REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1508 OF 1984

CHARLES THYS…….....PLAINTIFF/DECREE-HOLDER/RESPONDENT

-VERSUS-

HERMAN STEYN….DEFENDANT/JUDGEMENT-DEBTOR/APPLICANT

RULING

I. **PROCEEDINGS TOUCHING ON DECREE ARE PENDING, SO DECREE NOT DUE FOR EXECUTION — THE APPLICANT'S CASE**

The judgement-debtor's application by Notice of Motion dated and filed on 3rd February, 2005 was brought under ss.3A, 34(1) and 63(e) of the Civil Procedure Act (Cap.21), Orders XXI rules 18(1)(a), 19(2), 32(1) and 35 and L rule 1 of the Civil Procedure Rules.

The application had two main prayers —

> (i) that, there be a stay of execution proceedings pending the examination of the judgement debtor on his *affidavit of means* sworn on 15th July, 2002 and/or final determination of the decree-holder's advocate's application filed on 7th December, 2001 for the arrest and committal of the judgement-debtor to civil jail;
>
> (ii) that, there be a stay of execution proceedings pending the determination of the decretal amount with interest accruing as interpreted by the ruling of the Honourable ***Mr. Justice Ojwang*** of 17th September, 2004.

Ten substantive grounds are put forward as the basis of the application, the chief ones of them being as follows:

> (a) By an application filed on 18th February, 2002 the decree-holder's advocate sought the Court's aid to enforce the decree drawn from the suit — by praying the Court to issue a notice to the judgement-debtor to show cause why he should not be arrested and committed to civil jail.
>
> (b) On 30th April, 2002 the Court issued a notice calling upon the judgement-debtor to appear on 29th may, 2002 and to show cause why he should not be committed to civil jail.
>
> (c) On 29th May, 2002 the judgement-debtor appeared before the Court in obedience to the said notice to show cause.

(d) On divers dates starting from 2nd December 2002 the judgement-debtor was examined and cross-examined on his affidavit of means sworn on 15th July, 2002.

(e) On 11th December, 2002 the decree-holder's application was stayed pending the *application by the judgement-debto*r before a Judge for the hearing and determination of the question of *applicability of the interest rate of decree* under Order XLVIII, rule 3 of the Civil Procedure Rules.

(f) On 17th September, 2004 ***Ojwang, J*** delivered ruling on the judgement-debtor's said application of 9th January, 2003 on the question of *interest rate;* and subsequently there has been a *failure to agree the decree amount in Kenya shillings.*

(g) Although ***Ojwang, J*** determined the interest rate question on 17th September, 2004 *there are still pending proceedings on appearance of the judgement-debtor in obedience to the notice to show cause by virtue of the provisions of Order XXI, rule 35 of the Civil Procedure Rules.*

(h) The decree-holder's advocates have severally threatened execution notwithstanding that —

(i) there are proceedings pending under Order XXI, rule 35 of the Civil Procedure Rules;

(ii) the judgement-debtor having by his affidavit of means, of 15th July, 2002 made an objection to execution of the decree, the Court is obliged, by virtue of the mandatory provisions of Order XXI, rule 19(2) of the Civil Procedure Rules, to consider the judgement-debtor's objection and make appropriate orders.

(i) The decree-holder's advocates have *denied* and continue to *deny* that there are *pending proceedings* before the Court — on appearance of the judgement-debtor in obedience to the said notice to show cause or at all — notwithstanding that proceedings were stood over on 2nd December, 2002 and have not finally been determined.

(j) the conduct of the decree-holder's advocates in threatening execution notwithstanding the pending proceedings before the Court, amounts to —

(i) interfering with the administration of the law in a continuing adjudication process;

(ii) impeding and perverting the cause of justice;

(iii) offending the dignity of the Court which on 2nd December, 2002 stood over the decree-holder's committal application;

(iv) an underhand challenge to the fundamental supremacy of the Civil Procedure Rules in any execution proceedings.

(k) It is imperative in the circumstances that there be a stay of execution to enable he Court to consider the judgement-debtor's objection to execution of decree and to make appropriate orders as required under the provisions of Order XXI, rule 19(2) of the Civil Procedure Rules.

Anthony Fredrick Gross, learned counsel for the judgement-debtor, swore an affidavit dated 3rd February, 2005 in support of the application. He avers that there are *two processes* related to the instant matter *now pending* in Court —

(i) final determination of the decree-holder's part-heard notice to show cause application filed on 17th December, 2001;

(ii) computation of the decretal amount with interest accrued in Kenya Shillings, as of to-day.

Following the ruling on interest rate given on *17th September, 2004*, the deponent avers, "I have repeatedly sought to settle terms of the decretal amount in Kenya Shillings at simple interest rates with ***Mr. Thangei*** of Waruhiu K'Owade & Nganga Advocates to no avail." In the meantime, it is deposed, the decree-holder's advocates have on several occasions *threatened execution* of the decree. The deponent avers that the decree-holder's advocates have denied and continue to deny that there are pending proceedings before the Court.

It is deponed that on 24th January, 2005 the judgement-debtor obtained Court's *leave to make a formal application for stay, against any form of execution* by the decree-holder that would not be in compliance with Court orders.

II. HIGH COURT'S DECREE WAS IN DOLLARS AND APPROVED BY COURT OF APPEAL, AND THIS COURT LACKS JURISDICTION — RESPONDENT'S CASE

Alex Ngatia Thangei, learned counsel with the conduct of this matter on behalf of the decree-holder (respondent), swore and filed a replying affidavit on 24th March, 2005 the main thrust of which goes as follows. It is averred that the Court's ruling of 17th September, 2004 which resolved the issue of decretal sum in the suit, "gave the respondent/decree-holder the option to either pursue the decretal sum in … Kenya Shillings or U.S. Dollars. The respondent/decree-holder has *elected* to pursue the decretal sum and interest in U.S. Dollars."

It is deponed that since the *respondent* has made the election referred to in the forgoing paragraph, "there is therefore *no pending determination of the decretal amount* with interest accruing as interpreted [in] the ruling of ***Justice Ojwang*** delivered on 17th September, 2004 against which a stay of proceedings can be granted as sought in.. the application."

The deponent avers: "In any event, there cannot in law be anything pending after ***Justice Ojwang*** delivered his ruling and as far as the said application and ruling [are] concerned the learned Judge is *functus officio.* His ruling can only be appealed against or reviewed. There is nothing called 'interpretation' known to our Civil Procedure Rules."

On the question whether there is a pending application by the respondent for the arrest and committal to civil jail of the applicant, it is deponed that "*any execution can only issue upon the Court determining the notice to show cause* and there is no need for any stay."

The deponent goes on to aver:

> "The superior Court judgement that awarded the plaintiff/respondent USD 439,586 together with interest at 12% p.a. from 20th June, 1989 till payment and which judgement was confirmed by the Court of Appeal in Civil Appeal No. 86 of 1996 is express in word and spirit and does not require any interpretation. That any purported interpretation of the said judgement by this Court amounts to this Court sitting on appeal against the said judgement. That any such attempted interpretation of the said judgement is a nullity and void *ab initio*" [para.3(d)].

The deponent, in a non-fact statement [para.4] says: "the applicant is shrewdly using the issue of interest to mislead and hoodwink this Court into believing that the issue of interest is unsettled and requires interpretation. This is untrue…"

While on one side criticising the Court's decision of 17th September, 2004 the deponent abstracts from it one option which he applauds: "..the applicant has himself conceded that the amount due to the respondent in U.S. Dollars with the interest rate calculated at the LIBOR rate as ordered by ***Ojwang, J*** is U.S.D.587,281 as at 8th December, 2004."

The deponent restates the figure of ***12%*** as the contractual interest rate operative in relation to the judgement debt; and for good measure he avers (para.4(d): "..in view of the said contractual agreement,

the High Court and Court of Appeal judgements, this Court lacks jurisdiction to *disturb* the decree issued by this Court on 18th September, 1989."

The deponent then states that *execution of the decree should take place* (para.5): "..this being a money decree and with the applicant having admitted that the sum of U.S.D.587,281 is due from him, this Honourable Court should not grant the stay sought since the principles that have been set by this Court for granting stay have not been satisfied…"

The deponent avers that the claim is being made in U.S. Dollars so that little loss falls upon the judgement-creditor (respondent) (para.6 (b)): *"...the respondent [stands] to suffer huge exchange losses if this Honourable Court converts into Kenya Shillings the Court of Appeal award of the decretal amount in U.S. Dollars*."

III. SUBMISSIONS AND ANALYSIS

Learned counsel ***Mr. A.F. Gross*** submitted that the instant application had arisen from Court orders made on *24th January, 2005*. Now in the background to the orders of 24th January, 2005 is the ruling which I had delivered on *17th September, 2004*, in relation to the judgement-debtor's application of 9th January, 2003. There had been no preliminary objection to that earlier application on grounds of *jurisdiction*, and the matter had been canvassed in the normal manner, the judgement-debtor being fully represented by learned counsel ***Mr. A.F. Gross*** and the judgement-creditor by learned counsel ***Mr. Thangei.*** In the ruling I had determined that:

> ***"The judgement-debtor's indebtedness was in the first place a Kenya Shilling question, and the decretal amount of U.S. D.439,587 ought to have been converted then, into Kenya Shillings. And it follows that all interests payable on the decretal sum from that date were to be in Kenya Shillings, and any percentages used were percentages of the original decretal sum expressed in Kenya Shillings. The question was resolved in this Court, exclusively within the framework of Kenya's substantive and procedural law, and the correct currency expression of the judgement-debtor's liability was Kenya Shillings in the first place."***

The parties thereafter encountered difficulties in applying the above — what, with due respect, sounds like a self-evident direction — decision. And so both learned counsel ***Mr. Gross*** and ***Mr. Thangei*** appeared before me on 24th January, 2005 on which occasion I thus ruled:

> ***"Although I did give a comprehensive ruling on the remaining dispute in this matter on 17th September, 2004 it is clear that compliance has not taken place.***
>
> ***"The respondent has apparently attempted to obtain the decretal sum in a manner which he claims to be consistent with the ruling, but which the applicant contends is quite contrary to the ruling.***
>
> ***"I have to restate the essence of the ruling of 17th September, 2004. It is set out in the first two orders which I had made:***
>
> ***1. That, the decretal sum arising from the judgement of 19th June, 1989 shall be computed in Kenya Shillings as at that date, and it is on that basis that the interest rate of 12% per annum, again in Kenya Shillings, shall be payable***.
>
> ***2. That in the alternative, the said decree may be retained in U.S. $ provided the U.S. Dollar LIBOR rate for the period 1989 – 2002 shall apply and not the Kenya Shilling Court rate of 12%.***
>
> ***"It is to be noted that the first of the two alternatives set out above can be quite readily computed; the second requires the availability of LIBOR-rate information, which is not here***

before me.

"There is only one major obligation resting upon the applicant, to pay up on the basis of my earlier orders.

"Since the second alternative requires more information to be raised, the duty of paying up could very well have been conducted on the basis of the first alternative — unless, of course, the parties agree otherwise. It is not for the Court to agree for them — they must do it themselves.

"Counsel has submitted today that such agreement has been attempted, but without success.

"Proof has also been placed before me that two payment cheques dispatched by [the judgement–debtor] to the [judgement-creditor] have been rejected and returned — because the respondent is not accepting the mode of payment adopted by the applicant.

"This state of affairs will render nugatory the orders of the Court — a prospect which I cannot allow.

"I therefore make the following orders for giving fulfilment to the earlier orders aforementioned:

(1) Pending any agreement such as might be reached by the parties, on the two alternative modes of payment set out in my orders of 17th September, 2004 the applicant shall pay and be up-to-date with payments using the first alternative method set out in those earlier orders.

(2) The applicant's payment shall be made into the Court and the proceeds accruing therefrom shall be held by the Court pending further orders.

(3) For such payments as the applicant shall make as ordered herein, it shall be considered that that portion of the judgement-debt is well and truly discharged and no further liability in respect thereof shall remain.

(4) This mode of payment shall continue to apply unless and until the Court makes a different order, on the basis of an application which either party has the liberty to make."

Learned counsel ***Mr. A.F. Gross*** submitted that the instant application arises directly from order No.4 set out above. The wording of that order is, of course, clear and beyond doubt, and therefore, the instant application I would hold, has been quite properly brought before the Court.

The hearing date for this application, *17th of May, 2006* was given in Court on 27th February, 2006 in the presence of learned counsel ***Mr. Thangei*** (for the judgement-creditor) and learned counsel ***Mr. Chacha Odera*** holding brief for ***Mr. A.F. Gross*** (for the judgement-debtor). At the hearing, however, the judgement-creditor was unrepresented.

Learned counsel ***Mr. Gross*** submitted that notwithstanding the several decisions of this Court pronouncing that the currency language of the Kenyan Courts is and must be the *Kenya Shilling*, and that the decretal amount as at the date of judgement on 19th June, 1989 must in the first place accrue in the local currency, the judgement creditor has made his own interpretations which he is threatening to execute, on the basis of the dollar value as at 19th June, 1989 with 12% interest on the basis of the dollar all through since that time. It is on that basis, ***Mr. Gross*** submitted, that the judgement creditor *intends* to execute, and notwithstanding orders of stay which this Court has made.

Mr. Gross contested the claim made in the judgement-creditor's reply papers, that any Court decision *but* an endorsement of the theory that the judgement of 19th June, 1989 had been intended to be paid in dollars and to accrue interest at 12% in dollars from that time, would be a pretended appellate judgement over the decision of 19th June, 1989. Counsel stated that following the decision of this Court given on

17th September, 2004 he had approached counsel for the judgement-creditor, with a proposal to reach agreement as indicated in this Court's ruling, but his initiative was spurned, and thereafter learned counsel ***Mr. Thangei*** made a threat of execution, as if no decision had been made by this Court on 17th September, 2004**.** ***Mr. Gross*** submitted that even though there are pending before the Court proceedings which have been stayed for the moment, the threat of execution is still being made by the judgement-creditor.

Mr. Gross submitted that a claim being made for the judgement-creditor, that the ruling of 17th September, 2004 had allowed demand of payment *in dollars*, is inconsistent with the terms of that ruling; for it is one of the orders made on 17th September, 2004 that: "*the decretal sum arising from the judgement of 19th June, 1989 shall be computed in Kenya Shillings as at that date, and it is on that basis that the interest rate of 12% per annum, again in Kenya Shillings, shall be payable*" (p.18).

Learned counsel submitted that there were *part-heard execution proceedings* before the Registrar, who on 11th December, 2002 had proceeded under Order XLVIII, rule 3 of the Civil Procedure Rules to *stay the proceedings*, for a reference to be made to a Judge. He urged that in the pendency of those proceedings, it was improper for the judgement-creditor to threaten execution.

A remarkable aspect of this matter is that the judgement-creditor claims, entirely on his own and without the aid of judicial determination, that the judgement on 19th June, 1989 had been self-evident, and had conferred upon him a right to execute for the dollar-sum stated therein, in U.S. Dollars and nothing else, and to have interest accruing thereupon in nothing but U.S. Dollars.

When this assumption was challenged, in an application formally lodged in Court, to which the judgement-creditor did respond, and which favoured the position of the judgement-debtor, the judgement-creditor now questioned the *jurisdiction* of this Court to entertain that application. The challenge to jurisdiction comes belatedly — and this would raise questions as to its *bona fides*. Whether or not there truly is jurisdiction, the Court did give its rulings, I believe, quite transparently, on *two* separate occasions. Notwithstanding those rulings, which clearly are not in favour of the judgement-creditor's position, the judgement-creditor still presumes to independently interpret the judgement of 19th June, 1989 as conferring upon him the right to execute in the original dollar amount, with interest accruing in dollars since then at 12%, and then to execute, on the basis of such interpretation. The judgement-creditor, moreover, overlooks the existence of incomplete proceedings which have been stayed, and threatens execution. I am of the opinion that execution by the judgement-creditor in those circumstances would be contrary to law and cannot be allowed, and I so hold herein.

Two days before the date of delivery of this ruling learned counsel ***Mr. Thangei*** (who had been absent during the hearing of this application) appeared before me with learned counsel ***Ms. Njuguna*** holding brief for learned counsel ***Mr. Gross.*** ***Mr. Thangei*** had pleaded with ***Mr. Gross*** to be allowed to come belatedly, with leave, to address the Court on matters of law which he could have canvassed on the day of hearing. In the Court's exercise of discretion I allowed ***Mr. Thangei*** to address me.

The upshot of learned counsel's address on behalf of the judgement-creditor, was a challenge to my earlier rulings — that of ***17th September, 2004*** and that of ***24th January, 2005.***

Such a contest of this Court's earlier rulings, I believe, was not in keeping with Court procedure and practice. Since what was being challenged was the substantive *merits* of decisions of the High Court, the matter ought to have been taken up on *appeal*, but this had not been done.

Since, however, I had exercised the Court's discretion in favour of counsel's request, I feel obliged to briefly address his client's gravamen and to indicate how the question, the content of which has a practical significance, can be dealt with *in the future*, more appropriately before the Court of Appeal.

Mr. Thangei belatedly brought before this Court several authorities of the Court of Appeal. One of these was ***Beluf Establishment v. The Attorney-General***, Civil Appeal No. 134 of 1986, decided on 23rd

September, 1993. There the question before the Court (in the words of ***Omolo, J.A***.) was: *"whether it was lawful for a* Keny*an Court to give judgement expressed in a currency other than that of Kenya."* The main judgement in that case was delivered by ***Akiwumi, J.A.,*** and he held as follows:

> ***"The currency that most truly expresses the loss of the appellant is the U.S. dollar. The Kenya Exchange Control Act does not prevent judgements being expressed in foreign currency… Finally, the decisions in Miliangos and Despina R. have in my view, put it beyond doubt that the conversion date should be that when payment is made or judgement enforced. Applying all those considerations to the present appeal, I have come to a different conclusion than that reached by the learned trial Judge. I hope that it is now clear that Kenya Courts in applying the common law can in proper cases, express judgement in foreign currency convertible at the rates prevailing on the date of payment or enforcement of judgement. In the result, the appeal is allowed…."***

Mr. Thangei also relied on a decision of the High Court as persuasive authority, ***Ingra v. National Construction Corporation*** [1987] KLR 652. ***Cockar, J*** (as he then was) thus held (pp.655 – 656):

> ***"If it is now ordered that the judgement sum was to be paid at the rate of exchange as [it] applied on December 31, 1978 then clearly the plaintiffs will get not even half of the amount of US dollars they were entitled to for repatriation. The plaintiffs will be made to suffer for the tardiness of the defendants….***
>
> ***"The plaintiffs are entitled to their US dollars at the value they held in the world market on December 31, 1978. The only way to assure that they get that value of the judgement sum which is rightfully due to them is by ordering a conversion at the rate of exchange that applies on the day of payment."***

Learned counsel ***Mr. Thangei*** relied on the foregoing decisions for his sustained contention that, for the matter now before the Court, *"conversion rate [must be as at] the date of payment, or enforcement of judgement; where judgement is in foreign currency, conversion must be [as] at the time of payment."*

Learned counsel's submission, I think, has not taken into account the main principle running through both the ***Ingra*** case and the ***Beluf Establishment*** case, namely that the decision on conversion of the foreign currency or not, or when, is a matter dependent on the *facts of each case* as determined by the Court. ***Akiwumi, J*** stated clearly in the ***Beluf Establishment*** case: *"I hope that it is now clear that Kenyan Courts in applying the common law can in* ***proper cases,*** *express judgement in foreign currency convertible at the rates prevailing on the date of payment or enforcement of judgment."*

How are such ***proper cases*** to be determined? The Court, I believe, would be guided by the ***merits of each claim***, and by any ***pertinent principles of law or considerations of public policy***. I would hold it, for instance, to be contrary to public policy that the commercial interests attached to rapid fluctuations of the Kenya Shilling on the international money market — which is notorious, and of which judicial notice may be taken — could be exploited for ends of supernormal profit earned through astute invocation of *judicial procedure.* The Court must at all times be perceived as an instrument of justice soberly dispensed, not an instrument for raking-in profits. On this principle, and in relation to the instant matter, I would hold that interest on a dollar decretal amount as from 19th June, 1989 ought in principle to be held to be 12% of a decretal amount *standing in Kenya Shillings*, the Kenya Shilling being the *first* expression of the monetary jurisdiction of the Kenyan Courts – as I would hold.

Consequently the submissions made by learned counsel ***Mr. Thangei*** do not, I would hold, affect the position as set out in this ruling.

IV. DETERMINATION, AND ORDERS

I hold it to be inappropriate and unsupported by any law, that a party who has grumbles against a Court order can proceed as if that order did not exist, and even presume to levy execution in contravention of

the Court order; and the only lawful recourse for such an aggrieved party is to lodge an *appeal* from the order in question. Short of an appellate Court decision granting such an aggrieved party's prayers, the law *requires* him to comply with the decision of the High Court.

I will therefore, determine the judgement-debtor's Notice of Motion of 3rd February, 2005 as follows:

> ***1. The judgement-creditor shall not, without the leave of Court, begin any execution proceedings in relation to the decretal sum emanating from the Judgement of 19th June, 1989 — subject to the 3rd order herein.***
>
> ***2. The terms of discharge of the judgement-debt as decreed in the Judgement of 19th June, 1989 shall be as ordered in this Court's ruling given on 24th January, 2005 — subject to a consent recorded in Court on 7th June, 2006 which is set out in the 3rd order herein.***
>
> ***3.* By consent, the decretal sum payable by the judgement-debtor shall stand at Kenya Shillings Seven Million, Seven Hundred and Fourteen Thousand, Seven Hundred and Fifteen only (Kshs.7,714,715/=) bearing interest at Twelve Percent (12%) as from 20th June, 1989.**
>
> ***4. Any applications such as may be made in this matter shall be heard and determined in the Civil Division of the High Court.***
>
> ***5. The respondent shall bear the applicant's costs in this application.***

Orders accordingly.

DATED and DELIVERED at Nairobi this 9th day of June, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Judgement-Creditor/Respondent: Mr. Thangei, instructed by M/s Waruhiu, K'Owade & Ng'ang'a Advocates

For the Defendant/Judgement-Debtor/Applicant: Mr. A.F. Gross, instructed by A.F. Gross Advocate