REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 462 OF 2008

JOHNSON KAGO MWAURA…….....CLAIMANT

VERSUS

ROSE NDUTA GITHUA…….....1ST RESPONDENT

BIA BORA DISTRIBUTORS LIMITED…….....2ND RESPONDENT

RULING

1. The plaintiff asserts that the defendants have defaulted in meeting their obligations under the consent order dated 28th September 2012.
2. Pursuant to the consent order, the parties acknowledged that the Arbitrator had awarded to the plaintiff, the sum of Kshs. 8,334,261.00.
3. However, the parties thereafter negotiated and agreed that the defendant would pay to the plaintiff, the sum of Kshs. 7,145,870.00. That lesser sum was agreed upon after deducting from the amount which the Arbitrator had awarded, the statutory deductions and/or taxes.
4. The consent order also indicated that the defendant would pay an amount equal to ¾ of the interest thereon, computed at the rate of 12% per annum from 5th August 2012, until the time of the first payment.
5. The said first payment of Kshs. 2,000,000/- was to be made on or before 30th September 2012. Thereafter, the defendant was to pay Kshs. 500,000/- on or before the last day of each succeeding month, until the agreed sum was paid in full.
6. Of particular interest are the following two paragraphs of the consent;

> *"(vi) As long as the said payments/installments are made within the dates aforesaid, no further interest shall be charged.*
>
> *(vii) However, in the event of default of any one installment, full interest shall immediately become payable on the whole gross amount of Kshs. 8,334,261.00, computed at 12% per annum and backdated from the date of the first payment stipulated in clause (v) (a) hereinabove, in addition to payment of the said net amount of Kshs. 7,145,870.00/-".*

7. It is the plaintiff's case that the defendants had defaulted, as they had only paid Kshs. 5,500,000.00.
8. In the light of the alleged default, the plaintiff submitted that the default clause set out as number (vii) above, came into play.

9. According to the plaintiff, the balance payable by the defendants, as at 22nd September 2013 was Kshs. 3,433,593.20. The said balance was calculated by the plaintiff as follows;

> *"Principal Amount ……..…. Kshs. 7,145,870.00/-.*
>
> *Amount payable under clause (iii) of the Consent i.e ¾ of the Interest on the sum of Kshs. 7,145,870/- at 12% p.a from the date of the Award, 5th August 2011, to the date of first payment, 26th October 2012……..787,611.90/-.*
>
> *Interest payable under default clause (vii) on the Gross Amount of Kshs. 8,334,261.00 at 12% p.a from 30th September 2012 to 22nd September 2013……..……* ***Kshs 1,000,111.30***
>
> ***Kshs. 8,933,593.20***
>
> *Less amount received as at 22nd September*
>
> *2013……..…….* ***Kshs. 5,500,000.00***
>
> ***Kshs. 3,433,593.20"***

10. However, after the application herein was filed, the defendants are said to have paid the sum of Kshs. 1,645,870/-.
11. Having given credit for those sums, the plaintiff submitted that the defendants still owed Kshs. 2,460,792.83, as at 2nd June 2014.
12. It is the plaintiff's case that the defendants have admitted owing the plaintiff. According to the plaintiff, the only issue which might be in dispute is the quantum of the balance still owed by the defendants.
13. Notwithstanding the dispute over the balance still outstanding, the plaintiff submitted that the court should make an express finding that there were monies which were still outstanding. Thereafter, the Deputy Registrar could be mandated to compute the exact outstanding balance.
14. In the meantime, the court was invited to restrain the defendants from disposing of their attachable assets.
15. The court was also asked to stop the defendants from withdrawing or transferring the money or funds that were in their bank accounts.
16. Once the Court was satisfied that there had been a default on the part of the defendants, it was the request of the plaintiff that the court should make a declaration that the default clause took effect.
17. Thereafter, the court was asked to declare that the plaintiff was at liberty to execute or to enforce the Decree.
18. In the alternative to the order granting leave to execute the Decree, the plaintiff asked for an order to compel the defendants to deposit or to furnish security for the payment of the balance of the decretal amount.
19. It is the plaintiff's position that the Defendants had a weak financial status and were therefore unwilling or unable to pay the agreed instalments on time. For that reason, the plaintiff holds the view that it was just and fair to allow the plaintiff to execute the Decree, unless the Defendants provided adequate security for the outstanding decretal amount.
20. In answer to the application, the defendants explained the background to the whole saga. They explained that prior to the listing of the Draft Decree for settlement, Mr. Wananda, the learned advocate for the plaintiff and Mr. Abidha, the learned advocate for the defendant, engaged in informal discussions.
21. The said discussions are said to have varied the terms of the consent order. As an example of such variation, the defendants pointed out that the sum of Kshs. 2,000,000/- was paid on 26th October 2012, whereas it was supposed to have been paid by 30th September 2012.
22. The defendants submitted that other payments were also made in line with agreements arrived at between their respective advocates. Those discussions were necessary because the defendants

were, admittedly, facing financial challenges.

23. In the light of the fact that the plaintiff had acceded to payments which did not follow the strict timelines of the consent order, the defendants submitted that the plaintiff cannot now be allowed to execute the strict terms of the consent.
24. It was the contention of the defendants that the plaintiff was estopped from interpreting the consent in a manner that was prejudicial to the interests of the defendants, because the promises and conduct of the plaintiff led the defendants to believe that the consent had been varied consensually.
25. The defendants relied on the following words of Denning L J in the case of **COMBE VS COMBE [1951] 1 ALL E.R. 766,** at page 770.

> *"The principle as I understand it is that where one party has, by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word".*

26. It is clear from the foregoing that it is the party who introduced a promise or an assurance, who cannot be allowed to go back on his word after the other party has acted in reliance upon such promise or assurance.
27. In this case, the defendants said that it is their lawyer who made representations to the plaintiff's lawyers. In effect, the scenario set out in the case of **COMBE VS COMBE [1951] 1 ALL E.R 766** is wholly distinguishable from that prevailing in this case.
28. In any event, the defendants have not specified any promise or assurance made by the plaintiff; and which the defendants acted upon.
29. The failure or omission to respond to an assertion cannot be equated to a promise or an assurance by the party who had not responded. At best, when a party does not respond, he may be deemed to have failed to controvert the fact raised by the other party.
30. In this case the defendants lawyers wrote on 15th and 19th October 2013, indicating that the balance still outstanding from the defendants was Kshs. 643,128.30.
31. When the plaintiff's advocates failed to answer those letters, the defendants concluded that the advocates for the plaintiff had acceded to the defendant's representations. In my considered view, silence, inaction or omission does not give rise to a promise or an assurance. Therefore, I find that the defendants have failed to prove that the plaintiff gave them any assurance or promise regarding the sum of money which the defendants would be required to pay, in a manner that varied the consent order.
32. The defendants have submitted that the plaintiff is bound by his pleadings. Indeed, based on the decision of **VERMEULEN & OTHERS VS MINISTER VAN VEILIGHEID EN SEKURITEIT EN ANDERS (1377/2008) [2011] ZANWHC 85 (10 MARCH 2011);**

> *"The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty of the function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings".*

I am in full agreement with that authority, which was cited by the defendants. Therefore, the plaintiff cannot purport to raise *"any other business"*, other than that which are to be found within the confines of the pleadings.

33. To the extent that the plaintiff has not demonstrated that the specific properties said to have belonged to the defendants in December 2010 were still in the hands of the defendants, it may be speculative of the court to issue an injunction touching on such properties.
34. However, it is clear that the defendants did not meet their obligations, in terms of making

payments of each installment within the period specified in the consent order. In effect, there were defaults.

35. By accepting money which was remitted late, the plaintiff cannot be presumed to have waived his right to enforce the terms of the consent order. Indeed, the plaintiff is on record as having drawn the defendants attention to the effect of the defaults.
36. In the letter dated 19th February 2013, the plaintiff's lawyers made it clear that the only variation that their client had agreed to was that the first installment of Kshs. 500,000/- be paid at the end of November 2012.
37. By that same letter, the defendants were reminded that they had defaulted by failing to remit the installment for January 2013.
38. Thereafter the plaintiff's lawyers wrote to the defendants lawyers on 19th March 2013, drawing attention to the defendants' default.
39. And on 8th August 2013 the plaintiff's advocates drew attention to the defendants' advocates of the fact that the installments for July and August 2013 had not yet been paid.
40. In the two letters, dated 19th March 2013 and 8th August 2013, the plaintiff invoked clause (vii) of the consent order. Therefore, the defendants were well aware of the plaintiff's consistent stance on the terms of the consent order. The said stance was that the terms of the consent order would be enforced. That means that the plaintiff never agreed to the alleged variation of the consent order, save to the extent specified in the letter dated 13th February 2013.
41. In the result I find that the defaults by the defendants brought into play the provisions of clause (vii) of the consent order. For the avoidance of any doubt, the said clause provided as follows;

> *"However, in the event of default of any one installment, full interest shall immediately become payable on the whole gross amount of Kshs. 8,334, 261.00, computed at 12% per annum and backdated from the date of the first payment stipulated in Clause (v) (a) hereinabove in addition to payment of the said net amount of Kshs. 7,145,870.00"*.

42. The consequence of having declared that clause (vii) took effect is that the defendants are yet to pay the whole decretal amount. I so find because, by their own contention, they had only paid the sums that would have been payable if clause (vii) had not taken effect.
43. Following the defendants' defaults, I declare that the plaintiff is at liberty to execute the Decree.
44. In the light of the fact that the Decree is more than 12 months old, the process through which it can be executed will afford the parties an opportunity to have the exact outstanding balance verified by the learned Deputy Registrar.
45. Finally, the costs of the application date 2nd October 2013 are awarded to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **12th day** of **February** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Wananda for the Claimant.

Abidha for the 1st Respondent.

…….for the 2nd Respondent.

Collins Odhiambo – Court clerk.