



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 889 of 2001

MASEFIELD TRADING KENYA LTD.....PLAINTIFF

VERSUS

OMAR TRANSMOTORS LIMITED.....DEFENDANT

R U L I N G

Two main orders are sought by the Defendant/Judgment-Debtor herein in the chamber summons dated 24th January, 2006:-

- “1. -----
2. -----
3. -----
4. **That an order do issue marking this matter as settled.**
5. **That the costs of this application be borne by the Plaintiff/Respondent.”**

The application is made upon the grounds:-

- (a) **That the Defendant has fully and finally settled the decretal sum herein and that this court has by its letter dated 27th July, 2005 reckoned as much.**
- (b) **That the issuance of execution was unlawful for failure to serve the Defendant with a notice to show cause why execution should not issue as required by law.**
- (c) **That the Defendant will suffer irreparable loss should execution proceed.**
- (d) **That the entire execution is tainted with illegality.**
- (e) **That the Plaintiff has previously confirmed that this matter was settled as between itself and the Defendant.**

There is a supporting affidavit sworn by one MUBARAK OMAR, the managing director of the Defendant, to which various documents are annexed. In addition, there is a supplementary affidavit sworn by the same Mubarak Omar. Other documents are annexed thereto.

The application is stated to be brought under sections 3A, 34 and 63(e) of the Civil Procedure Act,

Cap. 21. It is opposed by the Plaintiff/Decree Holder upon the grounds set out in the replying affidavit sworn by one STANISLAUS WIJENJE, the general manager of the Plaintiff. Those grounds are, *inter alia*:-

- (i) That the issue of interest upon the decretal sum, which is essentially the dispute in this application, has been litigated before and decided, something that the Defendant has failed to disclose.**
- (ii) That no waiver of interest was granted by the Plaintiff to the Defendant as claimed.**
- (iii) That the conduct of the parties subsequent to the alleged waiver shows clearly that there was no such waiver, and further, that if there had been such waiver the same was cancelled by conduct.**

There are many documents annexed to this replying affidavit. There is a supplementary affidavit sworn by the same Stanislaus Wijenje.

I have read the affidavits sworn in support of the application and those sworn in opposition. I have also given due consideration to the submissions of the learned counsels appearing, including the authorities cited. Finally, I have perused the court record.

Two issues are raised in this application. One, whether the execution as levied is unlawful in view of rule 18 (1) (a) of Order 21 of the Civil Procedure Rules, which provides:-

“18 (1) Where an application for execution is made-

- (a) more than one year after the date of the decree; or***
- (b) -----; or***
- (c) -----,***

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him;

Provided-----.”

It is the Defendant’s case that at the time the execution in question was issued the decree was more than one year old and that no notice to show cause was served upon it. The Plaintiff’s answer is that no notice to show cause was necessary under the first proviso to the said subrule (1) of rule 18. That proviso says in the relevant portion:-

“Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution -----“

I am afraid that the respective positions taken by both parties on this issue are not quite correct. The court record shows that a preliminary decree was issued on 9th September, 2002 which awarded the Plaintiff the sum of KShs. 2,367,869/50 only. This preliminary decree was issued pursuant to a consent interlocutory judgment. Then on 10th August, 2005, pursuant to another consent judgment, a final decree was issued by which the Plaintiff was awarded a further KShs. 1,789,951/05, making a total of KShs. 4,157,820/55, plus interest and costs.

It is common ground that the total principal sum of KShs. 4,157,820/55 has been paid fully and also part of the costs. The dispute of the parties is essentially over the interest. It is also common ground that the execution complained of in this present application is essentially for interest. The execution was

levied pursuant to the final decree dated 10th August, 2005, as it is the one that awarded the interest. The sum demanded is KShs. 1,822,817/48 as “recalculated” by the Deputy Registrar by order dated 15th December, 2005. The application for execution is contained in the letter dated 4th January, 2006 (filed on 9th January, 2006) addressed by the Plaintiff’s advocates to court. It is therefore clear that the decree that was being executed was not more than one year old. In other words, the application for execution was not made more than one year after the date of the decree.

The second issue is whether there was waiver of interest upon the decretal sum by the Plaintiff granted to the Defendant, and whether, if there was such waiver, the Plaintiff is now estopped from demanding the interest. Before I deal with that issue, there is a matter I must dispose of first. It is urged by the Defendant that the court, by its letter dated 27th July, 2005 addressed to the Plaintiff’s advocates, confirmed that the Defendant had fully paid (indeed over-paid) the decretal sum. The wording of that letter is significant. It states in the relevant portion:-

“Please note that there is no mention of interest on the preliminary decree. Further note that the judgment-debtor has paid to you KShs. 2,703,995/75 which is over and above the total decretal amount and certificate of costs of KShs. 2,367,869/50 and KShs. 213,268/92 respectively. The over-payment is KShs. 122,857/30.”

It should be obvious to everyone that the court here had in mind the decretal sum as per the **preliminary** decree. As already seen, there was subsequently a further consent judgment leading to the **final** decree by which the Plaintiff was awarded a further principal sum plus interest and costs. So, in short, the letter of the Deputy Registrar dated 27th July, 2005 cannot by any stretch of the imagination be taken as authority for the proposition that the Defendant has fully discharged the decree, the decree here being the **final** decree issued on 10th August, 2005.

And now back to the waiver. The claim for waiver is based upon the letter dated 30th March, 2005 addressed by one Stan Wijenje (describing himself as representative) to Mr. Mubarak of Omar Transmotors Limited. This letter is annexed to both the supporting and supplementary affidavits sworn by Mubarak Omar. It is written on the Plaintiff’s letter-head and reads:-

“Having received the principal amount and your request for a waiver on interest amount, we have no further claim subject to you clearing the court costs and lawyers fees.

Thank you and regards.”

Mr. Stanislaus Wijenje has explained in the replying affidavit the circumstances under which he wrote this letter. He is emphatic that it was not meant to be a waiver as he had no authority to grant any such waiver. He was also emphatic that the Defendant never understood the letter to be a waiver, and that the subsequent conduct of the parties is a clear indication that there was never any waiver granted. On the other hand, the Defendant through its managing director, Mr. Mubarak Omar, is equally emphatic that a waiver on interest was granted by the Plaintiff to the Defendant, that the Defendant acted upon the said waiver, and that the Plaintiff cannot now be allowed to go back on the waiver.

As already seen the alleged waiver is supposed to have been granted by the letter dated 30th March, 2005 which is quoted above. The court record shows that the Defendant had brought an application by chamber summons dated 11th February, 2005 which was similar to the present one. Admittedly, the issue of the waiver had not risen by then, and it was not, and could not have been, mentioned when that application was argued on 3rd March, 2005. Ruling dated 4th May, 2005 on that application was delivered on 9th May, 2005. In that ruling the court found that interest upon the principal sum and also a part of the certified costs had not been paid by the Defendant. The court then gave the parties some time to go and calculate and agree on the sum due and outstanding upon the decree. The court further ordered that if the parties were unable to agree the issue shall be referred to the Deputy Registrar (to do the necessary calculations).

As it happened, there was never any agreement, despite the matter having been mentioned before court on 25th May, and on 9th and 22nd June, 2005. During those three mentions it was never claimed by the Defendant that a waiver had been granted. However, the issue of waiver was mentioned in the next two mentions on 4th and 25th July, 2005. On that latter date the court referred the matter to the Deputy Registrar for him to calculate the interest, if any, payable upon the decretal sum. On 15th December, 2005 the Deputy Registrar “recalculated” the outstanding decretal sum to be KShs. 1,822,817/00. This recalculation was upon the final decree, as is evidenced by the proceedings before the Deputy Registrar of 16th November, 2005.

The order of the Deputy Registrar of 15th November, 2005 still stands. As already seen, by that order the Deputy Registrar “recalculated” the outstanding decretal sum upon the final decree to be KShs. 1,822,817/00. That order has not been challenged by the Defendant. One would have expected that the Defendant would have been anxious to place before the Deputy Registrar its claim for waiver. The Defendant did not do so. No reasons are apparent on the record why the Defendant did not appear before the Deputy Registrar. Again it is to be expected that if the Defendant had a good reason why it failed to appear before the Deputy Registrar for “recalculation” of the outstanding decretal sum, it would have sought a review and setting aside of the order of the Deputy Registrar of 15th December, 2005. It has not done so, and no reasons have been given to court why it has not done so.

The matter was referred to the Deputy Registrar because the parties were unable to agree on what sum was outstanding upon the decree. As already seen, that dispute was essentially with regard to interest. The claim for waiver that the Defendant has now brought by this application ought to have been placed before the Deputy Registrar, and there was plenty of time to do so as the waiver was allegedly granted on 30th March, 2005 and it was not until the 15th December, 2005 when the Deputy Registrar “recalculated” the outstanding decretal sum. The Defendant’s failure to place the issue of waiver before the Deputy Registrar is in my judgment a strong indication that there was never any waiver granted, notwithstanding the letter dated 30th March, 2005 already quoted, and that the parties have all along understood that there was no such waiver granted. It is also to be noted that no consideration has been put forward for such waiver.

Having considered all the material placed before the court I hold that no waiver on interest was granted by the Plaintiff to the Defendant as claimed. There is no clear and unambiguous evidence of such waiver. The letter of 30th March 2005, given the circumstances in which it was written, as explained in the replying affidavit, and which explanation I accept as portraying the true position, is not such clear and unambiguous evidence. I accept the argument that Stanislaus Wijenje, as general manager of the Plaintiff, had the necessary ostensible authority to bind the Plaintiff. However, there was, in fact, no waiver granted by Stanislaus Wijenje.

As the other issue (on the illegality or otherwise of the execution) has already been decided in favor of the Plaintiff, I will refuse the application by chamber summons dated 24th January, 2006 for lack of merit. It is hereby dismissed with costs to the Plaintiff. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JUNE, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 2ND DAY OF JUNE, 2006.