



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.
CIVIL CASE NO. E276 OF 2019

BETWEEN

AZICON KENYA LIMITED.....PLAINTIFF

AND

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED.....DEFENDANT

RULING

1. The Defendant, the Judgment-Debtor in this matter, has moved the court by the Notice of Motion dated 7th October 2020 seeking the following order:

[3] The Warrants of Attachment of Moveable Property in execution of decree for money and the Warrant of Sale of Property in Execution of decree for money both issued to M/s Kinyua & Co. Auctioneers on 24th September 2020 be and are hereby set aside.

2. The application is supported by the affidavit of Ermanno Rabbiosi, the Chief Quantity Surveyor and Contract Manager of the Judgment Debtor, sworn on 7th October 2020. The application is opposed by the Replying Affidavit of David Kibet Tonui, the Plaintiff's/Decree Holder's Managing Director, sworn on 8th October 2020. The parties, through their respective advocates, have filed written submissions in support of their positions.

3. The issue in contention is whether the execution proceeded in contravention of the consent dated 13th July 2020 and adopted by the court on 21st July 2020 ("the Consent") and which provided as follows:

1. THAT judgment be and is hereby entered against the Defendant for the total amount of United States Dollars (USD) 4,160,857.57.

2. THAT the aforesaid Decretal sum be paid to the Plaintiff within Fourteen (14) days from the date of receipt of the sums in the Partial Decree in HCCC E322 of 2019.

3. THAT in the event the Defendant fails to pay the Plaintiff as herein above ordered for any reason whatsoever, the Plaintiff to execute the order or decree in any other way recognized by law.

4. THAT in the event of execution as stated in 3 above, interest at court rate until payment in full of the judgment to apply.

5. THAT the parties herein shall bear their respective legal costs of the suit. [Emphasis mine]

4. The Judgment Debtor's case is that under Clause 2 of the Consent payment would be made to the Decree Holder within 14 days of receipt of the sums on in the partial decree in HCCC E322 of 2019. That despite being aware that the Judgment Debtor is yet to receive payment due to it under the said decree, the Decree Holder has proceeded with execution without any basis. The Judgment Debtor also claims that the warrants of attachment and sale issue are for USD 5,686,151.59 as opposed to the sum of USD 4,160,857.57 which is contained in the Consent. It therefore prays that the warrants of attachment and sale be set aside.

5. In the Replying Affidavit, Mr Tonui contends that the Decree Holder initiated execution in line with Clause 3 of the Consent and in so doing, it proceeded to calculate interest on the decretal sum according to Clause 4 of the Consent. He pointed out that although there was an error in calculation of the interest, the same was duly corrected and the Judgment Debtor duly informed prior to filing of the application under consideration.

6. As regards payment, Mr Tonui, deponed that the Plaintiff invoked Clause 3 of the Consent, *“since there has been a long delay of payment of the decretal sum and there was no formal communication whatsoever on the status of the sums in the Partial Decree in HCCC E322 of 2019. These reasons made it crystal clear that there will be no payment made to the Plaintiff/Decree Holder whatsoever.”* The Decree Holder complained that in the meantime, it was forced to suspend business operations as a result of the Judgment Debtor’s failure to pay the monies owed to it.

7. Mr Tonui further deponed that the Kenya Revenue Authority issued an Agency Notice against it, that it has received threats from banks for failing to service its loans and that it has failed loans, salaries and third party suppliers. Its case is that it had no option but to invoke Clause 3 of the Consent because the Judgment Debtor did not provide any indication when and whether it will pay the debt and it acted so as to avoid it imminent collapse.

8. From the foregoing submissions, the issue for determination is whether the Decree Holder was entitled to proceed with execution in terms of the Consent. A consent judgment is in the nature of agreement and parties are bound by the contents which they have freely negotiated. The terms of Clause 2 of the Consent are clear that the decretal sum, *“was to be paid to the Plaintiff within Fourteen (14) days from the date of receipt of the sums in the Partial Decree in HCCC E322 of 2019.”* Thus the condition precedent for payment to the Decree Holder was that the Judgment Debtor was to receive a certain sum from the third party and there would only be default in terms of Clause 3 of the Consent if it received the money but failed to pay the Decree Holder which would then entitle the Decree Holder to proceed with execution.

9. The Consent did not contemplate execution for any other reason other than for failure to pay the debt from monies received from the third party. While this may present hardship to the Decree Holder, the court cannot intervene in varying a consent the parties have freely negotiated and whose terms reduced in a consent order. The court can only enforce the bargain arrived at by the parties.

10. The inescapable conclusion is that the execution herein is premature in so far as it has not been shown that the Judgment Debtor has received the sums set out in Clause 2 of the Consent.

11. I therefore allow the Notice of Motion dated 7th October 2020 on the following terms:

(a) The Warrants of Attachment of Moveable Property in execution of decree for money and the Warrant of Sale of Property in Execution of decree for money both issued to M/s Kinyua & Co. Auctioneers on 24th September 2020 be and are hereby set aside.

(b) The Decree Holder shall bear the costs of the execution and of the application.

DATED and DELIVERED at NAIROBI this 23RD day of OCTOBER 2020.

D. S. MAJANJA

JUDGE

Mr Taliti instructed by Taliti Collins Advocates for the Plaintiff/Decree-Holder.

Ms Asli instructed by Ahmednasir, Abdikadir and Company Advocates for the Defendant/Judgmentp-Debtor.