



J.B.S. HALAKE.....DECREE HOLDER/RESPONDENT

Versus

BURREL ENGINEERING CO LTD.....JUDGMENT DEBTOR/APPLICANT

RULING

This ruling relates to the Notice of Motion dated 9th March 2009 in this suit where parties seem to have fallen in love with interlocutory applications.

Substantial prayers are numbers 2 and 3 which state as follows:

“2. THAT this Honourable Court be pleased to stay the consent order of 23/03/2007 pending the hearing and determination of this application.

3. THAT this Honourable court be pleased to set aside and or review the consent order of 28/03/07 between the Decree Holder and the Judgment Debtor”

Although prayer number 3 is the main prayer and learned Counsel for the Applicant, Mr. Morara said so, looking at the two prayers raises a question whether the Applicant in this Notice of Motion is talking about two consent orders. One dated “23/03/2007” the one he wants be stayed; and the second one dated “28/03/2007” the one he wants be set aside and or review. But from annexure PMM 2 to the supporting affidavit, it would appear the Applicant is concerned about the consent order dated 28/03/2007.

That consent was in execution of a judgment then in existence against the judgment Debtor/Applicant now in this Notice of Motion.

Three grounds given for this Notice of Motion:-

“(a) That the consent was given in misapprehension of and or in ignorance of and or without sufficient material facts.

(b) That there was a mistake or error apparent on the warrant of arrest in execution issued on 11/07/2006 in that it is more than what it ought to have been.

(c) That the Applicant herein will be prejudiced by paying more in terms interest.”

Looking at the Applicant’s Affidavit in support, what the Applicant is doing is to revive the issues which were settled through the consent of 28/03/2007, issues which are therefore res judicata as Mr. Meto, Counsel for the Decree Holder/Respondent has rightly pointed out. The consent involved a compromise.

Confronted with what Mr. Meto said Mr. Morara now said the Applicant wanted review and not to set aside the consent. He said the Applicant wanted review to reflect a fact that he has paid Kshs.7.5 million and that only Kshs.2.5 million remains unlike what the Respondent is saying that Kshs.3.8 million remains.

I have considered what has been brought and said from both sides and must say I find no merits in the Applicant's Notice of Motion. The Applicant is creating problems for himself by thinking he will get away by failing to fully comply with court orders to continue to default in payment of the consent amount. That consent was a compromise, a fact not only the Applicant but also the Applicant's new Advocates must recognize in order to bring litigation in this suit to an end and affidavits such as the one dated 2nd October 2009 deponed by Njenga Marube, Advocate from M/s Morara, Marube & Co. Advocates should not be encouraged. Otherwise what was the Deputy Registrar doing with the parties? These cat and rat plays on the part of the judgment Debtor should stop especially more so in applications like this one where existence of principles for review or setting aside of a consent has not been shown.

The judgment Debtor has had enough applications already in this matter and should now stop from filing more or else he may find he is spending more money paying for those applications than he would have used clearing the sum consented to plus interest in the consent order dated 28/03/2007.

From the foregoing, I do hereby dismiss the Notice of Motion dated 9th March 2009 with costs to the Judgment Creditor.

Dated this 30th day of October 2009.

J.M. KHAMONI

JUDGE

Present

Mr. Morara for the Judgment Debtor/Applicant

Mr. Meto for the Judgment Creditor/Respondent

Court Clerk: Kabiru