



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 422 OF 2009

EPCO BUILDERS LIMITED.....PLAINTIFF

-VERSUS-

KABUITO CONTRACTORS LTD.....DEFENDANT

RULING

The following pleadings were found in the court file;

1. The Complaint was filed on 15th June 2009.
2. Defence entered appearance on 28th July 2009
3. Defence and counterclaim was filed on 14th August 2009.
4. Affidavit of service of defence and counter claim upon Plaintiff filed on 31st August 2009.
5. Decree by Deputy Registrar given on 31st August 2009. The Honourable Deputy Registrar ordered;

i) That the Plaintiff pay to the defendant on its counter claim the sum of Kshs 11,452,903 together with interest at commercial rate; and

ii) That the Plaintiff to pay the Defendant costs for the counter claim together with interest and cost to be taxed and/or certified by the taxing officer of this honourable court.

6. Application for execution of decree filed on 11th September 2009.
7. Plaintiff's supporting Affidavit filed on 16th September 2009 and dated 16th September 2009
8. Plaintiff's chamber summons dated and filed on 16th September 2009.
9. Order by Justice Apondi issued on 17th September 2009. The Honourable Judge ordered that;

i) The application be certified urgent;

ii) The defendant or his or his agents, workers and/or representatives, particularly and through Prodigy Commercial Agencies be and are hereby restrained from executing the decree of this Honourable Court passed on the 31st August 2009 until the hearing and determination of this application;

iii) That there be a stay of execution of the decree and any consequential orders entered in this application herein pending the hearing and determination of this application;

iv) The application be heard inter partes on 23rd of September 2009.

10. Amended chamber summons dated 16th September 2009 and filed on 18th September 2009
11. Replying Affidavit filed on 22nd September 2009 and dated 22nd September 2009.
12. Plaintiff's/Applicant's list of authorities dated and filed on 6th October 2009.
13. Reply to defence and defence to counter claim dated 13th September 2010 and filed on 17th September 2010.
14. Notice to Show Cause why suit should not be dismissed by Deputy Registrar and dated 21st February 2017.
15. Affidavit to answer notice to show cause dated and filed on 7th March 2017.
16. Ramji Derji Varsani filed a witness statement dated 17th May 2018 and filed on 18th May 2018.

DISPOSITION

On 6th March 2019 the Plaintiff was ready to proceed with the hearing and the Defendant stated that there was no hearing as the Court order of 4th September 2009 where judgment was entered that the plaintiff was/is to pay the defendant **Ksh 11,452,903/-** as per the Counterclaim was valid court order on record and was not set aside. The Plaintiff's claim was/is for **Ksh 9m** which is less than **Ksh 11m** or so judgment and was dismissed.

The Plaintiff stated that the dismissal order was set aside by Hon J Apondi on 14th September 2010.

The Defendant claimed that the ruling on Preliminary Objection was not delivered. Hence, the hearing of the matter scheduled on 11th February 2019 did not take off.

The Court sought to peruse the Court file and confirm from pleadings and proceedings whether there is a suit for hearing or not but some documents more so the instant Rulings were missing from the Court file.

The Court ordered that Respective Counsel to furnish the Court with relevant documents not in the Court file to aid in the verification exercise.

The Plaintiff filed affidavit on 12th April 2019 and annexed relevant documents and alluded;

a) Although judgment in default was entered on 31st August 2009, The Plaintiff filed application dated 16th September 2009 which was amended on 17th September 2009 seeking *ex parte* proceedings with decree and all consequential orders be set aside and unconditional leave to file defence and counterclaim of the draft attached be granted. The said Application is attached as NN1'.

b) In response the Defendant filed Preliminary Objection opposing the application. Hon J Apondi dismissed the Objection on 18/11/2009. Copy of the said Ruling is attached NN3'.

c) The Defendant filed Replying Affidavit on 22/9/2009 opposing the application. After *inter partes* hearing Ruling was delivered on 10/9 /2010. A copy of the Ruling is annexed as NN4'

The Ruling of 10th September 2010 restrained the Defendant from executing decree of 31st August 2009 and ordered restitution of the Plaintiff/Applicant's movable goods attached. There was stay of execution granted, *ex parte* proceedings of 14th August 2009 and all consequential orders were set aside. The Applicant was granted leave to file defence and defence to counterclaim.

This position has not been controverted by the parties nor the authenticity of the applications and Court Rulings attached contested and are hereby provided to the Court.

Therefore, in light of these documents the Court record is complete and discloses a pending suit for hearing and determination.

In light of the age of the suit and to expedite the same, parties are to complete case management in 30 days before the Deputy Registrar Commercial Division/Registry and hearing date be obtained within 30 days thereafter.

DELIVERED SIGNED & DATED IN OPEN COURT ON 20TH MAY 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

ADVOCATE FOR PLAINTIFF

ADVOCATE FOR DEFENDANT

COURT ASISSTANT