



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 157 of 2005

TREADSETTERS TYRE LTD.....PLAINTIFF

VERSUS

COUNTRY MOTORS LTD.....DEFENDANT

RULING

1. There are 2 applications for determination brought by the Defendant/Applicant, both seeking for a stay of execution of the Decree against it for attachment and sale. The first application is dated 29 February 2012 and the second dated 27 September, 2012. The first application is made pursuant to the provisions of **sections 1A & B, section 3A** of the *Civil Procedure Act* and the second application is brought under **Order 51 Rule 15, Order 9 Rule 5** of the *Civil Procedure Rules*, **Sections 1A, 1B and 3A** of the *Civil Procedure Act* and all other enabling provisions of the law. The Defendant bases its applications on the fact that an arrangement to settle the Decree was entered into between the parties, payments were made pursuant to the same and which were completed and paid in full in October 2010. It maintained that the Orders for execution both in February and July 2010 were brought as an afterthought, as the monies payable under the Decree to the Decree holder had been fully satisfied. Both applications are supported by the Affidavits of P. S. Pandhal sworn on 29th February and 27th September, 2012. They reiterated the grounds adduced in the main applications. The Defendant submitted that as the Decree had been satisfied, it was unprocedural and unwarranted for the Plaintiff to seek to enforce the same by obtaining warrants for the attachment and sale of the Defendant's property. The Defendant relied on the case of **Galeb Gulam v Cyrus Shakhhalaga Kwah Jirongo, H.C. (Milimani) Civil Case No. 393 of 2003 (2012) eKLR** in support of its applications.

2. The Plaintiff in opposing the applications relied on the Replying Affidavit of Jane Baiyu sworn on 13th March, 2012. It contended that there was a Decree that was issued on 22nd May, 2009 which the Defendant had not satisfied and that there was no agreement for waiver, variation or satisfaction of the Decree as alleged by the Defendant. Further, the Payment Acknowledgment Form annexed to the supporting Affidavit of Mr. Pandal dated 29th February 2012 which purported the settlement of the decretal sum was in no way an acceptance of a lesser amount in full and final settlement. It was also contended that the application was brought in bad faith and a machination by the Defendant to deny the Plaintiff the fruits of its judgment.

3. In considering an application for stay of execution, the Court in exercising its discretionary authority pursuant to the provisions of **Sections 1A and 1B** of the *Civil Procedure Act*, the applicant has to satisfy the conditions as set out in the case of **Butt v Rent Restriction Tribunal (1982) KLR 417**. It was held inter alia;

“A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings...the

court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.”

In considering the applications by the Defendant for stay of execution of the Decree herein, it would be prudent to address the issue in relation to what has transpired before this court. The Defendant’s application of 29th February, 2012 sought amongst other orders:-

“2. Pending the hearing and determination of this application there be a stay of execution of the decree herein.”

4. According to the court record, that application dated 29th February, 2012 came before the Senior Deputy Registrar on 2 March, 2012 when a temporary stay of execution was granted pending the inter-parties hearing of the application on the 15 March, 2012. On that day, Mr. Ogunde appeared for the Defendant/Applicant but there was no appearance for the Plaintiff/Respondent as before the Deputy Registrar. Accordingly, the matter was still over for further hearing inter-partes on 20 March, 2012. There is no mention of any appearance before court on that date. Accordingly, the Defendant/Applicant's said application dated 29 February, 2012 had not been determined. The Plaintiff/Respondent then made an application by way of Notice to Show Cause which eventually led to Warrants of Attachment being issued through the Order of the Deputy Registrar made on 3 July, 2012. The service of such Warrants upon the Defendant/Applicant led to its current application before court under Certificate of Urgency dated 27 September, 2012. On that date, Mr. Ochola appeared for the Defendant/Applicant as the said application also involved Mr. Oduor John Henry, advocate seeking leave to come on record for the Defendant. Thereafter on that day, I made the following Orders:-

"1. THAT leave be and is hereby granted for Oduor John Henry to come on record as representing the Defendant/Applicant.

2. THAT a stay of execution of the decree be and is hereby granted until the hearing of the application dated 27/9/2012 inter-partes.

3. THAT hearing inter-parties will be on 9th October 2012 before Hon. Mr. Justice J. B. Havelock.

4. THAT the Defendant/Applicant to serve all necessary court process on the advocate for the plaintiff.

5. THAT no orders as to costs."

5. So it was that the parties appeared before me for the inter-partes application on 10 and 11 October, 2012, and thereafter on 6 November, 2012. On that day, Mr. Ogunde reiterated that the legal principle as regards stay applications is the same as both parties relied on the decision of my learned brother **Mabeya J.** in **Gulam & Anor vs Cyrus S.K. Jirongo (2012) eKLR**. Counsel maintained that there was a Payment Acknowledgement Form signed by both parties as regards the monies owed and payable by the Defendant/Applicant under the Decree. In the Replying Affidavit, the Plaintiff/Respondent indicated that it had given credit for the amounts paid in arriving at the sum claimed in the Plaint. Payments were completed by the Defendant/Applicant in October 2010. There was no follow-up or attempt to execute the Decree until earlier this year, after a period of one and a half years. It was the Defendant's contention that it was clear that as between the parties that there had been an accord and satisfaction. Later, the attempt to execute the Decree involved an amount of Shs. 244,000/-.

6. Mr. Nganga appearing for the Plaintiff/Respondent maintained that the contention that the Decree as being satisfied in full was not true. The document headed "Payment Acknowledgement Form" had been prepared by the Defendant/Applicant and is not an agreement as between the parties. In counsel's view the same could not be construed as an acknowledgement of payment. He noted that the court had awarded interest at the rate of 16.75% per annum from the date of filing suit. The Payment Acknowledgement Form contains no interest element and there is no letter from the advocates for the Decree Holder or

indeed the Decree Holder itself which certifies full payment of the monies due under the Decree. Counsel submitted that the amount of Shs. 3.8 million was paid but it did not completely settle the amount due under the Decree. There could not be an accord by one party which was not agreed by the other. He noted that the amount of Shs. 244,000/- was in respect of the Auctioneer's costs who taxed its Bill on going ahead with the execution process.

7. Quite honestly, the whole matter of whether monies are approved by the Defendant/Applicant under the Decree herein revolves around the interpretation of the said Payment Acknowledgement Form. From the Affidavit of Mr. Pandal in support of the Defendant's Application of the 29 February 2012, it is apparent from Exhibit "P S 1" attached thereto that the proclamation of attachment which prompted the Application noted that the amount required to be paid by the Decree herein with Shs. 244,292/-together with auctioneers charges at Shs. 51,444/-. This contrasts somewhat with Plaintiff's counsel's submission that the Shs. 244,000/- all related to the auctioneer's charges. Turning to the Payment Acknowledgement Form, it is correct that the same was prepared by the Defendant as it is drawn on the Defendant's letterhead paper. It notes that there was a balance due "per statement" of Shs. 4,601,986.64. After deduction of rent due of Shs. 778,000/- there remained a balance to pay of Shs. 3,823,986.64. Against this five cheques were tendered on various dates between June and October 2010 and in varying amounts. Those cheques totalled the same amount being Shs. 3,823 986.64. However, the Payment Acknowledgement Form details that it was prepared by one John Odhiambo Okeyo and was dated 21 May, 2010 being received on behalf of the Plaintiff by one Julius Muthoka. To my mind, the Payment Acknowledgement Form is not what it supposedly appears to be – acknowledgement of payment. The last dated detail thereon for payment was the 20 October, 2010 which would be some 5 months after the document was prepared. The Defendant has produced no evidence that those sums were actually paid and in full. Thereafter, attached to the said affidavit, there is an acknowledgement from the auctioneer dated 25 May 2010 of having received the sum of Shs. 20,000/- from the Defendant covering auctioneer's charges.

7. All this has entailed me to look back on the court file so as to try to trace the history of this matter. It appears that on the 7 October, 2009 before the deputy registrar of this court, Mr. Oluoch Olunya, ostensibly for the Plaintiff, appeared before the Deputy Registrar and the suit was marked as "settled". However that Order was later varied on the 26 October, 2009 when the Deputy Registrar allowed an application to set aside the said Order of 7 October, 2009 and ordered that this matter proceeds for taxation of the Plaintiff's Bill of costs dated 24 July, 2009. That taxation eventually took place along with the taxation of Eshikoni Agencies Auctioneers' costs as well. It is apparent from the record that on the 20 February 2010 the Plaintiff's Bill of costs was taxed in the amount of Shs. 320,529.33 inclusive. Later, on 10 May 2011, the Senior Deputy Registrar taxed the costs of the auctioneers as above in the amount of Shs. 242,292.68.

8. The application for execution of the Decree as filed by the advocates for the Plaintiff on 2 April, 2012 and detailed the principle amount of Shs. 4,601,986.64 together with interest from 22/3/2005 to 22/3/2010 amounting to Kenya Shs. 4,443,353.49. It also detailed costs at Shs. 320,529.33 which is in accordance with the Certificate of Costs issued by this court on the 15 March, 2010. The payment adjustment detailed on the application for execution was given as Shs. 3,823,986/-. This figure ties up with paragraph 3 c) of the Replying Affidavit of Jane Baiyu dated 13 March, 2012 in which the deponent confirms that sum as having been received by the Plaintiff from the Defendant. The court record shows that 29 May 2012, Mr. Nganga appeared for the Plaintiff before the Senior Deputy Registrar and Mr. Murichi appeared for the Defendant. The latter required ten days to make an application to come on record as representing the Defendant. Consequently, the Notice to Show Court was extended to the 3 July 2012. On that date, Mr. Gachoka appeared for the Plaintiff before the Deputy Registrar but there was no appearance for the Defendant as a consequence of which, the Deputy Registrar ordered that Warrants of Attachment do issue. The service of those Warrants of Attachment dated 31 August, 2012 along with the Proclamation of Attachment dated 22 September, 2012, as served by the aforementioned Auctioneers, resulted in the Defendant making the Application dated 27 September, 2012 under Certificate of Urgency.

9. I should note here that there were two Warrants of Attachment dated 31 August, 2012. The first made no sense to me in relation to the Plaintiff's claim against the Defendant. Although it showed the correct

decretal amount of Shs. 4,601,986 .64 other money details therein were not clear. Taxed costs were detailed at Shs.160,554.80. Interest on the decretal amount was detailed as Shs. 5,668,261.00. Further costs were recorded at Shs. 3,450.00 along with a collection fee of Shs. 1,500.00, totalling Shs. 10,435,752.44. Nowhere was there credit given to the Defendant for the amount that it had paid of Shs. 3,823,986/-. The second Warrant of Attachment dated 31 August, 2012 simply covered the taxed costs of the Auctioneers at Shs. 242,292/-as well as a further costs and a collection fee totalling Shs. 2,450/-. This came altogether to Shs. 244,742 .68. I have no idea where the 0.68 came from but would accept the figure of Shs. 244,742/-as correct. As a consequence, I consider the first Warrant of Attachment to be inaccurate and misleading and I strike out the same.

10. I have much more confidence in the Application for Execution filed by the advocates for the Plaintiff on 2 April, 2012 as above. I believe that the total of Shs. 9,045,340.13 which includes interest up to the 22 March 2010 to be an accurate figure. To this amount must be added the certified costs at Shs. 320,529.33 giving a total of Shs. 9,365,869.46. From this must be deducted the sum already paid by the Defendant of Shs. 3,823,986/-which would give a total still to pay of Shs. 5,541,883.46. It must be remembered that as long ago as 19 June, 2009, Lady Justice Lesiit ordered that interest would be payable on the sums due from the Defendant to the Plaintiff at the rate of 16.75% from the date of filing suit until payment in full. On top of the said amount of Shs. 5,541,883.46, I find that the Defendant also owes for the said Auctioneers' charges at Shs. 244,722/-as above.

11. The conclusion to my reasoning above is that I dismiss the Defendant's Application dated 29 February 2012 as well as its Application dated 27 September, 2012 with costs to the Plaintiff. I direct that this file be placed back before the Deputy Registrar of this Court to amend the Notice To Show Cause/Warrants of Attachment as necessary for further service upon the Defendant/Judgement Debtor.

DATED and DELIVERED at NAIROBI this 14th day of December 2012

**J. B. HAVELOCK
JUDGE**