



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 171 OF 2009

PARAGON ELECTRONICS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

SAMSUNG ELECTRONICS LIMITED.....DEFENDANT/APPLICANT

RULING

1. The ruling relates to a notice of motion application dated 12th November 2018, brought under the provisions of; Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. The applicant is seeking for orders as here below reproduced;

(a) The Honourable court be pleased to stay execution of the judgment entered on 10th November 2016, at the High Court by Hon. Justice E.K.O. Ogola and read by Hon. Lady Justice Grace Nzioka and all consequential orders thereof pending the hearing and determination of the application;

(b) That the Honourable court be pleased to allow the Defendant/Applicant deposit the decretal amount as per the warrants of attachment generated on the 18th April 2018, in court and thus bring to a stop the escalation of interest and any attachment.

(c) That the Plaintiff/Respondent be at liberty to apply for the said funds once and when it is ready to receive the decretal sum deposited in court;

(d) That the Honourable court be pleased to stay execution of the Judgment on 10th November 2016, at the High court by Honourable Justice E.K.O. Ogola and read by Hon. Lady Justice Grace Nzioka and all consequential orders thereof pending the hearing and determination of the costs plus interest awarded to the plaintiff in accordance with the law;

(e) That costs of the application be in the cause.

3. The application is premised on the grounds on the face of it and an affidavit of even date sworn by Arthur K. Wamae, an advocate of the High court of Kenya, practicing as an associate at the firm of; Messrs John Mburu & Company Advocates which has the conduct of this matter on behalf of the applicant.

4. The applicant avers that, judgment was entered in favour of the respondent on 10th November 2016, in the sum of; USD 54,300 together with costs and interest with effect from 2003. Subsequently, it was reviewed by consent of the parties, whereupon the year 2003 was amended to read 2008.

5. That by a letter dated 27th February 2018, the applicant reached out to the respondent's advocates requesting for its particulars of the bank account where to pay the judgment sums to settle the decretal sum but the particulars were not received. Instead, the respondent filed a garnishee application dated 27th March 2017, seeking to have funds held in applicant's bank accounts paid out to it, but the application was subsequently withdrawn.

6. On the 1st October 2018, the respondent filed another application seeking to have; Linda Karimi Kaai; Kinam Kim and Hyun Suk Kim held in contempt of court for failing to obey a court order. On 30th October 2018, applicant vide a letter by registered post sought for bank account details for deposit of the decretal sum. To date the particulars have not been provided. The applicant avers that, it has ever been

ready and willing to pay the decretal sum but the respondent has frustrated its efforts to make the payment as such, it is in the interest of justice that, the it be allowed to deposit the decretal sum in court, so as to stop the escalation of interest.

7. However, the application was opposed based on the ground of opposition dated 30th April 2020 and a replying affidavit dated 29th May 2020 sworn by; M/s Clemence Waki, a representative of the respondent, who deposed that, the application has been superseded by the parties' agreement on 28th November 2018, whereby the applicant agreed to pay the decretal sum upon re-confirmation by the Deputy Registrar of the actual amount payable. Subsequently the amount was computed on 3rd December 2018, without any objection from the applicant.

8. That the applicant was instructed as to where to pay the decretal sum but disregarded the instructions, the latest being instructions vide the letter dated 6 April 2020, which has never been responded to despite receipt thereof. Further, the applicant has not provided any material to back the allegation that, it has been ready and willing to settle the decretal sum.

9. That, the modes of payment of the decree are provided for under Order 22 Rule 1 of the Civil Procedure Rules 2010, and there is no explanation why the same has not complied with. On 28th November 2018, the court guided the applicant on how to pay the decretal sum but it has also not complied. There is nothing in law that gives the applicant a right to choose the manner in which or the bank account into which it ought to pay a settled decretal sum.

10. On 30th January 2019, applicant filed another application with similar issues as herein and it was dismissed on 21st February 2019 and the applicant ordered to pay the decretal sum, therefore, the application herein has been overtaken by events.

11. The respondent submitted that there is no pending appeal against the judgment nor an application to review, set aside or otherwise vary the judgment. On or about 27th March 2017, the respondent applied for and was granted leave to execute the judgment prior to assessment of interest or costs. Therefore, there is no basis of seeking a stay of execution of the judgment. That this application is a ploy to delay the respondent from enjoying the fruits of the judgment. Thus to bring this matter to a closure, the applicant should be ordered forthwith, to pay the decretal sum together with interest to the bank account instructed by the respondent's advocates in the letter dated 6th April 2020

12. The application was disposed of by filing of submissions. The applicant invited the court to consider the following issues: whether the applicant should be allowed to deposit the decretal sum in court as per the warrants of attachment generated on the 18th April 2018 and whether the respondent is entitled to interest accrued from 18th April 2018 onwards.

13. The applicant submitted that, it should be allowed to deposit the decretal sum in court, as the bank account details provided by respondent are questionable in that:

a) Mr. Bullent whilst purporting to act on behalf of the respondent failed to provide proof that, he has authority to act on behalf of the respondent (which should have been evidenced by way of a board resolution to the effect that he is duly authorized to act on behalf of the respondent);

b) The bank account details given by the respondent held a different name from the respondent's name; and

c) There was no company's resolution to show that, the respondent is the legal owner of the bank account details issued by Messrs Valentine Ataka Advocates via their letter dated 6th April 2020.

14. The applicant is thus apprehensive that it may deposit the decretal amount in unknown bank account and later be called upon to pay the same again.

15. In addition, the respondent has constantly changed its legal representative, thus occasioning a delay, which should not be visited upon the respondent as a result of escalation of interest. The interest on the decretal sum should only accrue from 10th November 2016 to 18th April 2018 as per the warrant of attachment taken out. Any order to the contrary will amount to unjust enrichment by the respondent. It was submitted that, the delay for the last 812 days, by the respondent has greatly prejudiced the applicant as a result of an ending litigation.

16. However, the respondent submitted that, the applicant has been using several excuses to deny it the fruit of the judgment by filing several applications inter alia:

a) An application dated 17th November 2016, to review the judgment filed on 18th November 2016;

b) An application dated 13th December 2016, filed on 15th December, 2016 for stay of execution;

c) An objection proceedings application dated 24th April 2018 filed on 26th April 2018, through proxy; Samsung Electronics East Africa;

d) An application filed on 30 January 2019, challenging the authority of the respondent's director, Bulent Gulbahar to instruct payment of the decree. It was dismissed on 21st February 2019 and the court directed the applicant to pay the respondent.

17. That the applicant has not properly invoked the jurisdiction of the court, in that an order for stay of execution can only be granted where there is a pending appeal. Further the application has been brought after a delay of four years. The case of; Suleiman Sumra & another v Said

Mohamed Said (2018)eKLR was cited. It was further submitted that, in any event, the prayer for stay, is contradictory as the applicant is at the same time seeking to be allowed to pay the decretal sum. The respondent reiterated that the application is Res judicata.

18. Finally, it was submitted that, since the applicant has been holding the decretal sum, they should the interest. The respondent relied on the cases of; Highway Furniture Mart Ltd vs. Permanent Secretary Office of the President & Another (2006) Eklr. Barclays Bank Ltd vs. William Mwangi Ngaruki (2014) eKLR and Lwanga vs. Gentenerary Rural Development Bank (1999) 1 EA 175, to argue that, the law on payment of interest is intended to dissuade delay in settlement of decrees and to remedy a successful litigant's deprivation of their funds.

19. I have considered the arguments advanced by the parties, the documents relied on and the submissions as highlighted and I find that four (4) have arisen for determination: -

a) *Whether the court should order stay of execution of the judgment and all consequential orders thereof;*

b) *whether the court should allow the respondent to deposit the decretal sum in court;*

c) *whether the court should make an order that respondent to be at liberty to apply for funds once deposited in court; and*

d) *who should bear the costs of the application.*

20. In addressing the first issue I note that, the provisions of the law that govern stay of execution, are provided for under; Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules 2010 which states that: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from, except appeal case of, in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

21. These provisions clearly apply where the applicant has preferred an appeal against the judgment from which the decree or the order that is sought to be stayed arise from. In the instant matter, it is not in dispute that, there is no appeal filed against the judgment herein. What the applicant is seeking for is to be allowed the stay execution of the judgment pending the hearing and determination of an application for costs and interest payable. This is not provided for under the above provisions. Even then at most, stay of execution can only be granted in respect to the costs and interest but not the decretal sum. Neither has the applicant met the conditions under sub rule (2) aforesaid and for those reasons the prayer for stay of judgment and all consequential orders, cannot be granted.

22. I shall now turn to prayer of deposit of the decretal sum in court. Having considered the respective arguments advanced, it is clear that, each party is shifting blame to the other. The applicant has referred the court to two letters dated; 27th February 2018 and 30th October 2018, as evidence that, it requested the respondents for bank details to facilitate the payment of the decretal sum.

23. However, it is not clear as to whether these two letters were responded to, but the respondent has not disputed receipt thereof. Be that as it were, it is noteworthy that, the first letter is address to; Andrew & Steve Advocates, who were acting for the respondent. The content of the letter reads inter alia:

“our client proposes to pay the judgment sum plus interest at court rates calculated from the date judgment was entered so as to bring the matter to a close”.

24. I further note the second letter dated 30th October 2018, was sent to the respondent by registered post and also hand delivered and received by one, Clemence on behalf of the respondent on the 8th November 2018. The letter reads inter alia as follows:

“the above matter refers and in particular the extracted decree dated 18th day of April 2018. Please furnish us with account details for purposes of settling the same”.

25. The letter was also scanned and sent to the respondent via an email on 8th November 2018 at 3.52 p.m. As can be clearly seen from its content, the bank details were expressly requested for. I also note from the court record, a letter dated 14th November 2019, from the respondent's advocate to the applicant's advocate giving details of a bank account into which payment should be made. It is accompanied by a board resolution signed by two persons described as the directors of the respondent's company although it does not have the company's seal authorizing the payment. It is not clear from the copy in the court file whether this letter was received by the applicant.

26. However, the letter gives the details of the bank account as follows;

Account name-----Paragon Electronics Ltd (USD), Account number----- 0900337702,

Bank----- Gulf Africa Bank

Branch----- Eldoret.

27. Similarly, on 16th November 2018, Mr. Bullent Gulbar wrote to the applicants advocates; John Mburu & Company Advocates, and made reference to letters dated, 30th October and 12th November 2018. The letter reads in part as follows: -

“as indicated during court, we do not have a US Dollar account and therefore propose to you to avail a bankers cheque in settlement of the decretal sum. Given circumstances of your averments during court, that the applicant wishes to transfer the decretal sum from Korea. We have asked our in house counsel whether he could avail his US account details for the said transfer. Our in- house counsel has agreed to avail his bank account for the purposes of settlement of the decretal sum. The details are as follows:

Beneficiary: ----- Atak Kimori & Okoth Advocates, care of Paragon Electronics,

Bank: -----Bank of Africa,

Branch: -----Kenyatta Avenue Nairobi,

Bank Branch Code: ----- 19026

Account Number: ----- 05416760017”.

28. Pursuant thereto by a letter dated 29th November 2018, from the firm of; Ataka, Kimori & Okoth addressed to the firm of; John Mburu & Company Advocates, which makes reference letters dated 16th November 2018 and 19th November 2018, and states inter alia that, the Respondent has authorized its law firm to receive payment of the decretal sum on its behalf. The details of payment are provided as follows:

Bank: -----Bank of Africa Ltd,

Branch: -----Kenyatta Avenue,

Account Number: ----- 0546760068

Swift Code: -----AFRIKENX,

Bank Branch Code: -----19026.

29. The Respondent has referred the court to the order made on 28th November 2018, whereby the parties agreed to go before the Honourable Deputy Registrar to determine the amount payable. It is argued that as a result of the consent to recalculate the amount, the application herein is overtaken by events. However, the said recalculation was informed simply by the amendment in the judgment on the date when interest would be payable being amended from the year 2003 to 2008 and does not deal with the issue of payment of the decretal sum.

30. I have further taken note of the order made by the court on 21st February 2019, which the Respondent argues directed the Applicant where to deposit the decretal sum. However, I note that the said order states inter alia as follows; “the notice to act in person by Bullent Gulbar is not in compliance with mandatory provisions of; Order 9 rule 8, 9 and 10 of the Civil Procedure Rules. In default of the applicant Bullent Gulbar to act in person and/or any other advocate complying with rule 8, 9 and 10 of the CPR 2010, the Respondent shall comply in term of payment to the Respondent funds to fulfill the judgment as prescribed in court file HCC171/2009 and the instant application of 30th January 2019 is dismissed”. As can be seen clearly from this ruling there is no order directing on the mode of payment of the decretal sum.

31. Be that as it were, the mode of payments of payment of money under decree are provided for under Order 22, Rule 1 of the Civil Procedure Rules as follows: -.

“(1) All money payable under a decree or order shall be paid as follows—

(a) into the court whose duty it is to execute the decree;

(b) direct to the decree-holder; or

(c) otherwise as the court which made the decree directs.

32. It is evident herein that, the Judgment debtor is ready and willing to pay the subject sum to the Decree holder directly subject to being provided with the proper and correct bank account particulars of the Decree holder. In that case there is no justification of payment of the money in court. Therefore, to direct this matter I order that, the Decree holder should furnish the subject particulars for payment to its bank account. However, if the Decree holder wants the payment made to a third party and/or an assignee, then the Decree holder should provide an indemnity in favour of the Judgement debtor or a properly executed board of directors' resolution authorizing the payment of a third party or assignee.

33. If the Judgement debtor makes payment pursuant to that indemnity and/or resolution, it shall be released from liability in respect to any other future claims from the Decree holder in respect of the payment.

34. I therefore direct that the Decree holder provides its bank particulars within two (2) days of the date of this order and the Judgment debtor to make payment within a similar period of two (2) days. If the particulars are not provided, the money be deposited in court forthwith, if the payment is not made then the Decree holder shall be at liberty to proceed in accordance with the law.

35. I make on orders as to casts as it relates to this application.

36. It is so ordered.

Dated, delivered on line and signed on this 29th day of July, 2020.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Gikerafor the Applicant

Mr Atakafor the Respondent

RobertCourt Assistant