



PHOEBE MUMBUA NDUVA PLAINTIFF

VERSUS

1. BUSCAR BUS CO. LTD.

2. PETER MUTILI DEFENDANTS

RULING OF THE COURT

1. Before the court is a Chamber Summons application dated 1/08/2006, and filed in court on the same day. The same is brought under Order 21 Rules 2 (2), and 22 (1), Order 44 Rule 1 of the Civil Procedure Rules (CPR), Sections 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the law.
2. The application seeks four substantive orders in terms of prayers 2, 3, 4 and 5 thereof which are:-
 2. **“THAT there be a stay of execution of the decree entered in this Suit.**
 3. **THAT Mr Mugendi t/a Jocet Auctioneers as an officer of the court be called upon to account for the sum of Kshs.225,000.00 received in satisfaction of the decretal sum herein.**
 4. **THAT the decretal sum be reduced by the sum of Kshs. 2,029,284.00 paid to the decree holder and/or her agents and the judgment debt be marked as fully satisfied.**
 5. **THAT decree and the warrants herein be reviewed by removal of interest charge after satisfaction of the decretal sum.”**
3. The grounds upon which the application is based also appear on the face thereof and they are that:-
 - a. The judgment debtor has fully paid the decretal sum to the decree holder’s agents.
 - b. The judgment debtor does not owe the decree-holder any money and has fully dissatisfied (sic) the decretal sum.
 - c. The Auctioneer, Jocet Auctioneers received the sum of Kshs. 225,000/= towards payment of the decretal sum and failed to forward the same to the decree-holder or her advocates.
 - d. Any further payments to the judgment debtor will be payment of sums amounting to more than the decretal sum and unjust enrichment of the decree-holder.
 - e. Unless the decree-holder is stopped by orders of this Hon. court they shall proceed with unlawful attachment and sale of the judgment debtor’s moveable property.
 - f. Other grounds and reasons to be adduced at the hearing hereof.

4. The application is also supported by the sworn affidavit of one PETER KIBE dated 1/08/2006. Mr Kibe who describes himself as the Insurance Manager of the Defendant's company says that upon entry of judgment and decree in this suit, the defendant made several payments to the plaintiff's advocates and to Jocet Auctioneers as per the bundle of copy payment cheques annexed and marked "PK1". He further says that the decree-holder has been fully paid to the tune of Kshs. 2,029,284.00; the same amount that is shown to be outstanding and due to the decree-holder as per the copies of the Warrants of Attachment marked "PK2". Mr Kibe also says that subsequent attempts by the decree holder to recover the already paid decretal sum has resulted in the judgment debtor's buses being proclaimed. He asks the court to make a finding that the judgment debtor does not owe anything to the decree holder and to order M/S Jocet Auctioneers to account for the money they received on behalf of the decree holder.

5. Mr Kibe swore a further affidavit on 3/08/2006 in which he says that judgment was entered against the defendant for the sum of Kshs. 1,713,694.00 and that costs were assessed at Kshs.194,595.00 as per annexure PK5 and that to-date, the plaintiff's advocates and M/S Jocet Auctioneers have been paid the sum of Kshs.2,149,289.00 which means that the entire decretal sum has been paid and therefore that the attachment of the defendant's goods is wrongful, and that the court ought to stay the same.

6. The application is opposed. The Replying Affidavit was sworn by the plaintiff, PHOEBE MUMBUA NDUVA (Phoebe), on 9/08/2006 in which she says that the applicant's application is incompetent, bad in law and wrongly before court. She denies that the full decretal sum has been paid. She says that the decretal sum was paid over a period of one year at monthly instalments of Kshs.150,000/= and that such instalment payments were made on the understanding that interest would be calculated on completion of the principal sum and that such interest remains unpaid to-date. She admits that the sum of Kshs.225,000/= was paid to Jocet Auctioneers instead of the same being paid to her advocates.

7. Annexed to Phoebe's affidavit and marked "PMNI" is a copy of a letter dated 10/06/2006 by Peter Kibe to A.K. Mutua & Co. Advocates of which paragraphs 2 and 3 thereof are relevant to the issues before the court:-

"It is therefore our request that you indulge and give us time to try and push Jocet Auctioneers to honour their part and remit cash totaling Kshs.225,000/=. Meanwhile, we are also appealing to you to reconsider the hefty percent which you have imposed on interest. Kindly lower the same to enable us make some payment comfortably."

8. Phoebe asks the court to order the defendant/applicant to pay her interest on the decretal sum.

9. At the hearing of the application, Mr Olonde appeared for the applicant while Mr A.K. Mutua appeared for the plaintiff/respondent. Mr Olonde reiterated the grounds in support of the application and also the averments of the two sworn affidavits by PETER KIBE. He contended that the sum of Kshs.225,000/= paid to Jocet Auctioneers on behalf of the decree holder's advocates having been duly acknowledged by the auctioneers as such should count towards the decretal sum. Mr Olonde also submitted that it was wrong for the decree-holder to charge the applicant further interest since the decree which the decree holder was purporting to execute did not provide for interest. The decree annexed to PETER KIBE'S Further Affidavit was:-

i. **THAT** Judgment be entered on liability against the defendants of 100% basis.

ii. **THAT** Judgment is hereby entered for Kshs. 1,713,694/= (One Million seven hundred, thirteen thousand, six Hundred and ninety four shillings only) as special and general damages."

It is to be noted here that the judgment of the court was also for costs and interest.

10. Mr A.K. Mutua contended first and foremost that the applicant's application was incompetent and bad in law for the reason that counsel who filed the application on 1/08/2006 had no capacity to do so since he contravened Order 3 Rule 9A of the Civil Procedure Rules which provides as follows:-

“9A. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record.” (Emphasis is mine)

11. It is to be noted that a Notice of Motion application seeking leave of the court for the firm of M/S Odero-Olonde & Company Advocates to act for and on behalf of the Defendant in place of Njenga Mwangi & Co. Advocates is dated 23/08/2006 and was filed in court on 24/08/2006. One of the grounds upon which the application is premised is that the court’s leave to appoint another advocate after judgment is mandatory under Order 3 Rule 9A as set out above. A consent on the said application is also dated 23/08/2006 and filed in court on 24/08/2006 simultaneously with the application. A Notice of Change of Advocates is also dated 23/08/2006 and filed in court on 24/08/2006 alongside the application itself and the consent.

12. On the above ground alone, Mr Mutua urged the court to strike out the application. In response to this issue, Mr Olonde submitted that the issue of representation as provided for under Order 3 Rule 9A was dealt with by Hon. Mr Justice Emukule on 15/08/2006 when counsels appeared before him. Without citing any particular authority, Mr Olonde argued that there are enough authorities to say that an application such as the one that is before this court should not be rendered invalid as long as the offending counsel takes steps to properly come on record.

13. From the record of 15/08/2006, Hon. Mr Justice Emukule, among other orders, granted the parties 14 days within which to sort out issues of representation. It was, I believe, after that order that Mr Olonde’s law firm filed not just the application seeking leave to come on record, but also both the consent allowing the application and the Notice of Change of Advocates. Mr Mutua thinks that such a procedure was irregular and that Mr Olonde’s firm is therefore not properly on record.

14. There are a number of persuasive authorities dealing with the issue although the advocates in this case did not cite any to the court. In Milimani, H.C.C.C No. 61 of 1998 – Savings & Loan (K) Ltd vs Francis N.M. Githiari, Azangalala J ruled that any lapse under Order 3 Rule 9A was curable by Order 50 Rule 12 of the Civil Procedure Rules, noting further that the court has inherent jurisdiction to do justice to the parties and can entertain an application partly pending compliance with Order 3 Rule 9A of the Civil Procedure Rules. It does appear to me that this is exactly what Emukule J did on 15/08/2006 when he allowed the parties time to sort out the issue of representation. I find no reason to differ with my brother judges on this issue. Accordingly, I find and hold that the firm of M/S Odero-Olonde Company Advocates are properly on record upon compliance with the court’s orders issued on 15/08/2006. In any event, I see no prejudice that has been occasioned to the respondents by the applicant’s counsel’s failure to first seek leave of the court to come on record before filing the present application. It is also noteworthy that the previous advocates have not only been served, but they have consented to the change.

15. I now come to the second issue seeking stay of execution of the decree entered in this suit. It appears to me that the only amounts in dispute comprise the sum of Kshs.225,000/= admittedly paid to and received by M/S Jocet Auctioneers and interest payable (if any). Should the court allow this prayer? Mr Mutua thinks that the applicants are not deserving of the order for reason that the applicant is not seeking any particular course of action in the matter such as pursuing an appeal etc. Mr Mutua argues that since the decretal sum has been paid without question, save for the sum of Kshs.225,000/=, an order for stay would be issued in vain. A look at the Warrant of Attachment shows that the respondent acknowledges payment on account of the sum of Kshs. 1,800,000/= (of course not having taken account of Kshs.225,000/= paid to Jonet Auctioneers for the respondent’s benefit) and shows an outstanding balance of the decretal sum amounting to Kshs.86,306/= taxed costs of Kshs. 194,595/= interest of Kshs.719,751/= and further costs of Kshs.22,905/= bringing the total decretal sum allegedly outstanding to Kshs.850,945/=. In the circumstances of this case, it is clear that interest has not been paid but it appears that the decretal amount of Kshs.1,713,694/= has been fully paid less costs and interest. But because the parties are still fighting it out with M/S Jocet Auctioneers, it is only fair that a stay be granted and that Mr Mugendi t/a Jocet Auctioneers be and is hereby called upon to account for the sum of

Kshs.225,000/= received by himself in satisfaction of the principal decretal amount herein.

16. As for prayer 4 of the application, I am unable to allow the same since the issue of interest is still pending and since also the issue of the sum of Kshs.225,000/= paid to M/S Jocet Auctioneers needs to be sorted out as between the parties. It is only after the two issues have been resolved between the parties that the judgment debt can be said to have been fully satisfied.

17. I also decline to grant prayer 5 of the application for the reason that since the interest charge is yet to be resolved between the parties, it is not possible for the court at this stage to remove the interest charge from the decree as the applicant would like this court to do.

18. In the result, I allow prayers 2 and 3 of the application but decline to allow prayers 4 and 5. The respondents shall be paid half the costs of this application. It is so ordered.

Dated and delivered at Machakos this 29th day of January, 2008.

R.N. SITATI

JUDGE