



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 2456 of 1994

JOHN NJAU NJUGUNAPLAINTIFF

VERSUS

JOSEPH KIBE MUNGAI DEFENDANT

RULING

1. By an Originating Summons filed on 8th April, 1994, the Plaintiffs sought several reliefs. One of the reliefs was the ascertainment of the partnership assets of RKNS and consequently distribute then to the Plaintiff and Defendant in equal shares. After hearing the parties Hayange J (as he then was) entered a Preliminary Judgment on 20th September, 1999. In that judgment, the court directed that an Accountant do ascertain profit and other monies due to the Plaintiff and be paid to him. He further directed the Defendant to pay to the partnership Kshs.4,442,579/40.
2. It would appear that Ms Koimburi, Tucker & Co. Accountants carried out some accounts and released their report on 21st July, 2000. He concluded that the amount payable to the Plaintiff was Kshs.9,519,987/-on the 16th November, 2000. On the application of the Defendant herein, Commissioner of Assize Philip Ransley, as he then was, ordered that he matter be referred back to Mr. Koimburi, with explicit instructions on what to do, he also directed that he Defendant do deposit in an interest bearing account a sum of Kshs.4,442,579/20. The parties were at liberty to apply for direction to be given to Mr. Koimburi. On an application by the Plaintiff, Mbaluto, J (as he then was) gave final Judgment on 7th December, 2001 by which he directed the Defendant to pay to the Plaintiff the sum of Kshs.9,519,987/- as the share of the Estate of Reuben Kangara Kirika and also directed the sale of L.R No. MI Sec XIV/19 Mwakilingo street and the proceeds thereon to be disbursed by Ms. Koimburi Tucker & Co.
3. The judgment and decree of Mbaluto J, was appealed against. That appeal was struck out and an attempt to extend time for filing a Notice of Appeal out of time was also refused on 8th May, 2008.
4. On 17th June, 2009, Koome J (as she then was) made an order by consent of the parties, inter alia, for a sum of Kshs.14million being the share of the Defendant from the sale of LR No.209/178/29, Ngara which he owned jointly with his wife, to be deposited in a joint account to be opened at the Housing Finance Company of Kenya, Rehani House Branch in the joint names of the Advocates for the parties pending further orders of the court. A prohibitory order had been issued against that property in execution of the decree herein in favour of the Plaintiff. The amount deposited was kshs.11,500,000/- and for the purposes of this application, I need not deal with the difference between the amount ordered to be deposited and the actual sum deposited.
5. On this background, on 29th November, 2011, the Plaintiff took out a Motion on Noitce under orders 24 and 27 of the Civil Procedure Rules seeking that the said sum of Kshs.11,500,000/- be released to the Plaintiff's Advocates forthwith and for one Hansa Ramesh Liladhashah to be appointed a legal

representative of the Defendant.

6. It was contended for the Plaintiff that this matter is concluded, judgment and a final decree has already been passed in his favour and that there is no appeal pending since the once preferred against the decree had been struck out, that there is no stay in force, that the release of the said sum is in execution of the decree of this court given on 7th December, 2001, that the decretal sum continue to attract interest. That the matter has taken long to be finalised and that the Defendant will not suffer any prejudice. The Plaintiff therefore prayed that the application be allowed.

7. The Defendant filed Replying Affidavit and s Supplementary Affidavit both sworn by Joseph Kibe Mungai in opposition the motion. It was contended by and on behalf of the Defendant that the dispute herein was basically one of accounts, that Hayenga J had directed that an independent accountant do take accounts, that the accounts taken by Koimburi, Tucker & Co. in pursuance thereof were found by Ransley C.A to be defective, that it was directed that the accounts be referred back to Koimburi, Tucker & Co. for rectification and Kshs.4,442,579/20 be deposited in a joint account, that the accounts were not rectified but when the Plaintiff tried to execute the decree Ibrahim J (as he then was) held that exclusion was premature until and unless the accounts were completed in terms of Section 43 of the partnerships Act. The Defendant further contended that fairness and justice required that accounts be finalised before any execution can be proceeded with. That the court should do justice under Sections 1A and 1B by allowing accounts being taken first before any funds can be released, that the final Decree made on 7th December, 2001 is caught up and superseded by the order of Ibrahim J of 26th January, 2004. The Defendant urged that the application be dismissed.

8. I have carefully considered the Affidavits on record, written submissions and oral hi-lights of learned Counsel. At the beginning of this ruling, I gave a brief history of this suit. This is a suit that was commenced in 1994 and judgment decreed in December, 2001. The suit has remained in our courts for 18 odd years whilst judgment has remained unexecuted for eleven (11) years. It is doubtful if with such a delay, anything in the name of justice can finally be in the minds of the parties.

9. The matter may seem clear from the outset, there being a preliminary judgment followed by a final judgment, an account which is found to be faulty. The attempts to execute an appeal which is truck out, then the deposit of the monies in two separate joint accounts. The Defendant have raised three issued which I think are the ones for determination. These are that first, since the suit was originally meant to take accounts and the judgment arising therefrom dire ted that accounts be taken whether the decree can be executed before the partnership accounts are completed, secondly, whether the final judgment made on 7th December, 2001 had been overtaken by the order of Ibrahim J of 26th January, 2004 and thirdly what is substantive justice under Sections 1 A and 1B of the Civil Procedure Act.

10. On the first issue it is not in dispute that the suit as commenced basically sought the taking of accounts of the Partnership. It is also not in dispute that on 20th September, 1999 the Preliminary Judgment decreed by Hayanga J, directed that accounts be undertaken by an independent accountant. It is also not disputed that the accounts that were prepared by Koimburi Tucker and Company were faulted by Commissioner Ransley on 16th November, 2000. What is disput3ed is whether the final judgment having been entered on 7th December, 2001 execution therefor should await the completion of the accounts.

11. A decree is defined under Section 2 of the Civil Procedure Act to mean:-

“...the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any o the matters in controversy in the suit and may be either preliminary or final.....” (Emphasis added)

I have seen the document exhibited as Exhibit “JKM 12 A” in the Replying Affidavit of J.K. Mungai. It is titled Final Decree. It determined the dispute between the parties as follows:-

“1. The Defendant do pay the Plaintiff Kshs.9,519,987/00 being the share of the Estates of Reuben

Kangara Kirika.

2. That M/s Begeine Karanja Mbuu Limited do sell Mombasa property i.e. LR No. MISCE XVI/19 MWAKILINGO STREET and do pay the proceeds into the client account of Koimburi Tucker & Co. Certified Accountants (Kenya) who will then disburse the proceeds of the award.

3. That the costs of the arbitration be paid by the Plaintiffs and the Defendants on equal basis.”

To my mind therefore, this was the final determination of the rights of the parties in this suit. The Defendant was to pay the Plaintiff Kshs.9,519,987/- and the identified property was to be sold for purposes of having the proceeds therefrom disbursed according to the accounts to be prepared by Koimburi Tucker & Co. as at the time this final decree was being made, Koimburi Tucker & Co. had already delivered their faulted accounts and Commissioner Ransley had directed that the matter of accounts be referred back to Koimburi Tucker & Co. My view is, the decree of 7th December, 2001 was clear, it superseded the order of Commissioner Ransley and the issue of correcting the accounts. The decree was later in time. The order for payment of Kshs.9,519,987/- to the Plaintiff stood. It was appealed against but the appeal was struck out. The same therefore stands. There is no way one can ignore such a decree and seek to enforce an earlier order which clearly had been overtaken by a final judgment. To this end, my view is that the execution of the final decree made on 7th December, 2001 does not have to wait for the accounts to be completed.

12. As regards the second issue, it is contended that Ibrahim J, held on 26th January, 2004 that the attempted execution was premature as the account had not been settled. For that reason, the Defendant argued, the execution of the decree of 7th December, 2001 cannot be undertaken before the accounts of the partnership are completed. I have seen that ruling. The court was dealing with an application dated 10th July, 2003 by the Plaintiff for the release of part of the amount of Kshs.4,441,579/40 deposited in a joint account to it. In order to understand the court's reasoning, it is proper to set out the relevant portions of that ruling. The court held:-

“The question this court must ask itself is – are the Plaintiffs entitled to be paid the said amount as applied for. The Plaintiff wants the said amount to be paid in part liquidation of the decretal sum due to them in this suit. By an Order made on 20th September, 1999, the Defendant was ordered to pay into the partnership Account the sum of Kshs.4,442,579/40 pending inter alia account being taken and assets of the Partnership being sold .

On 24th January, 2001, the court found in favour of the Plaintiff and entered judgment for a sum of Kshs.9,519,987/- against the Defendant.

The court also ordered the sale of the Partnership property through Koimburi & Tucker & Co. Certified Accounts. The proceeds thereof was to be disbursed in accordance with the Award of the accounts. The Defendant was aggrieved by the said decision and he has lodged an appeal in the Court of Appeal. While there is no stay order, the application is still yet to be heard.

Can I allow the execution of the decree in the circumstances against the Partnership Account?

I do hereby hold that the monies being sought to be attached belongs to the Partnership. The proceeds are supposed to be disbursed in terms of order 4 of the Order of this court dated 20/9/99 namely:-

‘That the said partnership on being dissolved and wound up the entire assets of the same partnership be sold and the proceeds therefore divided equally, but such equal division be subject to the amount due to the decree as a debt from the Defendant.’

According to the record, the property or asset of the partnership has not been sold. This means that unless the parties agree as they did in respect of prayers 1, 2 and 3 the monies in the Partnership account can only be disbursed in accordance with the final award after sale of the Asset.

With regard to the amount found due to the Plaintiff, the same amount be recovered against the Partnership account. It is the monies belonging to the Defendant which is attachable. Until the property is sold, it is premature to attempt any attachment. To date the amount in the said account, belongs to the partnership and it has not been disbursed or divided to ascertain what portion is attachable or belongs to the Defendant.

On the law, I think that the Plaintiff could have been entitled to the orders after the finalization of the award and ascertainment of what is due to the Defendant. As it is, this application is premature. It is disallowed.”

13. My understanding of the ruling is that, the court was dealing with the sum of Kshs.4,442,579/40 which the judgment had directed be paid into the partnership account. That is the amount in my view which cannot be touched until the accounts have been concluded. The court did not rule on the sum of Kshs.9,510,987/- which was a judgment decreed as against the Defendant personally. That was to be obtained from the Defendant’s assets. It is for that reason that the Defendant’s property was sold and a sum of Kssh.14million ordered deposited in a joint account. That being the case, I do not believe that Ibrahim J’s orders were directed at the sum of Kshs.9,519,987/-.

14. In any event, as at that time, there was an appeal and an application for stay which were determined in or about 2009. Further, I note that ever since the order of Ibrahim J of 26th January, 2004, neither the Plaintiff not the Defendant has taken steps to have the accounts of the Partnerships settled. Can the Plaintiff who has a final decree for Kshs.9,519,987/- wait ad infinitum? I do not think so. I hold the view that there is no impediment on the plaintiff accessing those funds that were deposited in a joint account vide a court order of Koome J of 17th June, 2009 which did not have any strings attached to it whatsoever.

15. As regards the application of Sections 1A and 1B, I believe the overriding objective requires that justice be done to the parties. That civil disputes be determined expeditiously and proportionately. That there should be no undue regard to technicalities. My take of it is that the Plaintiff got a final judgment and a decree therefrom on 7th December, 2001. An appeal against that decree was struck out. That decree has not been challenged, stayed or set aside. Delaying the release of the proceeds that is in the joint account without any good reason will, in my view, be contrary to that overriding objective of the law.

16. Accordingly, I have come to the conclusion that the application has merit and I allow the same as prayed. I award the costs of the application to the plaintiff.

DATED and DELIVERED at Nairobi this 3rd day of December, 2012

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A. MABEYA
JUDGE