



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 622 OF 2001

M.A. BAYUSUF & SONS LIMITED..... PLAINTIFF/RESPONDENT

VERSUS

EXPRESS KENYA LIMITED 1ST DEFENDANT

CHINA ROAD & BRIDGES CORPORATION 2ND DEFENDANT

RULING

1. This ruling relates an application dated 14th November 2016, brought under the provisions of Order 22 Rules 51, 52, 53 and 54 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act and is supported by the grounds thereto and an Affidavit sworn by Clare Nyabuti, the Legal officer of the 1st Defendant's Company.

2. The Applicant is seeking for orders;-

(a) Spent

(b) *That this Honourable Court be pleased to order that there be a stay of execution of the sale of movable property proclaimed by Messrs John M. Mbijiwe t/a Bealine Kenya Auctioneers on behalf of the Plaintiff/Judgment Creditor and listed in the Schedule thereof and in the Notification of Sale dated 4th November, 2016 and scheduled for sale by public auction on 19th November, 2016 pending the hearing and determination of this Application.*

(c) *That this Honourable court be pleased to order that the goods and/or movable property proclaimed and attached by Messrs John M. Mbijiwe t/a Bealine Kenya Auctioneers on behalf of the Plaintiff and listed in the Schedule thereof and in the Notification of sale dated 4th November, 2016, and scheduled for sale by public auction on 19th November, 2016 be released to the 1st Defendant/Applicant on a running attachment pending the hearing and determination of the Application herein.*

(d) *That this Honourable Court be pleased to take accounts as to any balance of the decretal sum that may be now due and owing to the Plaintiff herein.*

(e) That this Honourable Court be pleased to allow the 1st Defendant/Judgment debtor to satisfy the balance that may be found on the decretal amount in monthly installments of Kshs. 250,000/- (Two Hundred and Fifty Thousands Shillings) on or before the end of every succeeding month until payment in full.

(f) Such other or further order as this Honourable Court may deem fit to grant.

(g) Costs of this Application be provided for.

3. The Applicant's case is that pursuant to a decree of this Court issued on 29th April, 2015, the Plaintiff/Decree Holder (herein "the Respondent"), instructed John M. Mbijiwe t/a Bealine Kenya Auctioneers, to proclaim the 1st Defendant/Judgment Debtor's (herein "the Applicant's") goods.

4. The goods were proclaimed on 10th August 2016, and on 9th November 2016, the Auctioneer issued a notification of sale of the proclaimed goods, removed the goods from the 1st Applicant's premises and scheduled the sale thereof by public auction on 19th November 2016.

5. However, the Applicant moved to Court to stop the execution on the grounds that:-

(a) The amount to be recovered is different from the goods listed in the Notification of Sale dated 4th November 2016 and the amount indicated in the said Notification of sale.

(b) Some of the goods attached by the Auctioneer for sale, namely the furniture and office machinery do not belong to the Applicant but were leased from Third Parties, who have issued a Notice of objection to the attachment.

(c) The sale of the goods will expose the Applicant to endless litigation and cripple its business

(d) The proclaimed goods have been grossly undervalued and therefore will cause the Applicant serious financial loss and employees negatively affected.

6. The Applicant averred that the Respondent has already recovered Kshs.475,120, following the sale of its Motor Vehicle. That the Applicant has been making efforts to settle the decretal sum and the parties have been engaged in negotiations to settle the amount owing.

7. The Applicant averred that it has been experiencing financial difficulties and is not able to pay the outstanding sum in a lump sum but is willing to pay the sum on reasonable terms.

8. Finally the Applicant argued that civil attachment and execution is not meant to harass, embarrass, intimidate and/or cripple the persons and business entities but ensure that a Judgment debtor/creditor gets the fruits of the Judgment.

9. The Application was however, opposed based on the Replying Affidavit dated 17th November 2016 sworn by John Maina Ngechu, an advocate of the High Court who has conduct of this matter on behalf of the Respondent. He deposed that, the proclamation was lawful, and in an effort to satisfy the decree herein. He argued that the lease agreement relates to documents, imaging, photocopying and printing and not all the items listed in the proclamation form.

10. That the Applicant is being economical with the truth, arguing that the Respondent has responded to all correspondences received. That the newspaper cuttings annexed to the Replying Affidavit are evidence that the Applicant plans to develop a Real Estate on the property and that the averments under paragraphs 8 and 9 of the Supporting Affidavit clearly indicate that, the Applicant is not in any financial trouble as it has assets worth Kshs. 180,000,000.

11. Therefore the Applicant is abusing the court process to the detriment of the Respondent as the

Application is a further effort to frustrate the Respondent's recovery of the sum due to it. That the application should be dismissed.

12. The Applicant however filed a Supplementary Affidavit sworn by Clare Nyabuti reiterating that, some of the goods attached which include a photocopier printing machine and furniture do not belong to the Applicant. That as per Clause 56 of the Sale Level Agreement between the Applicant and the owners of the photocopying and imaging machine, the equipment remain the property of the supplier during the rental period.

13. She maintained that the Applicant has made efforts to pay the decretal sum and settle the matter amicably and therefore it is only fair that the orders sought be granted to protect the Applicant, as they ready to settle the sum due as it continues with operations.

14. The Parties agreed to dispose of the Application by filing submissions which I have duly considered. The Applicant submitted in a nutshell that, evidence has been availed to show that the Company is experiencing financial difficulties, and therefore it is not able to pay the decretal judgment sum at once. The Applicant argued that the Court is clothed with the discretion to ensure that justice is dispensed and can order payment by installments. The case of; **Freight Forwarders Ltd. Vs Elsek & Elsek (K) Ltd (2012) eKLR** was relied on where the Court stated as follows:-

“doing the best I can to consider the rights of both parties, I will allow the Debtor to pay the decretal amount within a period of twelve (12) months in four (4) equal consecutive installments. The first installment to be paid on or before 20th January, 2013. Other installments to be paid on the 20th day of every third month, thereafter namely, April, July and October. In default of payment of any installment execution to issue.”

15. The Applicant also cited the case of; **Masai Kenya Limited vs Hardware & Steel Centre Ltd & Another (2013) eKLR**, where the Court expressed itself as follows:-

“The cardinal rule on the exercise of discretion as regards payment of the decretal sum by installments, like any other, must be exercised in a judicial and not an arbitrary manner. In the case of A. Rajabali Alidina vs Remtulla Alidina & Another (1961) EA 565, Law JA (as he then was) detailed that:

“All commentators on the Civil Procedure Code agree that the Court's discretion to order payment of the decretal amount in installments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the defendant to show that he is entitled to indulgence under this rule”

16. The case of, **Commercial Bank of Africa Ltd. Vs David Njau Nduati (2015) eKLR**, was also cited, where the Court held stated that;-

“Be that as it may, the Defendant was emphatic that he could not pay the decretal sum in lump sum. While the Plaintiff contended that the Defendant had a large salary, drove an expensive car, lived in an affluent area of town, had not provided a pay slip and that he had not made payments for about five and a half (5 ½) years, the court was hesitant to find that the Defendant had filed the present application in bad faith despite having failed to adhere to his promises of effecting payments. Indeed, a sum of Kshs. 13,465,392.20 is a colossal sum to pay at once irrespective of a person's status in society.

The court had due regard to the Defendant's assertions that he was able and willing to pay the monthly sum of Kshs. 500,000/- until and final payment of the decretal sum without any failure whatsoever.”

17. The Applicant submitted that in relation to the Level Service Agreement, which the Respondent argues that it is not stamped, the same does not require registration under Section 4 and 5 of the

Registration of Documents Act, (Cap 285) of the Laws of Kenya.

18. The Respondent in response filed submissions and invited the Court to take note of the following germane to this suit;-

(i) *That the supporting affidavit at paragraph 11, alludes to the Judgment debtor's financial impecunity*

(ii) *The suit herein was filed on 30th April, 2001, and Judgment was entered on 19th January, 2009.*

(iii) *The decree was settled vide a ruling delivered on 17th July, 2013, wherein the Applicant was ordered to settle the decretal sum with interest at 12% per annum and there is no appeal by the Applicant from that ruling.*

(iv) *The Applicant paid the principal sum (without interest) by installments.*

(v) *On 12th May, 2015, the Applicant sought to review the ruling delivered on 17th July, 2013 but application was dismissed by Justice Ogolla on 24th November, 2015.*

(vi) *Pursuant to Justice Ogolla's ruling of 24th November, 2015, the Deputy Registrar took submissions from the parties and delivered a ruling on the balance outstanding on 1st July, 2016. There is no appeal from the ruling.*

(vii) *The Applicant filed its submissions on the computation of interest on 2nd December 2015. Therefore this application purporting to dispute interest is thus in bad faith and the Court is functus officio.*

19. I have considered the Application, the responses filed thereto and the submissions and I find that, prayers 2, and 3 of the Application are already spent. This is informed by the fact that the same were sought for pending the hearing and determination of this Application.

20. However I have decided to consider them because when the Application was filed and heard, no orders were made on those prayers. I find that basically prayers 2 and 3 are seeking for "*stay of execution of the sale of the Applicant's property proclaimed*" and release thereof. In regard to the same, I find that, there is no dispute that, the decretal sum herein has not been settled by the Applicant, as evidenced by the averments at paragraph 9 of the supporting affidavit, that the Applicant has been making efforts to settle the decretal sum, but have not fully paid the same and negotiations have been on-going between the Parties.

21. I have also considered the reasons advanced in opposing execution, namely; that the amount indicated in schedule of "movable property" dated 10th August 2016 and "Notification of Sale" dated 4th November 2016, are different. In my opinion, that is an issue which the Parties can deal with by taking accounts and/or reconciliation thereof.

22. The other reason advanced is that the goods do not belong to the Applicant. However I find that this is not an Objector's application and indeed there is an Objector's Application pending determination.

23. The other issue raised to the effect that the goods proclaimed are undervalued can be remedied by a proper valuation being done. I believe if the goods were to be sold by public auctioneer; the Respondent is under a duty to account to the Applicant over the sale proceeds and utilization thereof.

24. Finally, the Applicant argues that the sale of the goods will cripple the Company. But I find that the Respondent has the right to execute for the outstanding decretal sum, and the Applicant's inability to pay the debt must be balanced against the interests of the Respondent to enjoy the fruit of the Judgment. In conclusion, I find that the reasons advanced for stay of execution and/or sale of the proclaimed goods do

not have merit.

25. I shall now consider the Applicant's prayer that Accounts be taken to determine the balance of the decretal sum that may be now due and owing to the Plaintiff herein. There is no evidence that the Applicant has sought for a Statement of Accounts and has been or that the Applicant has knowledge of what is not due.

26. Be it as it may I order that the Respondent supply the Applicant with an account of what has been paid and what is due and at the Applicant's expense, (if any), at the earliest possible date but in not more than five (5) days from the date of this order. However, this order will not stall execution which I have found to be lawful.

27. I now turn to the prayer seeking that the Applicant be allowed to satisfy the balance that may be found due by monthly installments of Kshs. 250,000/- (Two Hundred and Fifty Thousands Shillings) on or before the end of every succeeding month until payment in full.

28. The provisions that guide settlement of a debt by installments are found under Order 21, Rule 12 of Civil Procedure Rules, which provides as follows:-

1. "Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by installments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

2. After passing of any such decree, the court may on the application of the judgment debtor and with the consent of the decree holder or without the consent of the decree holder for sufficient cause shown order that the payment of the amount decreed be postponed or be made by installments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise, as it thinks fit."

29. The issue to consider is whether the Applicant has satisfied the requirements of the above provisions, in particular that "sufficient cause" has been shown. The Applicant referred the Court to the case of Maasai Kenya Limited (supra), which defined sufficient cause as follows:

"As regards what constitutes "for any sufficient reason" as detailed in Order 21 rule 12, Law JA referred to a passage in Woodroffe & Amir Ali's Civil Procedure in British India, 2nd Edition, P. 869 and quoted as to what constitutes sufficient reason as follows:-

These are:

(a) The circumstances under which the debt was contracted

(b) The conduct of the debtor

(c) His financial position

(d) His bona fides in offering to pay a fair proportion of the debt at once"

30. I find that although the Applicant alleges it is experiencing financial difficulties, the Respondent has brought to the knowledge of the Court a daily newspaper cutting where the Applicant makes reference to development of its property worth Kshs. 180,000,000. These averments have not been rebutted and therefore the Applicant is being insincere to allege that it has no means to settle the outstanding decretal sum in one lump sum. The principles of Equity stipulates that "He who goes to Equity must go with clean hands"

31. I therefore find that this application has no merit and I dismiss it with costs to the Respondent.

32. Those then are the orders of the Court.

Dated, delivered and signed on this 24th day of October 2017 at Nairobi

G.L.NZIOKA

JUDGE

In the presence of:

Onyancha for Ms. Mugure for the 1st Defendant/Applicant

No Appearance for the 2nd Defendant

Mr. Ngechu for the Plaintiff/Respondent

Teresia Court Assistant

Court: By consent of the Parties, the five days herein given to run from 30th October 2017.

G.L.NZIOKA

JUDGE