



REPUBLIC OF KENYA



High Flyer Services and Publishers Limited v Mwangi T/A High Flyer Publishers (Civil Suit 107 of 2013) [2022] KEHC 12963 (KLR) (Commercial and Tax) (31 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 107 OF 2013
A MABEYA, J
AUGUST 31, 2022**

BETWEEN

HIGH FLYER SERVICES AND PUBLISHERS LIMITED APPLICANT

AND

PETER GICHUKI MWANGI T/A HIGH FLYER PUBLISHERS ... RESPONDENT

RULING

1. Before court is an application dated July 15, 2021. It was brought under sections 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, order 22 rule 22, order 21 rule 8 of the *Civil Procedure Rules*.
2. It sought interim orders staying the execution of the decree herein pending the determination of civil appeal No E003 of 2021 (“the said appeal”). The grounds thereof were set out on the face of the motion and on the supporting affidavit of Anthony Kiai sworn on July 16, 2021.
3. It was contended that vide the ruling of October 5, 2016, the court stayed this suit pending the determination of Milimani HCCC No 45 of 2011. The judgment in that case was delivered on December 20, 2019 dismissing the applicant’s case and allowing the respondent’s counter-claim.
4. That the applicant then filed the said appeal and an application for stay of execution in Milimani HCCC No 45 of 2011 and obtained orders staying execution pending the hearing of that application. That the ruling of that application was still pending. That instead of waiting for delivery of the said ruling, the respondent secretly obtained the subject decree, instructed Bemac Auctioneers and commenced execution. That on July 12, 2021, the auctioneers issued a seven-day notice of proclamation and attachment of the applicant’s assets.
5. That the respondents contravened order 21 rule 8 of the *Civil Procedure Rules* by failing to share the draft decree with the applicant’s for approval. That the execution process was misconceived as the court



- stayed this suit as it was substantially similar to Milimani HCC 45 of 2011. That as such, the outcome in the said appeal would affect the substratum of this suit. That execution in this matter was subject to the determination of the application for stay in HCCC No 45 of 2011 and the appeal.
6. That the applicant would suffer prejudice and substantial loss if the respondent proceeded with the intended execution before determination of the application for stay and the appeal.
 7. The respondents opposed the application vide the replying affidavit sworn by Peter Gichuki Mwangi on July 26, 2021 and grounds of opposition of even date. It was contended that *vide* the ruling of May 5, 2020, this suit was marked as compromised on December 20, 2019 and costs awarded to the respondent. That the applicant did not appeal that ruling whereby the respondent filed the bill of cost and served them upon the applicants which the contested.
 8. A ruling was delivered on February 18, 2021 whereby the costs were taxed at Kshs 529,337/=. That the applicants did not appeal the taxation and was served with the decree as per the affidavit of service marked as PGM4. It is then that warrants were issued to Bemac Auctioneers to execute the decree issued on February 18, 2021.
 9. That the decree that was issued on July 5, 2021 was for the bill of costs for HCC 107 of 2013 and not HCC 45 of 2011. It was admitted that there was a pending ruling in HCC 45 of 2011 but there was no stay granted therein and in the appeal since 2019.
 10. The parties filed their various submissions which the court has considered. The ruling of May 5, 2020 marked this suit as compromised and awarded costs to the respondent. There is nothing to show that the applicant moved the court to either review and set aside the ruling or any appeal preferred. The bill of costs were taxed *inter-partes* for Kshs 529,337/=. The same has also not been appealed against.
 11. Contrary to the allegation that the applicant was not notified of the subject decree, the affidavit of service filed in court shows otherwise. There was also an email from the respondent's office to the applicant's attaching the decree. In that regard, the court finds that upto the point of the issuance of the warrants, there was nothing untoward.
 12. The applicant's contention that the execution will prejudice both HCCC No 45 of 2011 and COACA No E003 of 2021 is unfounded. The execution of the decree for costs of this suit is not an issue in either of those two cases. The memorandum of appeal attached by the applicant had 20 grounds and none of them were in relation to the execution of the decree herein. In any case, there are no orders staying the grant of costs in this suit.
 13. There is therefore no justification in restraining the respondent from executing the decree for costs in a suit which has already been marked as compromised. Payment of costs in this suit has no effect whatsoever in any other suit as the issue of costs in this suit is not an issue before any other court. The parties will continue to engage in the appeal with no prejudice whatsoever.
 14. The upshot is that the application dated July 15, 2021 is found to be without merit and is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

