



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 213 OF 2016

MACHIRI LIMITED.....PLAINTIFF/ APPLICANT

VERSUS

CHINA WU YI COMPANY LTD.....1ST DEFENDANT/ RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....THIRD PARTY

RULING

Background

1. This ruling is in respect of the Plaintiffs' Notice of Motion application brought under **Order 51 Rule 1 of the Civil Procedure Rules, Sections 3A, 63 (c) and 94 of the Civil Procedure Act**, dated 15th June, 2020, seeking the following orders: -

a) That the Plaintiff be granted leave to execute the partial decree pursuant to the consent judgment entered on 21st May 2019 awarding the Plaintiff the principal sum of Kshs. 139,471,809.70/-

b) That the costs of the application be in the cause.

2. The application is premised on the grounds that on 21st May 2019, consent judgment was entered for the Plaintiff against the Defendant for Kshs. 139,471,809.71/-; despite demand to pay the judgment sum, the Defendant has refused to settle the outstanding sum of Kshs. 139,471,809.71/- in favour of the Plaintiff; it is in the interest of justice that the orders sought be issued for the Plaintiff to enjoy the fruits of its valid judgment.

3. The application is supported by the affidavit of **Eng. James Macharia**, the managing director of the Plaintiff. He deposed that the Plaintiff instituted suit against the Defendant for the sum of Kshs. 139,471,809.71, interest at the rate of 24% p.a. from 18th June 2014 until payment in full and cost of the suit; on 21st May 2019, the Plaintiff and Defendant entered a consent whereby judgment was entered in for the Plaintiff against the Defendant for the sum of Kshs. 139,471,809.71/-; that the rest of the claim on interest and cost of the suit was to proceed to trial.

4. Additionally, he deposed that the Plaintiff through its advocates on record had on several occasions reached out to the Defendant requesting for a payment proposal of the judgment sum; that the Defendant has refused to settle the judgment sum necessitating the Plaintiff to file the present application seeking to enforce the valid judgment of the court; and that it is in the interests of justice that the Court do issue the orders sought to enable the Plaintiff enjoy the fruits of its judgment.

5. In response, the Defendant filed a Grounds of Opposition dated 20th July 2009 opposing the instant application on grounds that the partial decree is not ripe for execution as the rightful party against whom the decretal sum should be executed is yet to be determined in the Third Party proceedings; that the decretal sum is owed to the Plaintiff by the Third party and not the Defendant, a fact that is not in dispute; that the Honourable Court prevailed upon the parties to record this consent with the understanding that once the proceedings to enjoin the Third Party were concluded, the Third Party would equally be bound by the consent order.

6. Further, the application is opposed on grounds that the Defendant shall be extremely prejudiced should the applicant be allowed to enforce the partial decree before the entire matter is heard and determined and the court pronounces itself on the extent of liability of the Third party; that on the other hand, the applicant will not be prejudiced as it shall be compensated by way of interest should it be determined that it is indeed owed any interest; and that it is in the interests of justice that the application be rejected with costs to the respondent as the partial

decree has not yet crystalized for enforcement.

Submissions

10. The application was canvassed by way of oral submissions on 24th May 2021 when the matter came up for hearing before the Court. **Mr. Njuguna** appeared for the Plaintiff/ Applicant while **Mr Eredi** appeared for the Defendant Respondent.

11. **Mr. Njuguna** submitted that the Grounds of Opposition raises matters of fact that can only be addressed in an affidavit. He also submitted that there is no reason given as to why there is no settlement of the partial decree. On the issue of third party proceedings, Counsel submitted that by virtue of **Order 1 Rule 21 of the Civil Procedure Rules, 2010**, the Defendant would only be entitled to a judgment of the third party after satisfying the Plaintiff's judgment.

12. **Mr Njuguna** further submitted that there is no application for third party directions under **Order 1 Rule 22 of the Civil Procedure Rules, 2010** that issues between the Plaintiff against Defendant and against the third party be dealt with simultaneously. It was also submitted that there are no directions staying execution against the Claim/Decree pending third party proceeding and that the partial decree is clear that it is the Defendant who owes the money and is liable to the Plaintiff.

13. On the question of prejudice, **Mr Njuguna** submitted that this matter has been pending since 18th June 2014 and that the judgment was issued on 21st May 2019. He thus urged this Court to grant leave to execute the partial decree as the Plaintiff is suffering great prejudice for not reaping fruits of the judgment.

14. Mr Eredi relied on the Grounds of Opposition dated 20th July 2020. He submitted that when the matter first came up for hearing there were multiple applications including the Third party's application that the Third party notice be struck off the record. He further submitted that since there was no dispute that the Plaintiff was owed money, the decree was to abide for Third party proceedings and that is premature to want to proceed to execute the partial decree. He added that after all, there will be right of appeal to any party and that the sums involved are colossal He therefore urged the Court to set down the Third Party Notice and the main suit for hearing.

Determination

15. I have considered the application, the grounds in support thereof, the supporting affidavit, the grounds of opposition, the submissions and the law. To my mind, the issue for determination is whether this Court should exercise its discretion to allow the application for leave to execute a partial decree.

16. Before delving into the issue for determination, I note that the Defendant elected to oppose the application through a grounds of opposition. I also note that the Defendant averred to factual matters in its grounds of opposition. Considering similar circumstances, **Newbold P, JA** (as he then was) in the Court of Appeal case of **Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd [1969] E.A. 696** stated as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

17. Therefore, guided by the foregoing, I am inclined to agree with the Plaintiff that factual matters ought to have been addressed through an affidavit and not a grounds of opposition.

18. I now turn to the main issue for determination. This is an application brought pursuant to **Section 94 of the Civil Procedure Act** which reads as follows:-

“94. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.

19. **Shah, JA** in the case of **Bamburi Portland Cement Co. Ltd v Hussein (1995) LLR 1870 (CAK)** while interpreting the said provision observed as follows:-

“Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.” [Emphasis added]

20. **Kuloba J** (as he then was) also elaborately discussed the rationale for the section in the case of **Mercedes Sanchez Rau Tussel v Samken Ltd & 2 Others [2002] eKLR**, as follows:-

“The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment-debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs.

.....

Till such formal expression has been given to the judgment of the court, the decree is not executable, and in order to obviate the difficulty arising in a case where the taxation of the costs would take some time, section 94 permits the decree holder, as it were to execute a “decree” which strictly does not constitute the formal expression of an adjudication in as much as the provision with regard to costs has not been embodied in that decree, and it is perfectly true that an order from the court for a decree to be executed is required if it is a “decree” not in the proper sense of the term as defined by section 2 of the Act. That is the rationale for section 94 making a specific order of the court necessary in a case where a decree holder wants to execute a decree which does not contain the provision for costs, and that permission is necessary because a decree cannot be drawn up and the seal of the court cannot be put upon the decree unless the provision with regard to costs is inserted in it, because it is in the judgment of which the decree is only a formal expression.”

21. **Kuloba J** went on to state as follows:-

“On the wording of the section the ordering of execution to be done forthwith is a matter in the sound discretion of the court when the court considers it necessary that in all the circumstances of the case the decree should be executed before awarded costs are ascertained by taxation.”

22. **Odunga J** in the case of **Erad Suppliers & General Contractors v NCPB, Misc. Civil Case No. 639 of 2009** put it differently: -

“In my view, the necessity for leave to be obtained where a party intends to execute before taxation is to obviate situations where a judgment debtor is likely to be confronted with two sets of execution proceedings. In respect of the same decree i.e. for the principal sum and for costs. This is a recognition of the fact that in a civil action the main aim is compensation and the process should not be turned into a punitive voyage. Therefore where there are no costs to be paid or where a party entitled to costs has abandoned or waived the same, in my view, Section 94 of the Civil Procedure Act does not apply. If the Respondent was not aware that the claimant was not keen on the said costs now it is aware and that would render that ground unnecessary.”

23. Therefore, in sum, **Section 94 of the Civil Procedure Act** seeks to prevent a judgement debtor from holding up the execution of a decree for a known sum or a sum to which there can be no sensible contest. On the other hand, it also seeks to protect a judgment debtor from multiple executions regarding the same suit, one in respect of the principal sum and the other for costs. See **Kartar Singh Dhupar & Co. Ltd v Lianard Holdings Limited [2017] eKLR**

24. I note from the record that the Plaintiff and the Defendant entered into a partial consent. The Partial Decree issued on 21st May 2019 and issued on 8th September 2019 reads thus:-

“CLAIM FOR:

a. Kshs. 139,471,809.70

b. Interest at the rate of 24% p.a. from 18th June 2014 until payment in full

c. Costs of this suit.

...

IT IS HEREBY ORDERED BY CONSENT:

a. THAT judgment be and is hereby entered in favour of the Plaintiff as against the Defendant in the sum of Kshs. 139,471,809.70 cents

b. THAT the issue of interest to be negotiated out of court and if the parties do not agree, the return to court for hearing.”

25. In brief, the background to this matter is that the Plaintiff filed this suit on 9th May 2016 seeking for judgment against the defendant for a sum of Kshs. 139,471,809.70, interest thereon at the rate of 24% per annum from 18th June 2014 until payment in full and the costs of the suit. The defendant entered appearance and filed a statement of defence dated 4th July 2016 under protest, upon service of the plaint and summons. The defendant also filed a chamber summons application dated 30th January 2017, seeking for leave to issue a Third Party Notice against Kenya National Highways Authority.

26. The application was allowed and the Defendant issued a Third Party Notice dated 30th January 2017 to Kenya National Highways Authority (hereinafter ‘the Third Party’). The Third party entered appearance and filed a notice of preliminary objection on 1st March 2017.

The preliminary objection was heard and on 31st October 2018, this Court dismissed the same for lack of merit and directed the parties to prepare the suit for hearing. The Third party also filed a chamber summons application seeking that the Defendant's Third party application be struck out because it was filed outside of the 14 days after the close of pleadings. Vide a ruling dated 28th January 2020, in the interests of justice, this Court directed the parties to, among others, for parties to consider for amicable settlement of the matter;-

“

a) The parties call for oral evidence on whether the plaintiff complied with the terms of the contract in relation to the submission of the final statement of accounts or certified amount; or

b) The delayed interest payable on the subject amount be calculated with effect from 18th June 2014 and be shared by the parties in the equal ratio of 50% in favour and/or as against either party;

c) If option (b) above is acceptable, the parties to determine the commercial interest rate payable as at the said date, and use it to calculate the subject interest rate;

d) Further, if (b) and (c) above is the preferred option, then each party shall meet its own costs;

e) However, if option (a) is agreed on, the issue of the applicable interest rate and costs shall equally be canvassed.”

27. As it stands, the issue of interest and costs is pending hearing and determination. I also note from the record that the Plaintiff has not filed a formal application for directions for the Third party proceedings. Further, I note that when the matter came up for hearing on 3rd October 2019 regarding the issue of interest and costs, the Court did not hear the Third party's application to strike out the Third party notice. In this respect, the record reveals that on **Mr Omollo**, Counsel for the Third party suggested that the Defendant ought to move the Court by way of an application for directions as to whether the issue of liability. However, **Mr Kairu**, the Defendant's Counsel, expressed the view that judgement will be delivered before the issues between the Defendant and Third party are heard and determined. In the end, it was settled that the issues would be heard and determined after the suit has been determined. In addition, it was observed that the Defendant would be the one to suffer prejudice for failure to comply with **Order 1 Rule 22 of the Civil Procedure Rules**.

28. **Order 1, Rule 22 of the Civil Procedure Rules, 2010** provides as follows:-

“22. If a third party enters an appearance pursuant to the third party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.”

29. **R.S.C Omolo, J in the case of Solomon Mwarimbo v Kenya Bus Services Ltd [1993] eKLR** observed as follows regarding the purpose of an application for directions once the third party enters appearance:-

“It appears to me that once a third party has entered an appearance and a defendant wishes to pursue the claim against the third party, then the burden shifts to such a defendant to apply to the Court, by way of a summons in chambers, to give directions and when giving such directions, the Court, if satisfied that there is a proper question to be tried as to the liability of the third party, order such question of liability to be tried at or after the trial of the suit. If there is no proper question to be tried regarding the liability of the third party to the defendant, then the Court is entitled to enter such judgment as it thinks proper against the third party. All these matters are to be determined at the stage where the Court is giving directions and directions can only be given on the application of the defendant.

It is not to be forgotten that the purpose of a third-party notice is to avoid multiplicity of suits and at the hearing of the application for directions, the Court is entitled to determine whether the defendant's claim against the third party should be heard at or after the trial of the plaintiff's claim against the defendant. A defendant who fails to take out a summons for directions after a third party has appeared deprives the Court of its right to decide whether such defendant's claim against the third party should be tried at the same time with, or after the trial of the plaintiff's claim against the defendant. In my view, it is only at the stage of giving directions that the Court, if it thinks it is necessary, can order a third party to file a defence to the claim made in the third party notice.”

30. Moreover, this Court in **Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR**, observed that:-

“The defence does not even allude to the said third party; the issue has just propped up in the submissions by the Defendant. In any case, the said third party is not a party in the suit and no claim has been laid against it by the Plaintiff or the Defendant. In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under (Order 1 rule 15 - 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”

31. Applying the above to the instant matter, I find no evidence that the Defendant filed a formal application for directions regarding the third party. I also find no evidence that the Court issued directions to the effect that the execution of the Decree was to await conclusion of the

Third party proceedings as submitted by the Defendant.

32. The Defendant also contended that the execution of the partial decree is premature and that there will be a right to appeal by any party. However, I find that this contention is not merited. **Kuloba, J** in the case of **Mercedes Sanchez Rau Tussel v Samken Ltd & 2 Others (supra)** observed as follows:-

“True, aspects of the judgments may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for a review to apportion liability amongst judgment-debtors, no part of a judgment is executable until after determination of the review or appeal. Such a view would permit any person desirous of jamming the justice process or merely to postpone pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment.”

33. The upshot is that the Plaintiff’s Notice of Motion application dated 15th June, 2020 is hereby allowed with costs to the Defendant.

It is so ordered.

DATED AND DELIVERED THIS 10TH DAY OF JUNE, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Bett for the Applicant
2. Mr. Gichuhi h/b for Ireri for Defendant/Respondent
3. Mr. Ngethe h/b for Mr. Ochieng for the 3rd party