

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 482 OF 2001

KENTAINERS LIMITED PLAINTIFF

VERSUS

SCANIA ENTERPRISES LIMITED DEFENDANT

RULING

This is an application under O. IXA Rule 11, O. XXI Rule 22(1) and O. XX Rule 11 of the Civil Procedure Rules for the following orders:-

- (a) That the judgment entered on 8.5.2001 in default of defence and all consequential orders be set aside; and
- (b) That in the alternative the court be pleased to stay execution of the decree issued against the applicant and allow the applicant to liquidate the decretal amount by monthly instalments of Shs.50,000/=.

The applicant is the defendant in the suit. On 8.5.2001, judgment was entered against it at the plaintiff's request dated 2.5.2001 and filed in court on the same day. The request for judgment had been made on the ground that the defendant had not filed its defence.

It is the defendant's contention that prior to judgment being entered against it on 8.5.2001 it had filed a statement of admission on 3.5.2001 in which it admitted the entire claim of Shs.807,597.40 but sought to be permitted to liquidate the sum by monthly instalments of Shs.50,000/=. The defendant now complains that by entering the judgment in default of defence when it had already filed its statement of admission, the court deprived it of the right to apply to settle the decretal amount by instalments.

I must say that I do not understand the defendant's complaint and it appears to me to have no substance at all. Irrespective of whatever provision of the Civil Procedure Rules a judgment is based on, the judgment debtor retains the right to apply to the court under O. XX rule 11 for payment of the decretal sum by instalments. Accordingly, the fact that the judgment in the instant case was entered in default of defence when the whole claim had already been admitted did not in any way affect the defendant's rights under O. XX Rule II of the Civil Procedure Rules. In my view, the defendant was not prejudiced and clearly no useful purpose would be served by setting aside a default judgment in a situation such as we have here where the entire claim has been admitted.

As regards the application to pay the decretal sum by instalments there is ample evidence tendered through the affidavit of the plaintiff's managing director Mr. Chandu Shah to show that prior to lodging this application, the defendant had made repayment proposals which if adhered to, would have cleared the debt by 30.4.2001. The defendant/applicant now appears to have reneged on those proposals and would like us to believe that it has difficulties in paying the decretal amount. That position is clearly an after thought brought about by the defendant's intention to unnecessarily delay the repayment of the decretal amount. Accordingly, I do not think the defendant/applicant has come to this court with clean hands and I would reject the prayer to pay the decretal sum by instalments.

The other complaint which the defendant/applicant raised in this application related to an alleged failure to serve upon it notice of entry of the judgment as required by O. XXI Rule 6 of the Civil Procedure Rules. However as the affidavit sworn on 24.5.2001 by Dominic Wambua Kaesa reveals, the

necessary notice of entry of judgment was served upon the defendant's director, Mr. Jethwa on 10.5.2001. Although in his affidavit Mr. Jethwa denies having been served, no attempt was made on behalf of the defendant/applicant to challenge what Mr. Kaesa depones in his affidavit. I of course recognise that it is not very easy to resolve the issue of credibility where you are confronted by two conflicting affidavits, but as regards this matter, I must say that I prefer what Mr. Kaesa states as against the bare denials by Mr. Jethwa because while the latter is an interested party and is inclined to deny what took place because it is harmful to his company, the former has no reason to wish to mislead this court by swearing a false affidavit. Accordingly, I believe what Mr. Kaesa stated, namely that notice of entry of judgment was served upon Mr. Jethwa.

For all the above reasons, I find that the judgment herein was not only properly entered against the defendant but also that the execution process that was commenced against the defendant/applicant was proper and in accordance with the Civil Procedure Rules. Accordingly, my view is that the application lodged by the defendant/applicant is wholly devoid of substance and/or merit and is dismissed with costs.

Dated at Nairobi this 6th day of July, 2001.

T. MBALUTO

JUDGE