



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY**  
**CIVIL CASE NO. 89 OF 2010**

CHUMA FABRICATORS LIMITED ..... PLAINTIFF

VERSUS

ACCROW SUPPLIES LIMITED ..... DEFENDANT

**RULING**

1. On 10th May 2013, this Court issued warrants for the sale of the movable and immovable property of the Judgement Debtor. More or less as a result of that, the Judgement Debtor/Applicant filed a Notice of Motion dated 27th May 2013 under the provisions of **Order 40 rules 1 (a), (b), 2 (i) and 3** of the *Civil Procedure Rules* as well as under **sections 3A and 63 (e)** of the *Civil Procedure Act*. The Application sought two main prayers namely that there be a stay of this Court's Orders made on 12th November 2012 pending the hearing and determination of this Application and secondly, that the Orders and Warrants dated 10th May 2013 be set aside. The Grounds in support of the Application were as follows:

**“A. The plaintiff were for a long time doing business in common with the defendants for many years in the general area in Industrial area, the plaintiff being a construction company and the defendant a steel fabricators dealer.**

**B. The defendants together with the plaintiffs entered into a gentleman agreement to supply steel for fencing in Muthaiga and Machakos and the same was agreed upon as well as the amount to be paid. The supply was done to the tune of Kshs. 3,932,427.27. The invoice raised was paid and a balance of Kshs. 912,826/= remained to be paid.**

**C. The defendant increased the balance to demand Kshs. 4,017,879.30/= they moved to Court and the suit was heard and determined and an order for Kshs. 1,482,628.30 inclusive of costs were granted. That the plaintiff vide their advocate's letter of 24<sup>th</sup> January 2013 proposed to pay the defendants by way of instalments of Kshs.50,000/= and attached post dated cheques of upto 5 months starting with one current one of Kshs. 100,000/=.**

**D. The Defendant continue to make unreasonable demands of the plaintiff to pay upfront all the monies as granted in court knowing very well of the prevailing economic conditions that the plaintiff could not pay up the decretal amount at once.**

**E. Further the defendant accepted the proposal by banking the one cheque that was current**

of Kshs. 100,000/= but returned the rest implying that they were actually acceptable to the plaintiff's proposal. Therefore if this application is not granted, it will cause the plaintiff irreparable loss and damage. This will also deprive the plaintiff of their granted only source of income and livelihood and leave them destitute in terms of generating income as well as jobs.

**F. It is to the interest of justice, equity and conscience that the orders prayed for herein be granted as the Defendant/Respondent do not stand to suffer any irreparable damage whatsoever”.**

2. The Application was supported by the Affidavit of **Jaspal Singh Birdi** sworn on 27th May 2013. The deponent confirmed that he was a director of the Judgement Debtor Company. He gave details of what he termed the gentleman's agreement that his company had with the Decree Holder for the supply to his company of steel materials. Going through the history of the matter, the deponent concluded that Judgement was entered against the Judgement Debtor in the amount of Shs. 1,482,628.30. He recounted how his company had proposed to pay the Decree Holder by way of postdated cheques for 5 months. The first and current cheque had been accepted and paid in the amount of Shs. 100,000/- but thereafter the Decree Holder returned the other postdated cheques and proceeded to obtain warrants of attachment by instructing the first Respondent herein Messrs. Kenya Shield Auctioneers. He had instructed the Judgement Debtor's advocates to file an application for stay of execution under Certificate of Urgency. The matter came before this Court 5th June 2013 and a temporary stay of execution of the warrants herein was allowed pending the hearing of the Application before Court.
3. The first Respondent, the auctioneers, filed Grounds of Objection to the Application on 4th June 2013. Objections were taken on the following grounds:

**“1. THAT the application is frivolous, vexatious and an abuse of the court's process.**

**2. THAT the Applicant has wrongly enjoined the 1<sup>st</sup> respondent after entry of judgments without compliance with proceeding of enjoining of a party. Thus the 1<sup>st</sup> Respondent will be seeking to have its name struck out.**

**3. THAT the 1<sup>st</sup> Respondent is an agent of a disclosed principle thus it should not be enjoined in this suit.**

**4. THAT the 1<sup>st</sup> Respondent herein has never been a party to these proceedings between the Applicant and the Decree holder.**

**5. THAT it is not privy to the contract or judgment herein between the Decree holder and the Applicant.**

**6. THAT the Application is devoid of merit and should therefore be dismissed with costs”.**

On the same day, the second Respondent filed a Replying Affidavit sworn by the Managing Director of the Decree Holder one **Anoop Singh Kallah** sworn on the 4th June 2013. Having established that the Decree Holder's advocates had advised him that the Application of the Judgement Debtor was frivolous, vexatious, abuse of the court process and muddled in form, he noted the point that it had been brought under the provisions of the Civil Procedure Rules relating to interim injunctions yet the prayers of the Application were for orders for stay of execution.

4. As regards the stay of Orders issued on 12th November 2012, the deponent had been advised that no such Orders were issued by this Court on that day. Leaving aside the advice of the Decree Holder's advocates, the deponent noted that the Judgement Debtor had attempted to liquidate the decretal amount by way of monthly cheque payments of Shs. 50,000/-. This had not been acceptable to the Decree Holder and all the cheques were returned with the exception of one

- cheque for Shs. 100,000/-. The deponent noted that if the Decree Holder had accepted monthly cheques in the amount of Shs. 50,000/- towards liquidating the decretal sum, the Decree Holder company would have to wait for well over 7 years to be paid. It seemed that the parties were *ad idem* on the fact that once the cheques were returned, the Decree Holder instructed its advocates on record to commence execution proceedings. The deponent noted that the Judgement Debtor had failed to make good the decretal amount.
5. With the leave of the Court, the Judgement Debtor, again through its director the said Mr. Birdi, filed a Further Replying Affidavit dated 11th June 2013. He condemned the Replying Affidavit of the Decree Holder stating that paragraphs 1 to 10 thereof were untrue and only related to mere procedural technicalities. In my opinion, the Affidavit added nothing to the proceedings before this Court. On the same day as the Further Replying Affidavit was filed, 12th June 2013, the Judgement Debtor/Applicant's submissions were filed herein. The submissions opened by reiterating the prayers of the Application and under which provisions the same had been brought. The Judgement Debtor noted that it had offered to pay the decretal amount in instalments but it had been the Decree Holder's position that it had wanted payment thereof in 6 months. It noted that one cheque in the amount of Shs. 100,000/- had been accepted by the Decree Holder but the rest of the cheques had been returned to the Judgement Debtor. As a result, this Application had been made and it was the submission of the Judgement Debtor that injunctive Orders should be granted as it had complied with the conditions therefore as laid down in the case of **Giella v Cassman Brown and Co. Ltd (1973) EA 358**. The Judgement Debtor maintained that it had to show that it had a *prima facie* case with a probability of success and that if the injunction was not granted, it would suffer irreparable loss so much so that it could not be adequately compensated by an award of damages. It maintained that it was clear from the Affidavit in support of the Application that the Judgement Debtor had made a positive move to pay the decretal amount by delivering post-dated cheques to the Decree Holder. It was willing to pay by instalments but the Decree Holder had only accepted one cheque and returned the rest.
  6. Thereafter, the submissions went into the repetitive story that if the Judgement Debtor could not pay by instalments the first Respondent would execute the Warrants of Attachment that it was holding. Such action would disrupt the day-to-day working of the Judgement Debtor. The latter was afraid that any such attachment would disrupt its business and would definitely tamper with the Judgement Debtor's offices as well as its tools of trade. The Judgement Debtor then went on to submit that the Replying Affidavit did not, in any way, indicate opposition to the Application. It was clear, in the Judgement Debtor's opinion, that the Application was unopposed and that the said Orders should be granted as prayed. The Judgement Debtor then pointed to the provisions of *Article 159 (2) (d)* of the *Constitution* where this Court, in exercising judicial authority, should administer justice without undue regard to procedural technicalities. The Judgement Debtor referred to the case of **Shah v Mbogo** detailing that all the procedural technicalities with regard to this suit were mistakes of the advocate which clearly should not hinder the Judgement Debtor from obtaining substantive justice. Finally, the Judgement Debtor summed up its submissions by asking this Court for it to be given a chance to pay the decretal amount in instalments. It was also prepared to pay the amount of the assessed taxed costs upfront.
  7. On 28th June 2013, both the first Respondent and the Decree Holder filed their respective submissions as regards the Application before Court. The 1st Respondent submitted that it was not correctly enjoined to this suit and had never been a party to the same. The first Respondent was an auctioneer and was engaged by the Plaintiff/Decree holder to commence execution as against the Judgement Debtor. The first Respondent was thus a disclosed agent of a disclosed principal working under the instruction of its principal. The first Respondent referred the Court to the cases of **Silvanus Lusi Amito v German Red Cross Society & Anor. HCCC No. 2606 of 1997 (unreported)** and **Ashish Magon & Anor. v Ameer Management Ltd HCCC No. 533 of 2008 reported at (2008) eKLR**. The first Respondent submitted that both these cases found that the law of agency as regards a disclosed principal was quite clear and any suit brought in that regard cannot stand. Unfortunately for the 1<sup>st</sup> Respondent, I do not consider that either of these two cases helps it as regards a defence to the Judgement Debtor's Application. I have no doubt as to the veracity and correctness of the two decisions cited to this Court. However, such should be used to bolster an application by the first Respondent to have the suit struck out as against it.
  8. By way of introduction, the Decree Holder's submissions summed up that Judgement was entered

herein on 6th November 2012 and the Judgement Debtor was notified of by the Plaintiff to make good the decretal sum. The Judgement Debtor offered to liquidate the amount in instalments of Shs. 50,000/-per month but this offer was not accepted by the Decree Holder and the Judgement Debtor was given a period of 30 days to settle the decretal amount. Accordingly, the stay period lapsed on 7th December 2012 and the Judgement Debtor failed to liquidate the decretal amount. One cheque of Shs. 100,000/-was accepted by the Decree Holder, all the other cheques were returned. Party/party costs were taxed on 16th April 2013 the same being taxed in the amount of Shs. 264,738/-. Accordingly, six months down the line, the Decree Holder took out Warrants of Attachment after it became clear to it, that the Defendant had no intention of liquidating the decretal sum. As it saw it, the Decree Holder put forward the issue for determination being whether the Judgement Debtor had satisfied the conditions for granting the setting aside of Orders. In the Decree Holder's opinion it had not so satisfied and it noted that grounds A, B, and C of the Application had already been canvassed in court through oral evidence culminating in the Judgement being entered. There was no suggestion from the Judgement Debtor that the Orders had been obtained by fraud or material non-disclosure. It was, in its opinion, in the interests of justice to have the warrants executed as litigation must come to an end. If the Judgement Debtor had been dissatisfied with the Judgement of the Court, it had now had ample time to lodge an appeal. This had not been done to date. The Decree Holder maintained that the Application was only aimed at delaying the Decree Holder from enjoying the fruits of the litigation. It had now been 6 ½ years that the Judgement Debtor had owed monies to the Decree Holder. It was obviously still keen and adamant to delay payment.

9. Turning to the Judgement Debtor's submissions, the Decree Holder submitted that they were materially at variance to its Application before Court. It sought a blanket injunction to be put in place so as to avoid the Judgement Debtor having to pay a valid and proper Judgement of this Court. It pointed out that if the Judgement Debtor was permitted to pay instalments of Shs. 50,000/-per month, the decretal sum would take over seven years to liquidate. As regards the Judgement Debtor's submissions in relation to procedural technicalities, the Decree Holder referred the Court to the Supreme Court the decision in **Raila Odinga & 5 Ors v IEBC & 3 Ors** **Petition No. 5 2013** in which the Court had stated:

**".....our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The Article simply means that a court of law should not pay undue attention to procedural matters at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with the procedure imperative as they seek justice from courts of law."**

10. **Order 40** under which the Judgement Debtor has brought its Application before this Court deals with Temporary Injunctions and Interlocutory Orders. **Order 40 rule 1 (a) and (b)** read as follows:

**"40. 1. Where in any suit it is proved by affidavit or otherwise –**

- a. **that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**
- b. **that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders".**

Unfortunately for the Judgement Debtor there is no prayer in its Notice of Motion dated 27th May 2013 in which the word "injunction" appears. In any event, **Order 40** provides for temporary

injunctions for a period of time or until an event occurs e.g. the determination of the suit. Here, the Judgement Debtor has not asked for an injunction pending anything. However, if one ignores the heading to the Application detailing the provisions of the Civil Procedure Rules under which it is brought, what is it really asking for? Section 3A of the Civil Procedure Act as quoted by the Judgement Debtor refers to the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is not the section, in my view, which a party can come under in bringing an application such as this one, before Court. **Order 51 rule 10 (1)** reads as follows:

**“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”**

11. In the prayers to the Application, the Judgement Debtor seeks a stay of the Orders given by this Court on 12th November 2012 pending the hearing and determination of the same. I have perused the record of this Court but there are no Orders made on that date. However, on 6th November 2012, my learned brother **Ogola J.** having delivered his Judgement on that day, allowed a stay of execution for 30 days to enable the Judgement Debtor to file a formal application for stay should it be necessary. No such application would seem to have been made by the Judgement Debtor. The 30 days have long since expired. Can we take it then that the Judgement Debtor's current Application is the long awaited stay of execution application? Interpreting prayer 2 of the Application, this Court is simply unable to grant a stay of those Orders given by **Ogola J.** on 6th November 2012. Turning to prayer 3 of the Application, such asks of this Court to set aside the Orders and Warrants of Attachment dated 10th May 2013. That prayer is hardly a prayer for injunction. I cannot see how this Court can grant any injunction that is not prayed for. Accordingly, I dismiss the Judgement Debtor's submissions in that regard relating to the principles for the granting of injunctions as laid down by the **Giella v Cassman Brown** case.
12. Applications for stay of execution necessarily need to be made under the provisions of **Order 22 rule 22** of the *Civil Procedure Rules, 2010*. The Judgement Debtor has failed to take this step and instead has brought this Application before Court. Under the stay of execution provisions, the Court shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the Judgement Debtor to apply to the Court, by which the decree was passed, for an order to stay the execution. To this end, the Judgement Debtor was given 30 days by my learned brother **Ogola J.** on 6th November 2012. To my mind, the Judgement Debtor, by its Application before this Court, has not applied for any further stay of execution. It has applied for the lifting and setting aside of the Warrants of Attachment and no more. In my opinion, it has adopted the wrong procedure in this connection, in a last gasp attempt to avoid such execution. The Decree herein is for the principal amount including interest of Shs. 2,683,557.22 together with the taxed costs at Shs. 264,758/-. The instalments that the Judgement Debtor has offered to pay are Shs. 50,000/-per month. According to my calculations, the decretal amount would take 59 months to clear at that rate, which is clearly unreasonable. That offer by the Judgement Debtor was made as far back as December 2012, 11 months ago. The Judgement Debtor has not improved upon such offer and is obviously not serious.
13. To my mind therefore, it would be injudicious for this Court to deny the Decree Holder the fruits of its Judgement any longer. As a result, I dismiss the Judgement Debtor's Notice of Motion dated 27th May 2013, with costs to the Decree Holder.

**DATED and delivered at Nairobi this 20<sup>th</sup> day of December, 2013.**

**J. B. HAVELOCK**

**JUDGE**