



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 106 OF 2017

MARY KAMENE NGUNDOPLAINTIFF/RESPONDENT

VERSUS

RAPHAEL MUSIMBA NZAU.....DEFENDANT/APPLICANT

RULING

1. What is before this court for ruling is the Notice of Motion application dated 08th February, 2019 and filed in Court on even date. It is expressed to be brought under Article 159(2)(d) of the Constitution 2010, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 as well as Sections 3A and 63(e) of the Civil Procedure Rules and all other enabling provisions of the law for orders:-

1) Spent

2) Spent

3) THAT the court be pleased to stay execution of the decree herein pending the hearing and determination of this application.

4) THAT costs be provided for.

2. The application is predicated on the grounds on its face and is supported by the affidavit of Raphael Musimba Nzau, the Defendant/Applicant herein sworn at Nairobi on the 08th February, 2019.

3. Mary Ngundo, the Plaintiff/Respondent herein has opposed the application vide her replying affidavit sworn at Machakos on the 14th February, 2019.

4. The application was orally argued before me. The Defendant/Applicant's counsel submitted that there was a consent judgment entered by the parties whereby the judgment was to be liquidated by installment. That by the time of execution, the Defendant/Applicant had paid Kshs.400,000/= through a third party leaving a balance of Kshs.538,950/=. That a misunderstanding between the Defendant/Applicant and the third party resulted in the outstanding amount not being paid. That the Plaintiff/Respondent did not give the Defendant/Applicant an opportunity to offer a way of liquidating the balance. That the Defendant/Applicant has not refused to pay the balance and seeks to be given an opportunity to do so. That he has offered to pay Kshs.100,000/= as the first installment before 27th February, 2019. The counsel went on to submit that what has been proclaimed is family property.

5. On the other hand, the Plaintiff/Respondent's Counsel submitted that the application has no prayer for leave to liquidate the outstanding amount by installment and as such the application should be rejected. The Counsel further submitted that if it was not for the fidelity to uphold the law, the application would have been admitted whereupon the orders would have lapsed immediately. He pointed out that the Defendant/Applicant admits that the judgment was by consent dated 13th February, 2017. That there was no prayer to set aside the said consent judgment. That the sum that the Defendant/Applicant has mentioned had already been paid and that was why the Respondent agreed to have the balance liquidated by way of post dated cheques which were to mature on the 20th January, 2018, 05th February, 2018 and 05th March, 2018. The Counsel pointed out that order 4 of the consent judgment was explicit that in the event of there being a default, the Plaintiff/Respondent had the right to execute. That by the 21st January, 2018, the right to execute had crystallized when there was a default. That the Plaintiff/Respondent waited for a whole year after the default. He went on to submit that the Defendant/Applicant has admitted that he was earning income from the property that has been proclaimed. The counsel added that there was no basis in law for giving notice to the Defendant/Applicant since the consent judgment authorized execution to be levied.

6. The Counsel added that it was not the business of the Plaintiff/Respondent to question where the money she was paid came from. The Counsel pointed out that the Defendant/Applicant has not informed the court the steps that he took when the misunderstanding between him and the third party arose and that he ought not to have waited until the Plaintiff/Respondent executed.

7. In reply, the Defendant/Applicant's Counsel referred the Court to paragraphs 6 and 16 of the supporting affidavit which shows that due to a misunderstanding between the Defendant/Applicant and a third party, the former learnt that the latter had stopped paying the decretal amount and further that the attached property are the Defendant/Applicant's only source of income.

8. Having read the application together with the ground it is predicated upon as well as the supporting and replying affidavits, my finding is that the application lacks merit. I do agree with the Plaintiff/Respondent's Counsel that the application ought to have included a prayer for leave to liquidate the decretal amount by installment. Secondly, the Defendant/Applicant has not applied to set aside the consent judgment which gave the Plaintiff/Respondent the authority to execute in case of default. The Defendant/Applicant has admitted that he defaulted in liquidating the outstanding balance and instead of showing the steps that he took to inform the Plaintiff/Respondent about his inability to pay, he points a finger at a third party. It is clear that the Defendant/Applicant waited a whole year to make this application after the Plaintiff/Respondent chose to execute.

9. The upshot of the foregoing is that the application is dismissed with costs to the Plaintiff/Respondent.

Signed, dated and delivered at Makeni this 03rd day of May, 2019.

MBOGO C.G

JUDGE

In the presence of:-

Mr. Langalanga holding brief for Mr. Muia for the Defendant/Respondent

Ms. Nzioka – court assistant

MBOGO C.G., JUDGE,

03/05/2019.