



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.9 OF 2001

ANTHONY EDWARD FARNSWORTO1ST PLAINTIFF

PAMELA ROSEMARY FARNSWORTO 2ND PLAINTIFF

VERSUS

KANTILAL DAMJI KUKAKIA t/a

RAIYA CONTRUCTIONS RESPONDENT

RULING

In a plaint dated 20th July 2001 the Plaintiffs sued the Defendant t/a Raiya Constructions and prayed for Judgment against the Defendant for:

“(a) Special damages KSh.2,476,886/98

(b) General Damages.

(c) Interest at the rate of 10% per annum on paragraph (a) above from May, 2001 until total payment on amount owed.

(d) Costs and interest.”

The Defendant filed written statement of Defence and counter-claim in which it stated at paragraph 8 (a) as follows:

“The Defendant further av ers that Trust Bank Limited having neglected, failed and/or refused to surrender back to the Defendant his title documents to the abovesaid property and Trust Bank Limited having been now reported to have gone belly up, the agreement dated the 23 rd day of March 2000 has been frustrated in its performance for reasons beyond the control of the Defendant, the consideration for the said agreement has now totally failed and the Defendant now therefore claims back all moneys thus far paid by himself to the Plaint iffs under the said agreement by

way of counter -claim.”

Defendant’s counter was filed on 4th September 2001. Thereafter there were a number of applications but on 24th May 2002 both parties wrote a letter of consent to the court. That letter stated as follows on the

main:

“Consensus having been reached by the parties herein, we should be grateful if the following order would now be recorded in this suit:

“This suit is hereby marked as “settled”, upon the following terms and conditions:

1. That judgment be and is now hereby entered for the Plaintiffs against the Defendant in the sum of KSh.2,476,886/98 with interest thereon at the rate of 10% per centum per annum (hereinafter called the decretal amount);

2. That the Defendant shall pay to the Plaintiffs the decretal amount as follows:

(a) KSh.100,000/ - on or before the 31 st day of May 2002.

(b) KSh.80,000/ - in equal monthly installments with effect from the 30 th day of June 2002 and thereafter on or before the 30 th day of each succeeding month until payment

3. The Plaintiffs and the Defendant shall jointly through their respective advocates herein make expeditious arrangements to secure release of the Title Deeds to Industrial Plot No.2612/2 Malindi Municipality from Trust Bank Limited to the custody of this Honour able court by way of security for the due payment by the Defendant to the Plaintiffs of the decretal amount in the manner above stated.

4. THAT in default of payment in full of any instalment for a period of sixty (60) days when it shall have become due and payable, the Plaintiffs shall then be at liberty to obtain and execute decree in this suit.

5. THAT the Defendant shall pay to the Plaintiffs one half of their costs including disbursements in this suit which costs are to be agreed by and between their respective advocates and in default of agreement by taxation.”

On 20th June 2002, the court recorded a settlement in terms of the same letter dated 24th May 2002 and filed on 28th May 2002. It is not clear from the records but it would appear that the question of costs had been settled sometimes prior to 3rd October 2002 for I note that on that day a decree was issued and costs appear to have been cited in the same decree.

The Defendant has now applied by way of Chamber Summons dated 7th October 2002 and filed on the say day. He is seeking mainly two orders which are first that there be a stay of execution pending the resolution of the problem arising out of the letter from Trust Bank Limited dated 26th August 2002 and secondly that the court be pleased to lift the proclamation of the Defendant’s properties effected on the 3rd October 2002. There is also a prayer for costs to be provided for. The grounds for the same application are that vide a letter dated 26th August 2002, Trust Bank Limited has challenged the legality of the agreement of assignment that gave rise to the Defendant/applicants indebtedness to the Plaintiffs and discharge of his indebtedness to the Bank and the same Bank has subsequently demanded full payment of the monies owed to itself by the Defendant, but that despite the fact that the Plaintiffs know this, they have proceeded to execute even when the problem raised by the same letter from Trust Bank has not been resolved as yet. There is an affidavit in support of the application sworn by the Defendant and annexed to that Affidavit are several exhibits.

The application is opposed by the Respondent who states inter alia, that the Defendant is bound by the judgment of the court and also by the privity of the contract which was signed on 16th December 2000.

I have perused all the pleadings in this file including the application, the grounds of the same application, the affidavit, the Replying Affidavit as well as all the annexures to the two affidavits. I have also considered the able submissions by the learned counsels.

In my humble opinion, such as I do appreciate the predicament in which the Defendant now finds himself with the court saying he should pay the Plaintiffs their money as a result of the consent order entered herein on 20th June 2002, and the Bank also saying that they would not recognise and act on the agreement of assignment that gave rise to the applicants' indebtedness to the Plaintiffs and are demanding the same money from the Applicant; three matters however militate against the issue of the orders sought. These are first that the stay sought is pending the resolution of the problem arising out of the letter from Trust Bank. None knows when such a resolution would be reached and none knows whether it would indeed be reached at all. To ask the court to grant such an order is tantamount to asking the court to grant an order that is indefinite at interlocutory stage as in any event the resolution of the same matters raised by the letter from Trust Bank will not involve the court as Trust Bank is not a party to these proceedings. Such an order would not only be unfair; it would also be a denial of the proceeds of sweet judgment to the Respondent when the judgment still remains on record.

Secondly, paragraph 3 of the consent letter dated 24th May 2002w and filed on 28th May 2002, is not in itself a condition upon which the consent settlement was based. It only represented what the parties agreed to do but paragraphs 1, 2, and 4 do not seem to be subject to it (paragraph 3). This may have been unfortunate particularly as both parties were aware that the same settlement was probably entered on the understanding that the title Deeds involved would be released from the Bank once the agreement of assignment was perfected and implemented. However, the parties did agree not to base their settlement on the release of the same title deeds and the court cannot go into that as it was not an illegal agreement in any way.

Thirdly, the orders sought cannot be issued while the judgment is still on the records. I do agree with the learned counsel for the Plaintiffs that if the Defendant/Applicant feels there was a mistake when the judgment was entered then he must first move to set aside the same judgment. In so far as the same judgment is still on record, it would not be fair to stay execution on grounds that some other matters are still to be resolved. I would have expected this application to be seeking stay of execution pending the hearing of an application to set aside the consent judgment if the applicant genuinely believed that such a consent settlement was entered into through some mistaken facts. This however is not the case here and as I have stated, however much I may appreciate the predicament into which the applicant is now in, I cannot stay execution because the consent order is on record and is binding to both parties. Pursuant to the same judgment (or part of it) the Defendant was aware that if he failed to pay any instalment for a period of 60 days, the Plaintiffs would obtain and execute decree in the suit. He does not deny failing to comply with that part of judgment and hence the execution was proper. The Defendant has not demonstrated any other reasons for seeking stay of the execution and none exists.

The application must fail. It is dismissed with costs to the Plaintiffs/Respondents. Orders accordingly.

Dated at Mombasa this 26th November 2002.

J.W. ONYANGO OTIENO

JUDGE