



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 425 OF 2004

RELIANCE BANK LIMITEDPLAINTIFF

• VERSUS -

NYUMBA YA CHUMA LIMITED1ST DEFENDANT

MINESH KANTIBHAI PATEL.....2ND DEFENDANT

KANTI GHAI PATEL3RD DEFENDANT

RULING

1. The defendants pray that this suit be marked as settled. They also crave an order to compel Peter Mwangi, a proprietor of Day Star Auctioneers to pay to them the sum of Kshs 250,000/-. Those prayers are the remainder of an old chamber summons dated 18th December 2003. It remains a serious indictment to both parties that an interlocutory motion has been pending in court for a decade.
2. The chamber summons is predicated upon two depositions: the first is by Gilbert Mungu, an advocate for the defendants. He deposes that on 24th July 2001, the suit was listed before Aganyanya J (as he then was) when it was marked as “*compromised or settled*”. That fact is contested by the plaintiff/decree holder. The second deposition is by Minesh Patel, the 2nd defendant. He relies on information from his lawyers that the suit was compromised on 24th July 2001. He deposes that notwithstanding the settlement, the auctioneer, on 15th December 2003, purported to execute a decree dated 11th December 2003. The auctioneer attached two vehicles. The 2nd defendant paid him Kshs 50,000 in cash and a banker’s cheque for Kshs 200,000 to “avoid embarrassment”. That is the reason the defendants seek a refund. The 2nd defendant has also annexed two sets of bank statements from the plaintiff dated 31st July 1996 and 21st January 1998 showing that the claim pleaded in the plaint was “paid off” in the year 1997 or about 4th August 1997 respectively.
3. The chamber summons is contested by the decree holder. The attack is three-pronged: first, that the decree has not been settled; secondly, that the application is an abuse of court process and lacks any merit; and, thirdly that the application is incurably defective for violating the mandatory provisions of sections 228 and 241 of the Companies Act. The plaintiff thus prays that the application be dismissed with costs. Both parties have filed written submissions which they highlighted in court on 24th September 2013.
4. Regarding the sum of Kshs 250,000, the auctioneer conceded receipt of the amount in his affidavit

- sworn on 16th February 2004. He asserted his rights to that amount as professional fees. On 18th December 2003, Nyamu J (as he then was) ordered the auctioneer “to pay in court Kshs 250,000 paid to him by the defendant as auctioneers charges forthwith”. It is not clear why the defendants chose not to enforce that order. A similar order was made by the court on 23rd December 2005 (Azangalala J, as he then was). There is then a sense in which the current prayer is being regurgitated and is an abuse of process. The auctioneer was ordered to file a bill for taxation within 14 days. There was thus a clear remedy granted. There is a multiplicity of applications by the defendant all seeking stay of execution and similar reliefs. They are dated 22nd March 2001, 11th September 2004, 31st August 2006 and the present one dated 18th December 2003. That militates against the grant of a further order to compel the auctioneer to pay the same sum to the defendant. Fundamentally, the prayer is anchored on the presumption that there was no pending decree or that the decree had been settled. That fact is under contest.
5. Part of the problem relates to the record. This is a reconstructed court file. On 18th October 2006, my predecessor, Azangalala J (as he then was), stated that he was quite unhappy with the record. I express the same sentiments. I have seen a decree dated 8th April 1997 and issued by the court on 28th April 1997. It is made pursuant to a consent letter dated 3rd April 1997. It is for the sum of Kshs 2,818,356.30. The defendants were to liquidate it in twelve equal monthly installments from 28th April 1997 until full payment: in default of any one installment on its due date, execution was to issue. Quite clearly, the auctioneer was referring to a strange or non-existent decree dated 11th December 2003 or any other date. That said the statements exhibited by the 2nd defendant do not itemize the payment of the decree. There is an entry of 4th August 1997 showing disbursement of Kshs 2,250,000. Even assuming that that payment was not contested, it does not satisfy the decretal sum of Kshs 2,818,356.30 above.
 6. I now turn to the prayer to mark this suit as settled. From the deposition of Mungu, it is stated that the defendants had filed an application seeking an order to have the suit marked as settled. That is the application that he deposes was listed before Aganyanya J (as he then was) on 24th July 2001. He deposes that the matter was marked as settled in the absence of the decree holder.
 7. Three key problems are evident; first, the defendants admit that the daily cause list for that date has remarks “OM” against the case number. The defendants’ interpretation is that that means “orders made”. Secondly, the defendants have not exhibited a copy of the order of court of that date. That would have settled all doubts. There is the third and more pertinent matter: If the defendants sought and were granted that order, the current prayer is superfluous, perhaps even *res judicata*. Furthermore, there are affidavits of Mohamud A. Mohamud dated 12th February 2004 and 18th September 2006 contesting the settlement and stating that by 31st August 2003, the decree had ballooned to Kshs 4,103,501.35. It would then be a travesty of justice to mark the suit settled on contested affidavit evidence.
 8. Finally, the present application offends section 228 of the Companies Act. It is common ground that the plaintiff went into liquidation on 12th September 2000. The Deposit Protection Fund Board was appointed the liquidator. Accordingly, no proceedings shall be commenced or continued against the decree holder without leave of the court. No such leave has been granted or ratification of the liquidator obtained as further envisaged by section 241 of the Act. The present application is thus dead fish in the water. See Welcome Properties Vs Jackson Karuga and 2 others Nairobi, High Court case 70 of 2001 (unreported), *Halsbury’s Laws of England* 4th edition volume 7 (2) paragraph 1578.
 9. In the result, the remainder of the defendants’ chamber summons dated 18th December 2003 is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of November 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff/Decree holder.

Mr. J.O. Were for the Defendants/Judgment debtor.

Mr. Collins Odhiambo, Court Clerk.