



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL CASE NO. 9 OF 2019**

**JOEL MUTUMA KIRIMI.....1<sup>ST</sup> PLAINTIFF**

**SHARON CHEPKORIR KOSKEI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE STANDARD DIGITAL.....1<sup>ST</sup> DEFENDANT**

**THE STANDARD GROUP LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By their Motion on Notice expressed to be brought under *sections 1A, 1B, 3A and 94 of the Civil Procedure Act, Orders 42 Rule 6 (1) and (2), 51 Rule 1 and 21 Rule 8 (2) and (3) of the Civil Procedure Rules*, the defendants sought the orders in the following terms: -

a) A temporary injunction be issued restraining Joel Mutuma Kirimi and Sharon Chepkorir Koskei, the plaintiffs herein and Isaack Ringera t/a Viewline Auctioneers, whether by themselves, their agents, servants, employees, invitees and/or otherwise whomsoever from selling, disposing of, charging, dealing, managing, letting, advertising for sale, offering for sale, or otherwise using or in any way whatsoever from interfering with the movable property listed in the proclamation of attached movable property dated 26<sup>th</sup> June, 2020 pending the hearing and determination of this Application inter partes;

b) The Honourable Court be pleased to order stay of execution of the judgment and Decree of the Court given on 18<sup>th</sup> June, 2020 pending the hearing and determination of this Application.

c) The Honourable Court be pleased to order stay of execution of the warrants of attachment and sale issued to Viewline Auctioneers on 23<sup>rd</sup> June, 2020 pending the hearing and determination of this Application inter partes.

d) The Honourable Court be pleased to order that the warrant of attachment and warrant of sale of property issued to View Auctioneers on 23<sup>rd</sup> June, 2020 be recalled and cancelled;

2. The application was premised on the grounds on the face of the Motion and in the supporting affidavit of **Millicent Ngetich**, head of Legal Department of the 2<sup>nd</sup> Defendant. She averred that the defendants were aggrieved by the judgment of this Court made on 18/6/2020 and have since filed a Notice of Appeal and sought copies of the proceedings.

3. It was further averred that the plaintiffs had, through Viewline Auctioneers, obtained warrants of attachment and warrants of sale to recover Kshs. 8,602,950/=. On 26/6/2020, the Auctioneers proclaimed the defendant's assets in execution of the warrants. It was contended that the said execution was premature as the plaintiffs had neither taxed their costs nor obtained leave of Court.

4. It was therefore contended that the defendants will suffer substantial loss and great prejudice if the proclaimed goods are sold as it will render the appeal nugatory. The defendants offered security by way of a bank guarantee and an insurance bond as security.

5. The plaintiffs opposed the application vide the replying affidavit of **Joel Mutuma Kirimi** sworn on 2/7/2020. He averred that the plaintiffs had financial capability to refund the defendants the decretal sum in the event the appeal succeeds. That the plaintiffs were willing to allow the defendants pay 70% of the decretal sum and deposit 30 % of the decretal sum in a joint interest earning account.

6. It was contended that the taxation of costs is a separate cause of action and must not necessarily be contained in the decree as the same can be stated in a separate certificate. That *section 94 of the Civil Procedure Act* does not affect the provisions of the *Advocates Remuneration Order*.

7. **Ms. Koske**, Learned Counsel for the defendants submitted that the application was made timeously. That due to the financial implication of covid-19, a bond or guarantee would suffice as security.

8. She further submitted that the execution commenced by the plaintiffs was contrary to **section 94 of the Act**. She relied on **Butt v Rent Restriction Tribunal [1982] KLR 417, National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another (UR) C.A. 238/2005, Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another [2018] eKLR** in support of those submissions.

9. On behalf of the respondents, **Mr. Walukwe** submitted that they were not persons of undisclosed means. That substantial loss had not been proven. That the offer of a bank guarantee will defeat the award of interest in the judgment. He further submitted that **Order 21 Rule 9 of the Civil Procedure Rules** does not make it mandatory that taxed costs have to be included in the decree. He relied on **Equity Bank vs Capital Construction Ltd Nrb Civil Suit No. 645 of 2009** in support of those submissions.

10. The application clearly raises two issues for determination. **1. Whether the warrants of Sale and Attachment were obtained procedurally, and, 2. Whether a stay of execution of should issue.**

11. On the first issue, it was contended that the decree was obtained without a draft decree being served upon the defendants and that the warrants were premature as they were obtained prior to taxation and without leave of the Court.

12. **Section 94 of the Civil Procedure Act** provides: -

*“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”.*

13. In **Kartar Singh Dhupar & Co. Ltd v Lianard Holdings Limited [2017] eKLR** cited by the defendants, it was held: -

*“The mischief sought to be addressed by section 94 of the Civil Procedure Act, is to protect a judgment debtor from suffering multiple executions, one in respect of the principal sum and the other for the costs after ascertainment in respect of the same suit.”*

14. The Court in **Kartar Singh Dhupar (supra)** also cited the case of **Bamburi Portland Cement Co. Ltd v Hussein (1995) LLR 1870 (CAK)** where Shah JA stated as follows: -

*“Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.”*

15. From the foregoing, it is quite clear that the plaintiffs ought to have sought the leave of the Court before proceeding with the execution process. The provisions of **section 94** can only be avoided if no costs are ordered or if a party entitled to costs waives its rights to costs. See **Erad Suppliers & General Contracts Vs NCPB - Misc. Civ. Case No. 639 of 2009 (UR)**.

16. The applicant has also found fault in due process since the draft decree was not served upon them. In **Equity Bank Ltd v Capital Construction Ltd & 3 others [2014] Eklr**, it was held: -

*“Order 21 Rule 7 (2) as read with Order 21 Rule 8 (2) provides that any party to the suit shall prepare a draft Decree in accordance with Rule 7 (2) and present the same to the other party or parties for approval, with or without amendment. It also provides at Rule 8 (2) that if the draft is approved the same shall be forwarded to the Registrar who shall sign and seal the Decree if he is satisfied that the draft Decree is in accordance with the judgment. It is further provided at Rule 8 (3) that the Registrar may approve the decree if within seven days of service of the draft decree on the other parties, no approval or disagreement is filed and/or received...”*

17. In **David Mutemi Ngumi v Kamili Packers Limited [2019] Eklr**, it was held: -

*“My reading of Order 21 rule 8(1) above shows that this rule is not couched in mandatory terms. Rule 8(7) above also show that the fact that the Court is not precluded from approving a draft order even if the procedure laid down in the rule is not adhered to.*

*I believe the main purpose of the rule is to ensure that the decree corresponds to the judgement of the Court and in this case the main duty of the Deputy Registrar is to confirm as such. The Deputy Registrar is also not bound with what is in draft decree even if the parties have approved it.*

*In my view then, the failure by the Claimant to share his draft decree with the Respondent/Applicant herein does not render the executive process illegal or null and void as submitted by the Applicant...”*

18. The decree in the present case conforms with the judgement. There is no dispute as to its contents. I therefore do not foresee any justifiable reason to set it aside. Once the costs are taxed, the same can be amended accordingly to include the costs.

19. The next issue relates to the stay of execution. That prayer is already spent since it was prayed to last ‘*pending the hearing and determination of the application inter-partes*’. The application was heard inter-partes and determined by this ruling.

20. However, from the averments in the affidavit, this Court deduces that the defendants must have intended to have a stay pending the hearing and determination of an intended appeal. That being the case, I will consider the prayer for stay to have been intended to be until the appeal is determined.

21. The principles applicable in an application for stay of execution pending appeal under **Order 42 Rule 6 of the Civil Procedure Rules** are well known. An applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the performance of the decree in the event the appeal does not succeed.

22. The decision sought to be appealed against was made on 18<sup>th</sup> June 2020. The defendants filed their application on 29<sup>th</sup> June 2020. That was a record period of 11 days only. The same was therefore made timeously.

23. On substantial loss, the defendants averred that the amount involved is colossal. That the plaintiffs are persons of undisclosed wealth and that the goods to be attached are tools of trade to undertake the defendants daily operations. The plaintiffs submitted that they are persons of good standing and that they can pay the decretal sum if the appeal succeeds.

24. In **Machira t/a Machira & Co Advocates v East African Standard [2002] Eklr**, the court held: -

***“If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business (eg appeal or intended appeal).*”**

***Sometimes litigants seek to go to a higher court or to ask for review, and simultaneously ask for further steps or execution to be stopped while they go forth, for reasons of expressing their unhappiness with what has been decided. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay merely on the ground of annoyance to feelings. Indeed, remote contingencies would not warrant the court’s interference with the ordinary course of justice and the process of law....”***

25. In the present case, the decretal sum is Kshs.8,800,000/-. The substantial loss that is alluded to is that the plaintiffs are persons of unknown financial capability. That the items attached are items of operations for the defendants.

26. The plaintiffs on the other hand stated that they are not persons of straw. That they are capable of refunding the amount if paid over to them and the appeal is ultimately successful.

27. However, I note that the plaintiffs did not produce any evidence to that effect other than stating that they are advocates of the High Court. In my view, they may be officers of this Court but unable to refund the sum if required to refund. They should have, for example have sworn any properties they own or their monthly income to satisfy the aspect that no substantial loss would be suffered. This they did not do.

28. The next issue is the security for the due performance of the decree that will be ultimately be binding upon the defendants. The defendants propose to offer a bank guarantee or an insurance bond. The plaintiff opposed the same.

29. In **Xplico Insurance Co. Ltd v Impreza Construzioni Giuseppe Maltauro Spa [2019] Eklr**, the court while allowing a bank guarantee as security, held: -

***“I agree with the submissions of the respondent that the lifespan of the bank guarantee is too short therefore it cannot secure the respondent’s interest. However, since the appellant has stated that the period can be extended, then the appellant will be required to do so within a given time line...”.***

30. In **Samuel Kabuthia Ndana v Jennifer Wawira Njeru & another [2018] Eklr**, the court held that the offer of security by way of a bank guarantee without naming the relevant bank is as good as no security. The defendants did not name the bank whose guarantee they proposed to give.

31. In my view, there is no cogent evidence to show that the defendants have been so affected by Covid-19 that they cannot raise the security of Kshs. 8,800,000/-. In this regard, the offer of guarantee or bond is declined. The plaintiffs prayed that 70% of the decretal sum be released to them. This would have been an appropriate order had they demonstrated that they own property that is capable of refunding such sum if released to them.

32. Accordingly, I allow the application as follows: -

**a) The warrants of attachment issued herein are hereby set aside.**

b) There be a stay of execution of the decree herein pending the hearing and determination of the intended appeal on condition that the defendants do deposit a sum of Kshs. 8,800,000/- in an interest bearing account in the joint names of the parties' respective advocates within 14 days.

c) In default, the stay will lapse and execution to issue.

d) Costs to be in the appeal.

DATED and DELIVERED at Meru this 12<sup>th</sup> day of August, 2020.

A. MABEYA

JUDGE