



Centurion Engineers & Builders Ltd v Kenya Bureau Of Standards (Miscellaneous Application 506 of 2012) [2023] KEHC 27104 (KLR) (Commercial and Tax) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 506 OF 2012
A MABEYA, J
DECEMBER 21, 2023**

BETWEEN

CENTURION ENGINEERS & BUILDERS LTD PLAINTIFF

AND

KENYA BUREAU OF STANDARDS DEFENDANT

RULING

1. Before me for determination are two applications. The respondents Motion on Notice dated 14/11/2022 and the Applicant's Motion dated 13/12/2023.
2. The Motion of 14/11/2023 did not disclose the provisions of the law it was brought under. It sought a stay of execution pending the hearing and determination of an application for Certification in the Court of Appeal for leave to appeal to the Supreme Court against the judgment of the Court of Appeal dated 27/10/2023. Then application was supported by the affidavit of Miriam Kahiro sworn on 14/11/2023 and on the grounds set out on the face of the Motion.
3. It was contended that the dispute arose out of a contract made on 27/4/2009 for Kshs. 79,910,440/=. When a dispute arose, the matter was referred to arbitration whereby an award of Kshs. 114,590,383.30 in June, 2015. The High Court dismissed the application for recognition but that decision was overturned by the Court of Appeal on 27/10/2023. That the respondent had filed an application in that Court to have the matter certified for reference to the Supreme Court.
4. It was contended that the respondent has an arguable appeal in the Supreme Court. That the amount due is substantial being in excess of Kshs. 500 million plus interest. That if the appeal succeeds, the same will be rendered nugatory as there is no likelihood of recovery. That the respondent is a statutory body and it need not give security but can offer a bank guarantee. That since costs had not been taxed,



- the decree cannot be executed as the same would be against section 94 of the *Civil Procedure Act*. The case of *Joel Mutuma v Standard Digital* [2020] eKLR was cited in support of that contention.
5. The application was opposed vide a replying affidavit of Engr Samay Singh sworn on 15/11/2023. It was contended that the attempted execution was lawful. That it was the applicant's under liable right to enjoy the fruits of its judgment. That no Notice of Appeal or the alleged application for Certification had been filed. That this court cannot stay a decree of the Court of Appeal. That in any event, the applicant will be able to refund the money if required as it is an ongoing concern.
 6. This is an application for stay. The respondent did not cite any provision for which under which it anchored the application. Ordinarily applications for stay pending appeal are brought under Order 42 Rule 6. However, the present one is not such an application. The appeals contemplated under S 75 of the *Civil Procedure Act* and Order 42 Rule 6 are appeals from the High Court to the Court of Appeal.
 7. In the present case, the matter has already crossed that bridge. The Court of Appeal has already heard and determined the matter. The respondent seeks that this Court stays the execution of the decree pending the Court of Appeal hearing a Certification application. That application is meant to allow the respondent appeal to the Court of Appeal against the latter's judgment dated 27/10/2023.
 8. In the premises, I do not think that it is Order 42 Rule 6 that applies in the circumstances of this Court.
 9. It was contended that since the judgment of the Court of Appeal is a decree of this Court, this Court has jurisdiction to stay its execution. I entertain doubt on that submission. While it is true that the judgment of the Court of Appeal when executed, it is executed as if it is of this Court, the question that arise is can this Court, which is inferior to the Court of Appeal put breaks on an order or judgment of the Court of Appeal. I entertain doubt.
 10. This Court could have invoked its inherent jurisdiction to entertain the application if it was shown that the Court of Appeal has no power to arrest or stay its judgment awaiting a determination on application for Certification. Holding otherwise would be usurping a jurisdiction that this Court does not have.
 11. The proper route the respondent should have taken was to approach the Court of Appeal and ask it to stay its own judgment pending the Certification. Accordingly, I decline to assume jurisdiction to halt a judgment of a Court Superior to this Court. The application is therefore for striking out.
 12. The next application is the one by the applicant dated 13/12/2023. It sought to garnishee various accounts belonging to the respondent held by the garnishees. Then therefor were that there was a decree for Kshs. 584,492,094/20 which remained unsatisfied. That the garnishees held funds for the respondent capable of satisfying the decree.
 13. The same was opposed by the respondent vide the replying affidavit of Mirriam Kahiro sworn on 15/12/2023. It was contended that the application was an abuse of the Court process as it was the third application from 10/11/2023. That since the respondent's application for Certification was pending, the application for garnishee orders should be declined. It was submitted that the application was premature as costs had not been taxed. That section 94 of the *Civil Procedure Act* barred execution of decrees before taxation of costs.
 14. I have considered the rival contestations. This is garnishee application. Ordinarily, it is a duel between a decree holder and a person who is indebted to a judgment debtor. The Court usually summons such a person to show his/her indebtedness to the judgment debtor with a view to pay over to the decree holder the amounts owed in satisfaction of the decree.



15. In this regard, the participation of the judgment debtor is limited to showing the Court that either the decree has been satisfied or if not yet satisfied for good reasons, the monies thereon are not payable.
16. In the present case, the objection by the respondent are three fold. It does not deny that the decree is yet to be satisfied. All it says is that, the application is an abuse of the Court process being the 3rd to be made in less than a month, that there is a pending application for Certification in the Court of Appeal and finally, that costs having not been ascertained, execution cannot issue.
17. On the first ground, the same has no basis as a successful party is entitled to mount all force to recover and or have his judgment satisfied. He can make countless executions with a view to recover the decretal sum. That objection is dismissed.
18. On the pending application for Certification in the Court of Appeal, the same has already been dismissed. Nothing turns on it.
19. On the ascertainment of costs, I agree with Mr. Issa that under Section 94 of the Civil Procedure Act, there can be no execution before costs are taxed. The question that arise is where are the costs to be taxed, before the taxing master of this Court or the Court of Appeal. Looking at the judgment of 27/10/2023, the Court of Appeal did not award the costs in the High Court. It only awarded costs in the Court of Appeal. I doubt if costs of that Court are to be taxed before the taxing master of this Court and executed as part of the decree.
20. Be that as it may, looking at the decree as issued by the deputy registrar, the costs specified are those of the arbitration. There is no costs left to be executed later. Accordingly, that objection also fails.
21. That leaves the Court with the garnishees. The applicant applied to leave the 4th garnishee. All the remaining 3 garnishees filed responses to the application. For reasons on record, the Court excluded 2 Accounts held by the 1st garnishee. Such exclusion does not preclude the applicant from garnisheeing the same in future if the decree is not fully settled.
22. The garnishees disclosed their indebtedness to the respondent as follows:-
 - a. 1st Garnishee – Kshs. 11,085,829.50
 - b. 2nd Garnishee – Kshs. 3,962,715.52
 - c. 3rd Garnishee – Kshs. 1,184,200.45
23. Accordingly, the Court determines the two applications as follows:-
 - a. The Motion dated 14/11/2023 is hereby struck out with costs to the applicant.
 - b. The Motion dated 13/12/2023 is allowed and the decree Nisi made absolute. Consequently, the 1st, 2nd and 3rd garnishees are directed to pay over the monies in the respective accounts less, Kshs. 50,000/= for each garnishee for costs, in terms of prayer 5 of the Motion.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2023.

A. MABEYA, FCI Arb

JUDGE

