

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 889 OF 2001

MASEFIELD TRADING (K) LTD.....PLAINTIFF

VERSUS

OMAR TRANSMOTORS LTD.....DEFENDANT

RULING

This is an application for stay of execution of decree. It has been brought by the Defendant/Judgment-Debtor by chamber summons dated 11th February, 2005. It is said to be brought under Section 3A of the Civil Procedure Act, Cap. 21 (the Act) and also under Order 21, Rule 18 of the Civil Procedure Rules (the Rules). The grounds for the application are:-

- (1) That the decree is more than 12 months old yet no notice to show cause was issued to the judgment-debtor as required by the Rules.***
- (2) That the judgment-debtor has not only fully paid the decretal sum but has in fact over-paid it by Kshs.146,775/20.***
- (3) That the attachment is invalid, unlawful and malicious.***

The supporting affidavit sworn by one **MUBARAK SULEIMAN OMAR**, the managing director of the Defendant/Judgment-Debtor, elaborates those grounds.

The Plaintiff/Decree-Holder has opposed the application. In the replying affidavit sworn by its advocate it is admitted that the Defendant/Judgment-Debtor has paid the sum of Kshs.4,304,595/75. But it is argued that interest on the decretal sum together with the costs of the suit (certified at Kshs.213,268/92) have not been paid, and that execution was levied for those.

I have considered the submissions of the learned counsels appearing. I have also perused the court record. On 6th September, 2001 judgment in default of appearance and/or defence had been entered against the Defendant, but the same was subsequently set aside by consent on 26th July, 2002. By the same consent judgment was entered for the Plaintiff for the admitted sum of Kshs.2,367,869/50, the balance of the claim to proceed to hearing. On 17th October, 2002 further judgment was by consent entered for the Plaintiff for the sum of Kshs.1,789,951/05, making up a total of Kshs.4,157,820/55, "together with costs and interests".

Having paid Kshs.4,304,595.75, as admitted by the decree-holder, the judgment – debtor has already paid fully the principal sum of Kshs.4,157,820.55 and some Kshs.146,775/20 over and above that sum, which can count towards the costs. That means that interest upon the principal sum and also a part of the certified costs have not been paid. The judgment-debtor says that the interest cannot amount to the kshs.1,096,186/72 demanded in the warrants of attachment and sale. Probably so. But the issue as to exactly how much is still outstanding upon the decree can easily be sorted out by the advocates or by the Deputy Registrar. There is no reason why that exercise should engage the court at all. I note from the record that the issue as to what is outstanding has arisen before and has never been sorted out satisfactorily. That issue is really the basis for this application.

I do not intend to decide on the technical issues raised in the application. That will be a waste of the court's time. What I shall do is that I will give the parties two weeks to calculate and agree on the sum

due and outstanding upon the decree. If they are unable to agree the issue shall be referred to the Deputy Registrar. The matter shall be mentioned. Interim orders are extended to that date. Costs in the cause.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF MAY, 2005.

H. P. G. WAWERU

JUDGE