REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 56 OF 2012

FREIGHT FORWARDERS KENYA LIMITED…….…PLAINTIFF

VERSUS

ELSEK & ELSEK (K) LTD.....DEFENDANT

R U L I N G

1. In this suit, after the suit was filed, the defendant did not enter appearance nor file a statement of defence as a consequence of which judgment was entered in default. Later the defendant sought leave to settle the decretal sum by instalment and it is agreed by both sides that there has been payment but the sticky issue is whether that payment has taken into account interest which was pleaded at 3% for 45 days, which translates into 24% per annum.

2. That dispute as to interest chargeable was brought for the determination of the court pursuant to an application by the defendant dated the 13/11/2015 and filed in court the same day. That application seeks orders that:-

> **a) That this application be certified as urgent and service be dispensed with at the first instance.**
>
> **b) That there be stay of execution herein pending the hearing and determination of this application interparties.**
>
> **c) That the warrants of attachment of movable property in execution of a decree for money dated 23/10/2015 and other consequential orders be set aside. That the plaintiff to give account of the monies already paid to them albeit not accounted for in the warrants of attachment of movable property in execution of a decree for money dated 25/10/2015.**
>
> **d) That the interest being charged be set aside and or stopped.**
>
> **e) That the plaintiff do bear the costs of this application.**

3. The grounds forming the foundation of the application on the face of the application at paragraph 5 is shown to be:-

> **“5 The defendants prays for a stay to be granted, to enable the parties determine what outstanding sum is…..6 The plaintiff has been charging illegal interest and is unconscionable, unreasonable and unconstitutional be incurably irregular and the same should be set aside”.**

4. In opposition to the said application the decree holder swore and filed a Replying Affidavit by one RAJESH JAYSUKHLAL CHUGAR which gave the detailed history of the litigation between the parties in this suit and availed a computation of sums paid so far to the decreholder and how the interest has been calculated and the outstanding balance.

5. With the leave of the court, the defendant/judgment debtor did file a further affidavit on the 13/4/2016 whose purpose it appears was to assert that the interest rate was 16% and not 3% every 45 days and to show its own workings of the outstanding decretal sum. To that end two sets workings have been exhibited and both show there are outstanding balances of Kshs.1,601,190.19 and 3,774,252.62 respectively. What is not clear from the judgment debtors' position is how the commercial interest rate of interest 16% is arrived at or the basis thereof.

6. In the submissions filed by the judgment debtor/applicant a lot of heavy whether has been placed on what rate of interest should be applicable in this matter and to this court that is the fulcrum upon which the determination herein would revolve.

7. To this court that answer is not difficult to lay hands upon. It is not difficult to discern because the plaint at paragraph 7 and prayer C specifically pleaded and prayed for interest rates at 3% for every 45 days. It is not disputed that no defence was filed to that plaint and a default final judgment that ensued remains unchallenged.

8. It is to this court a mundane learning and very trite that there cannot be a joinder to any pleading in the plaint where no defence is filed. Order 2 Rules 11 and 12(3) are therefore worded and provides:-

> "**Order 2, rule 11**
>
> **Admissions and denials**
>
> **1. Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.**
>
> **2. A traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication.**
>
> **3. Subject to subrule (4), every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be a sufficient traverse of them.**
>
> **4. Any allegation that a party has suffered damage and any allegation as to the amount of damages shall be deemed to have been traversed unless specifically admitted.**
>
> **Order 2 Rule 12(3)**
>
> **There can be no joinder of issue on a plaint or Counterclaim".**

9. Put in the context of this case the defendant having failed to challenge the pleadings by the plaint as aforesaid is deemed to have admitted same wholly and once a judgment was applied for and entered the question of what the interest rate was applicable become a concluded conclusion and not available to be re-opened otherwise than by setting aside the judgment which has become final. There was never a joinder of issues with the pleading on contractual interest and there being an uncontested judgment it cannot be raised as an issue at this juncture and by the current application. I would for that reason dismiss the application for lacking in merit in that its foundation is wholly misconceived.

10. That however doesn't mean that the warrants taken out and dated the 23/10/2015 are now laundered

and given a clean bill of health. According to the court file the judgment was entered on the 27/3/2012 and therefore by dint of Order 20 Rule 18, no warrants of attachment and sale ought to have issued without a notice to show cause being issued and served. I have looked at the court file and it is apparent that the decree holders' application filed in court on the 10/7/2015 did not take this provision into account.

11. Additionally, the application for execution should be self-evident on how much the judgment was, the sum paid in reduction of the decree and the sum outstanding as well as the costs and interests accrued as at the date of the application. This to court is the requirement of the provisions of order 22 Rule 7(2). No such particulars are evident on the face of the Application which yielded the warrants of attachment and sale and I must say that the application was to that extent was lacking in material particulars and ought not to have been acted upon.

12. The third point and which is related to the foregoing is that an application for execution which results in a warrant of attachment and sale should be determined by a judicial office who ought to give orders on the fate of such application. That to this court is the dictate of order 22 Rule 7 as read with order 49 Rule 7(1) b(x).

13. In this file there is no indication at all that the application was ever considered judicially for the warrants to issue. That to this court was unlawful and if it be that a practice has emerged by which such applications are handled by the registry as if they were administrative functions then such a practice must stop. It must stop because it rests upon the registry staff. Judicial function that does not belong to them.

14. For all the reasons foregoing the application dated 13/11/2015 is disallowed but in the interests of substantial justice, the warrants dated 23/10/2015 are recalled for having been issued irregularly. I give directions that the decree holder is at liberty to execute for any balance of the decretal sum but such process must follow the law to the letter.

15. It is so ordered.

Dated at Mombasa this **24th** day of **February 2017.**

HON. P.J.O. OTIENO

JUDGE