REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL SUIT NO. 74 OF 2008

FRANCIS L. OYATSI.....PLAINTIFF

AND

MANANI, LILAN COMPANY ADVOCATES

JOHN MUTHEE NGUNJIRI T/A

TANGO AUCTIONEERS AND GENERAL MERCHANTS....DEFENDANTS

R U L I N G

1. In the plaint filed and dated 4th September, 2008, the plaintiff prayed for judgment against both defendants jointly and severally for the sum of Ksh. 7,838,000/= as well as damages for loss of user together with costs of the suit and interest.

Judgment was ultimately entered for the plaintiff against the defendants jointly and severally for the sum of Ksh. 2,823,520/= plus costs and interest.

This court, in rendering the judgment on the 12th March, 2013, observed as follows:-

> ***"Both the first and second defendants had the power and the means to stop the sale of the plaintiff's tractor but they did not, due to their careless and selfish attitude towards the plaintiff. Both must therefore be held equally responsible for the loss incurred by the plaintiff due to their negligent actions and/or omissions.***
>
> ***They cannot be heard to throw blame at each other.***
>
> ***They knowingly and willingly created the unpleasant state of affairs, which led to the illegal sale of the plaintiff's tractor. They are thus liable to the plaintiff in equal measure for the loss suffered. The actual loss being the loss of the tractor which would justly be compensable on the basis of its purchase value with reasonable deduction for the normal wear and tear leading to depreciation".***

2. On 29th July, 2013, a decree was issued for the total sum of Ksh. 4,433,158/50cts. What followed was the present application by the first defendant dated 19th August, 2013, seeking essentially orders that the judgment delivered on 12th March, 2013, and the subsequent decree be set aside, reviewed or varied by apportioning liability to be shared equally as between the defendants herein and by ordering that the sum of Ksh. 355,358/= drawn from the proceeds of the sale of the plaintiff's tractor Reg. No. KAT 397E and

deposited by the second defendant in court in CMCC No. 260 of 2008 be released to the plaintiff as part payment of the decretal amount and further by ordering that the sum of Ksh. 282,642/= drawn from the proceeds of sale of the aforementioned tractor returned to and retained by the second defendant be released to the plaintiff in further part payment of the decretal amount and also by ordering that the balance of the decretal amount after payment of the amount hereinabove stated to the plaintiff being the sum of Ksh. 2,185,552/= together with taxed cost and interest be shared equally as between the defendants.

3. The grounds in support of the application are in the body of the appropriate notice of motion and are enhanced by the averments in the supporting affidavit dated 19th August, 2013, deponed by **Benard Odongo Manani,** and a further affidavit by the same person dated 30th November, 2014.

the application is however opposed by the plaintiff on the basis of his grounds of opposition filed and dated 25th November, 2014 and the averments in his replying affidavit dated 25th November, 2014. Written submissions were filed by both parties and were briefly orally highlighted by **Mr. O.Otieno**, learned counsel for the applicant first defendant and **M/s. Wambugu**, learned counsel for the respondent/plaintiff.

Order 22 Rule 14 (4) and Rule 22 (1) of the Civil Procedure Rules were invoked by the applicant in bringing the application.

4. This court has carefully considered the application in the light of the supporting grounds and those in opposition thereto and would opine first and foremost, that under rule 14 (4) of Order 22 CPR, the requirement that the holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons is not mandatory and would in any event not apply in the present circumstances as the decree herein did not relate to two separate suit, each against either party. The suit herein was by a single plaintiff against either party. The suit herein was by a single plaintiff against two defendants and none of the defendants had any suit against the plaintiff. This was not a cross-action for which a cross-decree would issue.

As for rule 22 (1) of Order 22 CPR, it only provides for stay of execution and nothing more. It became handy when the applicant ex-parte the respondent sought for stay of execution pending the hearing and determination of this application inter-parties.

From the foregoing, the application is misconceived and incompetent.

5. The grounds in support of the application clearly show that it would have been made under the provisions of review of decrees and orders where there is discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by the applicant at the time when the decree was passed or the order made, or where there is some mistake or error apparent on the face of the record.

Indeed, the orders sought herein by the applicant are essentially for review of the judgment delivered by this court on the 12th March, 2013, so that liability be apportioned between the two defendants on the basis of equal sharing.

It is the applicant's view that such a review of the judgment would correct the supposed error apparent on the face of the record to wit, that the defendants were held jointly and severally liable yet they were found equally responsible for the loss incurred by the plaintiff.

6. The question arising is whether there is an error apparent on the face of the record or a mistake which may prevail upon this court to exercise discretion in favour of the applicant.

At the beginning of this ruling, the court quoted from its own judgment with a view to clarifying and affirming its reason for finding the defendants equally responsible in measure for the plaintiff's loss. Hence, the joint and several liability which generally refers to a shared responsibility for a debt or a

judgment for negligence in which each debtor or each judgment debtor is responsible for the entire amount of the debt or judgment. The plaintiff had thus the option to collect the entire decretal amount from any of the defendants and was not to be limited to a share from each defendant since the court did not make a determination on the percentage of negligence of each of the defendants. There was no request from the applicant to apportion the degree of negligence on each defendant. Therefore, the judgment as entered jointly and severally was correct.

7. Equal responsibility for loss incurred by the plaintiff and/or liability in equal measure simply meant that the first defendant was responsible for the loss just as much as the second defendant. They did not carry shared responsibility. Each carried his own cross. The plaintiff was at liberty to execute the decree against either of them. He could collect the entire judgment from any one of the parties or from any and all the parties in various amounts until the judgment is paid in full. This was not a situation where each party was to blame at the degree of 50:50 (fifty fifty) or at a higher or lesser degree than the other. Each one of them was to blame 100% for the plaintiff's loss and therefore the court could not in the circumstances apportion liability and made no error in entering judgment against the defendants jointly and severally.

If the plaintiff has opted to execute the decree against the first defendant only, it would be at liberty to claim for contribution from the second day but not by way of an apparent application for review.

8. Most of the other matters raised the first defendant in its submission in relation to the procedure applicable in extracting decree and in relation to the interest calculated in the decree were irrelevant for purposes of an application for review of the judgment of this court and would more or less boil down to technicalities which ought not be given undue regard.

As to the sums of money said to have been drawn from the proceeds of the sale of the plaintiff's tractor and deposited in court by the second defendant or retained by the second defendant, the same may be claimed by the first defendant from the relevant court and from the second defendant but not by way of the present application especially after it was found that the transaction leading to the sale of the tractor was unlawful.

9. In sum, the present application by the applicant/ first defendant whether competent or incompetent was lacking in merit and is hereby dismissed with costs to the respondent/plaintiff.

[Read and signed this 18th day of February, 2015.]

J.R. KARANJA

JUDGE