



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 132 of 2004

JUNGLE QUEST VENTURE PLAINTIFF

- Versus -

AFRICAN SAFARI CLUB LIMITED DEFENDANT

Coram: Before Hon. Justice Mwera

Mwakisha for Applicant – JD

Mutubya for Respondent

Court clerk – Kazungu

RULING

The Chamber Summons dated 8/8/2005 which was brought under order 21 rules 22, 25, order 3 rule 9A and sections 3A, 34 of the Civil Procedure Act by the time of its argument, had only one prayer to be determined:

(a) To set aside the warrants of attachment and sale herein and bar further execution of the decree.

On the grounds, affidavit(s) and annexures presented to this court Mr. Mwakisha argued that a decretal sum of Sh. 17,269,450/75 due to the plaintiff (costs were also paid) had been fully settled by payment in Euros between March and June 2005. That that was made by cheques, which were accepted by the plaintiff's director, who had directly discussed with the defendant's representative on the same. That the cheques began by one equivalent to Sh. 3m (in Euros) and the rest were post-dated. That they were paid on due dates. That it was the plaintiff's director who desired to have all the cheques handed to him at once so that they could be presented when they were due. That on 9/3/2005 even after, the defendant sounded the plaintiff that all cheques should not be written and handed over at once because of the risk of exchange rates fluctuation – between the euro and the Kenya shilling, yet the plaintiff nonetheless wanted all the cheques at once. That when the defendant duly complied and euro cheques written for various dates but equaling the whole decretal sum (above) were paid, it discharged of its liability to the plaintiff in full and the exchange rate fluctuations were all on it – whether it gained or lost. So the defendant was surprised that after the last cheque was paid in June 2005, the plaintiff has come back to execute for Sh. 2.9 allegedly constituting a short fall in the payment due to exchange rate fluctuation plus interest. That by accepting to be paid as it did the plaintiff was estopped and cannot now come and seek what it is seeking.

Mr. Mutubia had a different view. To his client the decretal sum was in Kenya shillings. On

28/2/2005 when the plaintiff's director and the defendant's representative discussed the mode of payment (see annexure A, supporting affidavit) 5 cheques would be delivered on 4/3/2005 each denoted in Kenya shillings. That if the defendant unilaterally paid in euros and there was a shortfall when the last cheque was paid, the defendant ought to pay up the short fall.

The court considered the above stands with considerable anxiety. It is not in doubt that the sum claimed was as stated above – Ksh. 17,269, 450/=. It is also not in doubt that when the 2 parties discussed the mode of payment on or about 28/2/2005, they agreed that five cheques would be written beginning with Sh. 3m on that date. Others were to follow, again indicated in Kenya shillings for March, April, May and two in June 2005.

When the March 2005 cheque was written in euros and delivered the plaintiff declined to take it and insisted on having the rest of the instalment cheques up to June 2005. The court was told that the plaintiff feared for its dues in case the winding-up proceedings that the defendant faced at that time crashed it out of operations. So on 9/3/2005 the defendant wrote a fax to the plaintiff.

“Please note that we delivered our cheque of March payment today to your office but your accountant refused to receive the cheque.

Although we agreed that all cheques should be delivered at once, with the dates marked as agreed, we can only deliver your cheques in (sic) due dates because of the cheques being in foreign currency, and we, as well as yourself should not run the risk of being victims of unpredictable currency fluctuations.

We however showed our commitment to pay you as per agreement and furthermore do.

Please let us know where to send the cheque. In the meantime the cheque lays (sic) in our office ready for collection.”

Signed”

And on 15/3/2005 again by fax the defendant sent the 5 cheques in euros to the plaintiff with a copy to M/S Ghalia & Advocate. That message added:

“Being full and final settlement.”

On 21/3/2005 the plaintiff's lawyers addressed Mr. S. Ghalia Advocate referring to a conversation that morning:

“We should be glad if you could forward your clients cheques to us for our onward transmission to our clients as and when they fall due.”

The reply followed on 8/4/2005 saying inter alia.

“Enclosed herewith find our client's cheques dated 30th April, 2005, 31st May 2005, 10th June 2005 and 30th June 2005 in full and final settlement of the judgment obtained by the plaintiff herein.” (underlining added)

The cheques were received by M/S Swaleh & Co. Advocates on behalf of the plaintiff.

So from the above, what does this court make of the whole thing? Just one – the plaintiff accepted the euro cheques in full and final settlement of the judgment obtained and the defendant fully discharged its liability to it. It was warned of exchange rate changes but it insisted that all cheques must be handed over. Even as at 8/4/2005 the plaintiff was told that with all the cheques handed over they constituted “full and final settlement”. It did not put any rider or return them because the cheques were in euros and not Kenya shillings. The plaintiff cannot now be heard to say that it suffered a short fall when exchange rates changed to its disadvantage.

Indeed it would not be in court in case the rates changed in its favour.

In sum the orders sought in this application are granted with costs.

Ruling delivered on 2/11/2005.

J.W. MWERA

JUDGE