



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 627 OF 2005

KOLABA ENTERPRISES LTD.....PLAINTIFF

Versus

SHAMSHUDIN HUSSEIN VARVANI.....1ST DEFENDANT

MEFUZABANU SHAMSHUDIN VARVANI.....2ND DEFENDANT

RULING

Three applications in one

[1] The application before me is made by the Defendants and is dated 27th May 2014. The application is expressed to be brought under Order 10 Rule 11, Order 22 Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicants have sought three significant prayers except one of the prayers is in the alternative as follows, *inter alia*;

- 1. THAT there be a stay of execution of the decree herein issued on the 15th December 2015 pending the hearing and determination of this application;**
- 2. THAT the decree herein issued on the 15th December 2005 be set aside;**
- 3. THAT in the alternative, the decree herein issued on the 15th December 2005 be amended and adjusted to read that “ the defendants jointly and severally do pay to the plaintiff the sum of Kshs 3,754,996 without interest and costs.”**
- 4. THAT the costs of this application be provided for.**

The Defendants/Applicants’ gravamen

[2] The Defendants’ major argument is that, since it filed a Notice of Appeal against the ruling of this court delivered on 11th March 2014 dismissing the application to strike out the suit, it would be unjust and inequitable to allow the decree issued on 15th December 2005 to stand. The injustice is found on the fact that, contrary to the previously consensually entered decree dated 29th September 2005, this decree is asking the Defendants to pay interest and costs. They averred further that the inclusion of interest and

costs in the decree dated 15th December 2005 was irregular, illegal and inequitable. The Defendants' advocate on record, Justry Lumumba Nyaberi, swore an affidavit on 27th May 2014 in which he enunciated the merits of the application and made specific depositions that the Plaintiff, in total lack of *bona fides*, sought an inclusion of interest and costs over and above the decretal sum of Kshs 3,754,966 as per the decree dated 29th September 2005. All these things are being done despite the fact that an appeal has been filed on dismissal of its dated 14th August 2013.

[3] The Defendants canvassed the application through written submissions filed on 26th November 2014. They submitted that, although the application was premised on the wisdom of this court in its obiter in the ruling dated 11th March 2014, the same was brought under equity and the law to set aside an unjust decree and the co-extensive liability of guarantors respectively. It was submitted that the Plaintiff was estopped from the strict benefit of the law under Section 26 and 27 of the Civil Procedure Act with regards to costs and interest on the judgment debt. It was further submitted that it would be oppressive and unfair for the Defendants to be condemned to pay costs and interest of a compromised consent judgment as the same would exceed the liability of the principal debtor in the consent decree. It was contended that by its conduct, the Plaintiff waived its legal rights on costs and interest and it is unfair for them to seek to enforce those rights again through a subsequent decree. The waiver is in consideration in the previous consent agreement in HCCC No 423 of 2004. The terms of the consent decree were binding upon the Defendants as guarantors in the same way they were binding on the directors of the now defunct company. They relied on the cases on **Hughes v Metropolitan Railway Company (1874-1880) All ER 187** and **Central London Property Trust Ltd v High Trees House Ltd (1956) All ER 256**.

[4] The Applicants further submitted on the issue of "novation" in which they contended that the consent decree between the principal debtor and the Plaintiff was tantamount to rescission of the old agreement and that they were subsequently bound by the terms of the new agreement under the consent decree, even as guarantors. In support of this contention, they relied on the case of **Scarf v Jardine (1882) 7 APP CAS 345**. They submitted that they, as guarantors, had not expressly consented to the admission of liability under the consent decree, and were therefore, under novation, discharged from any previous liabilities which they guaranteed. They relied on the cases of **Holme v Brunskill (1878) 3 QBD 495 (CA)** and **Shire v Thatiti Finance Company (2002) EA 279**. In sum, it was submitted that it would be wholly unjust to condemn the Applicants with the burden of interest and costs despite having executed the terms of the consent decree dated 29th September 2004. They referred to the doctrine of *qui prior est tempore, potior est jure* and implored upon the court to apply the same in the circumstances of this case.

The Plaintiff/Respondent's response

[5] The Respondent opposed the application and filed; Grounds of Opposition dated 5th June 2014 and the Replying Affidavit sworn on 5th June 2014. The Plaintiff insisted that the application was an abuse of the judicial process; a Notice of Appeal does not operate as a stay of execution; there were no reasons adduced to justify the setting aside of the decree should be set aside and that the Defendants were estopped from denying the correctness of the decree having already paid a substantial amount. It was deposed that the prayer for costs and interest was included in the Plaintiff and was awarded under Section 26 of the Civil Procedure Act. It was further reiterated that the consent decree dated 29th September 2005 in HCCC No 434 of 2004 had not been honoured, and that as such the Defendants were obligated to pay interest and costs on the decretal sum of Kshs 3,754,966/- in the decree dated 15th December 2005. Further, it was contended that the amount of Kshs 504,246/- deposited as security for this application be disbursed to the Plaintiff, and the instant application to be dismissed.

[6] The Respondent also filed submissions dated 16th January 2015. It was submitted that the Defendant in its application to set aside and/or vary the terms of the ruling dated 15th December 2005, had failed and/or neglected to state that the consent decree entered on 29th September 2005 had been frustrated, and thereby necessitating the filing of the instant suit to claim on the lease from the Defendants as guarantors. It was submitted that a party cannot rely on its own wrong-doing to obtain a favourable interpretation of the law. See the case of **Nabro Properties Limited vs. Sky Structures Limited Civil Appeal No 175 of**

2000 (2002) 2 KLR 299). Again, a consent judgment has contractual effect and may only be set aside in a similar manner as a contract. For this contention, and that the Defendants were not parties to the consent judgment, they relied upon the cases of **Wasike v Wamboko Civil Appeal No 81 of 1984; (1988) KLR 429** and **Peras Limited v Esso (Kenya) Limited Civil Appeal No 127 of 1996; [1996] LLR 4891**.

[7] The Respondent submitted further that the Defendants had failed to show a defence with merits. The court should also consider the circumstances of the case, both prior and subsequent, before issuing orders of setting aside a regularly obtained judgment. They relied upon the cases of **Salim Khan T/A Kenchic Agencies v National Bank of Kenya Civil Appeal No 164 of 1994** and **Kenya Ports Authority v Kurston (K) Limited Civil Appeal No 142 of 1995; [1995] LLR 4916**.

DETERMINATION

Toil for success

[8] The application dated 27th May 2014 is seeking for the setting aside of the decree dated 15th December 2005 ostensibly on the obiter in the ruling by this Court dated 11th March 2014. I wish to state that, in that ruling, the court observed that the arguments preferred in support of the said application were good for an application to set aside the judgment and decree or for stay of execution of decree rather than striking out of the suit. The observation, from plain reading of it and in the context of the ruling by the court simply means that the arguments were fit or probable arguments in an application to set aside the judgment and decree. The court did not pronounce those arguments to be indomitable or a sure success of such application when it is made as the Defendants seem to suggest. Of course, the potency of the arguments will depend on the court after careful consideration of their merit. In light thereof, the application before me must be and I shall so determine it on merit.

Issues

[9] I have considered the application, the affidavit evidence, Grounds of Opposition and the submissions by the parties. The ultimate determination is whether the decree issued on 15th December 2005 should be set aside. However, I see strands of arguments around the extent of liability of guarantors on a consent that was recorded between the principal debtor and the lender. I also see other arguments that by virtue of the consent dated 29th September 2005, the Plaintiff is estopped from insisting on its legal and equitable entitlement on costs and interest in this case. These arguments were made in the earlier application dated 14.8.2013 on which I delivered a ruling on 11.3.2014. I observed and quite rightly that the arguments were good in an application to set aside the decree or judgment. I will, therefore, consider all of them in a more resounding manner.

Liability of guarantor

[10] In my earlier ruling, I re-stated the law on this legal issue and I will state it again. Guarantee is a separate contract from and distinct from that of the borrower. Liability of guarantor is therefore based on the guarantee to pay the debts of the principal debtor should he not pay or be unable to pay. However, liability of guarantor is limited to the liability set out in the guarantee. See **Halsbury's Laws of England, 4th Ed** that:

Para 101

"A guarantee, being merely an accessory contract, does not, even when under seal, cause a merger with that of the principal debtor's simple contract debt to which it relates....."

Para 103

"...although sometimes bound by the same instrument as his surety, the principal debtor is not a party to the surety's contract to be answerable to the contract; there is not necessarily any privity"

between the surety and the principal debtor; they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the surety contracts.”

[11] The Defendants have been sued as guarantors of Kits 2000 Ltd, the principal debtor, after it failed to satisfy the consent decree dated 29th September 2005. Had the principal debtor paid the debt as agreed, there would have been no liability on the guarantors. Or had the principal debtor paid part of the debt, the guarantor would be liable to the extent of the debt outstanding after the part payment. It should be understood that the consent decree dated 29th September, 2005 is not the decree in this case. To my understanding, the said consent decree only constitutes evidence of indebtedness of the principal debtor in respect of which the guarantor will be liable. Again, this suit was filed against the guarantors to recover the debt owed by Kits 2000 plus interest and costs thereon. Therefore, strictly and legally speaking, this suit is not an enforcement of the consent decree of 29th September 2005. There is an independent decree in this suit which was issued on 5th December 2005 and is the one being executed. The decree in this case arises out of judgment entered against the Defendants in default of appearance and defence. And perusal of the decree reveals it was drawn in accordance with the judgment entered. The Defendants did not apply for the setting aside of the default judgment. Instead, they paid part of the decree and then applied for the setting aside of the decree or amendment of the decree especially the part which awarded costs and interest. The quarrel by the Defendants is on the interest and costs on which he made elaborate submissions.

Interest and costs

[12] The Defendants argued that since the Plaintiff compromised on interest and costs as against the principal debtor, it is estopped from insisting on its entitlement to interest and costs under section 26 and 27 of the Civil Procedure Act. The Defendant sought to rely on the principle in the maxim *qui prior est tempore, potior est jure*. They urged that the decree dated 29th September 2005 was entered into by consent of the parties. In the said consent decree, Kits 2000, had undertaken to repay the Plaintiff the sum of Kshs 3,754,996/- as money owed. The same was to be paid in accordance with the terms of the consent decree exhibited as “JLN-2” Clause 1(a) – (d). The payments were evidenced in “JLN- 6” and related to **Bankruptcy Causes No 8 & 9 of 2006** in which the Plaintiff was a secured creditor. However, after making several payments, the Defendant filed an application dated 14th August 2013 in which it sought to strike out the instant suit ostensibly on the grounds that the same was *res judicata*. But, this court in a ruling dated 11th March 2014, determined that the parties in this instant suit were different from HCCC No 423 of 2004 and that therefore the issue of *res judicata* did not arise.

[13] The Plaintiff also made extensive submission on the consent judgment and decree between the principal debtor and the lender; that it constituted a contract between the parties and so the Defendants not being parties thereto cannot seek to enforce it or seek to derive advantage therefrom. These arguments have been answered by what I have stated; that the said consent decree is mere evidentiary material in this suit and is not the decree herein, and this suit is not an enforcement of that consent decree. How about the estoppel issue?

[14] Again I will fall back on what I stated. The Defendants have not applied for the setting aside of the default judgment herein. They have only applied for the setting aside of the decree herein or amendment of the part of the decree that awarded costs and interest. They have also paid the entire principal sum save the costs and interest. The judgment is still firmly in place as nothing has been adduced which impels the court to exercise its unfettered discretion to set aside the default judgment herein. A decree can only be set aside if it is not drawn in accordance with the judgment and the law. Nothing shows that the decree does not agree with the judgment herein or was not drawn as provided for in the Civil Procedure Rules. Secondly, this suit is separate from the one between; the principal debtor and the lender; and so costs and interest would be allowed at the discretion of the court. The court awarded costs and interest in its entry of judgment. Therefore, in the circumstances of this suit, estoppel does not arise. There is no promise that was made by the Plaintiff to the guarantors on costs and interest in this case. The judgment has not been set aside and the decree is drawn in accordance with that judgment. There is really no injustice which is occasioned by the enforcement of the decree of the court.

[15] In real terms, any debt that is unpaid by the borrower, in so far as it is in relation to the debt covered by the guarantee, and as long as it is not a fraud on the guarantors, constitute a debt for which the guarantor will be liable to pay to the extent of the guarantee. The decree herein constitutes the debt payable. There is absolutely nothing which would justify the setting aside of the decree herein. As long as the decree has not been satisfied, the debt is owing and enforceable against the guarantors. It is not disputed that the decretal amount of Kshs 3,754,996/- was not fully paid by the Defendants. In fact they admitted that they had paid only Kshs 3,200,750/- leaving a balance of Kshs 504,246/- which they opted to pay into court on 1st July 2013. By opting to satisfy the decree herein, the Defendants are estopped from denying any part of the decree.

[16] The Defendants have sought the aid of ‘novation’. According to the definition of novation in *Black’s Law Dictionary, Ninth Edition at pg. 1168,*

A novation may substitute (1) a new obligation between the same parties, (2) a new debtor or (3) a new creditor. A contract that (1) immediately discharges either a previous contractual duty or a duty to make compensation, (2) creates a new contractual duty, and (3) includes as a party who neither owned the previous duty nor was entitled to its performance.

In **Scarf v Jardine** (supra), it was determined that for the original obligation to be discharged, there has to be a mutually consented consideration, which is the discharge of the old obligation. From the evidence presented before the court, and the testimony of the parties, it is evident that the Defendants had not performed their obligation as guarantors to pay off the debt owing under the guarantee. There is also no substitution of their obligations at all as guarantors. As long as the parties suggest that the consent of 29th September 2005 constituted a substituted obligation or a variation of the obligation of the guarantors, I think, there is absolute misconception in the application of this doctrine of novation in this case. There was no mutually consented consideration on the part of the Defendants which could be said to have the effect of substitution of their previous obligations. The doctrine of novation is, therefore, being used inappropriately. In light thereof, the Plaintiff was justified in filing the instant suit and laying claim to the outstanding balance, costs and interests as stated in the decree dated 15th December 2005. The only safeguard the Defendants have in law is that interest should be on the sum owing, and the Deputy Registrar should ensure interest is tabulated correctly. Therefore, while I dismiss the application dated and filed on 27th May 2014, I direct parties to appear before the DR on such date as shall be agreed among them to confirm interest shown to be due is correctly tabulated. The upshot is that I dismiss the application dated 27th May 2014. I will not order costs given the circumstances of this case. Each party shall bear own costs. It is so ordered.

Dated, signed and delivered in court at Nairobi this 16th day of April 2015

F. GIKONYO

JUDGE