



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 286 OF 2015

BYRON TRUSTKETT INVESTMENTS LIMITED..... DECREE HOLDER/RESPONDENT

VERSUS

SPORT STADIA MANAGEMENT BOARD.....JUDGMENT DEBTOR /APPLICANT

RULING

1. The genesis to the Application now before Court is the consent order entered by counsel for the substantive parties herein on 27th February 2016 before Honourable Justice Kariuki. The relevant part of the order was that Judgment was entered against the Defendant as prayed in the Plaint and costs were agreed at Kshs.570,610/=.

2. The Plaintiff's claim in the Plaint of 12th June 2015 was for Judgment of Kshs.18,012,015/=, with interest thereon at 1.46% per month calculated on the monthly amount due from the date of accrual until payment in full.

3. The record of the Court shows that the Plaintiff has on various occasions complained that the Defendant has failed to satisfy the Decree. The record also shows that a very substantial part of the proceedings is activity after the consent Judgment.

4. The starts and stops in execution of the decree culminated in a consent order recorded before the Deputy Registrar of this Court on 15th November 2018 in the following terms:-

i. The Garnishee order absolute herein be and is hereby set aside.

ii. The Judgment-debtor to pay to the Decree-holder the sum of Kshs.1.8 Million on or before the close of business on 14th day of November 2018.

iii. The balance of the decretal sum to be liquidated by monthly instalments of a minimum of Kshs.500,000/= with effect from the 9th day of December 2018 and the 9th day each succeeding month until payment in full.

iv. In default of any one instalment the Garnishee order absolute to be re-instated without formal application being filed and/or prosecuted.

v. The parties to meet and conduct reconciliations and discuss the interest rates.

5. There was then a Notice of Motion brought by the Defendant on 16th May 2019 whose main prayer was to seek that the aforesaid consent (of 1st November 2018) be set aside and/or parted or vacated.

6. Two substantial grounds were raised in support of that Motion; that an internal audit conducted by the Defendant revealed that there was a collusion between its former management and the Plaintiff to defraud it as there was already an overpayment and; that the consent order went against the *in Duplum rule*.

7. In a short Ruling of this Court dated 22nd November 2019, it held that the *in Duplum rule* had no application to the debt herein. Answering the question of overpayment, I stated and directed:-

5. As to whether there has been overpayment, that is an accounting issue. It would be prudent for accounts to be taken before this Court can consider the application further.

6. I direct that parties do within 14 days hereof jointly appoint an accountant to audit the debt herein and report to Court on what has been paid and what amount, if any, is due. Should the parties fail to agree on an accountant then the chairperson of the Institute of Certified Public Accountants of Kenya (ICPAK) do appoint such accountant. Although parties will initially share the costs of the accountant and audit exercise, this Court will make a final order in respect thereof upon receiving the accountant's report.

8. The Defendant is back to Court with a Notice of Motion dated 27th February 2020 in which it craves that the Court reviews its Ruling of 22nd November 2019 and issues further directions on the scope of the accounting and audit exercise.

9. In the affidavit in support of the current Motion, Pius Metto, on behalf of the Defendant, states that although an accountant has been appointed to carry out the audit, the parties are unable to agree on the scope of the exercise as the Plaintiff takes a position that the exercise should be undertaken from the time when the impugned consent of 15th November 2018 was entered, while it (the Defendant) holds the view that it should be from the time when the first payment was made to date.

10. By the time the Application came up for oral hearing on 9th June 2020, the Plaintiff had not filed any documents in opposition and so the Application stands unopposed.

11. The context in which the audit was ordered is the Defendant's application of 16th May 2019 in which the Defendant sought to set aside of the consent order of 15th November 2018 alleging an overpayment. In that application the Defendant does not question the validity of the consent order of 27th February 2016. That, it has to be remembered is the consent order that handed over a Judgment in favour of the Plaintiff. The Court therefore proceeds on the basis that the consent of 27th February 2016 is valid.

12. The allegation of the Defendant is that there is an overpayment of the debt. I would take it that it means an overpayment from the time the consent order of 27th February 2016 was entered as it does not challenge its veracity. I think that so as to attend to the concern of the Defendant, which is not a trivial concern, the audit should begin from the date of the consent of 27th February 2016.

13. I allow the application dated 27th February 2020 to the extent that the accounting and audit exercise shall begin from the date of the consent Judgment being 27th February 2016, to the date of the report. As the application was not opposed, costs shall be in the cause.

Dated, Signed and Delivered in Court at Nairobi this 20th Day of July 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Karuiri for the Applicant.

No appearance for the Respondent.