



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

Civil Case 41 of 1999

IJAZ HUSSEIN GAN IJEE.....PLAINTIFF

VERSUS

HUSSEIN M. AIDEED.....DEFENDANT

RULING

On the 30th March, 2004, the High Court at Milimani Commercial Courts, Nairobi issued a Warrant of arrest against the Defendant, Hussein M. Aideed on the application of the Plaintiff, Ijaz Hussein Ganijee. The Warrant was for the personal arrest and committal to Civil jail in the execution of a decree for a total sum of Kshs. 15,247,617.52 against the Defendant/Judgement debtor in favour of the Plaintiff Decree-holder.

The Judgement-Debtor was arrested and committed to civil jail on 20th May 2004 and was subsequently held at the Industrial Area Prison. On the 24th May, 2004 the Judgement-debtor filed an application under certificate of urgency for the grant of bail and/or release from civil jail pending the hearing of an Appeal said to have been filed on his behalf. The application was presented ex parte and for reasons that are on record the court presided by me ordered the release of the Judgment-debtor from civil jail or prison on the following conditions; either upon:-

- (i) The Kenya Government through Kenya's envoy to Somalia provides an undertaking or written assurance that it will ensure the appearance and attendance of the debtor in court from time to time until the appeal is determined or
- (ii) If this is not possible the debtor do furnish a security by depositing in court a sum of Kshs.5,000,000/= (Five million shillings) before his release.
- (iii) Such sum is to be held in court until the determination of the appeal or further orders of the court.

The Plaintiff/Decree-holder being aggrieved by the aforesaid ex parte orders filed an application under Certificate of Urgency in court on 2nd June, 2004 seeking the following Orders:-

“ 1. That the Orders made on 24th May, 2004 be reviewed and/or varied to require the Judgment-debtor to furnish security in the sum of Kshs.15,247,617.52.

2. That alternatively, the orders made on 24th May 2004 be set aside and the orders of the Deputy Registrar of 20/5/2004 be reinstated.

3. That the costs of this application be provided for. “

The Plaintiff's application was subsequently certified as

urgent and fixed for inter partes hearing before me on 14th June, 2004. The Defendant on his part moved fast and filed another application on 9th June, 2004 with a view, inter alia, of having the Judgement and Decree granted by the court on 27th July, 1999 and all subsequent orders set aside and the case heard on its merits.

Both applications came before me for hearing on 14th

June, 2004 and after hearing arguments as to which of the two applications ought to be heard first, I ordered that the Plaintiff's application be heard first. I subsequently granted leave to the Defendant to file a Replying Affidavit and convert his Notice of Preliminary Objection to Grounds of Opposition. The Plaintiff's application finally came for hearing before me on 28th June, 2004 when his counsel argued the application to conclusion. The Defendant's Counsel, Mr. Oseko was to respond at the resumed hearing as the matter was adjourned at that point.

At the resumed hearing, Mr. Oseko for the Defendant raised the issue of the Court's jurisdiction which was one of the Grounds taken out in the Defendant's Replying Affidavit. He urged the court to stay all other proceedings to facilitate the issue of jurisdiction to be heard determined. The Defendant submitted that the Contract/Agreement on which the Default Judgment and the Decree dated 27th July, 1999 was based, having been entered into between the Government of the Republic of Somalia and the Plaintiff, a Memorandum of Appearance under protest having been filed on the 8th day of July, 1999, the Defendant then in his capacity as the president of the Republic of Somalia and therefore a sovereign of another state elected not to submit to this Honourable court's jurisdiction and that he has since done nothing to forfeit or to waive his privilege and he is for all juridical purposes supposed still to be in his own country, Somalia. The Defendant's counsel said that he intended to argue as a preliminary and jurisdictional issue that the Judgement and decree of this court were without jurisdiction and the same are therefore null and void and of no legal effect.

In total sum the Defendant desired and applied to court that the said question of jurisdiction be heard, albeit, the Plaintiff's application being partly-heard and yet to be determined. The Plaintiff's Counsel, Mr. Thiga who held brief for Mr. K'owade opposed the application. He argued that the Defendant had submitted himself to the jurisdiction of the court as he had allegedly applied for stay of proceedings pending arbitration and never raised the question of jurisdiction before. That he benefited from the jurisdiction of this court when he was released from Civil jail.

I have considered the oral application of the Defendant and Counsel's submissions. I am conversant with the decision of the Court of Appeal in the landmark case of “**The owners of the Motor Vessel “Lilian S” –v- Caltex Oil (K) Limited (1989) KLR, 1** which was relied upon by the Defendant. On the basis of this decision it is a cardinal principle of law that once a party raises the question of the court's lacking jurisdiction in any proceedings then it is the duty of the court to hear the said issue forthwith and determine it before proceeding with any other matter or issue. This decision is binding on this court and several of my decisions will show that besides applying the ratio decidendi in this regard as a matter of law (stare decisis), I personally cherish the sound principles thereof.

When considering this question, I am obliged to ask myself, what application, proceeding or matter is before me at the moment? What is before me is the Plaintiff's application dated 31st May, 2004 seeking, inter alia, orders for the review and/or variation of the court's order made on 24th May, 2004 and to require the Judgment-debtor to furnish security in the sum of shs.15,247,617.52 the decretal sum herein. In the alternative, that the said orders be set aside and the orders of issuing the warrant of arrest made by

the Deputy Registrar on 20/5/2004 be reinstated.

The Defendant's application dated 9th June, 2004 seeking, inter alia, orders that the Judgment and Decree granted by this Honourable court on 27th July 1999 and all subsequent orders be set aside and the case be heard on its merits is **not** before me and is still pending. I had already ruled that the Plaintiff's present application be heard first and before the Defendant's said application. With respect, if I embark on the question of jurisdiction then I would be entertaining or in effect, be hearing the Defendant's application. This would not be proper as the said Application has neither been fixed for hearing nor is it before me at the moment.

Should I or can I stay the Plaintiff's application and allow the defendant's application to proceed for hearing wherein the question of the court's jurisdiction in respect of the entire suit can be dealt with forthwith in compliance with the principles laid down in "**Lilian S**" ?

I have considered this question with a lot of solemnity and gravity and I am of the view that I cannot and should not stay the hearing of the Plaintiff's application which is now partly-heard. To do so would amount to a travesty and miscarriage of justice which this court cannot allow.

First and foremost, there is a Judgement of this court in this suit and a Decree has been issued and is being enforced. These are a Judgement and Decree of the High Court of Kenya. They are at the moment valid and enforceable. The Defendant said that he had lodged an Appeal against the said judgement. He came to court for bail or a release order from civil jail or prison pending the hearing of his appeal and of quite a great significance and which influenced this court, to be allowed and be able to continue participating in the then on-going crucial Somali Peace Talks taking place in Nairobi and which was sponsored by IGAD and the International community. The Defendant requested to be allowed to attend the Somali Peace talks and discharge his duties as Vice Chairman of the said Peace Talks, leader of the majority of delegates and a Presidential Candidate. In his application for bail or release, he offered to provide sureties and assurances from the Kenya Government that he would attend court as and when required to do so. In his affidavit at paragraph 17 he deponed:

"17. That I am a political leader of a country and I am in no position to flee from jurisdiction of any court of law or the due process of the law."

As a result of the aforesaid pleas and statements on oath, the court released the defendant on terms already set out in detail hereinabove.

In the light of the foregoing, I do hereby hold that the Defendant is estopped from raising the question of this court's jurisdiction as far as the Plaintiff's application to set aside the release orders are concerned. Strictly, if this court lacked any jurisdiction, the Defendant willingly and voluntarily submitted himself to the jurisdiction of this court and therefore all courts in Kenya in obtaining his release. He was released on terms and he elected to comply with the alternative security of providing an undertaking or written assurance from the Kenya Government that he would attend court as the Judgement-debtor when so required by the court. If the Defendant absconds or defaults, the Kenya Government is liable to forfeit the bail amount of Kshs.5,000,000/= to the court and which can be applied as the court deems fit including applying it towards partial satisfaction of the Decree herein.

In other words, for the purposes of the Warrant of Arrest and the Plaintiff's application, the Defendant cannot in law or fact raise any objection on the basis of the jurisdiction of this court. To do so, the court can in its discretion can and may deprive him of any advantage he may have already obtained by his representations, statements, and actual submission to jurisdiction.

It is in order to point out that in the event the Defendant wishes to pursue the question of jurisdiction in respect of the Plaintiff's application to set aside, then he is at liberty to surrender to this court for cancellation of the bail and/or release order and for him to return to civil jail or prison wherefrom he can pursue his right to raise the issue of jurisdiction as a preliminary point of law to the fullest. To this extent I do hereby distinguish the facts of this case from those in "**Lilian S**" and application thereof.

In all fairness to the Defendant, I am of the view that the issue of jurisdiction can possibly only be appropriately raised with regard to his application to set aside the Judgement and Decree and/or the said pending Appeal.

On the basis of the foregoing, I do hereby disallow the application by the Defendant to raise the question of jurisdiction in the present application. Costs of the oral application shall be paid by the Defendant to the Plaintiff. The Plaintiff's application dated 31st May, 2004 to proceed for further hearing.

Dated and delivered at Nairobi on this 14th day of October 2005.

MOHAMMED K. IBRAHIM

JUDGE