

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 304 OF 2001

SHARIFF MOHAMED A. OMAR PLAINTIFF

VERSUS

YUSUF SHAA MOHAMED A. OMAR DEFENDANT

RULING

By Notice of Motion dated 6.6.2002 the defendant/judgement debtor applies for orders that the warrants of attachment of his property be lifted and that the court do vary the consent order made between the parties by permitting the applicant to liquidate the decretal amount now outstanding by instalments of Shs.100,000/= each monthly until full payment of decretal sum. The application is grounded on the fact that the applicant is unable to comply with the consent order due to sickness and present economic slump and that the motor vehicle KV8958C and trailer KV9983C were involved in an accident and time for repairs delayed business and instalments. The driver of the vehicle was also hospitalized. Also Tip Top Auctioneers do not have jurisdiction in Nairobi and therefore attachment by the said auctioneers is unlawful. The supporting affidavit of the applicant shows that in execution of consent decree his motor vehicle has been attached by Tip Top Auctioneers who are not licenced to execute warrants in Nairobi and therefore the attachment is illegal. Also sum of Shs.60,000/= paid to the respondent before consent was recorded is not accounted for. I note that at the beginning of hearing this application both counsel consented as to the amount paid by applicant thus on 24.12.2001 - Shs.150,000/=, on 22.2.2002 - Shs 200,000/= and as per para. 7 of replying affidavit shs.50,000/= bringing the total paid to Shs.350,000/= which is not disputed. The balance of decretal amount is now Shs.485,000/= principal plus interest and costs.

The applicant submits that failure to comply with consent judgment was due to long illness and hospitalization which means the business came to a standstill as he was a sole proprietor and also that his 3 vehicles broke down. He is also a bread winner in his family so whatever income is available goes to maintain his family as a first priority. Applicant hopes to generate income in future to enable him to pay Shs.100,000/= instalments towards liquidation of this decree. It is noticed that the applicant fails to mention that his vehicles are registered in a foreign country and that he himself is a Kenyan of Zairean now DRC origin and that he used to transport goods from Uganda to Thika in Kenya.

In reply to the application the decree holder through his advocate states that on the issue of licensing auctioneers his jurisdiction was extended to enable him to carry out this execution. Court order issued on 13.5.2002 is exhibited. Further the plaintiff states that since the vehicle is registered in Zaire now DRC it could easily be taken out of the jurisdiction of court or sold thereby depriving the plaintiff of attachable assets. Also that out of the decretal amount of shs.1,083,890/= only Shs.350,000/= is paid and nothing is offered upfront on filing this application.

Upon considering submissions of both counsel and upon perusing the undisputed consent judgement it is clear that the applicant agreed to pay full decretal amount before expiration of 4 months of the date specified in the consent. This shows that the last payment would have been paid by first day of November 2001. As it is the first payment was paid on 12.9.2001 of Shs.50,000/=. This is the only payment made in time. Second instalment was paid on 24.12.2001 after the period agreed upon had expired. The only other payment was made in February 2002 much after the said period. From 22.2.2002 no further payment has been made. Also the certificate of sickness exhibit 5 shows that the applicant was seen by doctor on

16.3.2002 when treatment was received and he recovered by 9.4.2002. On 29.9.2001 it shows applicant was admitted to unidentified hospital for diabetic treatment and was discharged on 22.11.2001. It is to be observed here that diabetic condition is known to everyone to be a chronic illness for life. The applicant was suffering even when he was making consent offer to pay. It was not a new matter and he must know how to live with such a disease and to manage his affairs. It is not extraordinary that he was unwell to be able to comply with the agreement. Exhibit 6 marked YSMO6 clearly shows that his vehicles travel to Uganda out of the jurisdiction of this court.

I find in the in the circumstances to lift the attachment would be prejudicial to the plaintiff. On the issue of varying the consent order a court can only interfere if there is shown that the consent was entered in to by fraud or collusion or contrary to public policy. The possibility of illness or accident happening is a natural calamity which can befall anyone at any time. It is a risk that everyone has to take by nature of things.

I find therefore in this case there is no ground to entitle the court to interfere with the consent entered into by the parties. The other aspect is that the applicant has shown no evidence of his present financial position. He simply says he hopes that when he repairs his vehicles he will be able to raise instalments of Shs.100,000/= per month. How does he know that he will be able to pay that amount and not more or less? I can only say that he is reluctant to show his financial position to court. If he does not keep accounts he surely must have bank statements or other documents to indicate his income. Also there is delay since the expiration of agreed period to the time of filing this application. I am persuaded to believe the counsel for the respondent that this application was filed only because the attachment was made.

For the above reasons I find the application has no merit and the same is dismissed with costs.

Dated this 28th Day of June 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

In presence of Mr. Muinde holding brief for plaintiff and Mr. Mogaka for defendant.