



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL, ADMIRALITY & TAX DIVISION

CIVIL SUIT NO 178 OF 2013

SEYANI BROTHERS & COMPANY (K) LIMITED.....PLAINTIFF

VERSUS

AFFILIATED BUSINESS CONTRACTORS LIMITED.....DEFENDANT

RULING

1. The Judgment in this matter was delivered on 15th August 2017. On 30th August 2017, the Judgment debtor filed a notice of motion application seeking for orders, inter alia that there be a stay of execution of the Judgment pending the hearing, and determination of the intended Appeal against the Judgment. Further the Decree holder be restrained from executing the decree and the costs of the application be in the cause.

2. The application was heard inter parties, whereupon the court ordered that, there be a stay of execution of the decree on conditions that;

(a) The Judgment debtor/Applicant deposits a total sum of Kshs. 22,387,568.70 plus interest from the date of judgment to the date of the order in an interest earning account in the joint names of the parties within thirty (30) days of the date of the order;

(b) The Applicant pay costs of the application to the Respondent; and

(c) In default of compliance with the orders above, under (a) and (b), execution to proceed forthwith.

3. The court record reveals that, the Judgment debtor did not comply with the court orders within the time stipulated but kept seeking for indulgence to comply. The Respondent indulged them albeit with reservation as to the delay it occasioned. It did subsequently occur that there was a dispute between the parties, as to whether the court had ordered the Judgment debtor to deposit the principal sum per se or with interest accrued thereon.

4. Subsequently, the court gave directions on the same that interest was payable. However, it was noted that the Judgment debtor was indulged to comply with the court order on various occasions but did not within time set. Eventually the Judgment debtor paid the principal sum and interest. But the Decree holder maintains that the entire interest had not been paid.

5. It is against this background that the Plaintiff filed an application dated 13th November 2018, seeking for orders inter alia that, the court discharges the orders given staying the execution and allow the Decree holder to execute the decree.

6. It is argued that, the reason why the stay of execution was granted was to enable the Judgment debtor lodge the Appeal against the Judgment, and have the same determined. That there is no Appeal lodged to date, two and a half (2 ½) years, since the Judgment was delivered. All that the Judgment debtor argues is that, they filed a notice of Appeal on 28th August 2017, a year and a half (1 ½) ago, and the delay in lodging the Appeal has been attributed to the delay in receipt of proceedings although this is not evident. Therefore, it is evident, that, the record of Appeal has not been filed.

7. However, the Judgment debtor has filed a Replying affidavit dated 22nd November 2018, is sworn by Zephania Gitau Mbugua, its wherein he deposes that, he complied with the court order and paid a sum of Kshs 23,999,473.6. That, the Decree holder is claiming interest based on the judgment rate of 20% per annum, but if the applicable rate was 20% per annum, the interest due would be Kshs. 2,686,508.24. However, out of abundance of caution, the Judgment debtor has now deposited a further sum of Kshs 1,100,000 in the event that the court's ruling will be that the applicable interest rate was 20% per annum. In that regard there is compliance with the court order.

8. I have considered the application and the Affidavits both in support and in reply and find that the entire matter herein revolves around

whether; the Judgment debtor has complied with the court order given on 21st March 2018, in relation to the deposit of the principal sum of Kshs 22,387,568.70 plus interest thereon.

9. According to the Decree holder the sum payable is principal sum of Kshs 22,387,568.70, and interest of Kshs 26,265,696; being interest for the period between, 13th October 2011 and 25th August 2017. Yet, the Respondent has only deposited Kshs 23,999,473.6, without seeking variation of the court order.

10. Therefore the issue remains whether, Judgment debtor has deposited the principal sum plus interest as ordered or not; and/or whether, the interest payable is based on the Judgment and/or Ruling delivered on the application for stay of execution.

11. The evidence on the court record shows that, an amount of Kshs 23,999,473.60 was deposited in an interest earning account in the names of the Advocates of the parties on the 20th July 2018. That sum obviously represents more than the principal sum of Kshs 22,387,568.70. It therefore supports the Judgment debtors position that, an amount of Kshs 1,611,904.95 was paid over and above the principal sum. I have also seen a further transfer of Kshs 1,400,000 paid in the subject joint account on 21st November 2018. Presumably, it is interest on the principal sum.

12. What is not clear and seems to be in dispute is the interest applicable and how much is payable. In this regard, the court's ruling is clear. I find no substance in the Judgment debtor's submission that, the ruling is silent on the same. The Judgment delivered in this matter provided for interest at the rate of 20% per annum from the date it became overdue until payment in full. The order in the ruling simply re-affirmed that save interest payable is from the date of judgment to the date of stay order, 21st March 2018. The calculation of interest for that period reveals the interest applicable and payable based on the interest rate of 20% is Kshs. 2,674,241.08.

13. As indicated herein, so far a sum of Kshs 1,611,905.95 and a further Kshs 1,400,000 has been paid giving a total sum of Kshs. 3,011,905.95. Based on the above calculation, the Judgment debtor has complied with the court order albeit out of time.

14. I however note that, the Judgment debtor has not taken any reasonable step to prosecute the appeal for almost two years now. It is therefore prejudicial to keep Decree holder from the fruits of judgment on the indolent action of the Judgment debtor. The law requires that, non-compliance with the order lead to the setting aside of the same.

15. However, I find that, it will not serve the interest of justice. to do the same In that case, I find that to mitigate the injustice visited upon Decree holder/Applicant, I shall review the orders given on 21st March 2018 in the following terms:-

(a) That 50% of the sum of Kshs. 22,387,568.70 plus all interest that has accrued thereto (Kshs. 2,674,241.08) be released to the Decree holder;

(a) The Judgment debtor to file and serve a record of appeal within thirty (30) days of this order;

(b) In default thereof, execution to issue forthwith.

16. Those then are the orders of the court.

Dated, delivered and signed in an open court this 25th day of April 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Thuku holding brief for Mr. Bundotich for the Plaintiff/Applicant

Mr. Oyoo holding brief for Mr. Kahura for the Respondents

DennisCourt Assistant