



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 374 OF 2010

KARURI STORES PHARMACEUTICALS LTD.....PLAINTIFF

SUMA AUCTIONEERS.....AUCTIONEER/2ND RESPONDENT

- VERSUS -

ACACIA MEDICAL CENTRE LIMITED.....DEFENDANT

R U L I N G

1. Before me is a Motion on Notice dated 4/9/2020. It was brought *inter - alia* under **Article 159 (2) (d) of the Constitution; Order 40 rule 4, Order 22 rule 22(1) and rule 51 of the Civil Procedure Rules.**

2. The Motion sought a raft of orders. These included; an order for the refund of Kshs. 500,000/- paid to Suma Auctioneers, an assessment of the interest payable on the decree issued in this case, an order for set off of money owed to the applicant by the plaintiff and a determination of whether there is any money due to the plaintiff prior to any further execution. There was also a prayer for damages for alleged disruption of the defendant's business.

3. In an unreasonably long affidavit, the defendant set out its case for the orders it sought. It stated that the plaintiff instructed the auctioneer to proclaim a sum of Kshs.22,487,983/72 against it based on an untrue decree with wrong figures. That judgment by consent had been entered for Kshs. 7,493,105/89 out of which the defendant had paid Kshs. 5,305,000/00 leaving a balance of Kshs. 2,188,105/89.

4. That despite as aforesaid, the plaintiff prepared a decree with an unreasonable and exorbitant amount of Kshs. 22,487,983/72 pursuant to which the auctioneer proclaimed the defendant's goods on 10/3/2020. Since attachment did not take place, the warrants of attachment expired on 4/4/2020.

5. However, on 27/8/2020, the auctioneer raided the business premises of the defendant and commenced to remove the items therefrom. The defendant was forced to pay the auctioneer a sum of Kshs. 500,000/- to halt the illegal attachment. It was urged that the prayers sought be granted.

6. The plaintiff opposed the application vide a replying affidavit sworn on 16/9/2020 and grounds of opposition dated 15/9/2020, respectively. It was contended that the consent judgment entered into between the parties operates as a contract between them. That therefore the court has no right to entertain a dispute that has been settled in such a contract. That under the Banking Act, the *in duplum* rule does not apply to interest on court judgments. That the auctioneer was under no obligation to issue a fresh proclamation notice after the expiry of warrants of attachment.

7. It was further contended that the consent judgment was entered into on 19/11/2010 and attracted interest at the rate of 1.5% per month from 30/9/2009 until payment in full. That the applicant only began paying the judgment debt in March, 2011 and made the last payment in March, 2013. In the premises interest had accrued to the amounts executed for.

8. In his replying affidavit **James Rimui**, advocate averred that the applicant had expressly admitted to being indebted to the 1st respondent to the tune of Kshs. 7,905,051/85 whereby a consent judgment was entered. That the defendant had failed in making the periodic payments required under the consent thereby leading to the escalation in the interest payable.

9. Mr. Rimui further averred that the defendant had only paid Kshs. 5,305,000/=, being the principal sum only. That since August 2013, the defendant had made no payment at all. That as at 15/4/2020, the outstanding debt stood at Kshs. 24,233,634/01 which sum continues to

accrue interest.

10. That the decree had been obtained in a regular manner whereby, the draft decree was forwarded to the defendant's advocates who approved the same as drawn. The same contained a provision for interest at 1.5% from 30/9/2009 until payment in full.

11. The parties have filed their respective submissions which the Court has carefully considered.

12. Vide an Order dated 19/11/2010, a consent was recorded in the following terms: -

"IT IS HEREBY ORDERED BY CONSENT:

THAT judgment be entered for the Plaintiff against the Defendant for the admitted amount of Kshs. 7,493,105/89 plus interest at 1.5% per month from 30th September 2009 until payment in full."

13. It was the defendant's submission that after the above consent, a subsequent consent was entered on 22/2/2011 by which the sum of Kshs. 7,493,105/89 was to be paid in monthly instalments of Kshs. 405,000/00 from 20/3/2011. On the other hand, the plaintiff contended that the latter consent did not vary the interest of 1.5% per month that had been agreed upon. That it did not set aside the earlier consent but only acted as an addendum on how payment was to be effected.

14. The parties were clear in their consent judgment as to the rate of interest applicable and the period. The latter consent did not set aside the judgment. It only clarified how the decretal sum was to be liquidated, *to wit*, by monthly instalments of Kshs. 405,000/.

15. Consensual agreements are contractual and binding upon the parties. It is a well-known principle of law that the court cannot rewrite a contract of the parties. In **MARY WAMBUI MIGADDE v ECOBANK LIMITED & 3 others [2009] eKLR**, it was held: -

"Going by the above principles, the consent order herein is to be treated as a contract. The Plaintiff who is a party to the contract instituted this suit against several Defendants but chose to enter into a compromise with the 1st Defendant. The Plaintiff undertook to do certain things as per the consent order. Indeed, there are no allegations that the Plaintiff lacked capacity to enter into the consent or there was undue influence. It is also not denied that the Plaintiff instructed her Advocates to sign the consent."

16. The foregoing applies here in all fours. The parties entered into the consent judgment with open eyes. They agreed as to its terms including the interest rate of 1.5% per month! Until and unless the same is set aside and/or varied under the known principles of interfering with contracts, the defendant cannot be heard to complain of the exorbitant interest rate.

17. In any event, it is the defendant to blame itself for failing to make prompt monthly instalments that must have led the interest to skyrocket to incredible levels. All that this Court can do is to satisfy itself whether the decree was extracted in accordance with the consent judgment and whether the interest in the warrants was properly calculated. The draft decree was approved by the defendant's advocates in accordance with the law and cannot therefore be faulted.

18. I have looked at the calculations of interest that were made before the warrants were issued. The same was based on the judgment sum together with 18% for a total number of 3981 days. That was clearly wrong. There were part payments made by the defendant in the years 2011 and/or 2013. The calculations should have taken into consideration those payments made and apply the interest accordingly. Interest should run only for the period the money remains outstanding and rest once a payment is made.

19. Accordingly, the warrants of attachment herein were illegal and cannot stand. They are set aside for being illegal. Let the parties appear before the Deputy Registrar for the recalculation of the interest payable. Obviously it must be simple interest for the periods the monies remained outstanding and not for the whooping 3981 days as the Deputy Registrar had calculated.

20. Having held that the warrants were illegal for having been based on illegal and wrong calculations, the attachment cannot stand. The entire exercise was illegal and is hereby set aside.

21. That leaves the issue of the Kshs.500,000/- paid by the defendant to the auctioneer. There is no benefit that can flow from an illegal act. In any event, the auctioneer should have first proclaimed before moving in to remove the items in execution of the warrants. Once the warrants were re-issued in August, 2020, it was imperative that the auctioneer should have first proclaimed the good and give the usual 7days before attaching them.

22. Rule 12 of the Auctioneers Rules 1997 provides the procedure to be followed once the auctioneer has received a court warrant for the attachment of movable property. **Rule 12 (1)(b)** states:

"Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—

prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect."

23. On the other hand, **Rule 12 (4)(b)** provides:-

“Where orders obtained by a judgement debtor staying execution and served on an auctioneer are subsequently vacated, the auctioneer shall:-

(b) where the warrants of attachment and sale have expired, apply for extension of the warrants for a period not exceeding forty-five days, within which he shall finalize execution;

(c) where fresh warrants of attachment and sale or letter of instructions are issued with new figures, proceed in the manner provided in these Rules in respect of a fresh warrant.

24. Accordingly, the attachment was irregular and unlawful. The auctioneer was not entitled to any charges out of an irregular and unlawful attachment. Accordingly, he should either refund the said sum of Kshs. 500,000/- to the defendant or in the alternative pay over the same to the plaintiff for the credit of the defendant, whichever is convenient to him, within 7 days of the date hereof. In default, execution for the same to issue and the sum will start bearing interest on the said sum at the rate of 14% per annum until payment in full.

25. I have looked at the prayers sought. Most of them cannot be granted in the circumstances of this case.

26. In view of the foregoing the application dated 4/9/2020 is allowed on the following terms: -

a. The Auctioneer does pay over to the plaintiff the sum of Ksh. 500,000/- within 7 days of this ruling in default execution to issue and interest to start running at simple interest.

b. The parties appear before the Deputy Registrar on a date to be agreed to determine the actual sums due under the decree.

c Each party to bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2021

A. MABEYA, FCI Arb

JUDGE