



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 186 OF 2009**

**PKM.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**GSB.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

(Suing on own behalf & as next Friend of **AJB** (Minor))

**VERSUS**

**NAIROBI WOMEN'S HOSPITAL.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DR. MUTINDA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application dated 24<sup>th</sup> November, 2020 seeks orders that the Plaintiff/Decree Holder be allowed to execute the Decree herein before taxation of the Party to Party Bill of Costs.

2. The application is premised on the grounds set out in the application and the supporting affidavit. The Applicants' case is that the Plaintiffs' Party and Party Bill of Costs was stayed on 10<sup>th</sup> December, 2018 on the Judgment Debtor's application. That the Appeal by the Judgment Debtor was dismissed by the Court of Appeal on 20<sup>th</sup> November, 2020. It is stated that this case involves a child who is disabled and urgently requires medical attention.

3. The application is opposed. The Respondents filed a Preliminary Objection dated 17<sup>th</sup> December, 2020 on the grounds that the application offends the provisions of Order 32 rule 6 of the Civil Procedure Rules.

4. In the replying affidavit filed in opposition to the application, it is stated that although the Court of Appeal dismissed the Appeal in respect of the Judgment, there is a pending application for review of the Judgment. That there is Appeal No.88/20 also pending before the Court of Appeal in respect of an application dated 12<sup>th</sup> March, 2018 wherein there is an application for stay of execution pending hearing and determination of the Appeal. It is further averred that the Respondents stand to suffer irreparable damage if called upon to satisfy the huge decretal sum herein before the matters pending before the Court of Appeal are determined.

5. I have considered the application, the response to the same and the written submissions filed by the respective counsel for the parties.

6. Section 94 of the Civil Procedure Act provides as follows:

**“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”**

7. The said provision gives the court the discretion to allow execution before the ascertainment of costs. The discretion must however be exercised judiciously.

8. In the case at hand, the Court of Appeal has determined the Appeal. The Appeal was dismissed with costs on 20<sup>th</sup> November, 2020. Now that the Court of Appeal has spoken, matters that are still pending before the Court of Appeal can only be addressed by the Court of Appeal. It is noteworthy that there are no orders for stay of execution that have yet been issued by the Court of Appeal. In the case at hand, the court is dealing with a special circumstance involving a minor who is disabled and requires medical attention. The ascertainment of costs may take long. That will not be in the best interests of the minor herein. There is no prejudice demonstrated that will be suffered by the Respondent if the application is allowed.

9. The Respondent has referred the court to Order 32 rule 6 which provides as follows:

**“(1) A next friend or guardian ad litem shall not, without the leave of the court, receive any money or other movable property on behalf of a minor, either—**

**(a) by way of compromise before decree or order; or**

**(b) under a decree or order in favour of the minor.**

**(2) Where the next friend or guardian ad litem has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the court to receive the money or other movable property, the court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.”**

10. In this court’s view, allowing an application for execution before the ascertainment of costs is not a bar to the making of an application under order 32 rule 6 Civil Procedure Rules. The Preliminary Objection therefore has no merits and is dismissed.

11. With the foregoing, the upshot is that the application dated 24<sup>th</sup> November, 2020 is allowed with costs.

**DATE, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2021**

**B. THURANIRA JADEN**

**JUDGE**