



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE NO. 187 OF 1998

DAIMA BANK LTD..... PLAINTIFF

VERSUS

JULIUS MBILO KISULI1ST DEFENDANT

JUDGMENT DEBTOR

BERNICE KATUNGE KISULI2nd DEFENDANT

JUDGMENT DEBTOR

KENSUL LIMITED3RD DEFENDANT

JUDGMENT DEBTOR

RULING

The Defendants/Judgment Debtors have brought this application under Sections 3A and 42 of the Civil Procedure Act Order XXI Rules 22 33 34 and 35 of the Civil Procedure Rules for the following main orders:

2) That the Court stays the orders of the Deputy Registrar issued on 2.4.2004 and lift the warrants of arrest issued against the 2nd and 3rd Defendants.

3) That the Court sets aside the orders of the Deputy Registrar dated 2.4.2004. T

he application is supported by an affidavit sworn on 5th April, 2004 by the 2nd Defendant and is based on the following grounds:-

(a) That the decree herein was issued ex-parte in default of attendance by the Defendant's former advocates and the amount claimed is not legitimately due.

(b) That the Deputy Registrar hurriedly issued the Warrant of Arrest without applying her mind to whether the provisions of Order XXI Rules 32 – 35 had been complied with.

(c) That the Deputy Registrar erroneously proceeded with the matter irrespective of the consent order of 27th August, 2001.

(d) That the Decree Holder was placed under receivership, by the Central Protection Fund yet the receivers have not been joined as Plaintiffs.

(e) That when the former advocates of the Decree Holder ceased acting the present firm of Advocates have not shown any mandate to conduct this suit.

(f) That the instalments paid by the Judgment Debtor have not been remitted to the Deposit Protection fund.

(g) No application has been made to review the consent orders of 27th August 2001 and the same is binding on the parties herein.

h) That the leave of the Court has not been sought to amend the pleadings to show the Plaintiff is under receivership as required by the Companies Act.

The application is opposed and although there is a replying affidavit sworn by one Simeon C.A. Nganga the statutory manager of the Plaintiff Decree Holder, Counsel for the Plaintiff/Decree Holder chose not to rely on the same. The same was accordingly expunged from the record. There are however Grounds of Opposition filed by the Plaintiff/Decree Holder.

The application was canvassed before me on 26th May 2004 by Mr. King'ara Counsel for the Defendants/Judgment Debtors and Mr. Mungata Counsel for the Plaintiff/Decree Holder. It was submitted for the Defendants/Judgment Debtors that pursuant to an earlier application to set aside the ex-parte Judgment the same was granted conditional on the deposit of Kshs 6,000,000/=.

The condition was not met and pursuant to an earlier application to show cause why the 2nd and 3rd Defendants should not be committed to civil jail in default of payment of the decretal of amount a consent order was entered into on 27th August, 2001 for the payment of the decretal amount in instalments. In counsel's view the Defendants diligently paid the decretal amount in accordance with the consent order upto September, 2003 when payments stopped because the Judgment Debtor did not know where to pay and their file was not released by their former advocates. Counsel submitted that the judgment debtors did not deliberately refuse to comply with the consent order regarding payment of the decretal amount and are ready to proceed from where they stopped.

Counsel further argued that the Deputy Registrar's Order should be set aside as there was no application to set aside the consent order before she made an order for committal of the Judgment Debtors. Further complaints were made regarding the status of the Plaintiff/Decree Holder and its counsel and further that sums paid to the former Advocates for the Plaintiff/Decree Holder were not credited to the Judgment Debtors account with the Plaintiff/Decree Holder. Counsel for the Decree Holder opposed the application on the basis of the Grounds of Opposition filed on 19th April 2004. He submitted that the Judgment Debtor's application amounts to an abuse of the process of the Court. In his view the Decree Holder is in Statutory Management and is entitled to maintain these proceedings. M/S Muciimi Mbaka & Co. Advocates are also lawfully on record pursuant to an order of this Court made on 19th June 2003. Objections raised in respect of the status of the Decree Holder and its Advocates is therefore not well taken. In Counsel's view there was no difficulty in identifying where to pay as alleged by the Judgment Debtors. The order for the current advocates for the Decree holder to come on record was by consent. Payments could have been made to them. If they were not happy with the Advocates they could still have deposited in Court. The allegation that the sums previously paid to the Decree Holder's Advocates were not credited to their Judgment Debtors' Account with the Decree Holder is not believable. The Judgment Debtor's Advocates have not exhibited any evidence of such payment. In Counsel's view the Judgment Debtor's in this application is merely intended to frustrate recovery of the decretal amount. The application should therefore be dismissed, as it is clear that the judgment debtors are in default.

Having considered the application and the above submissions, I have found as follows:-

The Defendants/Judgment Debtors are clearly in default of payment of the decretal amount. Their

reasons for the default are not believable.

On 18th June 2003 the Decree Holder's present Advocates were by consent allowed to act in place of the former Advocates and since then the Judgment Debtors' Advocates have been dealing with them. Yet no single payment was made to them. Even if the Decree Holders former Advocates were not replaced the Judgment Debtor could have paid to the Decree Holder directly. If they were not sure of the management of the Plaintiff/Decree Holders, the Judgment Debtors could have paid into Court. I reject the reason that they did not know where to pay. The Judgment Debtors admit that there is a Judgment against them. They further admit that they are in default. Under the circumstances the Deputy Registrar's Order for the arrest of the Judgment Debtors cannot be faulted. However, counsel for the Decree Holder was prepared to accommodate the Judgment Debtors if the instalments are updated. I have a discretion under Order XX Rule 11(2) to direct payment by the instalments. The Judgment Debtors admit that payments stopped last year. Under the circumstances I make the following orders:

(a) The Judgment Debtors shall pay to the Decree Holder through its Advocates all the unpaid instalments on or before the 5th day of July, 2004

(b) The balance of the decretal amount shall be paid by monthly instalments of Kshs 15,000/= commencing from the 5th day of August, 2004 and thereafter on the 5th of every succeeding month.

(c) On payment of all the unpaid instalments as provided at (a) above, the Deputy Registrar's Order for the arrest of the Judgment Debtors be lifted.

(d) In default of (a) and (b) above the judgment debtors application dated 8th April 2004 shall stand dismissed and the Deputy Registrar's Order of 2nd April 2004 shall take effect.

(e) The decree holder shall have the costs of this application.

The above then are my orders on the Judgment Debtors' application dated 8th April, 2004.

DATED AND DELIVERED AT NAIROBI THIS 1st DAY OF JULY 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of: