



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1655 of 1986

HALAL MEAT PRODUCTS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ATTORNEY GENERALDEFENDANT/RESPONDENT

RULING

A Judgment was delivered in this case by Gacheche, J, then the Resident Judge, Kisumu High court on 7th October, 2005.

A decree from that judgment shows the orders granted as follows:-

- “1. **THAT**, judgment be and is hereby entered against the Government in the sum of Kshs.1,807,772,000 as per plaint”.
- “2. **THAT**, the figure herein covers the period up to and including 31st October 2004”.
- “3. **THAT**, the company is hereby entitled to extra payment up to and including the date of this judgment that is 7th October, 2005 calculated on pro rata basis”.
- “4. **THAT**, the awards herein shall earn interest at court rates till payment in full”.
- “5. **THAT**, professional fees for the Plaintiff’s Surveyors, Engineers and Contractors are hereby granted at 7½% of the above award”,
- “6. **THAT**, the Plaintiff is hereby awarded costs of this suit with interest therein at court rates until payment in full”.
- “7. **THAT**, judgment on the counterclaim is entered for the Government/Defendant in the sum of Kshs.27,701,127/= only being the principal sum with interest at 12% p.a. from 21st August 1998 to the date of judgment”,
- “8. **THAT**, the award to the judgment be set off from the award of the plaintiff company”.
- “9. **THAT** the Government/Defendant do bear the costs of the Counter-claim and the resultant application for judgment”.

The Attorney General who is the defendant – judgment debtor, felt aggrieved by the said judgment, and moved the court by Notice of Motion grounded on Order XLI Rule 4 and Order I Rule 1 of the Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act Chapter 21 Laws of Kenya seeking:

“That there be a stay of execution of the decree in this suit issued on 7th October, 2005, pending appeal”,

and further,

“That the costs of the application be costs in the cause”.

The supporting affidavit averred inter alia that the

“Defendant stands to suffer loss as the amount to be paid as per the judgment is colossal, amount payable from public funds and that it may not be possible for the plaintiff to repay the said amount back, thus causing prejudice to the applicant and rendering the appeal if successful nugatory”.

There were several replying affidavits, sworn on behalf of the decree holder. One was by Mohamed Ali Motha, the Executive chairman of Halal Meat Products Ltd.

The affidavit dwells a lot on the actions and communications that occurred when the decree holder filed an application for contempt of court proceedings against the defendant for failure to hand over the abattoir, as ordered by the court and or as agreed.

There was a further replying affidavit sworn by C.P Robertson Dunn, a registered valuer, hired by the plaintiff to oversee the handing over of the Halal abattoir site in Bul Bul Ngong. The affidavit is dated 5th Defendant 2006 and denies that the handing over took place.

A clerk attached to the Law firm of Messrs Khalwale & co. advocates also swore an affidavit dated 4th December 2006 stating that no handing over of the abattoir took place on 1st February 2006, as both himself and Mr. Khalwale were present at the site.

All the affidavits related to the matter of the handing over of the abattoir, which the plaintiff’s contended was never effected on the 1st February 2006, that is why they moved to court for contempt. I have, however, not found the proceedings for contempt in the court file, so I cannot comment on the decision made by court because I did not find any.

Mr. Kaka, State Counsel appearing for the Attorney General submitted that his client the Ministry of Livestock and Fisheries Development instructed him that the abattoir was handed over to the plaintiff (decree holder) on 1.2.2006, and the officers who had effected the handing over and witnessed the exercise, had sworn affidavits to that effect.

Though the matter of the handing over of the abattoir was not in the application before me, I nevertheless gave parties time to sort it out within 14 days, and I adjourned the proceedings for that purpose because the decree holder’s advocate felt very strongly about it.

The hearing of the application for stay resumed after the 14 days when Mr. Kaka informed the court that the handing over had been effected the previous year, and his clients were no longer in possession, and even those guarding the premises are not government employees. He had brought with him one Mr. Ndonge, a Principal Procurement Officer whom he said was physically present at the handing over and witnessed the same. One Mr. Mwangi, said to have effected the handing over was also brought to court, but Mr. Gautama, disagreed with the submission and repeated that the abattoir was never handed over as shown by affidavits of his clients, and he termed the story of the handing over **‘false and misleading’**.

I once more directed parties to file affidavits on the matter of handing over, which they did, but they still

disagreed on whether there was a handing over of the abattoir or not, as the decree holder's advocate maintaining that there was no evidence produced to show that the 22 acres of land, plus buildings worth over Kshs. 7 million, was ever handed over. He submitted further that the government (judgment debtor) had agreed to pay compensation, but had not done so to date. That it is obvious that the government is frustrating the plaintiff/decreed holder, and has also refused to hand over the abattoir.

Mr. Gautama asserted that the appeal cannot succeed because liability is not an issue according to the judgment of Gacheche, J at pg. 2. That the only issue was the **"amount of liability"**. He submitted further that there was a consent order to the effect that the abattoir should be handed over, but this has not been done, so the intended appeal has **"no meaning"**, but Mr. Kaka, maintained that the abattoir was handed over and his clients are not in possession.

I perused the court file and discovered that immediately after Justice Gacheche delivered her judgment on 7th October 2005, Mr. Satish Gautama for the plaintiff made an application orally in court in the following terms,

"I apply for the handing over of the abattoir, with immediate effect".

Mrs. Onyango who was representing the Attorney General then, had no objection to the request.

The court then made the following order,

"Granted the abattoir should be handed over within the next 7 days at a venue to be agreed upon by the parties. Each party to be at liberty to apply".

Mr. Kaka did make an oral application for a stay of execution, pending appeal there and then, but the court directed him to make a formal application, which he did and was tabled before Mugo, J. The parties appeared in court several times, pursuing some preliminary issues which the judge eventually ruled on.

The application went for hearing before several judges, as the record shows. The 1st time it was tabled before me I dismissed it because the State Counsel did not appear in court, but I subsequently set aside my dismissal order and reinstated the application.

During the submissions before me, apart from the issue of the handing over of the abattoir there was a further issue to the effect that the government agreed to pay compensation after the judgment was delivered.

Once again I scrutinized the bulky court file and found a hand written note which reads, **"Suggested Interim Settlement"**. An interim total sum of Kshs.941,651.741, was arrived at, in the calculations on the note. However, this note is not dated and not signed either.

The contents of the note show that it was made after the judgment, but the court records do not show whether it was adopted and or made an order in this case.

From the evidence I have considered by way of submissions and averments in the various affidavits, I came to the conclusion that the matter of the handing over of the abattoir became central to this application because of the subsequent order made directing the handing over.

The court records show the efforts I made in trying to find out whether that order was complied with but no conclusion was reached before me. Perhaps a visit to the site by court might have resolved this issue. No request to that effect was made by any of the parties.

It is true that the judgment sum is quite high, but at the same time, a party who seeks justice from court must also do justice. I am not convinced that the defendant has met that test in this case, and I have no alternative but to refuse to grant a stay of execution pending appeal. The effect of this refusal means a dismissal of the defendant's application dated 24th October, 2005. I also award the plaintiff, decree

holder, the costs of the application.

Dated at Nairobi this 5th day of October, 2007.

JOYCE ALUOCH

JUDGE