



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1807 OF 2002

BOOK POINT LIMITED.....PLAINTIFF

VERSUS

GUILDERS INTERENATIONAL BANK LIMITED.....1ST DEFENDANT

GUARDIAN BANK LIMITED.....2ND DEFENDANT

RULING

1) The 2nd Defendant/Applicant Guardian Bank Ltd took out the Motion dated 17th January 2012, where it sought orders to wit:

- 1. That for reasons to be recorded in writing, in the first instance, service of this application be dispensed with and the Counsel for the Second Defendant be heard Ex-parte.***
- 2. That this Honourable Court to be pleased to stay the Notice to Show Cause why execution should not issue under Order XXI, Rule 18 as against the Second Defendant dated 11th January, 2012 for the sum of Kshs.178,514,179/00 until further orders of the Honourable Court.***
- 3. That this Honourable Court be pleased to set aside the Notice to Show Cause why execution should not issue under Order XXI, Rule 18 as against the Second Defendant dated 11th January 2012 for the sum of Kshs.178,514,179/00 until further orders of the Honourable Court.***
- 4. That all proceedings, directions and Orders based on the Notice to Show Cause why execution should not issue Order XXI, dated 11th January, 2012 for the sum of Kshs.178,514,178/00 be set aside.***
- 5. The Second Defendant/Applicant be at liberty to apply to the Honourable Court for such further directions and orders for purposes of meeting the ends of justice.***
- 6. That the costs of this application be provided for.”***

2) When the matter came for interparties hearing before **Ombija Judge** on 3rd December 2015, the parties highlighted their submissions and further highlighted their submissions before me on 16th August 2016. The parties through their respective counsel have also filed their written submissions which I have taken into consideration. I have also considered the affidavits filed for and against the application, the grounds of opposition and considered the facts deponed therein. The 2nd Defendant submitted that the figures not presented before court cannot form part of a Decree. In particular, the 2nd Defendant averred

that a summary Judgment was entered in this suit where the plaintiff extracted a decree dated 2nd September 2003 for Kshs.14,573,311.50/=.

It claimed that the plaintiff further on 7th December 2005 sought a review of the court order of 9th July 2003 for the 1st and 2nd Defendants to bear jointly and severally which the court granted. The 2nd Defendant asserts that it paid Kshs.14,573,311.50/= in full and final settlement of the Decree issued on 9th September 2010 and any other figures presented to the court by the plaintiff are foreign to it and to the court.

It is the contention of the 2nd Defendant that the additional figures sought by the plaintiff were neither captured in the plaint nor were they reviewed vide the Court Order on 15th February 2010. The 2nd Defendant further argued that the Registrar had no jurisdiction to approve a decree which was not in agreement with the judgment of the honourable court by adding figures that were neither pleaded nor presented before court for determination.

3) On his part, the plaintiff submitted that the claim against the 1st and 2nd Defendant in this suit was in respect of payment of rent, service charges and interest thereon and not general or special damages as claimed by the 2nd Defendant. It is the plaintiff's submission that the sums stated in the Notice to Show Cause are based on the provisions and stipulations contained in the lease dated 1st April 1996 which is binding on the 2nd Defendant according to the Ruling of D. A. Onyancha J. The plaintiff argued that there was a first decree arising from a Ruling by P. Ransley J. for a sum of Kshs.9,552,714/= with interest thereon from 1st July 2001. According to the plaintiff there is in existence of the Orders and Ruling of D. A. Onyancha J. delivered on 8th February 2012. The plaintiff submits further that the Notice to Show Cause is fully in accord with the decree of the court dated 8th February 2010. The plaintiff is of the view that the Deputy Registrar did not exceed his powers since the Decree conforms to the Ruling of D. A. Onyancha J. and the terms of the lease.

It is the plaintiff's submission that Section 26 (2) of the Civil Procedure Act provides for payment of interest at court rates where the Decree is silent. On payment of further interest, the plaintiff further averred that a claim for rent and service charge cannot be termed as "Special damages."

4) Looking of the court record, it is clear that the plaintiff instituted this suit vide the plaint dated 28th June 2001 where it sought for prayer of rent and service charges and land rent, land rates, interest and advocates amounting to Kshs.9,552,714.00. It also prayed for interest of Kshs.8,265,400/= and rent, service charges, interest and other outgoings falling due from 1st September 2001 until expiration of the lease. Judgment was entered for a sum of Kshs.14,573,311.50/= which decretal sum was deposited in court and the 2nd Defendant further paid a sum of Kshs.583,231.70/= being the taxed party and party costs. The plaintiff thereafter, issued a Notice to Show Cause why execution should not issue against the 2nd Defendant dated 11th January 2012 claiming the recovery of Kshs.178,514,179/= which is allegedly the balance of the Decretal sum together with interest, cost of execution and collection fees. This Notice to Show Cause is what has given rise to the application subject of this Ruling.

5) The issue of determination is therefore whether the Notice to Show Cause should be stayed and set aside. I have perused the court record and considered the arguments as advanced by the parties. It is not in contention that the 2nd Defendant paid a total sum of Kshs.14,573,311.50/= in settlement of decree dated 2nd September 2003 in court. What is in contention is the claim by the plaintiff of the sum of Kshs.178,514,179/=.

6) The plaintiff is adamant that it should be paid the sum of Kshs.178,514,179/= which sum was insinuated by D. A. Onyancha J. in his Ruling dated 8th February 2010 which gave rise to an amended decree. The 2nd Defendant on the other hand claims that the plaintiff should only be paid that sum that he pleaded in his pleadings which sum was decreed and nothing more. I have perused the Ruling dated 8th February 2010.

The Ruling was subject of review since the plaintiff had sought to have the Judgment reviewed on the grounds that it had discovered new evidences; that was not within its knowledge at the time. The evidence included: MOU and GSA between the 1st and 2nd Defendants. The good Judge upon considering the application, held that the 1st and 2nd Defendants are jointly and severally liable to the plaintiff, contrary to the holding by P. Ransley J. who only held the 1st Defendant liable and dismissed the case as against the 2nd Defendant. It is this review that gave rise to an amended decree to include the position of the court.

7) I have also perused the two decree issued by the court. The first decree read:-

1. "That the 1st Defendant do pay to the Plaintiff the sum of Kshs.14,573,311.50/= as more particularly set out hereunder.

a. Rent and Service Charge and Rates/Land Rent Ksh.8,253,600/=

b. Interest thereon Kshs.1,287,314/=

c. Advocates Costs Kshs.11,800/=

**d. Further interest at the rate aforesaid from the 1st of July 2001 to 9th July 2003
Ksh.5,020,396.50/= on Kshs.8,265,400/= @ 30% per annum @Kshs.6,793.50/= per day**

Kshs.14,573,311.50/=.

2. Rent service charge, interest and other outgoings as and when they fall due from the 1st September 2001 until the expiration of lease.

3. The 1st Defendant do pay the Plaintiff costs of this suit to be taxed and certified by the taxing officer of this Honourable Court.

4. The 2nd Defendant's Statement of Defence be and is hereby struck out.

5. The 2nd Defendant do pay the Plaintiff costs of this suit to be taxed and certified by the taxing officer of this Honourable Court with costs.

The second decree being the amended decree read. It is hereby ordered:-

1. That the 1st Defendant an 2nd Defendant do jointly and severally pay to the Plaintiff the sum of Kshs.14,573,311.50/= as more particularly set out hereunder:-

a. Rent and service charge and rates/land rent Ksh.8,253,600.00/=

b. Interest thereon Kshs.1,287,314.00/=

c. Advocate costs Kshs.11,800.00/=

Total Kshs.9,552,714.00/=

**d. Further interest at the rate aforesaid from the 1st of July 2001 to 9th July
Kshs.5,020,396.50/=**

2003 on Kshs.8265.400/= @ 30% per annum @ Kshs.6,793.50 per day

Kshs.14,573,311.50/=

2. That rents, service charge, interest and other outgoings as and when they fall due from the 1st September until the expiration of the lease.

3. That the 1st and 2nd Defendant to jointly and severally pay to the Plaintiff's costs of this suit to be taxed and certified by the Taxing Master of this Honourable Court.

4. That the 1st and 2nd Defendant's statement of Defence be and is hereby struck out.

5. That the 2nd Defendant do pay the Plaintiff its costs of this application as well."

The two decrees are similar only that the 2nd Defendant was included following the Ruling by D. A. Onyancha Judge (as he then was). It is clear from the record that the 1st and 2nd Defendant were decreed to pay to the Plaintiff a sum of Kshs.9,552,714/= which was the sum particularized and prayed for in the plaint. In addition to that sum they were decreed to pay further interest from 1st July 2001 to 9th July 2003 at the rate of 30% per annum which totalled to Kshs.5,020,396.50/= that ultimately brought the total figure to Kshs.14,573,311.50/=.

Furtherance to that, there were other orders numbered 1 – 5. Order 3 required the 1st and 2nd Defendants to pay the taxed costs. The 1st and 2nd Defendant was also required to pay the costs of application.

8) It is apparent that Orders 1, 2, 3, 4 and 5 of the Amended Decree were met by the 1st and 2nd defendants. None of those orders are in contention. In my view, the contention arises from order 2 which demanded payment of rent, service charge, interest and other outgoings as and when they fall due from 1st September 2001 until the expiration of the lease. The bone of contention of the sum of Kshs.178,514,179/= seem to arise from this order in particular. The 2nd Defendant claims that it has settled the claim having paid Kshs.14,573,311.50/= plus the taxed costs. The Plaintiff on the other hand acknowledges payment as deposited in court but argues that there is still an outstanding amount of money by virtue of order 2 which amount is to the tune of Kshs.178,514,179/=.

9) According to Order 2 the 1st and 2nd Defendants are expected to pay rent, service charge and interest as when they fall due from 1st September 2001 until the expiration of the lease. The lease between the Plaintiff and 1st Defendant is dated 1st April 1996. The parties entered into a lease agreement for a term of 10 years, which lease was meant to expire on 28th February 2006. The rent payment by the 1st Defendant varied between the period of 10 years that it was meant to be in occupation of the premises. The parties later agreed to vary the terms of the lease and registered a variation of lease dated 12th October 1999.

The 2nd Defendant according to the above order is required to pay rent dues from 1st September 2001 until 28th February 2006 when the lease expires, which rent according to my calculations amounts to Kshs.35,351,232/= while the service charge amounts to Kshs.4,949,166/=. The interest on the other hand would be 30% per annum as was payable at the time (30% on Kshs.35,351,232 + 9,949,166/=) = 12,090,11.94/=. It emerges therefore that there are additional sums of money that are payable to the Plaintiff by the 1st and 2nd Defendant. According to my calculations, the total sum payable is Kshs.57,390,517.4/= without calculating other outgoings.

10) I am of the view that the 2nd Defendant should instead have challenged the Plaintiff to explain how it arrived at the figure of Kshs.178,514,179/=. It is however as I stated earlier obvious that the decretal sum of Kshs.14,573,311.50/= was not the only money payable under the decree. The only question is how much more is payable as per Order 2 of the amended Decree.

11) On the issue of jurisdiction of the Deputy Registrar, I have perused the two decrees and I do not see at what point the Deputy Registrar exceeded her jurisdiction. She merely considered the amendments as per the Ruling by D. A. Onyancha J. and executed the amended Decree as required by the Law.

12) In the end the motion lacks merit. I hereby dismiss the application in its entirety with costs to the Plaintiff.

Dated and delivered in open court this 3rd day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant