



**China Sichuan Corporation for International Techno-Economic Co-operation (SIETCO) v Kigwe Complex Limited (Civil Suit 464 of 2012) [2022] KEHC 10558 (KLR) (Commercial and Tax) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 464 OF 2012**

**A MABEYA, J**

**MAY 26, 2022**

**BETWEEN**

**CHINA SICHUAN CORPORATION FOR INTERNATIONAL TECHNO-ECONOMIC CO-OPERATION (SIETCO) ..... PLAINTIFF**

**AND**

**KIGWE COMPLEX LIMITED ..... DEFENDANT**

**RULING**

1. Before Court is the defendant's Motion on Notice dated 3/2/2021. It was brought pursuant to the provisions of Order 10 Rule 11, Order 21 Rule 7, 8 and 9 and Order 51 Rule 1, Order 9 Rule 9 of the Civil Procedure Rules, Section IA ,1 B and 3A of the Civil Procedure Act.
2. The Motion prayed that the decree issued herein on 16/7/2019 be set aside and the consequent execution proceedings to enforce the decree be declared a nullity. There was also a prayer to quash the notice of sale of the defendant's moveable properties and set aside the warrants of attachment and sale.
3. The application was supported by the affidavit of David Waiganjo Kigwe sworn on 3/2/2021. Its grounds were that; on 30/5/2019, judgment was entered against the defendant. Subsequently, on 16/7/2019, a decree was issued irregularly without the approval of the applicant. A reference dated 14/1/2020 had been filed to challenge the decision of the taxing officer yet the applicant had now issued an illegal and/or irregular notice of sale against the defendant's property.
4. In opposition, the plaintiff filed a replying affidavit of Fan Bo sworn on 15/10/2021. He denied that the plaintiff had obtained an irregular decree. Rather, the same was obtained by the defendant who served it upon the plaintiff together with the Record of Appeal on 7/8/2019. That the preparation



of the decree is a function of the court as the preparation of a draft by either party is optional. The defendant had not demonstrated how the decree was defective.

5. He further averred that the filing of a reference on taxation did not act as a stay of execution and that therefore, the prohibitory order was lawfully issued. That under Order 22 Rule 48, attachment of immovable property is complete and effective upon registration of a copy of the prohibitory order against the title. No notice was required to be served upon a judgment debtor before execution is issued against him, except where a judgment is delivered in default of appearance or default of defence or where execution is taking place more than one year after the date of the decree. That these circumstances were not applicable in the present case.
6. Further that the prohibitory order was served on the defendant's advocates and affixed on the property on 20/1/2021. That the notice of sale of immovable property was served on the defendant personally as the registered owner of the property on 27/1/2021. That the auctioneer served the notification of sale as required under the law and that the defendant does not meet the conditions for a stay of execution pending appeal.
7. Having considered the record, the issue for determination is whether the decree was regularly and lawfully issued. The decree was produced as 'FB-2' in the plaintiff's replying affidavit of 15/10/2021.
8. The decree decreed: -Ksh 8,560,150.90 with interest at court rate from 4/1/2012 until payment in full. Ksh 17,339,150.70 with interest at court rate from 23/5/2012 until payment in full. Costs of the suit and costs of the defendant's counter claim which is hereby dismissed.
9. The decree was issued on 16/7/2019 and signed by the deputy registrar of this Court.
10. The defendant argued that the decree was defective as the draft thereof was not served upon its advocates for approval as required by the law. Order 21, rule 8 of the [\*Civil Procedure Rules 2010\*](#) provides that any party in a suit may prepare a draft decree and submit it for the approval of the other parties to the suit. The other parties may reject it, however if the deputy registrar is satisfied that the draft decree is drawn up in accordance with the judgment, he/she shall sign and seal the decree accordingly.
11. In [\*Masinde Muliro University of Science and Technology v Alfatech Contractors Limited; Kenya Commercial Bank Limited & another \(Garnishee\)\*](#) [2021] eKLR, it was held: -

“My understanding of the provisions that I have cited above, is that the draft decree may be generated by either party. The provisions do not make it mandatory for the draft to come from the parties. A decree is an instrument that issues from the court, duly executed by the registrar and bearing the seal of the court. It is, therefore, a court instrument, issued at the instance of the court, as a purport of the outcome of court proceedings as set out in the judgement of the court. In an ideal situation, the decree should be generated by the court, but Rule 8 gives the parties an opportunity to initiate the process. Where they choose to initiate it, it becomes mandatory that the draft be placed before the other party for approval. Whether it is approved by the other party or not should not be an obstacle to the finalisation of the matter, the registrar should still take charge and generate the decree.”

12. The Court concurs with the foregoing in total. The parties in a suit may prepare a draft decree. It is however, not mandatory that the draft decree emanate from the parties. The Court may issue the same suo motto and in the course of its normal business to perfect the judgment. In the present case, the defendant did not deny the allegation by the plaintiff that the latter first saw the decree when the defendant served upon it the Record of Appeal. That means that, the decree either was prepared by



the defendant or by the Court itself. There is nothing irregular with that. A party cannot rely on its irregularity to the prejudice of the opposite party.

13. Further, the Court has looked at the contents of the decree. The same mirror the judgment dated 30/5/2019 contrary to what the defendant alleged.
14. In this regard, the Court finds that the decree to be in order and not defective as alleged.
15. The second issue is whether the prohibitory order of 8/1/2021 was procedurally and regularly and lawfully issued. The defendant submitted that the prohibitory order was irregular and void *ab initio* as it was based on a defective decree. That it had been issued when there was an existing application seeking similar orders before a judge and that it was issued when there was in existence a notice challenging the decision of the taxing officer.
16. Order 22 Rule 48 of the [Civil Procedure Rules](#) provides: -

“Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgement-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.”
17. In the present case, the plaintiff’s application was for execution against immovable property. Consequent thereto, a prohibitory order was issued by the deputy registrar of the Court. This was followed by the registration thereof by the Register of Lands against LR Number 15297/2 of IR 209943.
18. The Court has already established that the decree was not defective in any sense. On the assertion that the prohibitory order was bad in law for having been issued in the subsistence of an application before the Court, I find that the said application was intended for a Prohibitory Order pending determination of costs.
19. Since the issue of costs was determined, *vide* the certificate of costs issued on 4/1/2021, the application has been overtaken by events.
20. The assertion that the Prohibitory Order should not have been issued in the subsistence of a reference fails because section 51 (2) of the [Advocates Act](#) provides that the certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby.
21. The 3rd issue for determination is whether the Notice of Sale was irregular and unlawful. It was the defendant’s contention that that the notification of sale of immovable property was illegal and irregular as the auctioneer did not serve the proclamation or any warrants of attachment upon the defendant as required by the law.
22. Annexure ‘FB-9’ in the plaintiff’s affidavit of 15/10/2021 is an affidavit of service indicating that the prohibitory order was served on the defendant’s advocates. On the other hand, annexure ‘FB-10’ shows that the auctioneer served the Notice of Sale on the defendant personally. That is satisfactory evidence that the defendant was duly served with the notification of sale by the auctioneer in accordance with the law.



23. The final issue was whether the defendant has met the conditions for a stay of execution. Prayer (e) of the application sought a stay order and all other consequential orders. The application did not quote the relevant provisions of the Civil Procedure Rules for that prayer.
24. Other than the averment that the defendant is likely to suffer prejudice if the auctioneers proceed with the sale, the defendant did not prove its case for a stay of execution. What the plaintiff had undertaken was a lawful process and cannot be restrained from perfecting the same.
25. For the foregoing reasons, the application dated 3/2/2021 is without merit and is dismissed entirely with costs to the plaintiff.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

**A. MABEYA, FCIArb**

**JUDGE**

