REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Winding Up Cause 1 of 2002

IN THE MATTER OF: ENNIO LIMITED

A N D

IN THE MATTER OF: COMPANIES ACT

R U L I N G

By a Notice of Motion dated 3-11-06, the applicant seeks for orders of stay of execution of the warrants of attachment and sale issued by this court to the petitioner on the 26th day of October 2006.

(2) That the court do determine the level of indebtedness existing between the petitioner and the company and the applicant do liquidate the sum found to be due and owing to the petitioner, by way of installments.

(3) That costs of and incidental to this application, be provided for.

It is premised on grounds that the applicant consented to liquidate the petitioner's shares in the company by paying her the sum of Euro 250,000 by way of installments.

(2) The applicant continued paying without incident until September 2005 when he was involved in a motor vehicle accident and he travelled to Switzerland for treatment – he thus fell in arrears on settlement of the agreed sum, but by July 2006, he had regularized the position and was on queue to finalise the payments by the due date.

During the month of August 2006, the applicant had illness in the family and this was brought to the attention of the petitioner's agent one Cucchi Massimillano who agreed to give the applicant time to pay – this time has not expired yet

(4) It is not true that the company owes the petitioner Euro 145,691 though the petitioner has instructed Kinyua, Auctioneers to sell the company's property to recover the sum and that the outstanding sum is only Euro 62,666. So it is necessary that the sum owing be ascertained before execution is allowed to proceed.

(5) The attachment levied against the company is wrongful because it is for a sum that is not due and it is an unnecessary attempt at making it impossible for the applicant to buy off the shares held by the petitioner.

(6) The attachment is also unlawful because it requires the company to pay the auctioneer's fees that are not lawfully due to him.

(7) The petitioner has received almost 70% of her claim and unless execution is stayed and the sum outstanding ascertained, then the applicant and the company are bound to suffer irreparable loss and damage.

(8) The company runs a hotel in Watamu known as Barracuda Hotel currently hosting 121 guests. If execution is levied and the goods itemized in the inventory are removed, the company's operations will come to a halt. The damage to the reputation of the company and the hotel will be almost impossible to salvage and the company will be totally ruined.

(9) Further, that the company has 147 members of staff who will lose their jobs.

(10) The petitioner is an Italian citizen, domiciled in Italy and if the attachment and sale turn out to have been wrongful, it would be unlikely that she would return to Kenya to make good the company's loss.

In the supporting affidavit sworn by Gaetano Grasso, (the applicant's director) he explains that up until July 2006 he was up to date with the payments but in August of the same year, his 13 year old son who lives in Italy fell ill and he had to evacuate him by air ambulance from Milan to a hospital in Rome, and then to France for further treatment at a cost of E 31,000. So he sought an extension of time by which he was to pay the installments for August, September and October and the petitioner's agent, Massimillano made him to understand that he could take the time he needed. So he was surprised to receive a letter dated 23 – 10-06 requiring him to pay the E 21,000 arrears by 25-10-06 and threatening execution if he did not comply. He then instructed his lawyers to respond to the letters and remind Petitioners agent of their earlier discussion – the next thing he knew were auctioneers at his door step. Applicant disputes the sum owing saying that according to receipts issued to him by petitioner's agent, he has paid up the arrears up to and including September 2006 and he can settle the October arrears on or before 15th November and then pay arrears for November and December by the end of December 2006.

The application is opposed on grounds that:

(1) The attachment is pursuant to a default to pay as per the consent judgment dated 16-3-05.

(2) The applicant is truly indebted to the respondent in the sum of E. 91,202.09.

(3) Staying the execution amounts to repudiating the consent judgment.

(4) The application is in bad faith and is an abuse of the court process and should be dismissed.

(5) The auctioneer's bill already incurred should be paid by the applicant.

At the hearing of the application, Mr. ole Kina on behalf of the applicant submitted that at the date of filing the consent on 16-3-05, the outstanding balance was E.166,666 in accordance with paragraph 2(11) (b) of the CONSENT, subsequent payments were made as detailed in a list appearing at page 6 such that by the time warrants of attachment were issuing on 26-10-06, a sum in excess of 100,000 Euro had been paid and a bundle of receipts issued for the payments annexed as W.C8.

Mr. Ole Kina states that by the time petitioner came to court, they indicated that only a sum of 1340 Euros had been paid, which was not correct. He draws the court's attention, to a further affidavit by applicant's director which states that subsequent payments amounting to 77000 Euro made and so right now there is an overpayment.

He submits that the only way in which court can determine all the questions arising between the parties is by directing taking of accounts between petitioner and respondent on the sum due and that this is distinguished from the exercise the court would be engaged in under Order 19 of the Civil Procedure rules although it is acknowledged that under seciton3 4 (2) the court can treat an application to determine the level of indebtedness as a separate suit.

In opposing the application, Mr. Ndegwa for the petitioner submitted that this is a situation where a party is in breach of his obligations under a contract and concedes to that breach, then designs to come to court seeking the court's discretion for taking accounts,. According to Mr. Ndegwa, this is sought, not because the applicant does not know how much he has paid, but rather because he wants to use a hind door to prevent the respondent from exercising the contractual right to execute the decree on time, upon the applicant's own failure to pay the installments on time. It is Mr. Ndegwa's argument that from the chain of events up to the time auctioneers were sent, the applicant did not raise the question of how much was owing and the issue of accounts is an afterthought for obtaining stay orders. Mr. Ndegwa's contention is that all the applicant needs to do is look at the receipts, see how much he has paid and he will know the balance and that by requesting for time to pay, he knew how much was due.

Mr. Ndegwa also argues that by claiming that time was extended, then that meant the consent is being varied yet the provisions of section 97 and 98 are very clear that once terms of a contract have been reduced in writing, no oral evidence will be admitted to contradict, vary, add or subtract its terms so this court must go by the terms of the CONSENT that was recorded - Mr. Ndegwa seeks to rely on the decision in **CMC MOTORS V EVANS KAGECHE BORO (2006) e KLR.**

It is his further submission that to order for stay in favour of a party who is in breach and has admitted that breach amounts to stealing a match from the Petitioner as the applicant will simply be using the court to escape his obligations to pay on time – he refers to **KBL v Washington Okeyo CA No. 312 of 2000**

Mr. Ndegwa questions why it should be the task of the court to determine the applicant's level of indebtedness and allow him to pay in installments yet in 2005, the parties agreed clearly on the exact mode of payments and four years down the line, applicant should not be asking the court to consider payment by installments. To crown that argument, Mr. Ndegwa submits that, consents can only be reviewed or set aside if it is against public order or on grounds that would ordinarily vitiate a contract i.e mistake misrepresentation on grounds - none of which is demonstrated here and there is nothing to impeach the consent.

It is further pointed out that, there was no implied term in the contract that in the event of the applicant encountering some misfortune he would be excused from paying on time and so none should be implied by the court.

The petitioner does not want the money now because some documents were to be exchanged and money had to be paid on time which did not happen.

In response, Mr. Ole Kina points out that, it is not denied that subsequent payments were made, the option of rescinding the agreement was abandoned and the petitioner cannot be allowed to blow hot and cold now.

He insists that taking of accounts, is still necessary because the petitioner's position is that more than what was consented to, has been paid and petitioner cannot be allowed to take what is not lawfully hers and thereby unlawfully enrich herself. He insists that they are not asking the court to do things outside the contract itself and seeks to distinguish this case from **Okeyo's** case saying in **Okeyo's** case, the sum due and owing was clear.

He also maintains that, there is a distinction between a consent event under Order XXIV where a court has no power to interfere and a consent which may be entered for the completion or conclusion of an action and in such a situation the court has power to interfere. The terms of the consent were inter alia as follows:

"2 That the respondent company buy out the petitioner's shares at the said Euro 250,000 payable as hereinunder:

(i) The sum of Euro 33,334.00 has already been paid to the petitioner

(ii) The balance of 216,666.00 be liquidated as follows:-

(a) Euro 50,000 payable forthwith to the petitioner's advocate

(b) The balance of Euro 166,000 be liquidated by EQUAL installments of Euro 7000.00 payable on the 30th of EACH SUCEEDING MONTH commencing on the 30th of April 2005 save for the 30th of May and the 30th of June of each year that there will be an outstanding payment till payment in full.

(3) On the date of payment of last installment or the payment of the entire outstanding account in a lump sum, then the petitioner shall release to the respondent, a duly signed and undated blank transfer of her entire shareholding in the respondent, a copy of her PIN card, copy of her passport and the respondent company, shall thereupon pay the entire amount outstanding as at that date.

4) That in default of any one installment, the entire balance as may be owing become due and payable in lump sum and the petitioner be at liberty to execute for the same against the company."

The content of the CONSENT order was very specific as to the amount owing, how it was to be liquidated and the consequences of failure to honour those terms. The applicant is playing poker with the judicial process, he has the receipts which acknowledge the payments he has so far made. He is not saying that there are payments which he has made and have not been acknowledged by way of receipt so for him to now come to court suggesting that accounts be taken is making a mockery of the steps he has so far taken towards honouring the terms of consent. Surely is there an error in the figures recorded in the receipts? That is not suggested.

It is acknowledged there has been default in payment of some installments and in fact at the time of seeking for temporary stay of execution pending hearing of the application, the applicant's counsel Mr. Ole Kina informed the judge then as follows:

"***we admit there is an outstanding amount which was occasioned by applicant's personal problems"***

It was as a result of such default that petitioner moved to exercise the terms of the CONSENT order as spelt out in clause 4 thereto – liberty to execute due to default. Now applicant says petitioner's agent agreed to indulge him over the late payment. There is however nothing in writing to confirm such a realignment of terms and the petitioner's agents Cucchi Masimillano has sworn an affidavit denying such an arrangement and pointing out that respondent/applicant has persistently defaulted in payments by issuing cheques which have been dishonoured then he gives excuses for the non-payment and his position is that respondent/applicant has only paid E 167,026.35 leaving a balance of 91,202.09 and that he had made it clear to applicant that any waiver could only be granted by the petitioner herself or her advocates.

He also points out that, this is the second time the petitioner is resorting to auctioneers because of non-payment. The provisions of section 97 of the Evidence Act state:

(1) When the terms of a contract ….have been reduced to the form of a document, ….no evidence shall be given at proof of the terms of such contract…..except the document itself ……"

Section 98 further states:

"***When the terms of any contract have been proved according to section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument…."***

So since the consent was in writing, the applicant is precluded from introducing oral evidence to say the terms were varied. In any event the terms, as correctly submitted by Mr. Ndegwa can only be varied or set aside on the same grounds that would vitiate a contract – non of which has been demonstrated – I am guided by the decision in **Flora Wasike v Destimo Wamboko** and I find no basis on which to approach

the water as suggested by Mr. Ole Kina under Order 24. The auctioneers costs arise as a result of the respondent's indolence, the Auctioneers Act recognise payment of auctioneers costs by the party at fault which means applicant should bear the auctioneers charges.

The upshot is that the application has no merit whatsoever and must fail. The application is thus dismissed with costs to the respondent.

Delivered and dated this 27th day of October 2009 at Malindi.

H. A. Omondi

JUDGE

Mr Ole Kina for Applicant

No appearance for Respondent