



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1964 OF 1997

KOBIL PETROLEUM LTD. ----- PLAINTIFF

VERSUS

INTEREACT LIMITED ----- DEFENDANT

R U L I N G

This application is brought under Order IXB Rules 1, 3 and 8; Order XX Rule 11; Order XXI Rules 22, 25 and 91; and Order XXIV Rules 6 and 7 of the Civil Procedure Rules. In it, the Defendant seeks inter alia the following orders:-

(a) To set aside the orders made by this Court on 21st November, 2000 which allowed the Plaintiff to attach the Defendant's movable property in satisfaction of the decree and to set aside the amount set out in the Notice to Show Cause *ex debito justitiae*.

(b) That the issue of the rate of interest applicable, the date of its application and the amount payable by the Defendant to the plaintiff has been compromised by the Plaintiff and agreed on by the Defendant as per the Plaintiff's advocate's letter dated 19th November, 1999 and the Defendant's Advocate's letter dated 13th November, 2000.

In this regard, the Defendant asks that the Court should, therefore, order that the defendant pays simple interest at the rate of 12% on the Principal sum beginning 1st October, 1994 until the date of filing this application.

(c) That the Defendant be allowed to liquidate the whole interest due by six equal monthly instalments beginning from 31st December, 2000 until payment in full and that further interest from the date of filing this application be waived in the interests of justice.

The matters leading to this application are fairly simple. The Plaintiff sued the Defendant for the price of goods sold and delivered to the Defendant at the Defendant's request. By summary procedure, judgment was entered for the Plaintiff as prayed in the plaint. The defendant filed an application under Orders XLIV R1(1) and L rule 1 of the civil Procedure Rules seeking to review and set aside the Order for summary judgment. After much jostling, that application was subsequently withdrawn. Thereafter, the Plaintiff, then fully entitled to enforce the decree under the judgment, issued a Notice to Show Cause why execution should not issue under XXI Rule 18 of the Civil Procedure Rules. The notice was scheduled for hearing on 22nd September, 2000. On that day Mr. Njai, the Principal Deputy Registrar of this Court adjourned the hearing to 13th October, 2000, and ordered that the judgment debtor be served directly. On 13th October, 2000 Mr. Wanyama appeared for the Judgment Debtor when the notice was deferred to 13th November, 2000. On this last date, the notice was not listed for hearing. However, Mr. Njai ordered the hearing of the notice to proceed on 21st November, 2000. He also ordered that the judgment-debtor's Advocate be served with a hearing notice. On 13th November, the Plaintiff's Advocates wrote to the Defendant's Advocates as follows:

“We refer to the above matter which was scheduled for hearing of the Notice to Show Cause why execution should not issue against your client today, but was not listed in the cause list for the day. [H]owever, we managed to trace the Court file which was placed before Hon. Mr. Njai for mention wherein the same was fixed for hearing of our above said application on Tuesday 21 st November 2000. [T]ake notice that you are required to attend the Court on the said date for the hearing of the said application, failure to which we will proceed with the same notwithstanding your absence.”

This letter was received by the Defendant’s Advocates the next day at 12.15 p.m. On 21st November, 2000, there was no appearance for the judgmentdebtor and Mr. Njai granted the Notice to Show cause as prayed. Now, the judgment-debtor, being aggrieved by Mr. Njai’s order, seeks the orders mentioned earlier on the following grounds:

- (a) That the defendant was not served with a hearing notice to enable it attend at the hearing of the Notice to Show cause;
- (b) That the parties had compromised the decree on interest in their Advocates’ letters mentioned earlier;
- (c) That the prevailing economic hardships had affected the cash flow levels of the Defendant;
- (d) That it is in the interest of justice that further charge of interest be waived since the filing of this application.

Before considering the submissions of Counsel, I would like to detail the matter of the letters of the parties’ Advocates referred to above. This is because that matter is relevant to the question as to whether the parties had compromised the decree on interest as claimed on behalf of the judgmentdebtor. On 19th November, 1999 the Advocates for the decree-holder wrote to the Advocates of the judgment-debtor and offered to accept the charge of interest at 12% p.a. This was to be backdated.

On 1st December, 1999 the judgment-debtors Advocates wrote back and said, in pertinent part, as follows:-

“On the issue of interest we have been informed by the Court that Court interest is 12%. Even if it is eventually confirmed at 14%, our client has no problem paying the same provided it was from the date of filing suit, and not backdated ... [W]e shall never advise our client to settle this matter on backdated interest as it was not specifically pleaded in the plaint as required.”

On 13th November, 2000 (approximately one year later) the judgmentdebtor’s Advocates again wrote to the Advocates of the decree-holder and said, in pertinent part, as follows:

“As per our discussion with your Mr. Karanja in Court, we wish to propose that our client settles in te rest herein as set out in your letter to us dated 19 th November, 1999 ...”

At the hearing of this application, Mr. Wanyama for the judgment-debtor argued that the decree-holder was under an obligation under Order IXB Rule 3 of the Civil procedure Rules to serve upon the judgment-debtor a formal hearing notice in form No. 14 of Appendix A of the Civil Procedure Rules informing the judgment-debtor of the hearing which was fixed ex parte for the 21st of November, 2000. In his view, the decree-holder’s Advocate’s letter dated 13th November, 2000 was insufficient for this purpose. He also argued that the execution had been issued in error since the decree included the principal sum and part of the costs which had already been paid. He argued that interest should be charged at the rate of 12% p.a as offered by the decree-holder’s Advocates in their letter dated 19th November, 1999 and accepted by the judgment-debtor’s Advocates by their letter dated 13th November, 2000. In his view, the Court was not informed of this matter at the time of passing the decree. He also argued that under order XXIV Rules 6 and 7 of the civil Procedure Rules, the Court had power for reasons given to order payment of the decretal amount by instalments. Finally, it was his argument that the Court had power to

suspend further interest accruing on the decretal sum.

Mr. Karanja for the decree-holder opposed the application and argued as follows: that order IXB only applied to hearings of main suits; that the offer on reduced interest rate made in their letter of 19th November, 1999 was without prejudice; that in any event that offer was rejected by the judgment-debtor's letter dated 1st December, 1999; that under order XX Rule 3(2) the Court cannot interfere with the issue of interest without sitting on appeal in its own case; that it had not been shown that the judgment-debtor was having economic problems to be allowed to settle the decree in instalments; and that, in any event the judgment-debtor's liability arose in 1994 so that it has had sufficient time and concessions from the decree-holder to settle this claim. Mr. Karanja conceded, for good measure, that the decree had not reflected part payment of the fees already paid and undertook to refund that sum already paid upon execution.

This Court is faced with several important issues in this application. These are as follows:

- (a) Was the Defendant given sufficient notice to attend the hearing of the Notice to Show Cause?
- (b) Have the parties compromised the decree on interest? (c) Should the defendant be allowed to liquidate the interest due by six equal monthly instalments? And
- (d) Should further interest since the filing of this application be waived?

I propose to deal with these issues seriatim.

Mr. Wanyama did not cite any case law to support his proposition that the decree-holder was obliged under order IXB Rule 3 of the Civil Procedure Rules to serve the judgment-debtor with a formal hearing notice more than the decree holder's advocate's letter dated 13th November, 2000 to the judgment-debtor's Advocates. That rule reads as follows:

“(O.IXB) r. 3 If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the Plaintiff attends, if the Court is satisfied –

(a) that notice of hearing was duly served , it may proceed ex parte;

(b) that the notice of hearing was not duly served, it shall direct a second notice to be served;

(c) that notice was not served in sufficient time for the Defendant to attend or that for other sufficient cause the Defendant was unable to attend, it shall postpone the hearing.”

There is nothing in that rule that requires the Plaintiff to serve upon the Defendant a “formal” hearing notice. A hearing notice by any other name is information to the other side of the day of the hearing which gives sufficient notice to enable the other side attend thereto. The hearing of the Notice to Show cause was initially scheduled for the 22nd September, 2000.

Unfortunately the notice was not listed on the cause list for that day. There is no denial that the judgment-debtor was aware of that hearing. Somehow, the file was placed before the Principal deputy Registrar on that day when another date was given in the absence of the judgment-debtor. The Advocates for the decree-holder then promptly wrote to the judgment-debtor's Advocate and fully informed them of the new date. That letter was, in my view, sufficient notice to the judgment-debtor. They always knew of the hearing upon receipt of that letter and saw it better not to attend. In matters of this nature the Court is always careful and should aim to have the case heard on merit rather than consign it to summary dismissal. However, the Court cannot aid a party who takes no steps to secure its interests on a flimsy ground. In any event, it has not been shown in anyway that failure to serve a “formal” hearing notice has occasioned the judgment-debtor any prejudice and the Court sees none in this case. This conclusion is sufficient to dispose of this application. However, I found it fit in the interests of justice to consider the other matters which I hereby do.

This Court is given power under Order XXIV Rule 6 of the Civil Procedure Rules to enforce any agreement, compromise or satisfaction where it is satisfied that a suit has been adjusted wholly or in part by such agreement, compromise or satisfaction. In doing this, the court must hear the parties and the evidence in support or rejection of the agreement, compromise or satisfaction. Looking at the correspondence referred to earlier, I cannot help but hold that I am not satisfied that the parties had compromised the decree on interest. The law on this point must be collected from the principles of contract. It is simple enough to say that there can be no compromise without agreement: There can be no compromise without a common intention. There is no clearer evidence than that the judgment-debtor's Advocate's letter dated 1st December, 1999 amounted to nothing other than the rejection of the offer contained in the decree-holder's Advocate's letter dated 19th November 1999. By being equivocal on the question, the offer must be taken to have been rejected. The judgment-debtor cannot go round and accept that offer again one year later. In any event, that offer was to have been accepted within a reasonable time. Mr. Wanyama's argument that an offer once tendered can be accepted at any time lacks legal merit. This was, if at all, a compromise relating to a decree. The offer had to be accepted within a reasonable time to enable execution of the decree to proceed. A delay of one year is obviously unreasonable in the circumstances.

Under order XX Rule 11, this Court may order the payment of the decretal amount to be made by instalments. However, the Court can only do this where the judgment-debtor shows sufficient cause. In such an application, it is incumbent upon the judgment-debtor to show material why the order should be made. It is not enough for the judgment-debtor to make a blanket claim that there exists harsh economic times. Such an allegation does not help the Court to consider the situation of the judgment-debtor and should not, therefore, be relied upon. In the present case, the judgment-debtor has not shown any material to help the Court consider its application with favour. In that case, no order is made.

I, therefore, dismiss this application with costs. The stay of execution granted on 19th December, 2000 is hereby lifted.

DATED and delivered at Nairobi this 19 th day of February, 2001

ALNASHIR VISRAM

COMMISSIO NER OF ASSIZE