



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Appli. 748 of 1996

EAST AFRICAN ENGINEERING CONSULTANTSDECREE-HOLDER

V E R S U S

MUNICIPAL COUNCIL OF KISUMUJUDGMENT-DEBTOR

R U L I N G

EAST AFRICAN ENGINEERING CONSULTANTS (hereinafter called the Decree-Holder) obtained in **Nairobi HCCC No. 1676 of 1987** judgment against MUNICIPAL COUNCIL OF KISUMU (hereinafter called the Judgment-Debtor) on 20th June, 1995. Judgment was for the sum of KShs. 1,126,000/00 plus costs and interest at court rates from the date of the suit.

The Decree-Holder could not directly execute the decree against the Judgment-Debtor in view of section 263A (a) of the Local Government Act, Cap. 265 which provides:-

“263A. Notwithstanding anything to the contrary in any law –

(a) where any judgment or order has been obtained against a local authority, no execution or attachment or process in the nature thereof shall be issued against the local authority or against the immovable property of the local authority or its vehicles or its other operating equipment, machinery, fixtures or fittings, but the clerk of the local authority shall, without delay, cause to be paid out of the revenue of the local authority such amounts as may, by the judgment or order, be awarded against the local authority to the person entitled thereto;

(b)

The Decree-Holder therefore moved by way of judicial review proceedings herein to enforce satisfaction of the decree. On 28th August, 1996 the following consent order was entered by the court:-

“**ORDER: By consent the Respondent to liquidate the decretal sum and interest as follows:-**

(i) KShs. 500,000/00 to be paid forthwith.

(ii) Thereafter the balance to be paid by monthly instalments of KShs. 300,000/00 on or before the 8th day of each succeeding month w.e.f 8th October, 1996.

(iii) In default of any one instalment execution to issue.”

On 5th June, 1997 the following further consent order was entered by the Deputy Registrar:-

“**1. That the Judgment-Debtor to continue liquidating the decretal sum and interest by monthly instalments of KShs. 300,000/00 as per the consent recorded in court on the 28th August, 1996, effective from 8th June, 1997, and thereafter on or before the 8th day of each succeeding month.**

2. That in addition to the above the judgement-debtor to liquidate the arrears of the instalments due as of today's date, totalling the sum of KShs. 900,000/00 within four (4) months of today's date by monthly instalments of KShs. 225,000/00 effective from 8th of June, 1997 and thereafter on or before the 8th day of each succeeding month.

3. That in default of any single instalment a notice to show cause to issue forthwith against the Town Clerk and Treasurer of the Municipal Council of Kisumu why they should not be committed to civil jail."

Pursuant to the default clause in this order of 5th June, 1997 the following further order was entered by the Deputy Registrar on 23rd May, 2007:-

"..... Ihereby issue warrants of arrest against both the Town Clerk and Treasurer, Kisumu Municipal Council. The warrants of arrest will be effected by the court bailiff."

It is this order that provoked the present application by notice of motion dated 12th June, 2007. The application is expressed to be brought under sections 3A, 34 and 94 of the Civil Procedure Act, Cap. 21 (the Act) and also under Order 21, rule 35 (1) of the Civil Procedure Rules (the Rules). The application seeks the main order that the orders of 23rd May, 2007 and the process of execution commenced by the Decree-Holder against the Judgment-Debtor be set aside. There is an alternative prayer that the court be pleased to assess what amount, if any, is due under the decree in Nairobi HCCC No. 1676 of 1997, and to issue appropriate directions in connection therewith.

The grounds for the application appearing on the face thereof are:-

1. That there is no decree or order in this suit capable of execution.
2. That the filing of this suit is expressly barred by law, and the court has no jurisdiction to make any order capable of execution, including the order made on 23rd May, 2007.
3. That the application leading to the order of 23rd May, 2007 is incurably defective and bad in law.
4. That the process of execution is oppressive because the Judgment-Debtor has satisfied the proper claim in Nairobi HCCC No. 1676 of 1987.

There is a supporting affidavit sworn by one RASHID MWAKIWIWI, the Clerk of the Municipal Council of Kisumu. There is also a supplementary affidavit sworn by the same person in answer to the two replying affidavits filed by the Decree-Holder.

The first replying affidavit is sworn by one JAMES OCHIENG' ODUOL, an advocate of this court who once represented the Decree-Holder in this matter. The second replying affidavit is by one MARGARET AMEKA, the current advocate for the Decree-Holder. The grounds of opposition emerging from the replying affidavits are:-

1. That the decree has not been discharged.
2. That the orders of 28th August, 1996 and 5th June, 1997 were by consent, and therefore the Town Clerk and the Treasurer of the Judgment-Debtor are bound by the default clause in the order of 5th June, 1997.
3. That the decree issued in Nairobi HCCC No. 1676 of 1987 is in consonance with the judgment delivered on 20th June 1995.
4. That by this application the Judgment-Debtor is trying to evade satisfaction of the decree.

I have considered the submissions of the learned counsels appearing, including the cases cited. It was conceded by the Decree-Holder's learned advocate that the Treasurer, not being the officer required by law to satisfy the decree, and who was not a party to the present judicial review proceedings which required the Town Clerk to do his statutory duty of satisfying the decree in the judgment suit, should not have been joined in the consent order of 5th June, 1997. That order, as far as it concerns the Treasurer of the Judgment-Debtor, was against the law and therefore null and void. By the same token, the order of 23rd May, 2007 by which a warrant of arrest was ordered to be issued against the Treasurer, was also null and void in respect to the Treasurer. Both are therefore hereby set aside as far as the Treasurer is concerned.

With regard to the Town Clerk, he had the statutory duty under section 263A (a) of Cap. 265 to cause to be paid out of the revenue of the Judgment-Debtor the decretal sum. He did not. As a result, not only have the parties been involved in unnecessary further litigation at great cost as to time and money, but a modest original decretal sum has ballooned into an astronomical sum due to the interest element.

The judicial review proceedings herein were brought in order to compel the Town Clerk of the Judgment-Debtor to perform his statutory duty to cause satisfaction of the decree. Had the application been ultimately disposed of on merit and an order of *mandamus* made, the same could have been enforced by way of committal to civil jail for contempt of court. As it happened, the parties – that is the Town Clerk and the Decree-Holder - compromised the judicial review application by the consent orders of 28th August, 1996 and 5th June, 1997. It cannot sit well on the Town Clerk to argue in the present application that those orders were illegal for want of jurisdiction on the part of the court. The orders did not emanate from the court; they emanated from the parties themselves. The court merely recorded the parties' own compromise of the judicial review application. There was nothing illegal or unlawful about the consent orders. The Town Clerk ultimately faced enforcement of an order of *mandamus* (had one been made) by committal to civil jail. The parties chose, out of their own free will, to compromise the application by the two consent orders. Those orders did not require any party to do anything unlawful; nor did they give one or the other party any unlawful or illegal advantage. The consent order of 5th June, 1997 simply gave the Decree-Holder the right to proceed to enforce payment of the decretal sum by committal to civil jail of the Town Clerk, an eventuality he may have ultimately faced anyway should the judicial review application have proceeded to hearing on the merits. On his part, the Town Clerk lawfully bound himself to cause satisfaction of the decree upon pain of committal to civil jail in default. The ensuing proceedings that resulted in the order of 23rd May, 2007 were thus **not** in reality execution of decree proceedings under Order 21 of the Rules but merely enforcement of the parties' own compromise, notwithstanding that forms similar to those used in execution of decree under Order 21 aforesaid may have been used.

The only issue raised that has some merit is that it is uncertain what, if any, the outstanding decretal sum is. It appears that in its computation of interest the Decree-Holder may have compounded the same. This is unlawful. The court ordinarily awards simple, not compound, interest unless there is a specific order to that effect. It is this aspect of compounding the interest that has so ballooned an initial modest decretal sum to an amount that the Judgment-Debtor may be finding hard to pay, and hence the present application. The same element of compound interest may have unreasonably raised the Decree-Holder's expectations.

After considering all the matters placed before the court without necessarily and specifically referring to all of them, I will make the following orders that are intended to bring this old matter to a just conclusion as soon as possible:-

1. The order of the Deputy Registrar of 23rd May 2007, be and is hereby set aside.
2. The Deputy Registrar shall forthwith take accounts in order to determine the outstanding decretal sum. In doing so the interest upon the decretal sum shall be simple and **not** compound. In other words, the interest shall be calculated at court rates from the date of the suit without rests except those necessitated by any payments made by the Judgment-Debtor towards the decretal sum.
3. If any sum is found to be due upon the decree, and if the same shall not be paid within thirty (30) days from the date of the Deputy Registrar's order settling the accounts, notice shall issue upon the Town Clerk of the Judgment-Debtor to show cause why he should not be committed to civil jail as per the consent order of 5th June, 1997.
4. There will be no order as to the costs of this application.

Those shall be the orders of the court.

DATED AT NAIROBI THIS 20TH DAY OF MAY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 21ST DAY OF MAY, 2008