REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

HCCC NO.271 OF 2004

ASTRAL AVIATION LTD.....PLAINTIFF/RESP

VERSUS

TADIS TRAVEL & TOURS LTD.....1ST DEFENDANT/APPL

ERITREAN AIRLINES LTD.....2ND DEFENDANT

R U L I N G

The 1st Defendant/Applicant filed the application dated 5th July 2018 seeking to set aside warrant of attachment and sale issued herein.

The application also sought stay of execution pending hearing and determination of this application.

This Court granted an order for stay of execution on condition that Kshs. 433,242.50 was deposited in Court. The Applicant complied with the said condition by depositing the said amount on 3rd October 2018.

What is pending for this Courts determination is whether warrant of attachment and sale should be set aside.

Grounds on the face of the application are that the Court of Appeal dismissed the Applicants appeal and awarded the Respondents costs, which were assessed at Kshs. 533,242.50.

The application is supported by an Affidavit sworn by Taddesech Yohaness swore Affidavit on behalf of the Applicant. He averred that after entry judgment the Respondent started calling the Applicant's office asking for payment of costs while threatening to execute if costs were not paid.

He averred that on 8th January 2018, he attended a meeting on behalf of the Applicant at the Respondent's office and that an agreement was arrived at to the effect that the 1st Defendant Tadis Tours and Travels Limited were to pay Kshs. 100,000 in full and final settlement of liability herein. Further, that the balance was to be recovered from Eritrean Airlines who were financially stable and able to pay the balance on demand.

The Applicant averred that in line with the agreement the Applicant paid Kshs. 100,000 on 9th January 2018.

He averred that on writing to the Decree holder's Advocate, he was informed that the letter was meant for the 2nd Defendant and that the Decree Holder had earlier on written to the 2nd Defendant demanding the entire amount.

He averred that the warrant of attachment was irregularly issued as it was more than a year hence it was mandatory to issue notice to show cause before execution; that warrant is invalid as it is based on decree dated 18th November 2017 which is nonexistent.

He further averred that decree was illegally and wrongfully issued as the Advocate for the decree holder failed to disclose existence of an agreement between him and the Applicant of 8th January 2018.

That failure to issue notice to show cause was deliberate to deny the Applicant to bring the facts to the attention of the Court.

In response Counsel for the Respondent filed Replying Affidavit, dated 7th July 2018. He averred that it was in order to inform the 1st

Applicant of the intention to execute who proposed to pay Kshs. 100,000 while she made contacts with the 2nd Defendant. Counsel stated that if there were an agreement to accept Kshs. 100,000 as full settlement, the same would have been in writing.

He further submitted that time taken from January 2018 to pursue execution was because the Court file was missing which prompted the Respondent to apply for reconstruction of the Court file to enable execution process to go on. He added that the Certificate of Costs from the Court of appeal does not come under the purview of Order 22 Rule 18 of the Civil Procedure Rules.

That issuance of the warrants was in order to recover the outstanding costs.

I have considered rival arguments by Counsels herein. I wish to consider whether issuance of Warrants of Attachment and Sale against the 1st Defendant is proper.

The 1st Defendant argued that judgment was against both Defendants and that the 1st Defendant should not be pursued alone in respect of costs awarded by the Court of Appeal.

The 1st Defendant has not disputed the fact the costs of Kshs. 533,242.50 were awarded to the Respondent by the Court of appeal.

The 1st Defendant's argument was that there was an agreement with the Respondent for the 1st Defendant to pay Kshs. 100,000 being full and final settlement. It is not disputed that Kshs. 100,000 was paid by 1st Defendant. The question is whether it was intended to be full and final settlement.

On perusal of the application, I note that the Applicant has not attached any agreement on payment of costs.

In my earlier ruling delivered on 10th July, 2018, I noted that the Court of appeal issued the order for payment of costs against the Applicants/Defendants jointly and severally. Under such circumstances, the Respondent is at liberty to execute against either all the judgment debtors or any one of them. It would be up to a party against whom execution has been levied to pursue the co-judgment debtors for compensation.

On issuance of notice if application for execution is made after one year as provided in Order 22 Rule 18, I note from attached Certificate of Taxation signed by Deputy Registrar Court of Appeal that it was issued on 18th December 2017. The Respondent applied for Warrants of Attachment on 19th June 2018. Application for warrants was therefore done within one. It did therefore require issuance of Notice to Show Cause.

From the forgoing, I find that warrant of attachment was regularly issued.

FINAL ORDER

1. Application dated 7th May 2018 is hereby dismissed with costs to the Respondent.

2. Costs to the Respondent.

Ruling Delivered, Dated and **Signed** at **Nairobi** this **6th** day of **December, 2018**

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

SAKINA: **COURT ASSISTANT**

WAIGWA: **COUNSEL FOR RESPONDENT/PLAINTIFF**

ODHIAMBO H/B FOR MWANGI: **COUNSEL FOR 1stDEFENDANT/APP**