



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

Civil Suit 823 of 1999

DIPAK PREMCHAND SHAH.....1ST PLAINTIFF

KAILESH DIPAK SHAH.....2ND PLAINTIFF

HARISH PREMCHAND SHAH.....3RD PLAINTIFF

PRITI HARISH SHAH.....4TH PLAINTIFF

SOBHAGCHAND PREMCHAND SHAH.....5TH PLAINTIFF

SURESHCHANDRA PREMCHAND SHAH.....6TH PLAINTIFF

JASODABEN PREMCHAND SHAH.....7TH PLAINTIFF

VERSUS

AKIBA BANK LIMITED.....DEFENDANT

R U L I N G

Delay in preparation and delivery of this ruling has been caused by my recent illness, hospitalization and long recuperation. The same is regretted.

This is an application by chamber summons dated 17th November, 2005 by the Plaintiffs seeking two main orders:-

“1. -----

2. -----

3. *That the warrants of attachment issued on 11th November, 2005 be lifted and/or stayed.*

4. *That the decree issued on 11th November, 2005 together with all consequential orders is set aside.*

5. -----”

The application is stated to be brought under Order 21, rule 32 of the Civil Procedure Rules and also under sections 3, 3A and 63 (e) of the Civil Procedure Act. The grounds for the application as they appear on the face thereof are:-

- 1. That the Defendant has deliberately misled the court into issuing warrants of attachment on the basis of an invalid decree.**
- 2. That the Defendant conceded to the withdrawal and/or lifting of the warrants of attachment herein dated 15th August, 2005 as the process of obtaining the same was manifestly flawed and fatally defective.**
- 3. That the purported execution is premised on the basis of a purported decree which was passed on 11th July, 2003.**
- 4. That the issues relating to the validity and probity of execution of warrants of attachment herein have already been litigated before and determined by this court.**

There is a supporting affidavit sworn by the 5th Plaintiff.

The Defendant has opposed the application upon the various grounds set out in the replying affidavit sworn by JAMES RIMUI, the Defendant's learned counsel, and filed in court on 13th December, 2005. Those grounds are:-

- 1. That there is a valid decree in favour of the Defendant which it has legitimately sought to execute.**
- 2. That the execution was not in contravention of rule 18 of Order 21 of the Civil Procedure Rules.**
- 3. That the application is res judicata on account of a previous similar application.**
- 4. That the application is mischievous, mala fides, misconceived and an abuse of the process of the court, brought only to delay the Defendant from enjoying the fruits of the litigation.**

I have considered the submissions of the learned counsels appearing after reading the supporting and replying affidavits. I have also perused the court record. On 15th January, 2003 this court (Mwera, J.) dismissed the Plaintiffs' suit for want of prosecution with costs. The Defendant did not extract decree until September, 2005. The same was issued on 25th October, 2005. I see nothing wrong with that decree though belatedly issued. In the meantime, the Defendant lodged its bill of costs which was taxed on 16th July, 2003 at Kshs. 230,351/20. A certificate of taxation was subsequently issued. On 24th July, 2003 the Defendant applied for execution of decree and warrants of attachment were issued. They were eventually returned unexecuted but reissued in June, 2004. It is not clear from the record if these reissued warrants were executed. At any rate other warrants of attachment dated 15th August, 2005 were issued. The Plaintiffs took objection to these warrants by chamber summons dated 19th August, 2005 upon the grounds that there was no formal decree capable of giving rise to the warrants of attachment, and that in any case the decree was passed well over one year before, and that no notice to show cause had been served. This application appears to have been superseded by a subsequent application by the Plaintiffs by notice of motion dated 12th October, 2005 which was similarly challenging the execution. That latter application came up for hearing on 28th October, 2005 when the following order was recorded (Ochieng' J.):

"COURT – By Consent:-

(a) The firm of A Akoto & Co. Advocates is granted leave to come on record in place of A. R. Shah,

Advocates.

(b) The warrants of attachment dated 15th August, 2005 are hereby lifted and set aside.

(c) The costs of this application are awarded to the Plaintiffs.”

That consent was recorded after learned counsel for the Defendant told the court that he did not oppose the application. As has already been seen, the formal decree was issued on that same day, no doubt after the consent order was entered as it was lack of formal decree that had prompted the Plaintiffs into raising objection to the execution.

A number of facts appear not to be in dispute. One, the order dismissing the Plaintiffs' suit and awarding the Defendant costs was never challenged either by an appeal or an application for review. Two, the taxation of the Defendant's costs was also never challenged. Three, the Plaintiffs' liability to pay the Defendant's costs still stands. Four, the Plaintiffs have never made any attempt to pay the Defendant's costs. Five, the Defendant moved to tax its costs and execute for the same before extracting decree. No doubt it acted in haste; but I do not see that the Plaintiffs suffered any prejudice thereby as they could have paid the costs which they had not challenged and bring the matter to an end.

It appears to me that the Plaintiffs are relying on technicalities to try and delay what they must surely eventually do, and that is to pay the Defendant's costs duly awarded and already taxed. This however is not to say that the Defendant should not have followed the rules. It was not right for it to proceed to tax its costs and apply for execution for the same before decree was extracted and issued. The court should not have permitted it. But that is so much water under the bridge. The important thing is that the Plaintiffs owe the Defendants its costs, which costs must be paid.

The orders that commend themselves to me in the interest of justice are as follows:-

- 1. All the execution proceedings so far are hereby set aside except those upheld by Kasango, J. in her ruling dated and delivered on 7th March, 2005.**
- 2. The Defendant, if it desires to execute for its costs, or any balance thereof, shall file a fresh application for execution of decree and adhere to the requirements of rule 18 of Order 21 of the Civil Procedure Rules.**
- 3. The parties shall bear their own costs of this application.**

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF DECEMBER, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 1ST DAY OF DECEMBER, 2006.