REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 237 OF 2014

MASINDE MULIRO UNIVERSITY OF

SCIENCE AND TECHNOLOGY.....CLAIMANT

VERSUS

ALFATECH CONTRACTORS LIMITED.....RESPONDENT

KENYA COMMERCIAL BANK LIMITED.....1ST GARNISHEE

NATIONAL BANK OF KENYA LIMITED.....2ND GARNISHEE

RULING

1. I am tasked with determining an application dated 6th November 2018, brought at the instance of the claimant, seeking stay of the decree, extracted from the ruling delivered on 26th September 2018, and of the warrants of attachment dated 26th October 2018 to Mbusera Auctioneers, and of the order dated 1st November 2018. It also seeks the setting aside of the same decree, the warrants of attachment and of the order of 1st November 2018.

2. The factual background to the application is set out on the face of it and in the affidavit sworn in support by Josephine Osiro, a legal working for the claimant. It is averred that the court had allowed granted orders on the basis of a summons dated 1st July 2017. It is argued that the Arbitration Rules, 1997, required that respondent, attach Contractors Limited, to comply with Order 21 Rules 8(2)(3)(4)(5)(6) of the Civil Procedure Rules by procuring a decree, upon which an application for execution could be mounted. It is argued that a draft decree for approval should have been submitted to the claimant. It is averred further that the decree as drawn, was inconsistent with the judgment, and that the application for execution was founded on an illegal erroneous decree, that had misrepresented the amounts due to the respondent. It is argued that the duration the interest charged covered was not disclosed. It is argued that the decree and application for execution were crafted in a malicious manner with a purpose of the respondent maliciously enriching itself. It is further averred that the order to garnishee the claimant's bank account was founded on an illegal decree. It is also argued that it was overreaching for the respondent to seek warrants of execution simultaneously with garnishee proceedings. It is averred that interest was calculated on the wrong amount, since the whole principal amount was Kshs. 11, 064, 307.37 which had been paid or accounted for through mandatory tax deductions under the law of contract, the subject of the arbitral award. It is further averred that the claimant had issued a cheque for the uncontested interest in the sum of Kshs. 6, 554, 131.15 and undertakes to pay the uncontested balance of Kshs. 837, 289.03.

3. Attached to the affidavit of Josephine Osiro are several documents. There is copy of the decree extracted in this case, on an unknown date, from an order made on 26th September 2018, for Kshs. 18, 169, 727.55, with the claimant being ordered to pay interest on a principal sum of Kshs. 11, 064, 307.37, at the rate of 11.5% per annum, effective from 19th July 2017, until payment in full. Then there are copies of an application for execution, warrants for sale of property in execution of the decree and the garnishee order. There is a letter forwarding, to the advocates for the respondent, a cheque of Kshs. 9, 665, 775.30, being in settlement of the principal amount of Kshs 11, 064, 307.37, less withholding tax that was paid directly to the Kenya Revenue Authority. There is a copy of an affidavit by the managing director of the respondent, Kenneth Mwaura, confirming the payments, and asserting that the claimant was not entitled to say that the arbitral process was incomplete given that it had paid the principal sum. There is also a copy of the cheque for Kshs. 9, 665, 775.38. There is copy of another letter from the respondent's advocates indicating that the principal sum of Kshs. 11, 064, 307.37 had not been cleared since, after taking into account the withholding tax certificates provided, the total came to Kshs. 10, 478, 7686.30, and the balance continued to attract interest at 11.5%, which the respondent put at Kshs. 1, 617, 511.00 as at 6th November 2018. There is a letter from the advocates for the claimant raising several issues. One, that the advocates for the respondent had not sent a draft decree to them for approval. Two, that the managing director of the respondent had admitted, in the affidavit of 15th November 2015, that the principal amount had been cleared. Three, that the respondent was calculating interest on interest, which was not allowed in law. Copies of the withholding certificates are attached. Finally, there is a letter dated 5th November 2018, indicating that the respondent had not complied with Order 21 Rule 8 of the Civil Procedure Rules, with respect to forwarding a draft decree for approval by the advocates for the other side.

4. The response to the application, is vide an affidavit sworn on 22nd November 2018, by the managing director of the respondent, Gichira Maina. He avers that it was not mandatory that a draft decree be submitted to the advocates for the claimant for approval as the court has power under Order 21 Rule 8(7) of the Civil Procedure Rules to approve a draft order. He also avers that all the requisite court fees were paid when the amended award was filed in court. He states that the claimant had already paid a sum of Kshs. 10, 478, 786.30 out of the principal sum of Kshs 11, 064, 307.37. He argues that the principal sum had not been cleared in full. He explains that in the application for execution, due credit had been given to the sum received of Kshs. 10, 478, 786.30, and interest was applied at the rate of 11.5% on the sum of Kshs. 11, 064, 307.37, from 19th July 2017 until 26th October 2018 when the application was made. He has attached to his affidavit copies of the cheques that the respondent had received from the claimant, and the withholding certificates.

5. There is a further supporting affidavit sworn on 3rd March 2020 by Linda Omenya, a legal officer of the claimant. It principally seeks to explain the argument by the respondent that the claimant had not paid the total principal of Kshs. 11, 064, 307.37, but Kshs. 10, 478, 786.30. It is explained that a sum of Kshs. 9, 665, 775.30 was paid directly to the respondent, while Kshs. 1, 398, 532.07 was paid to the Kenya Revenue Authority as withholding tax under the Income Tax Act (Cap 470, laws of Kenya) and Value Added Tax Act (cap 476,Laws of Kenya)on behalf of the respondent on the payment of Kshs. 9, 665, 775.30 and other previous payments. The sum of Kshs. 1, 398, 532.07 was allegedly liquidated in three installments of Kshs. 542, 007.00, Kshs. 271, 004.00 and Kshs. 585, 573.50. She explains that the respondent only acknowledges the payment of 542, 007.00 and Kshs. 271, 004.00, but contests the payment of Kshs. 585, 573.50. She explains that the sum of Kshs. 585, 573.50 was withholding tax relating to the first and second interim certificates paid to the respondent in 2012, in respect of which the claimant did not deduct the withholding tax at 3% under the Income Tax Act. Kenya Revenue Authority carried out a compliance audit in 2014 and established that the claimant had not paid the withholding tax of Kshs. 585, 573.50. As regard the first and second interim certificates payments made to the respondent in 2012, the claimant made the payment of Kshs. 585, 573.50 sometime between 2014 and 2016, and a withholding certificate was issued. She avers that it was erroneous of the respondent to have stated in its application for execution that the amount received was Kshs. 10, 478, 786.30 while the true position was that the principal sum of Kshs. 11, 064, 307.37 had been paid in full in 2017. She avers that the interest calculated in the execution application of the decree at Kshs. 1, 617, 511.00 was erroneous and was not payable as there was no principal amount outstanding as at the date of the application for execution. She further states that the interest in the corrected arbitral award of Kshs. 7, 105, 420.18 had been paid in full. She avers that the only amount outstanding was Kshs. 286, 000.00 being the interest accrued on the principal amount from 18th July 2017, the date of the published corrected arbitral award, to 28th September 2017. She has attached to her affidavit various documents including payments vouchers and the withholding certificate in respect of Kshs. 585, 572.57.

6. The application dated 6th November 2018 was argued orally on 26th November 2018, where Ms. Wakoli, for the claimant, and Mr. Burugu, for the respondent, breathed life to the filings by their respective clients.

7. In addition, the respondent filed written submissions, and a list and bundle of authorities. I have had occasion to read through the written submissions and the authorities.

8. My understanding of the application dated 6th November 2018 is that the claimant is unhappy with the manner the decree was extracted and the amounts reflected in the warrants, in terms of both the process and content thereof.

9. I have perused the record before me. I am persuaded that the position stated by the claimant is the correct one. The decree and the application for execution were founded on an incorrect calculation of the amount due by the respondent from the claimant, as the respondent omitted from the calculation the sum of Kshs. 585, 573.50, being withholding tax that the claimant had paid, as evidenced by the documents attached to the affidavit of Linda Omenya, the legal officer. Going by calculations that take that fact into account, the only amount outstanding would be Kshs. 286, 000.00, being the interest accrued. The respondent argued that the affidavit by Linda Omenya was filed without leave. I note that that was so, since the ruling I delivered on 7th February 2019 had only admitted the affidavit sworn on 12th December 2018. The affidavit by Linda Omenya was sneaked into the record. However, since it carries material that sheds light on the whole matter, I shall not strike it out, in the wider interests of justice, taking into account that the claimant is a public entity and that Article 159 of the Constitution encourages the court to go to the root of the matter rather than dwell on technicalities.

10. On the process of the extraction of the decree, and he subsequent application for execution, Order 21 Rule 8 of the Civil Procedure Rules is relevant. Rule 8 is about preparation of decrees and orders. For ease of reference, let me reproduce the relevant parts of it, which say:

> *"(2) Any party in a suit at the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.*
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> *(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.*
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> *(4) On any disagreement with the draft decree any party may file the decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties."*

11. My understanding of the provisions that I have cited above, is that the draft decree may be generated by either party. The provisions do not make it mandatory for the draft to come from the parties. A decree is an instrument that issues from the court, duly executed by the registrar and bearing the seal of the court. It is, therefore, a court instrument, issued at the instance of the court, as a purport of the outcome of court proceedings as set out in the judgment of the court. In an ideal situation, the decree should be generated by the court, but Rule 8 gives the parties an opportunity to initiate the process. Where they choose to initiate it, it becomes mandatory that the draft be placed before

the other party for approval. Whether it is approved by the other party or not should not be an obstacle to the finalization of the matter, the registrar should still take charge and generate the decree. Of course, part of the reason for letting the parties draft the decree is that they may be possessed of information, as they do in this case, that ought to assist in preparing the draft, which information the registrar might not be privy to.

12. The bottom-line is that the final decree or order is a document that is approved and signed by the registrar. The registrar has the final say in the process. Whether the initial draft had emanated from one of the party is neither here nor there, for ultimately it has to be approved by the registrar, and it issues at the hand of the registrar.

13. The other thing to note is that in the event of any disagreement between the parties on the content of the decree or order, as extracted, the matter is placed before the judge, with notice to the parties, for adjudication by the court, either without or after hearing the parties. Of course, where the provisions in Rule 8 are followed to the letter, there would be no need for a formal application, but I understand the application dated 6th November 2018 to have been made in that spirit.

14. I reiterate what I have stated above, at paragraph 10, that the respondent did not reckon a payment, that the claimant had made, in the process of extracting the decree. Consequently, the decree extracted had errors, which should be addressed before execution can be embarked upon. Accordingly, I do hereby order cancellation of the decree extracted from the orders made on 26th September 2018. Let the parties start the process of extracting the decree afresh, by following all the steps contemplated in Order 21 Rule 8(2)(3)(4) of the Civil Procedure Rules. The execution proceedings founded on the decree that I have just cancelled are accordingly hereby halted.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22nd DAY OF January, 2021

W MUSYOKA

JUDGE