



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**HCC 576 OF 2006**

**PRIME BANK LIMITED.....PLAINTIFF**

**Versus**

**VIPIN MAGANLAL SHAH.....1<sup>ST</sup> DEFENDANT**

**RAJESH BOGHILAL VYAS.....2<sup>ND</sup> DEFENDANT**

**TALIB ABUBAKER AHMED .....3<sup>RD</sup> DEFENDANT**

**RULING**

**Raising warrants of arrest**

[1] The 3<sup>rd</sup> Defendant has applied in a Motion dated 8<sup>th</sup> August 2014 for the Honourable Court to stay and lift the warrant of arrest issued against him, and also for an order for costs.

**The Applicant's case**

[2] The Applicant relies on three reasons why the warrants of arrest should be lifted. One; he submitted that, the Plaintiff in the application to commit the 3<sup>rd</sup> Defendant to Civil Jail did not disclose that part of the decretal sum was settled by the 2<sup>nd</sup> Defendant and the rest had been paid by the 1<sup>st</sup> Defendant. According to the Applicant, the Plaintiff has admitted in its Replying Affidavit dated the 9<sup>th</sup> September 2014 that the 2<sup>nd</sup> Defendant paid a total of Kshs. 9,700,000/=. Two; the Plaintiff failed to disclose also that consent was entered into between the Plaintiff and the 2<sup>nd</sup> Defendant on 7<sup>th</sup> December 2009, where the 2<sup>nd</sup> Defendant agreed to pay the whole decretal sum, albeit in installments and the Plaintiff agreed to the said terms. Hence, by that consent, the decretal sum was supposed to have settled by the 2<sup>nd</sup> Defendant. Consent is enforceable contracts and like contract can only be vitiated on proof of misrepresentation, fraud, undue influence, and/or duress in the entering of the consent. On this the Applicant cited the case of **Gateway Insurance Company Limited vs. Aries Auto Sprays (2011) eKLR** and **Flora Wasike vs. Destimo Wamboka (1988) 1 KAR 625**. And, three; by virtue of the consent an estoppel against the Plaintiff from recovering the decretal sum from the Applicant arose under section 120 of the Evidence Act. Seeking to recover from the 3<sup>rd</sup> Defendant the same monies provided for in the

consent dated the 7<sup>th</sup> December 2009 is double recovery.

[3] The Applicant relied on the case of **Beatrice Wanjiku & anor –vs- Attorney General & Anor (2012) eKLR** where Majanja J held that committal to civil jail can only be done once the decree holder proves that the judgment debtor has had means to satisfy the decree and further that the judgment debtor has refused or neglected to pay. The Applicant submitted further that arrest and committal to civil jail is the last resort after other modes of execution have failed. The Plaintiff has not shown this Honourable court any other method it used to recover the remaining decretal sums from the 3<sup>rd</sup> Defendant and therefore the application for committal to Civil Jail was done in bad faith.

[4] The Applicant stated that the decretal sum was Kshs. 9,198,287.80/= which attracted interest at the rate 24% from 20.5.2006 until payment is full. However, between 2009 and 2012 the total amount paid was Kshs. 9,700,000/=. Interest could only be calculated on the balance but the Plaintiff has calculated interest as if nothing has been paid from the time of the decree. In line with the consent herein, for the over four years from the date of the consent, the 2<sup>nd</sup> Defendant must have paid over Kshs. 25,000,000. That is why the said 2<sup>nd</sup> Defendant has never been committed to Civil Jail since the whole of the decretal sum has been paid.

### **The Respondent resisted the application**

[5] The Plaintiff regretted that the application and the warrants of arrest did not take into account the sum of Kshs. 9,700,000 received by from the 2<sup>nd</sup> Defendant and apologized for the oversight. They said it was not intentional or malicious or calculated to give them any advantage or cause prejudice to the 3<sup>rd</sup> Defendant. But, they vehemently denied that they received Kshs. 3,000,000 or any money from the 1<sup>st</sup> Defendant before he passed on. Again they denied that the decretal sum was inflated and explained how the final figure was arrived at upon applying interest at 24% p.a. from 20.5.2006 to date as granted in the judgment of the court. After crediting the sum of Kshs. 9,700,000 the balance is Kshs. Kshs. 13,332,251.69. The sum of Kshs. 9,700,000 was realized after the sale of the 2<sup>nd</sup> Defendant's property L.R. NO 209/5098. All these things were detailed in the Affidavit of Caroll Wangari Ndirangu the Legal Manager of the Plaintiff sworn on 9.9.2014.

[6] The Plaintiff also submitted that they disclosed the consent between them and the 2<sup>nd</sup> Defendant, and that consent did not absolve the 3<sup>rd</sup> Defendant from liability on the judgment herein which was entered into against the defendants severally. The consent does not also preclude them under the doctrine of estoppel from demanding the balance of the decretal sum from the 3<sup>rd</sup> Defendant who is under an obligation to pay.

[7] The Plaintiff averred that the Notice to Show Cause was duly served upon the 3<sup>rd</sup> Defendant by way of advertisement in the *Daily Nation* of 25.7.2014 after leave was granted by his Honourable Court. The 3<sup>RD</sup> Defendant did not attend court on 31.7.2014 in obedience to the Notice to Sow-cause and so the warrant of arrest was issued to compel his attendance. See Order 22 Rule 31 (2) which state:-

***“(2) where appearance is not made in obedience to the notice the court shall if the decree-holder so requires, issue a warrant of arrest for the judgment debtor”***

[8] In addition, the warrant herein is to arrest the 3<sup>rd</sup> Defendant and bring him to show-cause why he should not be committed to civil jail and it should not be mistaken for automatic committal. After all, if he is arrested and brought to court under the warrant he will still be entitled to Show Cause why he should not be committed in accordance with the provisions of Order 22 Rules 34 and 35. It is only thereafter he has had an opportunity to Show Cause and the court, after examining he has means to pay except he has refused or neglected to pay that a committal order may be made. See what Majanja J said in the case of **Beatrice Wanjiku** (supra).

[9] The Applicant has tried in the past to set aside the judgment herein but failed. And this application is

yet another attempt to deny the Plaintiff of fruits of its judgment. Contrary to the 3<sup>rd</sup> Defendant's claim that he signed one guarantee for Kshs. 2,000,000, he indeed executed two guarantees for Kshs. 2,000,000 and Kshs. 7,871,000 respectively.

## **The determination**

### **Issues**

[10] I see two issues for determination.

- 1) Whether the consent entered into between the plaintiff and the 2<sup>nd</sup> Defendant raises an estoppel against the plaintiff; and
- 2) Whether the warrants of arrest should be lifted.

But under issue 1, the following matters are invariable strands for determination; whether the consent covered the entire decretal sums; or whether the consent altered the terms of the judgment or whether recovery of the decretal sums from the 3<sup>rd</sup> Defendant amounts to double-recovery. Under issue 2, depending on the answers to issue 1, these matters will be discussed and determined; the efficacy of service by substituted method of advertisement as opposed to personal service in the scheme of notice to show-cause; the effect of the error or omission to credit sums paid to the decree-holder in the notice to show cause and the warrants issued thereon.

### **Consent judgment**

[11] Consent judgment between the plaintiff and the 2<sup>nd</sup> Defendant was recorded and endorsed by the Deputy Registrar on 7<sup>th</sup> December, 2009. The significant part of the said consent stated as follows:-

***“That the 2<sup>nd</sup> Defendant/judgment debtor do settle the decree sum herein together with interest and costs as follows...”***

[12] Does this consent absolve the 3<sup>rd</sup> Defendant from liability? In law, a consent judgment is not the less a contract for it emanates from the parties and also gets court's superadded authority as an order of the court. It is, therefore, binding and enforceable between the parties unless it is shown to have been obtained through fraud, coercion, misrepresentation or it is illegal per se. But, the challenge before me is not on the validity of the consent; it is an attempt by the third Defendant to reap certain benefits on the consent in question, i.e. to absolve himself from liability. First of all, the 3<sup>rd</sup> Defendant is not a party to the said consent. Second, the consent did not set aside judgment against the 3<sup>rd</sup> Defendant or expressly or by necessary implication, absolve him from liability herein. Third, the judgment against the 3<sup>rd</sup> Defendant was severally and when this is coupled with the status of the 3<sup>rd</sup> Defendant as a guarantor of the debt, he cannot escape liability on the debt until it is paid in full. In such a case, each judgment debtor carries full liability for the payment of the entire decretal sums. And as long as the decree is not satisfied in full, the decree-holder has the right to execute against judgment-debtors jointly or severally for recovery of the decretal sum. I should state also that where the guarantors are sued jointly and or severally, liability is construed to be joint and several such that even when one of the judgment-debtors dies, liability will devolve on the survivor or survivors. Therefore, as long as there is outstanding decretal sums, the decree-holder is at liberty to pursue any of the surviving judgment-debtors for the balance and he is not under any obligation to pursue a particular judgment-debtor or explain why he has pursued one and not the other unless the judgment itself sets out the specific liability for each judgment-debtor.

[13] Although the 3<sup>RD</sup> Defendant claims that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant paid the balance of the decretal sums, he did not provide any hard evidence. The evidence before the court show there is an outstanding sum to be paid by the judgment-debtor. Therefore, by recovering the balance from the 3<sup>rd</sup> Defendant, the plaintiff will not be recovering more than the maximum recoverable decretal sum. It will not be double-

recovery.

### **Issuance of warrants of arrest**

[14] The Notice to show cause was served through substituted service which had been ordered by the court. Although personal service of a Notice to Show Cause is most preferred, where the judgment-debtor cannot be traced for personal service, he may be served through other legal and permitted modes of service. And such service as by way of advertisement in a local newspaper of nation-wide circulation is sufficient within the scheme of Notice to Show Cause. If the judgment-debtor so served fails to attend court as commanded by the Notice to Show Cause, a warrant of arrest may be issued by the court to procure his attendance. I admit that the principal purpose of a warrant issued under Order 22 Rule 31 (2) is to procure the attendance of the judgment-debtor before the court to show-cause why he should not be committed to civil jail for the outstanding debt. It is not at all an automatic committal to civil jail as it has been misconceived by many. What Majanja J said in the case of **Beatrice Wanjiku** (supra) explains this position, that:-

***“Where the judgment-debtor does not make an appearance in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor under Rule 32(2). The warrant is issued to enforce court attendance of a judgment-debtor who has been served with the notice. Under Rule 35 aforesaid, where a judgment-debtor appears before the court in obedience to a notice issued under Rule 32, or is brought before the court after being arrested in execution of a decree for the payment of money, he may be examined on his means or otherwise to satisfy the amount of the decree and the court may on terms as it may think fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be. The application is disallowed if the judgment-debtor is unable to pay the judgment debt as a result of poverty or other sufficient cause.”***

[15] However, the warrants issued under rule 31(2) also serves another indirect but important purpose found in rule 32 in the words; ‘*unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid*’. These words and the purpose of calling upon the judgment-debtor to pay up the decretal sums indicated in the warrants brings me to the next question raised by the 3<sup>rd</sup> Defendant in respect of the actual decretal sum. The plaintiff has admitted that there was an oversight on their part and failed to credit the sum of Kshs. 9,700,000 recovered from the 2<sup>nd</sup> Defendant. But they sought to explain how they arrived at the sum being claimed after applying the interest applicable. But the fact that there was an error in the warrants would vitiate those warrants. The warrants should indicate the actual sum owing and that clarity should always be provided by the plaintiff. this insistence of proper amounts being indicated in the warrants is a serious matter especially given that warrants are, in one sense, accountable documents, and in another sense, coercive documents which deprive a person of his liberty or may cause payment of sums indicated therein. It must be prepared with diligence like other accountable and court documents. For that reason I direct the Deputy Registrar to recall the said warrants for purposes of setting them aside, except on condition that the judgment-debtor attends in person before the Deputy Registrar for that purpose on a date to be fixed herein. In the event of default of attendance as ordered, the warrants shall remain in force and the 3<sup>rd</sup> Defendant will be arrested and brought to court with all convenient speed unless to show cause why he should not be committed to jail. On such attendance, or in the absence thereof by the 3<sup>rd</sup> Defendant, the Deputy Registrar shall ascertain when the sum of Kshs. 9,700,000 was paid and after applying the interest as per the judgment against the 3<sup>rd</sup> Defendant, calculate the actual sum payable on the decree herein. Then, the Notice to Show Cause herein will be based on the figure so ascertained on such date as shall be set by the DR. I have issued these orders fully aware of tendencies by judgment-debtor of hiding so as to delay or defeat the course of justice. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 27<sup>th</sup> day of November 2014**

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**F. GIKONYO**

**JUDGE**