



SOFITRA SAVINGS & CREDIT CO-OPERTIVE SOCIETY.....PLAINTIFF

VERSUS

SOFITRA LIMITED.....DEFENDANT

RULING

I have two applications before me for hearing. The first application is dated 25th November 2008 and was filed on the same date by the defendant. It is by Notice of Motion expressed to be brought under Section 3A of the Civil Procedure Act and Order L of the Civil Procedure Rules. The applicant (hereinafter “the defendant”) seeks two main orders of the court namely:-

- a) A stay of confirmation of the sale and issuance of certificate thereto in respect of an auction held on 22nd November 2008 of trailers registration numbers ZB 6968, ZB 6966, ZB 0436 and motor vehicle registration numbers KAJ 264U, KTH 914, KAK 041Q pending further orders of the court.
- b) Setting aside the Decree herein and warrants of attachment of movable property given/issued on 30th October 2008 and all consequential processes including the public auction held on 22nd November 2008.

The second application is dated 5th December 2008 and was filed on the same date by M/S Ali Mbarak Ali t/a Mbarak Pit & Contractors (hereinafter “the Purchaser”). The application is also by Notice of Motion and is expressed to be brought under the provisions of Order XXI Rules 69 and 70 of the Civil Procedure Rules and Section 3A of the civil Procedure Act. The purchaser seeks two main orders of the court namely:

- 1) That there be a stay of execution of the orders made on 3rd December 2008 in respect of vehicles registration numbers KAJ 264 U, KTH 914, KAK 041 Q, trailer numbers ZC 0436, ZB 6968 and ZB 6966 pending hearing of this application inter partes.
- 2) That the said vehicles and trailers be released to the purchaser herein.

It is not surprising that these two applications were argued together as the results of the 1st application will determine the fate of the 2nd application. I will therefore consider the defendant’s application first. The application is predicted upon seven grounds stated on the face of the application. The grounds challenge the decree extracted by the plaintiff on the basis that the same is not in accord with the order given by consent and was not in any event approved by counsel for the defendant. The warrants of attachment are also challenged on the same grounds. The defendant further complains that motor vehicles belonging to a third party were attached in execution of the same decree. The defendant also complains that the costs of the suit have not been taxed and further that the sale of the said property was contrary to an agreement reached between the plaintiff and the defendant consequently the auctioneer has acted in bad faith.

The defendant has supported its application by an affidavit of one Hanif Somji, its General Manager sworn on 25th November 2008. The affidavit elaborates the above grounds. In his written submissions,

counsel for the defendant has argued that interest was not provided in the consent order recorded on 17th September 2008 and could therefore not be sought in the application for execution. To the extent that the execution was pursuant to the decree, the defect in the application for execution should be visited upon the decree, according to counsel. In the event, so argues counsel, the application for execution, the Warrants of Attachment, and sale are a nullity and should be set aside, *ex debito justitiae*. In counsel's view, that proposition is supported by the decision of the Court of Appeal in **Highway Furniture Mart Limited – v – The PS and Another: (CA No. 52 of 2005)** (UR) and **Official Receiver and Provisional Liquidator Nyayo Bus Services Corporation – v – Firestone E.A. [1969] Limited.**

In his written submissions, counsel for the plaintiff argued that the decree, as extracted, was in accord with the consent judgment recorded between the plaintiff and the defendant and he did not have to seek approval of the same. With regard to the application for execution, counsel submitted that he was entitled to include interest therein. In his view, Section 26 (2) of the Civil Procedure Act permitted such inclusion.

Significantly however, counsel submitted that after obtaining the warrants of attachment and after proclaiming the defendant's movable properties, counsel for the defendant initiated dialogue thereby acknowledging the validity of the attachment. Nevertheless counsel for the plaintiff informed "the auctioneer to halt sale of the defendant's said properties" pending further instructions which instructions unfortunately were not heeded and they continued to sell the attached.....property."

In counsel's view, as the defendant had undertaken to pay the decretal amount in full it should proceed to pay the entire amount upon which the attached vehicles should be released to it.

The purchaser's position on the other hand is that, on the defendant's default, execution ensued and its properties were attached and subsequently sold to the purchaser. In his written submissions, counsel for the purchaser argued that there was no irregularity in the sale to the purchaser of the defendant's property and even if there was any irregularity it would not vitiate the sale by virtue of the provisions of Order XXI Rule 69 of the Civil Procedure Rules. In counsel's view, the defendant came to court too late when the motor vehicles had been attached and sold to the purchaser who has since incurred expenses in repairs and restored the motor vehicles in running condition.

Regarding the allegation that some of the vehicles belonged to a third party, counsel submitted that if that were the case the alleged third party should have filed objection proceedings.

I have considered the applications, the affidavits filed, the annexures thereto, the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter. I readily accept that under Order XX Rule 6 (1), a decree must accord with the judgment and that under Rule 7 (2) of the same order, a draft of the decree should be forwarded to the other side for approval and the other side may approve the draft without amendment or may reject it. I have however, perused the decree sealed by the Deputy Registrar in this suit. It omits the number 'nine' before "equal monthly instalments" and the phrase "payment of any one" before "instalment on its due date". Save for those omissions the decree accords with the consent judgment recorded by the parties.

The defendant does not complain about those omissions. Its complaint is in respect of an element of interest which was included in the application for execution. The decree as sealed by the Deputy Registrar does not contain an element of interest. So, whereas, counsel for the plaintiff did not forward the draft of the decree to his counter part for his approval or rejection and therefore contravened the provisions of Order XX Rule 7 (2) of the Civil Procedure Rules, had he sought approval, I have no doubt in my mind that the draft would have been approved since counsel for the defendant's complaint is in respect of a matter which was not contained therein. His failure to approve or reject the decree in its draft form has not occasioned prejudice and would not vitiate the decree as sealed by the Deputy Registrar. Counsel for the plaintiff is however, not correct in stating that the use of the word "may" in Rule 7 (2) of Order XX gives a creditor the discretion to prepare a draft decree for approval or not. In my view, the "may" gives either of the parties the election to prepare the draft decree. But once the election has been made the party drafting such decree should seek the approval or rejection of the other side.

In the end however even though the plaintiff offended Order XX Rule 7 (2) of the Civil Procedure Rules, that offence does not attract the sanction of vitiating the decree that was sealed by the Deputy Registrar since the same agrees with the consent judgment.

The case of Highway Furniture Mart Limited – v – The PS and Anor (supra) and Provisional Liquidator Nyayo Bus Services Corporation – v – Firestone E.A. [1969] Limited (supra) are clearly distinguishable from the facts of this case. In those cases, the decrees clearly contained matters that were not in the relevant judgments.

With regard to the application for execution, it is common ground that the same carried an element of interest which, at the time of application, was stated to be Kshs. 180,656.00. The consent judgment did not mention interest at all and the inclusion of the same in the application was improper and in the language of the Highway Furniture Mart Case, it would amount to unjust enrichment. I do not accept the argument made by counsel for the plaintiff that the plaintiff was entitled to charge interest at court rates since the consent judgment was silent on the issue of interest. Counsel clearly misapprehended the provisions of Section 26 (1) and (2) of the Civil Procedure Act. If the plaintiff, after consenting to judgment thought that, interest should have been included, he should have moved the court appropriately before unilaterally charging the same.

Would the inclusion of interest in the application vitiate the application for execution? I do not think so. The court could still have excluded the same from the eventual instructions to the auctioneer. The application itself cannot be said to have been a nullity as it was not based on a decree that was a nullity.

The plaintiff's counsel however freely admitted that the auctioneer acted contrary to instructions given by them. Without the application by counsel for the plaintiff the auctioneer could not have taken any step in the matter. Yet when the same advocates instructed him to halt the sale, the auctioneer on his own decided to proceed with the sale. That in my view was reckless. The auctioneer did not have an interest that was in conflict with that of the plaintiff. If the plaintiff had decided to accommodate the defendant, the auctioneer's interest should have been in his charges and not the sale of the defendant's property. Having received express instructions to halt the sale, the auctioneer could not validly proceed with the same. The auctioneer received instructions to halt the sale before the date of the scheduled sale. He should have stopped the sale as mandated by rule 63 (3) of Order XXI of the Civil Procedure Rules. It is true that payment of the debt and costs had not been made to him or into court, but counsel for the decree holder had accepted a payment proposal from the judgment debtor which in my view is on the same footing as payment of the debt. All he should have been interested in was to secure his costs. In the premises, I find and hold that the auctioneer could not validly sell the attached properties to anyone including the purchaser herein. The purchaser's counsel sought to rely upon the provisions of Order XXI Rule 69 of the Civil Procedure Rules which read as follows:-

“69. No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.”

This rule is not helpful to the purchaser. The rule covers sales vitiated by irregularity in publishing or conducting the sale. That is not the position in our case. The auctioneer in this case lost the authority to sell the attached properties when the decree holder through its advocates instructed him to halt the sale. The auctioneer's disobedience of the decree holder's instructions was not an irregularity in the publication or conduct of the sale. The disobedience went to the root of his authority. He could therefore not pass a good title to the purchaser.

The defendant has further complained that the following properties, though in its possession at the time of attachment, did not belong to it: KTH 914, KAJ 264U, KAK 041Q and ZC 0436. To buttress its argument, it exhibited the relevant log books which show that the properties are registered in the name of Synergy Logistics Limited. Responding to that complaint, counsel for the purchaser argued that if indeed Synergy Logistics Limited were the owners of the said vehicles, they should have filed objection

proceedings. They did not. In counsel's view therefore the argument was an after thought. Faced with the two propositions, there is doubt in my mind as to who indeed owns the said properties. It was however the duty of the auctioneer to ascertain the correct ownership status of the properties before concluding that the same belonged to the defendant especially since the decree holder had not specifically described them in its application for execution. It would have been unlikely to obtain a vesting order in respect of the properties, if I had found that the sale was valid.

The upshot of my consideration of the two applications is that, the defendant's application dated 25th September 2008 is allowed in the following terms.

- 1) The warrants of attachment of movable properties given herein are set aside.
- 2) The purported sale of 22nd November 2008 in respect of the attached properties is hereby set aside.
- 3) The defendant to pay execution costs and auctioneers charges incurred upto the eve of 22nd November 2008 (the date of the purported sale).
- 4) The purchaser's application dated 5th December 2008 and filed on the same date is dismissed.
- 5) Each party shall pay its own costs of these applications.
- 6) Each party has liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MARCH 2009.

F. AZANGALALA

JUDGE

Read in the presence of:

Gachiri for the plaintiff, Mogaka for the defendant and Khatib for the purchaser.

F. AZANGALALA

JUDGE

26TH MARCH 2009