



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURTS

MISC CIVIL APPLI 607 OF 2006(OS)

IN THE MATTER OF L.R. NO. 1055/19, MIOTONI WEST, KAREN

AND

IN THE MATTER OF THE LATE AARON KIMOSOP KANDIE (DECEASED)

R U L I N G

The background of this matter is as follows, as far as I have understood it. The law firm of GITOBU IMANYARA & CO., ADVOCATES acted for the vendors in a proposed sale of a certain property in Nairobi. The purchaser's advocates, M/s WAWERU GATONYE & CO., paid to M/s Gitobu Imanyara & Co. the total sum of KShs. 5,425,000/00, being 10% of the purchase price, to hold the same as stakeholders pending execution of the sale agreement. As it happened, the vendors did not sign the sale agreement, and the proposed sale fell through. M/s Waweru Gatonye & Co. then demanded from M/s Gitobu Imanyara & Co. a refund of the part-purchase price paid for onward transmission to the purchaser. The latter advocates agreed to make a refund, but as it happened they never did so despite repeated demands made.

Following repeated pressure upon them to refund the money, M/s Gitobu Imanyara & Co. came to this court by originating summons dated 3rd August, 2006 seeking the main order:-

“The sum of KShs. 5,425,000/00 deposited with the said firm, Gitobu Imanyara & Co. Advocates be paid in court and that the same be paid out as the Honourable Court shall direct.”

The originating summons was stated to be brought under Order 36 of the Civil Procedure Rules, but no particular rule of that Order was cited. The originating summons does not name any respondent. It appears by its wording that the summons was meant to be an interpleader application under Order 33 of the Rules; but no rival claimants to the money were named. The material before the court shows clearly that apart from the purchaser in the aborted sale, there was no other rival claim at all to the money in question.

In the affidavit supporting the originating summons, sworn by GITOBU IMANYARA, an advocate of this court practicing under the name and style of Gitobu Imanyara & Co., it is deponed, *inter alia*, that a cheque for the subject sum of KShs. 5,425,000/00 was deposited with the filing of the application for collection by M/s Waweru Gatonye & Co. But there was no such deposit at all. It is quite clear to me that this originating summons was filed merely to buy time, and was a gross abuse of the process of the court.

When the purchaser was served with the originating summons, it filed an application by chamber summons dated 10th August, 2006 seeking the following orders, *inter alia*:-

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2.

3. That the application be heard together with the originating summons fixed for hearing on 21st November, 2006.

4. That M/s Gitobu Imanyara & Co. do have the sum of

KShs. 5,425,000/00 paid to M/s Waweru Gatonye & Co. within three (3) days of the making of such order for onward transmission to the purchaser.

5. **That in the alternative** M/s Gitobu Imanyara & Co. do deposit in court a banker's cheque for the said sum made out in the name of M/s Waweru Gatonye & Co. for onward transmission to the purchaser.

6. That in default of either payment or deposit as above, execution to issue against the firm of Gitobu Imanyara & Co. for the sum of KShs. 5,425,000/00 together with interest at commercial rates from 19th July, 2006 till payment in full.

7.

Though one of the prayers, as set out above, was for the chamber summons to be heard together with the originating summons which was already fixed for hearing on 21st November, 2006, hearing of both was moved forward to 15th August, 2006. On that date there was no appearance for M/s Gitobu Imanyara & Co. The court (Emukule, J) granted prayers Nos. 4, 5 and 6 of the chamber summons, notwithstanding that prayer 5 was an alternative to prayer 4. The orders were granted "**subject to payment within 7 days after service of this order**".

As it happened, there was no payment, and the purchaser applied for execution of decree against Gitobu Imanyara & Co. by attachment and sale by public auction of their moveable properties. Certain properties were attached, but there was objection to the attachment by a third party.

The purchaser then instituted bankruptcy proceedings against Gitobu Imanyara (t/a Gitobu Imanyara & Co.). In that cause, Gitobu Imanyara applied for orders *inter alia*, to set aside the bankruptcy notice. That application was dismissed with costs by the bankruptcy court (Okwengu, J) on 30th March, 2007.

Gitobu Imanyara then came to this court by chamber summons dated 17th April, 2007 seeking the main order, under Order 20, rule 11(2) of the Rules, that he be permitted to pay the decretal sum by equal monthly installments of KShs. 250,000/00 with effect from 30th May, 2007 and thereafter on the last day of each succeeding month till payment in full. He also sought stay of execution of decree herein and the proceedings in the bankruptcy cause. Temporary stay was granted on 18th April, 2007 (Kariuki, J).

In its turn the purchaser applied by chamber summons dated 23rd April, 2007 seeking the main orders that the stay granted on 18th April, 2007 be discharged or set aside, and that the chamber summons dated 17th April, 2007 be struck out.

These two applications are the subject of this ruling. I have carefully considered the submissions of the learned counsels appearing, including the authorities cited. I have my own doubts as to whether the orders granted on 15th August, 2006 by Emukule, J could result in a decree capable of being executed or amenable to an order under Order 20, rule 11(2) of the Rules. But that issue was not raised by any of the parties. They both proceeded upon the basis that there is a valid judgment against Gitobu Imanyara (t/a

Gitobu Imanyara & Co. Advocates) and a decree thereon capable of being executed against him. I will proceed on that basis.

Gitobu Imanyara's learned counsel, Mr. Orengo, framed the issues to be determined as follows:-

1. Whether the court has jurisdiction under Order 20, rule 11 of the Rules to grant the order sought in the chamber summons dated 17th April, 2007?
2. Whether the issue of payment by installments is *res judicata*, and whether it was an issue before the bankruptcy court?

On his part, Mr. Machira, learned counsel for the purchaser, framed the issues as follows:-

1. Whether this court has jurisdiction to grant the orders sought in the chamber summons dated 7th April, 2007 in view of the pending bankruptcy cause?
2. Whether that application is *res judicata* by virtue of the ruling of Okwengu, J of 30th March, 2007 in the bankruptcy cause?
3. Whether the application dated 17th April, 2007 is an abuse of the process of the court?
4. Whether the application has been brought through misrepresentation, non-disclosure and concealment of material facts?
5. Whether or not the application should be made in the bankruptcy cause?

I would on my part frame the issues as follows:-

1. Whether the application dated 17th April, 2007 is properly before this court? Under this issue will be considered whether the application is *res judicata*, whether it is an abuse of the process of the court and whether the court has jurisdiction to grant the orders sought.
2. Whether the orders sought should be granted.

I will not repeat the submissions of the learned counsels; they are on record.

Is the application dated 17th April, 2007 properly before the court?

The main prayer is for an order for payment of the decretal sum by installments under Order 20, rule 11(2) of the Rules. That rule donates to the court the power, after passing any decree for payment of money, on the application of the judgment-debtor, with or without the consent of the decree-holder, and for sufficient cause shown, to order that the payment of the decretal sum be postponed or be made by installments on such terms as to payment of interest, the attachment of the judgment-debtor's property or the taking of security from him, or otherwise, as the court thinks fit.

The decree herein was passed by this court in this case, and execution thereof has been sought before this court. The judgment-debtor has come to the right court to seek some accommodation regarding payment of the decretal sum. Clearly this court is clothed with the necessary jurisdiction to deal with the prayer for payment of the decretal sum by installments. Equally, the court would have jurisdiction to stay execution of decree were it to grant an order for payment by installments. In this regard, the application concerning payment by installments and stay of execution of decree is not an abuse of the process of the court.

What about stay of the bankruptcy proceedings? This (Civil Division of the High Court) is not a bankruptcy court. Bankruptcy jurisdiction is vested in judges of the Commercial and Tax Division of the

High Court by administrative arrangement of the Chief Justice. That is where the bankruptcy cause is. An application to stay those proceedings should be made in the bankruptcy court.

I also do not find that the application is *res judicata* on account of the ruling of 30th March, 2007 in the bankruptcy court. The issues before that court were whether the bankruptcy notice should be set aside and whether further proceedings towards prosecution of the creditor's petition (including issuance of compliance certificate, receiving order and advertisement of the petition) should be stayed. On the other hand, the main issue in the application dated 17th April, 2007 herein is whether the judgment-debtor should be allowed to discharge the decree issued herein by installments.

Should the order sought be granted?

To my mind this is the main issue. I have carefully read the affidavit of the judgment-debtor sworn in support of the application. I have also considered the conduct of the judgment-debtor that is apparent from the history of this matter. The money at issue came into his hands as a stake-holder. He was bound to pay it back to the purchaser when the sale fell through. He repeatedly acknowledged this obligation and repeatedly undertook to pay back the money. But he did not. Right to the time he filed the originating summons he gave the impression that the money was available and at hand; yet he did not pay it. Indeed, the money should have been available and at hand because it should have been received on and banked in client or trust account. It turns out that the money was not available after all. Where did it go? The supporting affidavit does not explain in succinct and frank terms why the money is not available after all.

There is an irresistible inference to be drawn that the money was misappropriated. In these circumstances, should the court grant the judgment-debtor the indulgence to pay back the money at his convenience? I think not; otherwise the court would set an undesirable precedent. The judgment-debtor clearly does not deserve this indulgence from the court.

Having considered all matters placed before the court, I must refuse the application by chamber summons dated 17th April, 2007. It is hereby dismissed with costs. The order of stay of execution granted *ex parte* on 18th April, 2007, if still in place, is hereby vacated. But the prayer for striking out the judgment-debtor's application, just dismissed, contained in the chamber summons dated 23rd April, 2007 is dismissed.

The decree-holder has partially succeeded in its application dated 23rd April, 2007. I will award it half its costs of that application. Those will be the orders of the court.

DATED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 16TH DAY OF NOVEMBER, 2007