REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Civil Case 1946 of 1994

EAST AFRICAN PORTLAND CEMENT CO. LTD……..…..……PLAINTIFF

VERSUS

TAUSI ASSURANCE COMPANY LTD……..1ST DEFENDANT

NZAMA-KUU CEMENT COMPANY LTD……..……2ND DEFENDANT

R U L I N G

This is an application for stay of execution, and the cancellation of warrants of attachment. It is premised on Order 21 rule 18(1) of the Civil Procedure Rules, as read together with Order 50 rule 1, as well as Section 3A of the Civil Procedure Act.

It is common ground that the Plaintiff's suit was dismissed with costs, on 26th April 2004. Thereafter, the party and party costs were taxed on 27th July 2005, in the sum of Kshs. 214,610/=. The court records show that the taxation was by consent of the parties thereto. Thereafter, on 17th October 2005, the 1st Defendant applied for execution, by way of attachment and sale of the Plaintiff's moveable property.

In response to the application for execution, the court issued warrants for the attachment of the Plaintiff's moveable property. The said warrants, which are dated 21st October 2005, were to be executed by Keysian Auctioneers. The choice of the court broker was made by the advocates for the 1st Defendant, M/s Mbugua & Mbugua Advocates, by their letter dated 17th October 2005.

The proclamation issued by the court brokers indicates that on 26th October 2005, they proclaimed the Plaintiff's property, including some six motor vehicles.

Following the proclamation, the Plaintiff instructed M/s Wekesa & Company Advocates to act for it, instead of Waruhiu & Muite Advocates. The said new advocates filed an application on 31st October 2005, seeking leave to replace the Plaintiff's former advocates.

The court records show that the application dated 31st October 2005, was listed for hearing before the Hon. Waweru J. on 1st November 2005. At the hearing of that application, Mr. Thangei, advocate represented the Plaintiff's former advocates, and consented to the firm of Wekesa & Company Advocates taking over from them.

I have set out the foregoing details because the first issue which the respondent's counsel raised, in opposition to the present application, was that the Plaintiff's new lawyers had failed to comply with the mandatory provisions of the law. Mr. Mbugua, advocate for the 1st defendant, specifically charged that the plaintiff's advocate had not complied with Order 3 rule 9A of the Civil Procedure Rules. That rule provides as follows:-

"**When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record."**

The 1st defendant submitted that by virtue of that provision, the plaintiff ought to have served it also, with the application for leave to change advocates. Therefore, as that application had not been served upon it, the defendant believes that the plaintiff's present application is flawed. Consequently, it was submitted that the plaintiff's application does not lie, as it had come to court with unclean hands.

In my understanding of Order 3 rule 9A, the requirement for service is in relation to the advocate who the applicant seeks to replace. That is "**the advocate on record**."

The rationale for the insistence that the said advocate be served is that he should not be taken by surprise, by being replaced, after the court had already granted judgement. The rule was introduced to protect advocates who may have done all the donkey work, upto the stage of judgement, from being replaced by unscrupulous clients, who might wish to derive benefit from the judgement, without paying for the services which led to the said judgement.

In this case, the advocate on record was duly served, and an appropriate Affidavit of Service was filed in court. Therefore, I hold that the plaintiff did comply with the provisions of Order 3 rule 9A.

But perhaps before moving on from that issue, it would be prudent to mention here that had the rules intended that the other party should also be served with the application for leave to change advocates, the rule would have expressly stipulated so, by making reference to "**the other party or parties**." That is the standard procedure in the Civil Procedure Act, and the rules made thereunder. I am therefore satisfied that Order 3 rule 9A did not impose on obligation on the applicant to serve the 1st defendant with its application for leave to replace its advocate.

However, even if that had been a requirement, the position is that this court did hear the application and granting the appropriate leave to the plaintiff's new lawyers to come on record. Therefore, the new lawyers were on record, with appropriate leave of the court. If such leave was deemed to be flawed, it would nonetheless remain an order of this court until and unless it was vacated or varied by another order, either of this court of an appellate court.

The next questions are whether or not the warrants should be cancelled or set aside; and also if there should be a stay of execution.

The plaintiff contends that the only lawful way of getting to the stage of execution should have been by complying with Order 21 rule 18(1) of the Civil Procedure Rules. The said rule stipulates as follows:-

"**(1) where an application for execution is made –**

(a) more than one year after the date of the decree; or

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43,

the court executing the decree shall issue a notice to the person against who 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 that no such notice shall be necessary in consequence of more than one year having lapsed 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, or in consequence of the application being made against the legal representative of the judgement-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him;

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgement-debtor having changed his employment since a previous order for attachment."

In the face of that rule, the advocate for the 1st defendant does not dispute the age of the judgement. There can be no doubt that that was the correct position to take, as the Decree expressly states on its face that it was given under the hand and seal of the Court on 26th April 2004. Clearly, therefore, by the date of 17th October 2005, when the 1st defendant applied for execution, the judgement was more than a year old. Thus, pursuant to Order 21 rule 18(1) of the Civil Procedure Rules, the court should have issued a notice to show cause against the plaintiff.

However, the 1st defendant contends that it was not executing a decree; as contemplated by Order 21 rule 18(1). It's argument is that the execution process was only in relation to costs, and not a decree.

Of course, if looked at from a superficial level, one could say that the execution was only in relation to costs. But that begs the question as to how the 1st defendant got the award of costs.

Section 27(1) of the Civil Procedure Act stipulates as follows:-

"**Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.**

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

The statutory provision gives to the court or judge the discretion in relation to costs of, and incidental to a suit. It is in the exercise of that discretion that the Hon. Emukule J. decided, in this case, that the plaintiff's suit be dismissed with costs. Had he exercised that discretion in any different manner, the 1st defendant would not have become entitled to the costs of the suit. Therefore, the 1st defendant's entitlement to costs, stems from the Ruling dated 26th April 2004. It does not, and could not stand alone.

In effect when the 1st defendant was applying for execution, in relation to the taxed costs, it was executing the decree, from which the costs were awarded. Indeed, the 1st defendant cannot purport otherwise, because even in its application for execution, its advocates expressly stated as follows:-

"**We, MBUGUA & MBUGUA ADVOCATES for decree-holder, hereby apply for execution of the decree hereinbelow set forth."**

That being the case, and the decree being more than one year old, the 1st defendant was obliged to take out execution proceedings in accordance with Order 21 rule 18(1) of the Civil Procedure Rules.,

Instead, the 1st defendant applied directly for warrants of attachment. In response to that application, the court issued warrants for the attachment of the plaintiff's moveable property. Clearly, the warrants so issued were irregular; and the court should not have been persuaded to issue them. But, perhaps, the court was so persuaded by the fact that the 1st defendant did not indicate, on its application for execution, the age of the decree. It is very telling that the space provided for indicating the date of the decree was left blank.

In the light of the foregoing, I do hereby recall the warrants of attachment which had been issued to Keysian Auctioneers. As soon as the said warrants are delivered back by the court broker, they shall be cancelled forthwith. In the meantime, there shall be a stay of execution of the said warrants.

Before concluding this Ruling, I note that the warrants of attachment cited the sum to be recovered, as being Kshs. 217,560/=. Notwithstanding that sum, the proclamation of attachment issued by the court broker, shows that he had attached a total of six vehicles. By his own estimates, the said six vehicles were valued at Kshs. 1,110,000/=. To my mind, there cannot be any justification for the proclamation of so much property, in relation to the sum which was so much less in value. Court Brokers must be told, in no uncertain terms, that the process of execution is intended to enable the successful party recover that which he is entitled to, and no more. The process of execution is not ever intended to be punitive to the judgement-debtor.

Finally, the costs of this application are awarded to the plaintiff. But as regards the auctioneer's charges, if any, the same may be paid by the plaintiff. However, the plaintiff may thereafter deduct the same from such sum as may ultimately be payable to the 1st defendant, in respect to the taxed costs.

Dated and Delivered at Nairobi this 28th day of November 2005.

FRED A. OCHIENG

JUDGE