



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT No. 286 OF 2015

BYRON TRUSTKETT INVESTMENT LIMITED.....PLAINTIFF

VERSUS

SPORTS STADIA MANAGEMENT

BOARD.....DEFENDANT/JUDGEMENT DEBTOR

MUGANDA WASULWA T/A KEYSIAN

AUCTIONEERS.....INTENDED INTERESTED PARTY

RULING

1. This Ruling determines two questions. The first is the Notice of Motion dated 6th December 2016 whose substantive Prayer is for the Defendant to be allowed to pay the balance of the Decretal Sum by way of monthly installments of Kshs.1,000,000/= till payment in full.
2. The second is whether the Defendant should pay Muganda Wasulwa t/a Keysian Auctioneers Kshs.2,044,720/= said to be Auctioneers Fees.
3. A short background to this matter shows that it is not involved.
4. On 27th February 2016, Counsel for the Plaintiff and the Defendant recorded the following consent:

“By consent

1) Judgment be and is hereby entered against the Defendant as prayed in the Plaint.

2) Costs are agreed at Kshs.570,610/=.

3) The decretal sum is liquidated as follows:-

a) First installment Kshs.1,010,610 payable on or before 6.3.2016. Thereafter monthly installments of Kshs.500,000/- each with effect from 5.4.2016 and or before the 5th of every succeeding month until payment in full. Any default of any installment, the Plaintiff at liberty

to execute for the balances”.

5. It is now common ground that the Defendant failed to meet the terms of the Consent and Plaintiff set Execution proceedings in Motion. That prompted the Applications before Court.

6. The substantial reason why the Defendant wants the terms of the payment the Decretal sum revisited is in paragraph 10 of the Affidavit of Gordon Oluoch (the Acting General Director of the Defendant) sworn on 1st December 2016. He states:-

10. THAT the Applicant is currently facing serious financial/cash flow challenges and it is only fair that it be allowed to pay the balance of the decretal sum with monthly installments of Kshs.1,000,000/=, and noting that the initial consent was for a monthly installment of Kshs.500,000/= the proposed enhanced amount of Kshs.1 million is fair and just in the circumstances.

7. But as correctly submitted by Counsel for the Plaintiff, the Defendant, in effect, seeks to vary the terms of the Consent of 27th February 2016. And it is also true that the reasons put forward by the Defendant are not sufficient to cause the setting aside or variation of a Consent (See **Kenya Commercial Bank Ltd vs. Benjohi Amalgamated Limited & Another** [1998] eKLR.)

8. Moreover, the conduct of the Defendant makes it undeserving of the accommodation it seeks.

9. On 7th December 2016, the Court gave Interim Orders of Protection to the Defendant through stay of execution of warrants against it. But it turns out that two days later, two cheques (dated 9th December 2016 for Kshs.500,000/=) made out by the Defendant to the Plaintiff were returned unpaid. That does not speak well of the Defendant who had just obtained a respite from the Court.

10. For the reasons given, the Court declines to grant the Notice of Motion of 6th December, 2016. However, the Court is not insensitive to the fact that the Defendant is a State Corporation and there may be some truth when it says that it is facing financial constraints. The Default clause of the Consent of 27th February 2016 is now in operation and unless the Defendant makes full payment, it will face execution. So as to grant the Defendant time to organize itself, the Court will be making a ultimate order that enforcement of the default clause (ie. execution) be postponed by 90 days and if the Defendant will not have made full payment then execution to proceed.

11. I turn to the costs claimed by Keysian Auctioneers as against the Defendant. On 27th November 2016, the Court issued Warrants of Attachment to the said Auctioneers. On 28th November 2016, the said Auctioneers proclaimed the Defendants property and the Auctioneer seeks Ksh.2,044,720/= as costs therefor.

12. The Defendant resists that payment. The Defendant asserts that the Warrants issued in favour of Keysian were unlawfully and irregular as another firm or Auctioneers, M/s. Moran Auctioneer, held valid warrants and that on 21st November 2016, these Auctioneers visited the Defendants premises with a view of attaching the Defendant's goods and that the Defendant paid Kshs.1,000,000 to the Auctioneers as costs.

13. The Plaintiffs position is that by the time warrants were issued to Keysian those of Moran had expired and that in any event warrants are issued by the Deputy Registrar and not Advocates. An argument that any blame falls at the doorstep of the Deputy Registrar.

14. The Court record shows that, indeed, the warrants issued to Moran were to be returned to Court by **4th October 2016** a date before issue of Warrants to Keysian. However, there is a letter of 27th October 2016, a date after the Return date of the warrants, in which Ochieng Omolo & Co. Advocates (lawyers for

the Plaintiffs wrote to the Defendant,

“,,,,,The Auctioneers are hereby directed to immediately execute the warrant or, if unable, to return the same to Court unexecuted so that our client can embark on alternative enforcement mechanisms”

In a copy of that letter the Advocate urges the Auctioneers (Moran Auctioneers) to proceed as discussed previously.

15. There is yet another letter dated 23rd November 2016 from the said Advocates in which they ask the Deputy Registrar to reissue warrants to Keysian Auctioneers.

16. In order to resolve this question of Auctioneers charges with finality, the Court will need to make a finding as to whether any costs were incurred by the Defendant and paid to Moran after the expiry of the warrants and if so, whether the costs were lawful. And further, if so, and related thereto, who should bear responsibility for those costs.

17. The orders of the Court are as follows:-

- a) The Application of 6th December 2016 is dismissed with costs.**
- b) Payment of the Decree is postponed for 90 days from the date of this Ruling.**
- c) Moran Auctioneers shall within 30 days thereof file and serve Affidavit Evidence explaining its role in execution of warrants herein, costs incurred and when paid.**
- d) Thereafter the court shall make its final orders on the issue of Auctioneers charges.**

Dated, Signed and Delivered in Court at Nairobi this 13th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Ochieng for Plaintiff

Githii for Interested Party

N/A for Defendant

Alex - Court Clerk