



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 1095 OF 2003

SYNRESINS LIMITED.....PLAINTIFF

VERSUS

PRAVIN VORA T/A VORA CONSTRUCTION.....DEFENDANT

RULING

1. Judgment was delivered herein on 19th February 2016 in favour of the Defendant against the Plaintiff for Ksh.5 million plus the costs of the counterclaim. The Plaintiff filed an Appeal which was determined by the Court of Appeal on 9th October, 2020. The Court of Appeal upheld the judgment of the High Court. During the pendency of the Appeal the High Court had issued stay of execution orders on condition that the Plaintiff do deposit security for the due performance of the decree in the sum of Ksh.5,000,000/= in an interest earning bank account in the joint names of the advocates for the parties.

2. Following the determination of the Appeal, on 19th October, 2020 the parties wrote a consent letter to the Bank Manager for the release of the money deposited as security together with the accrued interest. Subsequently, the Defendant filed the Party and Party Bill of Costs dated 12th November, 2020. The Plaintiff thereafter filed the Notice of Preliminary Objection dated 7th December, 2020.

3. The Plaintiff herein has raised a Preliminary Objection dated 7th December, 2020 against the Defendant's Party and Party Bill of Costs dated 12th November, 2020 on grounds that:

1. By reason of an agreement dated 19th October, 2020 executed between the parties, the Defendant agreed to receive the sum of Kshs. 5,002,450.00 (Kenya shillings Five Million Two Thousand Four Hundred and Fifty) held in the parties' Advocates' joint account at NCBA Bank, Standard Street branch, Nairobi in full and final settlement of the judgment debt in the suit herein and that the sum of Kshs. 1,490,230.43 (Kenya Shillings One Million, Four Hundred Ninety Thousand Two Hundred Thirty and Forty-Three Cents) being the interest which has accrued on the amount deposited as stated above, be released to the Plaintiff.

2. The aforementioned amount due to the Defendant was released to the Defendant's advocates on the 23rd October, 2020 vide an electronic transfer into the Defendant's Advocates' account.

3. The decretal debt is therefore fully paid and the Defendant is now bound by the terms of the aforementioned agreement.

4. The court lacks the jurisdiction to tax the party and party Bill of costs and as it is now *functus officio* in the matter.

5. That the Defendant's party and party Bill of Costs offends the provisions of Section 25 of the Civil Procedure Act, Order 21 Rule 7 as read with Order 25 Rule 5 of the Civil Procedure Rules and is therefore an abuse of the court process and its prosecution would amount to a fraud

6. The Defendant's party and party Bill of Costs dated 12th November, 2020 ought to be dismissed with costs.

4. The Defendant filed a response to the Preliminary Objection and an affidavit in support of its Party and Party Bill of costs. It is stated that upon the dismissal of the Plaintiff's suit by the High Court, the Defendant was awarded costs which were not set aside on appeal as the Court of Appeal gave no orders as to costs. It is stated that upon the conclusion of the Appeal, the Defendant agreed reluctantly to give the Plaintiff the interest that the decretal sum that had been deposited in a joint interest earning account had accrued and did not in any way give up on costs. That the letter dated 19th October 2020 addressed to the bank was an instruction letter which both account signatories had to sign before release of security held therein and that if it was a consent to forego costs, nothing would have been easier than to expressly state so.

5. It was contented that the Defendant did not agree to forego costs. That the issue of Party and Party costs has never been determined and that the decree extracted was a preliminary one with no certificate of costs. It is further stated that by filing a replying affidavit to the Bill of Costs, the Plaintiff seems to have abandoned its Preliminary Objection and as such the same ought to be dismissed with costs. The Defendant further submitted that the Preliminary Objection does not meet the requirements and principles set out for such applications as the issues raised are points of fact not law.

6. During the hearing of the Preliminary Objection, the Defendant relied on it's written while the Defendant relied on it's response to the Preliminary Objection and the affidavit filed in support of the Bill of costs.

7. As regards Preliminary Objections, the principles to be met are set out in *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696*, and as endorsed by the Supreme Court of Kenya in the case of *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]* as:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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’.”

8. The Supreme Court of Kenya in the case of *Kalpana H Rawal & 2 others v Judicial Service Commission & 2 others [2016] eKLR*, the Supreme Court expounded the foregoing principles as follows:

“28] I have already stated that Mr. Omtatah’s Preliminary Objection is not anchored on jurisdiction although it is labelled as such. Does that disqualify it as a Preliminary Objection? Mr. Pheroze says yes. It is important to note that although Preliminary Objections are, more often than not, based on lack of jurisdiction, it is not the only ground. It is for that reason that, Law JA in Mukisa Biscuit Co. gave jurisdiction and limitation of time only as examples of the grounds of raising a Preliminary Objection. The list should not therefore be regarded as closed. Depending on the facts and circumstances of a particular case, there may be other grounds for raising a Preliminary Objection. The instant case is a good example. It is a case that has arisen in the post 2010 Constitutional era and the unique and exceptional facts, which all parties have attested to, will require this Court to interpret Mukisa Biscuit Co., in light of the provisions of the Constitution.”

9. In the instant case, the Defendant’s view that the Preliminary Objection does not meet the test is not sustainable. The Plaintiff’s Preliminary Objection is based on uncontested facts that are part of the court’s record.

10. I now move to the question whether an agreement between parties existed that settled this matter.

11. The Plaintiff placed reliance on a letter dated 19th October, 2020 which is addressed to the Branch Manager NCBA Bank. The said letter reads:

“The Branch Manager

NCA Bank

Standard Street

Nairobi

Dear Sir/Madam

**RE: JOINT ACCOUNT NAME: MUEMA KITULU & CO. ADVOCATES & MANDALA & CO. ADVOCATES
ACCOUNT NO. 778326**

By consent:

1. The Decretal Sum of Kshs. 5,002,450/= held in the parties Advocates Joint Account No. 778326 at NCBA Bank, Wabera/Standard Street Branch Nairobi, be released to the firm of Mandala & Co Advocates forthwith, in full and final settlement of the judgment debt in the above mentioned suit.

2. The balance in the aforementioned account be released in the name of the Plaintiff namely Synresins Ltd unconditionally.

12. It is not in dispute that parties did sign the aforesaid consent letter. The question is whether in the said consent the parties fully settled the matter inclusive of costs of the suit. The consent herein was not recorded in court and therefore cannot be treated as a consent order.

13. The Defendant's submission was that the decree that was the subject of the consent was a Preliminary one.

14. The definition of decree from Section 2 of the Civil Procedure Act, Cap 21 Laws of Kenya is as follows:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;”

15. Turning to the consent letter addressed to the bank, it is noted that the same is silent on the question of the costs of the suit. It is therefore not clear why the parties to the said consent letter did not reflect what was to happen to the costs of the Counter-Claim that had been awarded by the court to the Defendant. It is also noteworthy that the Ksh.5,000,000/= that was deposited in the bank was the principal sum awarded in the judgment. Whether the parties intended to waive the question of costs is not clear from their consent or agreement.

16. As stated by the Court of Appeal in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR:**

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

17. The consent letter between the parties makes reference to **“full and final settlement of the judgment debt”**. The question then is what the **“Judgment debt”** referred to was. As at the date of the letter in question, the costs in the suit had not yet been ascertained. The final decree had therefore not been issued. There is lack of clarity in the letter in regard to the costs of the suit. To state that the consent letter amounts to a full settlement of the decree is tantamount to re-writing the contract on behalf of the parties. Consequently, based on the consent letter in question, the Preliminary Objection cannot succeed and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2021

B. THURANIRA JADEN

JUDGE