



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO 4 OF 2019

[FORMERLY MOMBASA HIGH COURT CIVIL APPEAL NO 201 OF 2017]

SIMON UNDA KATANA.....APPELLANT

VERSUS

DEEMAN CONSTRUCTION CO LTD.....1ST RESPONDENT

FREIGHT FORWARDERS NBI LTD & DTK.....2ND RESPONDENT

KITUI FLOUR MILLS LIMITED3RD RESPONDENT

COAST SILOS (K) LIMITED.....4TH RESPONDENT

KHALID OMAR SWALEH T/A JOMVU SCRAP METAL...5TH RESPONDENT

RULING

1. This ruling emanates from an application dated 5th March 2020 filed by Kitui Flour Mills Limited, the 3rd Respondent in the appeal.
2. By its application, the 3rd Respondent seeks an order of stay of execution of the judgment delivered by this Court on 24th October 2019, the decree therein, the warrants of attachment and sale issued on 26th February 2020 and the proclamation of attachment dated 27th February 2020.
3. The 3rd Respondent seeks a further order declaring the execution and attachment process irregular *ab initio*, by virtue of the Appellant's failure to seek leave of the Court to execute before ascertaining and/or assessing costs.
4. The application is supported by an affidavit sworn by the 3rd Respondent's Counsel, Augustus Wafula and is based on the following grounds:
 - a) Judgment in this matter was delivered on 24th October 2019, in favour of the Appellant as against the 1st to 4th Respondents jointly and severally;
 - b) The 3rd Respondent was served with warrants of attachment and sale and a proclamation of attachment by Kameta Auctioneers, in satisfaction of the judgment herein;
 - c) No decree was served upon the 3rd Respondent's Advocates, MS Cootow & Associates as required by law, and therefore the execution is illegal and wrongful;
 - d) The Appellant has not sent any draft decree to the 3rd Respondent for approval as required;
 - e) The 3rd Respondent has proposed to the Appellant how the judgment sum is to be settled, following the proposal that the judgment sum be shared 50:50 between the 3rd Respondent and the 1st Respondent, which proposal the Appellant has not responded to;

- f) The decree on the court file is for Kshs. 1,702,000 whereas the Appellant is executing for Kshs. 2,226,996, without any explanation or justification and the attachment is therefore wrongful and unprocedural;
- g) The Appellant has commenced execution process without leave of the court and without first taxing the party and party costs, contrary to Section 94 of the Civil Procedure Act and the execution process and/or attachment of the 3rd Respondent's property is thus irregular and void *ab initio*;
- h) The 3rd Respondent is ready to settle its share of the judgment sum and the execution and/or attachment ought to be set aside;
- i) The 3rd Respondent is likely to suffer substantial loss if the orders sought are not granted and it is in the interest of justice that the said orders be granted.

5. The Appellant responded to the application by way of a replying affidavit sworn on 11th March 2020.

6. The Appellant states that after entry of judgment in his favour, his Counsel, Mwanaisa S. Shariff was called by the 1st Respondent's Counsel, Miss Elizabeth Munyari asking for time to organise finances and consult with the other Respondents, with a view to settling the judgment.

7. The Appellant adds that his Advocates agreed to indulge the Respondents as requested until February 2020, when they issued the Respondents with a notice of judgment.

8. Consequent thereto, the 3rd Respondent intimated to the Appellant's Advocates that the 1st and 3rd Respondents had agreed to liquidate the decretal sum but were yet to agree on the settlement of costs.

9. The Appellant further states that on 24th February 2020, Ms Kieti, Advocate from the firm of Cootow & Associates on record for the 3rd Respondent asked the Appellant's Advocate to accept a payment of 50% of the decretal sum on condition that the 3rd Respondent was discharged from any further liability, a proposal that was unacceptable to the Appellant and his Advocate.

10. The subject matter of the application before the Court is the 3rd Respondent's objection to the execution process, initiated by the Appellant before taxation without leave of the Court coupled with failure to serve a decree.

11. For some reason, the Appellant chose to respond to objection proceedings filed by a 3rd party, and did not respond to the real issues in the application before the Court.

12. In the final submissions filed on behalf of the 3rd Respondent, reference was made to Section 94 of the Civil Procedure Act which provides for execution before taxation of costs, subject to leave of the Court.

13. The 3rd Respondent faults the execution process initiated by the Appellant; first, because the leave of the Court was not sought. It is now well established that the mischief to be cured by Section 94 of the Civil Procedure Act is multiple execution proceedings against the same party (see *Kartar Singh Dhupar & Co. Ltd v Lianard Holdings Limited [2017] eKLR*).

14. I am aware that Section 94 refers to the original jurisdiction of the Court and this being an appeal, the Court could have been persuaded to look the other way. But there is the more fundamental accusation made against the Appellant by the 3rd Respondent that no decree was served and that there was a conflict in execution figures. Again, the Appellant chose not to respond to this grave issue.

15. In the circumstances of this case and in the absence of any substantive response by the Appellant, I find and hold that the execution process was irregular and must be stopped.

16. The result is that the warrants of attachment and sale of property issued on 26th February 2020 and the proclamation of attachment issued on 27th February 2020 are lifted.

17. The costs of this application will be borne by the Appellant.

18. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Ms. Shariff for the Appellant

Ms. Kieti for the 3rd Respondent