



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 34 OF 2012

CHRISTINE CHEPCHICHIR BAIG.....PLAINTIFF

VERSUS

MIZRA IQBAL BAIG.....1STDEFENDANT

AGRI SEED CO. LTD.....2ND DEFENDANT

R U L I N G

1. By its application dated 4/11/2016, the 2nd defendant sought the following orders:-

(1)spent.

(2) That there be a temporary stay of execution herein and the warrants issued herein to Ms. Fefma Auctioneers be recalled back to Court pending the hearing and determination of this application.

(3) That the execution process herein be and is hereby set aside as against the 2nd defendant/applicant who has fully paid his share of the costs to the plaintiff's advocates.

(4) That costs of this application be provided for and paid by the plaintiff.

2. The grounds of which the application is made are that when judgement issued in this suit, costs were awarded to the plaintiff against both defendants; the plaintiff costs were taxed on 15/9/2016 but the decree awarding costs has never been issued. The plaintiff then proceeded to obtain warrants which were issued to Fefma Auctioneers who proceeded to proclaim the 2nd defendant's goods in Kitale.

3. The applicant avers that judgement is older than one year and no execution can be carried out unless a notice to show cause has been issued against the applicant. The applicant states that the decree, which according to him has not been issued, is needed for purposes of an appeal. Finally the applicant, upon the proclamation of its goods, immediately settled its share of the costs: the applicant case is that the warrants were issued irregularly and that the execution process is irregular, illegal, null and void for failure to comply with **Order 22 Rule 18(1) (a)** and it should therefore be set aside.

4. The application is supported by the affidavit of Kassim Owino the Managing Director of the 2nd respondent. He avers that the 2nd defendant was unable to obtain the decree and due to frustrations arising from the seeking of the decree, the applicant paid its share of the taxed costs on 2/11/2016. He urges, as he adopts the grounds at the foot of the application, that since the costs were awarded against

both defendants, it is only fair that execution against the 2nd respondent be set aside and the plaintiff be at liberty to pursue the 1st defendant for their share of the costs.

5. A replying affidavit has been filed. The application is opposed on the grounds that the plaintiff's suit was allowed with costs against both defendants jointly and severally and that the 2nd defendant's counterclaim was dismissed with costs to the plaintiff. For those reasons, the deponent states, the plaintiff is entitled to execute for the taxed costs as against the applicant. The decree and certificate of costs are annexed to the said affidavit as "**PKN1**" and "**PKN2**" respectively.

6. The 1st respondent also opposed the application. However at the hearing of the application the 1st respondent associated himself with the submissions of the plaintiff. The 2nd respondent did not therefore file any submission.

7. I have considered the application and the reply and the rival submissions of the parties. The issues that present themselves are as follows:

a. whether upon payment of its share or rather what it considers to be its share of the costs of the proceedings the applicant is inured from all execution against it in respect of any other portion of the entire amount of costs;

b. whether the execution process complied with Order 22 Rule 18(1) (b);

c. whether the Bill of Costs dated 31/8/2015 should have distinguished between costs for the plaintiff's claim and costs on the 2nd defendants counterclaim.

A. Whether upon payment of its share or rather what it considers to be its share of the costs of the proceedings the applicant is inured from all execution against it in respect of any other portion of the entire amount of Costs

8. The plaintiff has in his submission pointed out that the costs were awarded to the plaintiff against the defendants jointly and severally and that the court did not order that the costs were to be shared by the defendants. Let us inquire into this issue by examining the decree, for contrary to the 2nd defendant's belief, there is a decree dated **16th October 2014** and issued on **3rd November 2014**. It states as follows:-

It is now ordered:

(a) That none of the claims of Agriseed Co. Ltd can be granted. Its claim against Christine and Baig are hereby dismissed.

(b) That Christine shall have the costs of the counterclaim but Mr. Baig shall not have the costs of the counterclaim.

(c) That Christine; the plaintiff has proved her case against Mr. Baig and Agriseed Co. Ltd and her claims are allowed in terms of prayer (a), (b), (d), (e) and (f) of the plaint.

9. This decree refers us back to the plaint. The relevant prayer in the plaint reads as follows:-

“Reasons wherefore the plaintiff prays for judgement against the defendants jointly and severally for:-

(a) A declaration that the sale of land agreement herein dated 15th May, 2011 is irregular, fraudulent, null and void and for the cancellation of the same.

(b) A declaration that the power of attorney herein donated to the 1st defendant by the

plaintiff has been revoked

(c) A declaration that the agreement for sale dated 15th May, 2011 having not been stamped appropriately under the Stamp Duty Act, the same is null and void.

(d) An order reversing any step taken or registration made by any person or office in furtherance of the transaction herein.

(e) An order of permanent injunction restraining the defendants from trespassing upon, taking possession intermeddling, and/or interfering with the plaintiff's possession, ownership and occupation of the suitland.

(f) Costs of the suit and interest.”

10. The background of this judgement was that the plaintiff, who was the registered owner of LR. No. 3707/4 had lived together as man and wife before divorcing in the year 2010. While living together as husband and wife the plaintiff had donated a special Power of Attorney to the 1st defendant to deal with LR. No. 3707/4 as her agent; On February, 2011, the plaintiff revoked the power of attorney. In January, 2012, the plaintiff discovered that an agreement of sale dated 15/5/2011 had been concluded and executed purportedly between herself as the vendor and the 2nd defendant as purchaser over the suitland. The plaintiff averred that she had never executed such an agreement and she brought this suit, pleading that the defendants had acted fraudulently on the basis that, having divorced with the 1st defendant, it was practically impossible for the 1st defendant to act as an agent in the proper interests of the plaintiff. The deposit of part of consideration as refunded to the 2nd defendant but before the suit was filed, the plaintiff had tried to make it clear to the 2nd defendant that she does not recognize the transaction but to no avail, hence the suit.

11. Of the nature of the fraud, the plaintiff testified as follows:-

“I was not the vendor in the agreement as claimed in the agreement. The agreement is said to have been signed by myself but I am not the one who signed the agreement. The signature on the document is that of my former husband. I did not appear before Mr. Jamal as indicated in the certificate contained in the agreement. I was in the U.S.A on 15/5/2011. There is no reference to a power of attorney in the agreement. The agreement does not even make any reference that the same was being signed on my behalf. The agreement is a pure fraud”.

12. It is therefore clear that the circumstances the plaintiff and the 2nd defendant found themselves in were occasioned by the fraudulent conduct on the part of Mr. Baig, the plaintiff's erstwhile husband. The court observed as follows while denying Mr. Baig costs:-

“Christine shall have costs of the counterclaim (by the 2nd defendant against Christine and Baig) but Mr. Baig shall not have costs of the counterclaim as he was the cause of the whole problem in this case”.

13. Nevertheless the court did not apportion the costs arising out of the plaintiff's claim between the two defendants. That appears to be the reason the plaintiff submits as follows:-

“The order on costs was severally and jointly against both defendants. The submission that the 2nd defendant has paid its share of the costs finds no support from the court record....”

From the above it is therefore the correct position that the orders on costs issued by the court were against the defendants jointly and severally.

The plaintiff has quoted excerpts from the cases of *Kakamega Election Petition No. 7 of 2013 - Arthur*

Kibira Apungu & Another –vs- The IEBC and 2 Others and Meru HC Civil Application No. 42 of 2015 – Dr. John Gachanja Mundia –vs- Francis Muiira& Another in support of the proposal that the two defendants in this case were condemned to meet the costs jointly and severally, and that the plaintiff is therefore justified in attempting to recover the entire costs sum from the 2nd defendant, they are persuasive. I must agree with the plaintiff on this point.

14. The court has an unfettered discretion when it comes to the award of costs and the situation was no different in respect of the judgement in this case. The very fact that the court denied the 1st defendant costs of the counterclaim implies that the courts' mind was focused on the apportionment of costs. When it came to costs of the plaintiff's suit, the court simply awarded the plaintiff costs against both defendants. The court punished the 1st defendant by denying him the costs of the counterclaim. The court would have done the same, this time round by pronouncing that the 1st defendant shall bear a proportion of the costs of the plaintiff's claim. It did not do so. This was a conscious decision and it is permitted by the law. It cannot be faulted. The 2nd defendant may meet the total sum due as costs and then seek reimbursement from the 1st defendant. To hold otherwise would be to bring inconsistency in the law and practice.

15. I therefore hold that, costs having been awarded against the defendants jointly and severally, then the plaintiff is at liberty to execute the order on costs as against any or both of the two defendants to the fullest amount payable as costs under the decree. The 2nd defendant is therefore not inured from such execution.

B. Whether the execution process complied with Order 22 Rule 18(1) (b).

16. As to whether the execution process complied with **Order 22 Rule 1(a)** the 2nd defendant avers that at the time of taxation of the Bill of Costs on 15/9/2016 and issuance of the Certificates of Costs on 20/9/2016, the decree was over two years old from date of issue. I have noted that the decree was issued on the **3rd November 2014**. The application for execution of the decree is dated **17th October 2016** and was filed on **17th October 2016**. The warrant of attachment was issued on the **31st October 2016**. Proclamation of attached properties was made on the **2nd November 2016**. The 2nd defendant argues that the certificate of costs is issued by the Deputy Registrar *after* taxation, upon an order or decree by a judge awarding costs. It argues that the decree or order which is the subject of execution herein was given on **16/10/2014**. Therefore, argues the applicant, the plaintiff should have taken out a Notice to Show Cause against both defendants prior to the issuance of the warrants.

17. The plaintiff avers that the execution process did not offend the Provisions of **Order 22 Rule 19** on the basis that the Rule contains a proviso waiving such Notice to Show Cause in the event of more than one year having elapsed from the date of the decree to the date of the application for execution.

18. I would like to reproduce the **Order 22 Rule 18** herein for more clarity; it states as follows:-

(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:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the

application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

(a) A period of more than one year has elapsed between the date of the decree and the application for execution,and

(b) The application is made within one year from the date of the last order made in an application for execution against the party targeted by the execution if upon a previous application for execution against the judgement debtor the court has ordered execution to issue against him.

19. In this court's view, where an application for execution is made more than one year after the date of the decrea Notice to Show Cause why the decree should not be executed as against the targeted party will issue. The proviso relied on by the plaintiff does defeat the requirement of Notice to Show Cause set out herein above if:-

(a) A period of more than one year has elapsed between the date of the decree and the application for execution,and

(b) The application is made within one year from the date of the last order made in an application for execution against the party targeted by the execution if upon a previous application for execution against the judgement debtor the court has ordered execution to issue against him.

20. A perusal of the record shows that an application dated 5/10/2015 was made by the 2nd defendant and that the same was dismissed on 7/4/2016. The court did not issue any order halting the execution process against the 2nd defendant. After that last order dismissing the application dated 5/1/2015 was made, the plaintiff, applied for execution before one year elapsed from the date of that last order.

21. A distinction must be made between an application for stay of execution made by the 2nd defendant and an application for execution made the plaintiff. The order that we speak of in the paragraph immediately preceding this one, that is the order made on 7/4/2016, is an order made upon the 2nd defendant's application for stay of execution and not upon an application made by the plaintiff's for execution. It may seem like splitting hairs. However, the order is clear. It states:-

"If upon a previous application for execution against the same person the court has ordered execution to issue against him".

22. The court did *not* on 7/4/2016 order execution against the 2nd defendant. The court merely dismissed the 2nd defendant's application for stay of execution. The plaintiff has stated as follows in his

submissions:-

“The application for execution on record was made within 12 months from the 7/4/2016”.

If the costs were taxed on **15/9/2016**, I find that there could not have been any valid application for execution **before** 15/9/2016, otherwise what would have been the execution sum? Note that the plaintiff does not even attempt to state that she had filed an execution application **before** 15/9/2016.

23. However the plaintiff proceeds to state that **after** 15/9/2016 (taxation date) the 2nd defendant once again prayed for a stay of execution for 30 days “and within 12 months of 15/9/2016”. The plaintiff’s case is that the two applications made by the defendant “precluded the 2nd defendant from the operation of **Order 22 Rule 18(1)** of the Civil Procedure Rules”. However, the question remains as to whether that really be the proper position in law?

24. First I find that the 2nd defendant’s two applications cannot be equated to any application for execution made by the plaintiff which latter application would automatically generate a Notice to Show Cause as envisaged by **Order 22 Rule 18**. Secondly I find that it is the date of decree, in this case **16/10/2014**, and not the date of taxation, in this case **15/6/2016**, that is relevant for purposes of calculation of the one year period stipulated in **Order 22 Rule 18**. I therefore agree with the 2nd defendant that Notice to Show Cause against both defendants should have issued before issuance of warrants. Nevertheless, the 2nd defendant has always in the past held, and still argues in this application, citing grounds, that it was not obliged to settle the whole amount of costs as awarded, but that each party made liable to pay costs should have borne its own share. As has been seen above, that argument has miserably failed in the face of established precedents. Consequently it is not possible to establish that the 2nd defendant sustained any more prejudice than he would have suffered had any notice to show cause been issued. Contrary to what was stated in the 2nd defendant’s submissions, there is no prayer in the instant application seeking a reimbursement of the auctioneer’s charges or that the plaintiff do bear those charges and therefore no orders will issue in that regard.

C. Whether the bill of costs dated 31/8/2015 should have distinguished between costs for the plaintiff’s claim and costs on the 2nd defendant’s Counterclaim.

25. The third point raised by the 2nd defendant’s application is that the Bills of Costs dated **31/8/2015** was for the costs of the entire suit. It did not separate which costs were for the plaintiff’s claim and which were for the 2nd defendant’s counterclaim. Regarding this issue, the starting point is that a counterclaim is a separate suit by itself, independent of the claim. Before proceeding on this quest, we must ask ourselves the question: “Does anything turn on this point?” If both defendants were condemned to the costs of the main claim, both have to pay. When the court however dismisses the counterclaim and orders that costs be paid in respect of that counterclaim to the plaintiff only it is only the 2nd defendant, the author of the counterclaim, who is bound to pay those latter costs.

26. I have looked at the Bill of Costs in this matter. One of the issue that will guide the decision of this court is whether the said Bill of Costs was challenged in terms of both form and content after it was lodged and served upon the 2nd defendant. The 2nd defendant is silent on this issue. It was at that point of taxation that an objection like this should have been raised in considering that objection the Taxing Master should have examined on whether the bill’s value would be affected by any such omission to separate the costs of the main suit and counterclaim. If this was not done, the 2nd defendant, who was represented at the taxation should not be heard to raise complaint now.

27. After perusing the record this court’s findings are that the Taxing Master disallowed several items in the bill among them items number 3 wholly and item 4 partially for duplicity. In her ruling dated 15/9/2016 the Deputy Registrar stated that she relied on the case of **Desai Sarria and Pallan Advocates Vs Jambo Biscuits K Ltd 2014 eKLR** for her action. This satisfied the 2nd defendant’s submission dated **19th January 2016** and filed on **24th January 2016** on those two items. The form and content of the bill

weretherefore challenged and the 2nd defendant's wishes were granted.

28. However, I have considered the fact that this court entertained and dismissed on **7/4/2016** an application for stay of any further proceedings, taxation or execution of any costs as a result of the judgment / decree and consequent orders of court given on 16/10/2014. In whether the Bill of Costs dated 31/8/2015 should have distinguished between costs for the plaintiff's claim and costs on the 2nd defendants counterclaim. In that ruling the court found as follows:

“The next consideration is whether the Applicant has demonstrated that it will suffer substantial loss. The Plaintiff /Respondent's claim was allowed. An intended sale of her property was nullified and the Applicant who was the intended purchaser has been refunded its money and has bought land elsewhere. The way I understand the Applicant's contention, it is not contesting the nullification of the sale. It is only contesting a finding of fraud which touched on it in the Judgement. It is also fighting dismissal of its counter claim. There is nothing to be executed in this case. If there is anything to be executed, it is only on costs. These costs have not been taxed.

The question which then arises is as to what loss will the applicant suffer? The simple answer is that the Applicant will suffer no loss. If costs will be taxed later and the Applicant pays, this will not render the intended appeal nugatory as the Respondent will refund the same. Though the Respondent stays in the U.S.A., she has property in Kenya. Her known property which was the subject of this suit is over Shs. 56,000,000/=. Is this a person who will not pay the costs? I do not think so. Whereas a losing litigant is entitled to appeal, equally a successful litigant ought not to be denied from enjoying the fruits of Judgement especially where such enjoyment will not render an intended appeal nugatory.

29. As seen from the passage above, an application for stay has previously been heard and dismissed by this court. It is not necessary to entertain the same prayers in this same court all over again. Going by the finding hereinabove as to the liability of the 2nd defendant to pay the awarded costs, it would be unnecessary to stay any execution process now. Besides, there is no evidence presented that a substantive appeal has been filed, and further, this is not an application for review of previous orders of this court declining stay orders.

30. In such circumstances, I find that it would not be in order to order a halt to all execution proceedings in this matter. I therefore dismiss the application dated **4/11/2016** with costs to the plaintiff.

It is so ordered.

Dated, signed and delivered at Kitale on this **20th** day of **September, 2017.**

MWANGI NJOROGE

JUDGE

Mr. Ndarwa holding brief for 1st defendant/respondent

Mr. Ndarwa for plaintiff

Ms. Wahome holding brief for Mr. K'opere for 2nd defendant

Court Assistant – Isabellah.

Ruling delivered in open court in the presence of the advocates for the parties.

MWANGI NJOROGE

JUDGE

20/09/2017