down procedures as per Rule 34(2) of the Court of Appeal Rules 2010. The background to the case in the High Court and Court of Appeal has already been laid down elaborately. Rule 34 of the Court of Appeal Rules 2010 provides:

“Where a decision of the court was given in a civil application or appeal-

- a. the party who has substantially been successful shall within 14 days from date of judgement prepare a draft of the order and submit it for approval of the other parties;
- b. the parties to whom the draft has been submitted shall approve the same within seven days from the date of delivery;
- c. if all parties approve the draft, the order shall, unless the presiding judge otherwise directs, be in accordance with it;
- d. if the parties do not agree on the form of the order, or if there is non-compliance with sub-rules 9(a) and (b) the form of the order shall be settled by the presiding judge or by such judge who sat at the hearing as the presiding judge shall direct after giving all the parties an opportunity of being heard;
- e. If the parties are unable to agree which party was substantially successful, the registrar on the application of either party, which application may be made informally and after giving all parties an opportunity of being heard, shall direct by which party the draft is to be prepared and such direction shall be final.”

Counsel for the plaintiff wants the court to determine issues that do not lie in this court. The judgment of the Court of Appeal was very clear and the execution process as per the Court of Appeal Rules has not yet started. The plaintiff has jumped the gun and wants the court to act ultra vires.

From the record, it is evident that the Defendant extracted a valid order of the Court of Appeal as per the final orders on 28<sup>th</sup> August 2017 as required by the law and the rules. The issue on interest rate to be paid can be found in the decree in Order No. 3, which expressly states as follows:-

"THAT the Respondent be and is hereby ordered to pay Kenya Shillings Five Million (Kshs.5,000,000/=) together with interest at Court rates to the Appellant in terms of the Ruling in the Eldoret and Land Court Number 384 of 2012 dated 28<sup>th</sup> May 2013".

This is not to say that I am determining the interest rate to be paid but emphasizing that the final order of the Court of Appeal was very clear and there was no need to bring the current application before this court. This court is not in a position to countermand or supervise the actions of the Court of Appeal in extracting the Final Order either constitutionally or legislatively as was rightly submitted by Counsel for the defendant/respondent.

Having said that I will not go any further to deal with the issues raised by the plaintiff/applicant. Counsel for the plaintiff/applicant is aware of what to do in order to ventilate the issues raised and in which forum. I find that this application is an abuse of the court process and is therefore dismissed with costs.

**DATED and delivered at Eldoret this 27<sup>th</sup> day of March, 2019**

**M.A. ODENY**

**JUDGE**

**RULING READ IN OPEN COURT** in the presence of Mr. Kigamwa for the Plaintiff/Applicant and in the absence of Gachuonyo for Mr.R.M. Wafula for defendant/Respondent.

M/s Koech – Court Assistant