

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 19 OF 2000

AHMED A.A. SAID PLAINTIFF

- VERSUS -

NAIROBI CONVEYORS LTD. DEFENDANT

R U L I N G

The plaintiff filed suit against the Defendant on 14.1.2000 for a claim of Kshs.2,603,000/= being amounts due on a contract for transport service. The Defendant on being served failed to enter appearance or file defence within the required time and consequently judgement in default was entered for the plaintiff and execution proceedings commenced. This resulted in the attachment of the Defendant's property but objection was lodged on 22nd June, 2000 by the objector. The plaintiff (attaching Creditor) did proceed to issue Notice under order 21 rule 54 of his intention to proceed with the attachment and consequently a Notice under Rules 54 and 56 issued by the Deputy Registrar requiring the objector to take out proceedings to establish its claim within ten (10) days from the date of service of the said Notice. The objector did take out the said proceedings through Chamber Summons dated the 3.8.00 and filed on 8.8.00. The same was then set down for hearing on 19.10.00 when it was stood over by consent of the parties to the 23.10.00 when the orders were granted as prayed after the plaintiffs (attaching creditor) failed to show up at the hearing. Soon thereafter the plaintiff filed an application seeking orders to set aside the orders granted on 23.10.00. The said orders were consequently set aside. At this point, the objector seemed to have realized that it's earlier application seeking to establish its claim on the attached property had been filed out of time and proceeded to file an application by Notice of Motion dated 26.2.2001 seeking an extension of time. It is the two applications that the plaintiff now seeks to have struck out through the application before the court for consideration by an amended Chamber Summons dated 11.11.02 brought under Section 3A and 63 of the Civil Procedure Act and order 21 rules 57, 58 and 59 and order 50 rule 17. The orders sought are as follows:

“1. That both the applications made by way of Chamber Summons dated 3.8.00 and Notice of Motion dated 26.2.01 be struck out as incompetent, mischievous, vexatious and an abuse of the process of the Court.

2. That the Honourable Court be pleased to issue an order raising and/or vacating the objection proceedings herein and discharge vacate and or set aside the ex -parte order issued herein on the 29 th June, 2000.

3. That the objector her ein be ordered to pay the Auctioneer's storage charges, fees and the plaintiff's costs in any event.

4. That in view of the urgency of this application, this honourable court do in the first instances dispense with the service of this application on the objec tor and give a priority for it's disposal.”

When the application first came up ex-parte on 15/11/02 the court declined to certify the application as urgent and also that the service of the application in the first instance upon the objector should be dispensed with as prayed in prayer No.4.

On the 4.12.02 the arrest application came up for hearing and Mr. Kiambya represented the plaintiff/applicant while the objector was represented by Mr. Odhiambo who held brief for the Firm of Waruhiu Kowade & Nyaga Advocates. He sought to have the case adjourned on the basis that the parties were still negotiating on a possible settlement but Mr. Kiambya objected to any adjournment because

negotiations had broken down. The application for an adjournment was consequently declined and matter set to proceed on 11.00 a.m. However Mr. Odhiambo failed to turn up for the hearing at the set time. Mr. Kiambya submitted that the two applications, that is chamber summons dated 3.8.01 and Notice of Motion dated 26.2.01 by the objector be struck out on the ground that the objector had failed to prosecute them and consequently an order issued on the 28.6.00 to the effect that the attached motor vehicle was to remain under attachment until further orders of the court were detrimental to the plaintiff's case as huge storage charges were accruing. The said charges as at the hearing of the application were said to be close to Kshs.300,000/=.

The application is supported by an Affidavit sworn by Naban Swaleh in which he states that on each occasion the two applications were set down for hearing it was through, the plaintiff's instigations. I have perused the record and confirmed that the hearing dates were indeed fixed by the plaintiff or given by the Court thereafter and the objector only took initiative to fix them for hearing on two (2) occasions. A bundle of letters of invitation and hearing notices by the plaintiff's Advocates were annexed to the Affidavit of Swaleh Naban.

I have gone through the record and find that no Replying Affidavit nor grounds of opposition were filed by the objector to this application. There is no doubt from the record that since the filing of the two applications the plaintiff has taken the initiative to fix them for hearing and that an attempt at possible out of court settlement had yielded no fruits. The objector seems to have relaxed after benefiting from the stay available to them under r 21 rule 54. And although the rule does not set out a time, I doubt that it was meant to allow the objector a field day to sit on the stay orders indefinitely. In this case, the orders have been in force for over 2 years. The situation is taken care of by order 21 rule 58 which provides as follows:-

"1 Should the objector fail to file proceedings to establish his claim within the time specified in the notice issued under rule 56, his objections shall be deemed to be waived and the attachment and consequently execution shall proceed."

As shown earlier on, the objection proceedings were filed on the 8.8.00 well outside the time provided in the Notice given on the 7.7.00. An attempt to cure the same by seeking an extension of time did not materialize as the application by motion was never prosecuted. Technically therefore there are no valid objection proceedings in place and it is therefore unjust to allow the exparte order of 28.6.00 and issued on the 29.6.00 to remain in force. Consequently the application is hereby allowed with costs.

Dated and Delivered at Mombasa this 14th day of March, 2003.

P.M. TUTUI

COMMISSION OF ASSIZE