



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 325 OF 2003

INSTEEL LIMITEDPLAINTIFF

VERSUS

WARREN ENTERPRISES..... DEFENDANT

RULING

The Defendant's application dated 15th December 2003 was heard ex-parte in the 1st instance when Ringera J. granted a temporary stay of execution pending inter-partes hearing of the application on 18th December 2003.

After several attempts at settlement without success the application finally came up for hearing inter parties on 12th February, 2004. Before the commencement of the said application Counsel informed me that the application had been settled and the only issue left for determination was one of the costs of the suit and the Court Brokers' charges. Submissions were therefore limited to this one issue.

Counsel for the Applicant/Defendant was heard first. She submitted that after the suit was filed and Summons to Enter Appearance had been served representatives of the parties held several meetings with a view to settlement. The Defendants after the meetings agreed to pay to the Plaintiff the principal sum of Kshs 2,078,978.68 as full and final settlement. The said sum was paid over a period of 10 weeks and the Plaintiff agreed to withdraw the suit against the defendants.

Counsel further submitted that after the Plaintiff accepted the cheques for the principal sum it started claiming that there was no agreement on costs and interest. When in fact the suit had been compromised. Later the Plaintiff agreed that interest would not be paid but started demanding costs. In Counsel's view costs of the suit are not payable as the suit had been compromised.

As regards Court Brokers costs Counsel for the Defendant submitted that the Defendant is not liable. The Defendant filed the present application soon after proclamation. In the proclamation the Plaintiff claimed Kshs 3,140,049.16 plus Court Brokers Fees of Kshs 5,600/=. This claim was made even after the Defendant had paid the entire principal sum of Kshs 2,078,958.68. The warrant in execution is dated 13.12.2003 two months after the last cheque had been paid. The proclamation was therefore wrongful and so was the subsequent attachment. Counsel for the Defendant argued further that Counsel for the Plaintiff did not give the Defendant notice that they would proceed with execution. In her view therefore under no circumstances are the Defendant's liable to pay Court Brokers charges.

In reply Counsel for the Plaintiff submitted that the principal amount was paid after the suit had been filed. Costs had been incurred in the institution of the suit. The compromise between the parties did not include compromise on the costs. The Plaintiff all along insisted on costs which were even quantified.

The suit was withheld on condition of payment of costs. Counsel submitted that the Plaintiff never agreed to withdraw the suit. The suit was withheld and not withdrawn. It could only be withdrawn on payment of costs. It was only after the Defendants refused to pay costs that application for judgment was made. The mandatory 10 days notice was given before execution. Counsel submitted that costs follow the event. The Defendant was served with summons to Enter Appearance. It has admitted this. Payment of the principal amount was made after the institution of the suit and after the Defendant had been served. Counsel for the Plaintiff maintained that costs must be paid by the Defendant.

As regards the Auctioneers charges, Counsel for the Plaintiff submitted that the same are payable by the Defendant. The Plaintiff was entitled to execute when the Defendant refused to pay the costs. The inclusion of the principal amount in the warrant was an oversight and the auctioneer was advised accordingly. Counsel further admitted that the proclamation included the amount that had been paid plus interest and costs. Counsel submitted that interest was waived after the application had been made. The amount payable to the auctioneer will be based on the amount due and the Defendant is liable to pay.

I have considered the application, the affidavits and the submissions by Learned Counsel. I have found that the agreement or compromise between the parties herein related to the principal sum claimed of Kshs 2,078,958.68 and waiver of interest. This at least is what the Plaintiff accepted as evidenced by the Plaintiff's letter dated 9th October, 2003 addressed to the Defendant and exhibited as "DMN 1" in David Mutali Nyaranga's further affidavit sworn on 15th January, 2004. The compromise was reached when this suit had been filed and summons to Enter Appearance had been served.

In my view there is no evidence of compromise in respect of any other item. Costs ordinarily follow the event. There are no circumstances in this case that would make me depart from this principle. I accordingly hold that costs of this suit are payable to the Plaintiff by the Defendant.

How about the Auctioneers fees? It is clear that when the application for execution was made and filed on 11th December, 2003, the Defendant had already paid the principal amount in full. This payment was not reflected in the Plaintiff's said application. The amount given in the warrant of sale of property in execution of decree was Kshs 3,140,049.16. No credit was given for the said principal amount and interest which had been waived by the parties was also claimed. This was wrong. However, does this make the application for execution and subsequent proclamation invalid. I hold that the Plaintiff was entitled to execute but not for the principal amount and interest but for costs. This being the case I hold that the auctioneer's costs limited only to the execution for the Plaintiff's costs are payable by the Defendant. In the event that there are any other or further auctioneer's costs incurred by reason of the application for execution for the Principal amount and interest the increased costs if any are payable by the Plaintiff. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH 2004

F. AZANGALALA

AG.JUDGE

26.3.2004

Read in the presence of: