



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 414 OF 2009**

**PETER KALUMA & ALBERT MUMMA T/A LUMUMBA, MUMMA & KALUMA  
ADVOCATES.....PLAINTIFF**

**VERSUS**

**MULTIPLE HAULIERS (EA) LTD & 37  
OTHERS.....DEFENDANTS**

**RULING**

The Applicant herein has moved the court under a Notice of Motion dated 14<sup>th</sup> November 2010, said to have been brought under **Orders 9A, 21 (Rules 22 and 5Q (?) 12 (Rules (1), (6) and (7) ?)** of the **Civil Procedure Act (Sic) Cap 21 of the Laws of Kenya**. Being the 11<sup>th</sup> Defendant in the suit and a Judgment Debtor (together with the 5<sup>th</sup>, 6<sup>th</sup>, 22<sup>nd</sup>, 30<sup>th</sup>, 31<sup>st</sup>, 33<sup>rd</sup> and 35<sup>th</sup> Defendants), as per the decree issued by this court on 18<sup>th</sup> February 2010, the Applicant seeks to block the Respondent's execution of the decree through the sale of its motor vehicle registration number KAP 945T attached pursuant in execution of the said decree.

The Applicant says that its application for stay of execution of the judgment and decree has been dismissed by the court. The Applicant prays, instead, that judgment be entered against it in the sum of Kshs. 117,600/= and its payment to the Respondent of Kshs. 150,000/= on 26<sup>th</sup> April 2010, be deemed as a full discharge of all its obligations and/or liability to the Respondent, subsequent upon the court finding that the payment by the Applicant of Kshs. 150,000/= to the Respondent was made in satisfaction of its liability under the decree.

The application is supported by the affidavit of Ahmed Abdule Noor, the managing director of the Applicant to which he has annexed a copy of the Respondent's Replying Affidavit filed on 22<sup>nd</sup> April 2010, the contents of which the Applicant seeks to rely on as supporting its case. The said affidavit, sworn by Peter Kaluma, a partner of the Respondent is clear and explicit in detailing the facts of the case before court. In view of the Applicant's reliance thereon the court takes the position that the facts deponed to therein are not disputed. Briefly stated, these facts are as follows:-

1. The Applicant, together with 32 other Defendants (all transporters) instructed the Respondent to challenge the legality of Gazette Notice No. 145 of 2007 by which the Government sought to, inter alia, to reduce the maximum permissible axle configuration of heavy commercial vehicles from 4-Group Axles to 3-Group Axles.
2. Pursuant to the instructions the Respondent filed the Misc. Application No. 838 of 2007 and obtained orders in favour of the Defendants, staying the operation of the Gazette Notice.
3. On 5<sup>th</sup> September 2007 the Defendants met the Applicant to discuss the quantum of fees and agreed on Kshs. 20.96 million.
4. The Defendants then agreed on their respective apportionments of the said legal fees based on the number of the trucks each one of them had on its fleet and as affected by the Gazette Notice.
5. The Defendants then presented the Respondents with a payment schedule under which the Applicant herein would pay Kshs 7,820/= for each of its motor vehicles the aggregate of which was Kshs 234,600/=, payable in four installments.
6. The Applicant paid a half of the above amount leaving a balance of Kshs 117,300/= which, despite demand issued by the Respondent, the Applicant did not pay.
7. As a consequence of the Defendants' failure to pay the agreed quantum of fees and the Applicant's failure to heed the demand issued in respect of the balance of Kshs. 117,300/= the Respondent instituted the present suit against all the 39 Defendants.
8. On 4<sup>th</sup> January 2010 the Respondent obtained judgment against the 5<sup>th</sup>, 11<sup>th</sup> (Applicant) 16<sup>th</sup>, 22<sup>nd</sup>, 30<sup>th</sup>, 31<sup>st</sup> and 35 Defendants claiming a balance of the agreed fees amounting to Kshs. 7,416,760/=.
9. On 19<sup>th</sup> February 2010, the Respondent served the Applicant with a Notice of the judgment which again it did not heed, leading to the proclamation of the Applicant's four motor vehicles, including the said KAP 945T, attached on 1<sup>st</sup> April 2010.
10. As is evident from the documentation filed, the Respondent holds the Applicant individually liable to it in the sum of Kshs.117,300/= and jointly and severally liable with the other Judgment Debtors for the amount awarded under the judgment and decree.
11. On 26<sup>th</sup> April 2010, the Applicant paid the Respondent a sum of Kshs. 150,000/= which, according to the Applicant represents the balance of its obligation under the agreement on quantum inclusive interest and costs payable thereon.
12. On the basis of the payment made as above, the Applicant has asked this court to find that it has satisfied its part of the decree and has discharged its obligation to the Respondent.

There is no dispute that the Applicant, jointly with the 38 other Defendants agreed to settle the Respondent's legal fees in the manner explained and that it agreed to be personally bound to settle Kshs. 234,600/= of the agreed sum. That a joint and several judgment was obtained (against the Applicant and 7

others) in default of Appearance and Defence is also not disputed. The Plaintiff indicates that at the time of filing suit, the 39 Defendants had paid Kshs 13,543,240/= leaving a balance of Kshs. 7,416,760/= for which the Respondent sought a joint and several judgment against all the Defendants.

In my considered opinion, the subject judgment and decree, though entered against the Applicant and the 7 other defendants who did not appear, can only be taken as proof of their joint and several liability in the suit, but not to the exclusion of the other 31 Defendants against whom there is no proof of a judgment. There is no evidence of the suit having concluded as against the other 31 Defendants who have been sued jointly and severally. To execute solely against the Applicant and the 7 others affected by the decree appears to me somewhat premature and not in the interests of justice. Joint and several liability under the Plaintiff can only be presumed as against the 39 Defendants. I find this to be a clear case where an interlocutory judgment must be taken to be just that-a provisional judgment, awaiting the entry of the final judgment in the suit.

The above notwithstanding, I find that the Applicant is jointly and severally liable to settle the decree alongside all the other 38 co-defendants. The Respondent law firm, having pleaded that the 39 Defendants have paid to it Kshs. 13,543,240/=, leaving the balance of Kshs. 7,416,760/= awarded under the judgment and decree, it must similarly hold all of them jointly and severally liable for the balance and obtain a final judgment in the suit whereby the liability of all the Defendants is established for purposes of execution. This notwithstanding however, I find that, unless the judgment and decree are varied or set aside, the Defendants liability to the Respondent remains joint and several in the amount of the decree and the issue of apportionment can only be as between the Defendants themselves.

For the above reasons I am inclined to allow the application, which I hereby do. Costs shall await the final judgment.

**DATED, SIGNED and DELIVERED at NAIROBI this 1<sup>ST</sup> day of SEPTEMBER, 2011**

**M. G. MUGO**

**JUDGE**

**In the presence of:**

Mr. Koech For the Applicant

Mr. Miyare holding brief for Mr. Kaluma For the Respondent

Mr. Okelo holding brief for Mr. Rimui For Objector