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

Civil Suit 622 of 2000

NATIONAL INDUSTRIAL CREDIT BANK LTD. ...……...……..... PLAINTIFF

VERSUS

JOHN MWAURA KINUTHIA ……..……..…...DEFENDANT

RULING

This ruling relates to an application by way of Chamber Summons dated 13.09.2004 brought by the Defendant herein under the provisions of Order XXI rules 22 and 23, and order IXB rule 8 of the Civil Procedure Rules, Section 3A and 63 of the Civil Procedure Act and all other enabling provisions of the law. The application seeks orders that -

(a) the execution of the decree herein be stayed;

(b) the judgement herein entered on 28.10.2003 after ex-parte hearing of this case, be set aside.

(c) the suit herein be reinstated and set down for hearing inter partes.

(d) costs of this application be provided for.

The application is supported by the Affidavit of the applicant, John Mwaura Kinuthia and the grounds set out in the application, the principal ones of which are that the applicant had been unwell during the material time and secondly, that his previous advocates M/s Kahiu Mbugua & Co. Advocates did not inform him of the hearing date of the case, and that he only found out this when he was served with a notice of execution of the decree herein.

Mr. Ogana reiterated these grounds during the hearing of this application, that the Defendant should not be condemned unheard, the decretal sum was large, the interests of justice demand that the application be granted so that the matter be heard inter partes, the Replying Affidavit does not show that the hearing notice was served, the Plaintiff had applied for summary judgement but which application was dismissed with costs, and that this showed that his defence had merit, and that for all these reasons his application be granted.

Counsel for the Plaintiff, the decree holder, predictably opposed the application. He relied upon the Replying Affidavit of Peter Makumi Mwangi sworn on 25.10.2004 and filed the next day on 26.10.2004. The essence of the said Affidavit is set out in paragraph 5 thereof and is that the Defendant's then Advocates Messrs. Kahiu Mbugua & Associates were at all materials aware of the hearing date for the Plaintiff's suit by reason of having been served with the hearing notice dated 29.01.2003 duly endorsed with the hearing date way back in February 2003. In this regard there is filed and on record of the Court,

an Affidavit of Service by one Charles Mutua Velela sworn on 13.10.2003 showing the Service of a Hearing Notice dated 29.01.2003 for the hearing of this suit on 14.10.2003, eight months later.

In his submission, Mr. Laibuta reiterated the averments in the aforesaid Replying Affidavit. He told the Court that the hearing of the case was properly conducted. The Plaintiff's Counsel satisfied the Court that the hearing notice was duly served; there was no Affidavit or letter from the Defendant's previous Advocates to explain their absence on the hearing date, there was nothing from the Plaintiff's Supporting Affidavit to support or suggest that he was not informed of the hearing date after dismissing his previous Advocates he had appointed another firm of Advocates.

On the Defendant's medical condition, Counsel observed that the Defendant was diagnosed with the illness on 7.05.2003, and was operated upon during the same month, and was granted 3 months rest without work, and three months of light duty. The Defendant had enough time to consult his previous Advocates. The hearing Notice had been served upon them in February 2003. His condition was diagnosed in May 2003. There was time to liaise with his Advocates. He had rest for 3 months from May to August 2003. The hearing of the case was in October 2003. There is no indication as to why he did not contact his then Advocates. The contention that he learned of the judgement nearly a year later (on 18.08.2004) was not convincing. There is no indication why he did not even write to his advocate, or even telephone him. It is a matter of fact that the judgement is on the record, and there is no requirement that it be annexed to the Supporting Affidavit of the decree-holder's application.

The applicant may be excused for the period May to August 2003 when he was on medical leave, there is no excuse for not contacting his Advocates for the period August to October 2003 before the hearing of this case. In any event the applicant did make an offer in February 1997 to pay the outstanding arrears then due. He cannot now claim that he has a defence or a meritorious defence as such.

The debt arose out of a contract, and the consequential judgement gave rise to a money decree. The interest rate was contractual. It is no ground for setting aside a judgement of the Court to say either that the sum in issue is large or that the interest rate is high.

Mr. Laibuta, Counsel for the decree holder made one concession in his submission. He told the Court that the decree holder would look at the applicant's position with favour if the applicant deposited into Court or paid to the decree-holder at least one half of the decretal sum, and offered a tangible security for the balance. There was however no offer by the Applicant, and there was no reason to deny or delay the decree holder from realising the fruits of the judgement herein.

The foregoing are the submissions by the applicant's and respondent's Counsel. I will now move my attention to the legal basis of the application and consider the merits of the application. As stated at the outset of this Ruling, this application is predicated upon the provisions of order XXI, rules 22, and 25 and order IXB rule 8 of the Civil Procedure Rules.

Commencing with Order IXB rule 8, which provides that where under this order judgement has been entered or the suit has been dismissed the Court, may, on application by summons, set aside or vary the judgement or order, upon such terms as are just. This application has been brought under the correct provision and is to that extent competent. However, as to whether the judgement entered herein may be set aside or varied depends upon the provisions of Order IXB rule 3, which reads -

"3. If on the day fixed for hearing after the suit has been called on for hearing outside the Court, only the Plaintiff attends, if the Court is satisfied -

(a) that notice of hearing was duly served, it may proceed ex parte

(b) that notice was not duly served, it shall direct a second notice to be served;

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing "

Judgement herein was delivered on 28.10.2003 by Hon. Mr. Justice Mwera. At page 3 of his judgement the learned judge observed as follows -

"The parties drew up and filed five (5) issues to be determined. On 14th October 2003, this suit came for trial. It was shown that M/s Kahiu Mbugua & Associates were served with a Notice of hearing. These defendant's Lawyers did not show up and the Plaintiff's proceeded to prove its case by putting one Reuben Nyanganga its Debt Management Manager (Pw1) in the witness box"

It is clear from the foregoing paragraph of Hon. Mr. Justice Mwera's Judgement that he was satisfied in terms of Order IXB rule 3 (a) that notice of hearing was duly served, and proceeded to hear the suit ex parte. There is no valid factual or legal ground upon which to impugn either the proceedings or the judgement herein. The Defendant's prayer to set aside or vary the judgement herein fails. Upon the same grounds, the third leg of the applicant's application that the suit herein be reinstated must also fall aside.

Having come to the above conclusion in respect of the Defendant's second and third prayers, will the Defendant's first prayer, that the execution of the decree herein be stayed succeed?

This prayer is predicated upon the provision of Order XXI, rules 22 and 25 of the Civil Procedure Rules. This leg too of the application cannot succeed. Rule 22 empowers the Court to which a decree has been sent for execution upon sufficient cause being shown to stay execution for reasonable time to enable the judgement debtor to apply to the Court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by the Court of first instance or appellate Court if execution has been issued thereby, or if application for execution has been made thereto. This being the court of first instance, it has no jurisdiction to grant the orders sought under this rule 22 of Order XXI.

I do not think rule 25 of Order XXI comes to the applicant/Defendant's aid. An order for stay of execution under that rule (25) may only be granted if there is a suit pending in any Court against the decree holder in the name of the person against whom the decree was passed. There was no plea either on the grounds of the application or the application's Supporting Affidavit, of the existence of any suit by the Defendant/Applicant against the Plaintiff/Decree-holder. The applicant's first leg of the application for stay of execution must similarly fail. I must add that an application for stay of execution under rules 22 and 25 of Order XXI is quite incompetent.

In all therefore, the Defendant's application dated 13.09.2004 and filed on the same day fails, and is dismissed with costs for lacking in any merit at all. It is so ordered.

Dated and delivered at Nairobi this 2nd day of February 2005.

M. J. ANYARA EMUKULE

JUDGE