



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 250 OF 2015

KARTAR SINGH DHPAR & CO. LIMITED.....PLAINTIFF/APPLICANT

VERSUS

LIANARD HOLDINGS LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice motion application dated 11th December 2016, brought under the provisions of Section 1A, 1B and 3A, Section 63(e) and 94, 95 and 99 of the Civil Procedure Act, (Cap 21) Laws of Kenya, Order 51 Rules 1, 3, 4, 10 and 16 of the Civil Procedure Rules, 2010 and Article 159 of the Constitution of Kenya, 2010 and the inherent powers of the Court.
2. The Applicant is seeking for order that;
 - a. The Honourable court grant it leave of under Section 94 of the Civil Procedure Act, (Cap 21) Laws of Kenya to execute a preliminary decree against the Defendant before taxation of costs;
 - b. Further and in the alternative, the partial judgment having been granted on 24th February 2017 against the defendant, the Honourable court grant it leave to proceed with execution;
 - c. The costs of this application be paid by the Defendant to the Applicant;
 - d. The Applicant be at liberty to apply for and the Honourable court be pleased to grant any further orders and directions as may be just and expeditious for the disposal of the application/suit herein.
3. The application is based on the grounds on the face of it and an affidavit in support dated 11th December 2018, sworn by Rajinder Billing, an Advocate of the High court of Kenya and practicing as such in the name and style of R. Billing & Company Advocates, which has the conduct of this case on behalf of the Applicant.
4. The background facts of the case are that, the Plaintiff filed a notice of motion application dated 18th June 2015, seeking for summary judgment. On the 24th February 2017, the Court delivered its ruling on the application and entered a partial judgment in favour of the Applicant, in the sum of Kshs. 17,918,142.52 with interest at 17% until payment in full, and a further sum of Kshs. 4,213,126.95 as retention sum.
5. The plaintiff obtained a decree and warrants of attachment in respect of the partial judgment and gave a proclamation notice to the Defendant. However the Defendant filed a notice of motion application dated 1st August 2017, seeking and claiming relief; inter alia for a stay of execution of the decree and warrants of attachment and sale of moveable property. It was the Defendant's contention that under Section 94 of the Civil Procedure Act, a party cannot execute a preliminary decree without the leave of Court. The Honourable court delivered its ruling on the defendant's application dated 1st August 2017, 31st October 2017.
6. The Defendant had applied for stay of execution for thirty (30) days and the court gave fourteen (14) days from 24th February 2017, to file a formal application for stay of execution, however that period lapsed on 9th March 2017, without the Defendant filing the application and neither has it done so to date. The Plaintiff states that there is no conservatory or injunctive orders in place and that the pendency of the Appeal does not preclude the Plaintiff from seeking to enforce a valid judgment of the Court. The Plaintiff being a successful litigant is entitled to the fruits of its judgment. As "justice is a double edged sword."

7. Be that as it were, the Honourable court of Appeal delivered its judgment on 26th January 2018, in the Appeal No. 107 of 2017 filed by the Defendant and effectively upheld the decision of the High on the claims found due and payable to the Plaintiff save for the issue of interest.

8. The Plaintiff argues that it requires the leave of the Honourable court under Section 94 of the Civil Procedure Act to execute the preliminary decree as it cannot do so without the leave of the Court. That there are no stay of execution orders nor any conservatory or injunctive orders in place.

9. However the Defendant filed a Replying affidavit dated 22nd January 2019, sworn by Bernard Onkundi Otundo, it director. He deposed that the application is fatally defective for the following reasons:-

- i. The Affidavit of the notice of motion application has been sworn by Rajinder Billing, the Advocate on record herein and having the conduct of this matter;
- ii. It is trite law that an Advocate having the conduct of a highly contentious matter should not descend from his position as an officer of the court into the dust of the arena by deponing on highly contentious matters;
- iii. The affidavit by Rajinder Billing thereby offends the provisions of Order 18 of the Civil Procedure Rules;
- iv. That the Affidavit of Rajinder Billing fails to meet the legal requirements set out in the case of; Kisya Investments and the same ought to be expunged;

10. That the decree and warrants of attachment obtained by the Plaintiff are illegal and void and the entire execution process instituted by the Plaintiff was declared unlawfully by the Honourable Court on 31st October 2017. That the appeal was allowed to the extent that the summary judgment entered in respect of the interest rate of 17% was set aside and the Honourable Judges of the Court of Appeal expressly stated "for avoidance of doubt, be set aside the summary judgment entered in respect of the interest rate of 17% on the outstanding amount under the first interim certificate and direct that the Learned Judge to determine the same after hearing both parties.

11. The Court of Appeal having directed that the issue be determined after hearing of both parties, the Court herein ought to proceed to hear and determine the suit herein on the merits. That the Court exercises discretion to grant orders under Section 94. Accordingly an Applicant must place cogent material before the Honourable court to enable the Court exercise its discretion, but the Applicant has failed to place a single reason before the Court for the exercise of the Honourable court's discretion.

12. The Respondent argued that application is res judicata, a similar application having been considered and dismissed on the merits by the Honourable court on 31st October 2017. Further there has been an inordinate delay in the institution of the application and militants against the exercise of discretion by the Honourable Court in favour of the plaintiff.

13. The parties disposed of the Application by filing submissions and thereafter highlighted and which I have considered alongside the arguments advanced and I find that it is not in dispute that the Court gave judgment in favour of the Applicant in the sum of Ksh. 17,918,142.52 with interest at 17% until payment in full. It is also not in dispute that the Respondent appealed against the judgment vide Civil Appeal No. 107 of 2017, whereupon the Court of Appeal upheld the amount of sum of Ksh. 17,918,142.52 and set aside judgment in respect of the interest rate of 17% on the outstanding amount under the first interim certificate. It therefore follows that, the judgment entered herein is valid save for the portion that was set aside.

14. Subsequently, the Applicant sought for enforcement of the judgment which was challenged by the Respondent as herein stated and the Court found that, the execution was irregular as the leave of the Court had not been obtained. The Court observed that the Plaintiff was at liberty to move the Court procedurally, if the execution of the partial judgment were to proceed. As a result of the ruling that the Applicant has filed this application seeking to regularize the execution.

15. The application is brought under the provisions of Section 94 which states as follows:-

"94. where the High court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation."

16. However before I consider these provisions I shall deal with the other issues raised by the Defendant. On the issue of the application being res judicata, I find no basis for this argument taking into account that, the first application was held not to have complied with the law and was on stay of execution. In essence of this application aims in doing exactly that. As regards the issue of an affidavit sworn by Advocate, I find that all the averments therein relates to matters on record which are therefore within the knowledge of the parties and the court.

17. To revert back to the application, the prayers and provisions of the law above, I find that there being a valid judgment with no orders to stay execution and the Plaintiff having moved the Court under the correct procedure, there is no basis to decline to grant the leave sought for execution of the partial and/or preliminary decree before taxation of costs. However, the execution must take into account the Court of Appeal ruling in relation to the interest rate.

18. In conclusion I allow the application in terms of prayer (i), with the orders that the costs thereof will abide the outcome of the main suit.

19. Those are the orders of the court.

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

G.L. NZIOKA

JUDGE

In the presence of:

Mr Kosgey holding brief for Mr Billing for the Applicant

Mr Odhiambo holding brief for Mr Masese for the Respondent

Dennis the Court Assistant