



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, AKIWUMI & SHAH, J.J.A.)

CIVIL APPLICATION NO. NAI. 128 OF 1996 (49/96UR)

BETWEEN

1. FOREST LODGE LIMITED

2. INDO-AFRICA FINANCE COMPANY LIMITED.....APPLICANTS

AND

1. ARI CREDIT & FINANCE LTD

2. DELTEX & AGENCIES LIMITED

3. K. S. GHEEWALA.....RESPONDENTS

(An application from the order of the High Court of Kenya

at Nairobi (Justice Bosire) dated 19th day of March, 1996

in

H.C.C.C. NO. 4295 OF 1988

RULING OF THE COURT

It is plain to us that the affidavits filed in this application are not altogether candid. But what is clear is that whilst the applicants have clearly failed to comply with the provisions of the consent judgment and thereby opening themselves to further action by the respondents, the respondents on their part, have also demanded from the applicants amounts such as handling charges which do not appear to be justifiable. We think that these circumstances make the intended appeal arguable particularly when it is considered that if the respondents are to sell the suit property, they would exploit this to recoup themselves not only of the 2,400,000/= involved in the consent failure to enter an appearance and/or file defence within the prescribed period pursuant to the plaintiff's application made on 21st July, 1989. Such judgment was on 25th September, 1989 set aside by Shields, J. when on an application then made to him he set it down for assessment of damages. On 14th February, 1990 evidence was led before the learned judge who awarded punitive damages for excessive and oppressive execution.

At the hearing of the appeal, Mrs. Wahome for the appellant in an able and attractive argument did not

dispute and, in our opinion rightly, that the ex-parte judgment had been properly set aside. She made two complaints; first, that there was no application made before the superior court for damages that were ordered. We are, however, satisfied that having regard to the summary relief intended to be provided by section 91 of the Civil Procedure Act the question of damages was properly raised before the superior court. Secondly, it was contended that the damages awarded were excessive and called for an interference.

We have given careful and anxious consideration to this aspect of the case. It is not in dispute that the execution against the respondent was oppressive, irregular and improper and as earlier stated, the learned judge described it as an "outrageous execution". The damages are said to be at large. We are satisfied that this is a case where substantial damages may be awarded although the nature of the damage prevents absolute certainty of proof. The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.

Where precise evidence is not obtainable, the court must do the best it can.

Giving the material before us the best consideration and doing the best we can in the face of paucity of evidence to assist the court in assessing proper damages, we are satisfied that Mrs. Wahome's complaint is well founded. We are of the view that the damages awarded are so high and excessive that it must be presumed that the superior court acted on a wrong principle entitling this Court to interfere. Having regard to all the circumstances of the case an award of KShs.150,000/ would be reasonable and just.

Accordingly and, for the reasons above stated, the appeal is allowed. The order appealed against is set aside and substituted by an award of KShs.150,000/= with costs and interest. As both parties have had a measure of success, there will be no order as to costs of this appeal.

Dated and delivered at Nairobi this 11th day of July, 1996.

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR