



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 2635 OF 1997

SIGINON (GSA) LIMITEDPLAINTIFF

VERSUS

KETONA CARGO LIMITEDDEFENDANT

RULING

The Chamber Summons before me is dated 22nd December 2003 and is brought under ORDER XX Rule 11 and ORDER XXI Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In it the Applicant seeks an order granting leave to liquidate the decretal sum herein, now standing at over Kshs.4,734,055 going by the application for Execution i.e. Notice to Show Cause dated 23rd September 2003. The Judgment debtor proposes installments of Shs.20,000/= per month. The main grounds on which the application is based are that:

- 1) The defendant is not in a position to pay the Decretal sum at once***
- 2) The plaintiff is in the process of executing the Decree***
- 3) The defendant intends to pay***
- 4) No prejudice will be occasioned the plaintiff.***

Among other grounds, the Respondent Decree holder objects to the application on the following main grounds:

- 1) No effort has been made to liquidate the decretal sum since judgment and decree were entered in 1998***
- 2) Similar applications have been filed but have been dismissed***
- 3) A stay has been denied previously: matter is res judicata***
- 4) Applicant hasn't shown any sufficient reason warranting the order sought***
- 5) The debt is colossal and proposed installments minimal***
- 6) Bad faith***
- 7) Applicant has unclean hands***

At the hearing of this application before me on 26th January 2004, Counsel for the Respondent brought to the courts attention that this application was brought to pre-empt the, hearing of the Respondent's Chamber Summons application for the examination of the judgment debtor's directors as to means, assets and liabilities among other things.

I have perused the court record and have indeed confirmed that in addition to a Chamber Summons application dated 12th September 2001 for an order compelling the examinations of the Judgment Debtor's directors, there is an order by the Senior Principal Deputy Registrar of this court made on 16th December 2003 to the effect that such examination of Directors would take place on 26th January 2004. I have further noted that on the same day that the S.P.D.R. made the said order the applicants came to court with their present application and obtained a temporary stay pending the inter partes hearing of the same during vacation. The parties again attended court on 8th January 2004 and when the application was adjourned by consent following the request by the applicant for leave to file a further affidavit in answer to the Respondent's Replying Affidavit filed on 7th January 2004. The hearing of Chamber Summons inter partes was by consent fixed for hearing on 20th January 2004. It could not be argued on that date owing to the indisposition of the Counsel for the Respondents. Hence the consent hearing date of 26th January 2004.

To date, the Applicants have not filed any further affidavit and there has been no mention of the same either way. Considering the grounds for this application as presented, I find that the same if anything provide a basis for the refusal of the orders sought. That the Applicant is heavily indebted and already paying another huge debt by installment clearly demonstrates the risk the Respondents will take in not proceeding to recover their debt in the most prudent way possible and with necessary speed.

The decretal sum is colossal and the installments offered most unreasonable and unrealistic. The defendant is not in business, which makes one wonder how it will raise even the proposed installments, even if as stated in ground No. 3 of the application it does intend to pay the debt. The Applicant in paragraph 6 of the Supporting Affidavit states that it is willing through its directors to pay the decretal sum. No wonder then that the Respondent/Decree Holder would wish that the said directors be examined orally towards that end. It is a clear show of bad faith that the Applicant would chose pre-empt such examination which would turn out to be beneficial to both parties in determining the way forward. The Respondents are at risk of losing a large amount of money if adequate recovery measures are not put in place. To allow this application would be extremely prejudicial to them in the circumstances. The Applicant has stated in paragraph 12 of the Supporting Affidavit that it is ready to comply with any order made by this court herein. Were it that the applicant is acting in good faith and if indeed the directors are willing to assist in the liquidation of the decretal sum they would have no hesitation in submitting to the oral examination intended herein. I find that the scale of justice weighs against them and hereby dismiss their application with costs to the Respondents. I order that a date be taken at the registry for the examination of the directors as previously scheduled.

Orders accordingly.

M.G. Mugo

Ag. Judge

27.2.2004