



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO.100 OF 2014

TUMAINI TRANSPORT SERVICES LIMITED.....PLAINTIFF

VERSUS

SIYAMA COMPANY LIMITED.....1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED.....2ND DEFENDANT

RULING

1. By a **Notice of Motion** application dated **20th April, 2018**, the 2nd Defendant seeks the following orders from the court:-

a) The Honourable Court be pleased to grant Leave to the 2nd Defendant/Applicant to execute the Decree dated 2nd March, 2017 before the ascertainment of costs payable on the Counter-claim;

b) That costs of this application be awarded to the 2nd Defendant/Applicant to be borne by the Plaintiff

2. The application is brought pursuant to the provisions of **Sections 1A, 1B, 3, 3A and 94** all of the **Civil Procedure Act, Cap 21** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. It is supported by the grounds on its face and the **Affidavit of Lawrence Karanja**, the 2nd Defendant's **Legal Officer** sworn on **20th April, 2018**.

3. The 2nd Defendant/Applicant's case is that it filed a **Statement of Defence** and **Counter-claim** on **20th January, 2016** which was served on the Plaintiff on **10th February, 2016**. Despite being served, the Plaintiff never filed a defence to the Counter-claim consequence thereof the court on **2nd March, 2017** entered **Judgment** on request for sum of **Kshs.6,422,256.50** in favour of the Defendant.

4. The 2nd Defendant further avers that it notified the Plaintiff of the entry of **Judgment** on **8th March, 2017** and requested the payment of the decretal sum but up to date the Plaintiff has never settled the amount awarded in the Judgment. The 2nd Defendant/Applicant is also of the view that the Plaintiff has lost interest in prosecuting its case for the reason that the Plaintiff has failed to prosecute its application dated **17th June, 2015** in which it was seeking to amend the **Plaint** even after numerous invitations by the 2nd Defendant to have the application fixed for hearing.

5. It is the 2nd Defendant's case that it is extremely prejudiced by non-satisfaction of the **Decree** and the **Judgment** of **Kshs.6,422,256.50** awarded in the **Counter-claim** is accruing interest.

6. Finally, the 2nd Defendant is apprehensive that it may not be able to recover the sum awarded unless it is allowed to execute the **Decree** immediately and is willing to forego the costs of the **Counter-claim** if it is the only impediment to its right to execute the **Decree**.

7. At the hearing of the application, **Mr. Kongere**, Counsel for the 2nd Defendant/Application notified the court that the application has never been responded to having served the Plaintiff in **2018**. The learned Counsel further submitted that the court can exercise its discretionary power under **Section 94** of the **Civil Procedure Act** to grant the Orders being sought.

Analysis and Determination

8. I have considered the application and the Affidavit deponed in support thereof. I have also taken into account the oral submissions by **Mr. Kongere**, the Applicant's Counsel. The 2nd Defendant/Decree Holder seeks Leave to execute the **Decree** dated **2nd March, 2017** against the Plaintiff pending determination of the issue of costs. That **Judgment** was for the undefended sum of **Kshs.6,422,256.50** in the **Counter-claim**.

9. Execution of a Decree of the High Court before costs are ascertained is provided for under Section 94 of the Civil Procedure Act, (Cap 21). The provision states that:-

“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”.

10. There being no **Grounds of Opposition** or **Replying Affidavit** filed in response to the application, the only condition precedent to exercise of the discretion conferred by **Section 94**, above, is that the **Decree** must have been passed in the court’s exercise of its original civil jurisdiction.

11. **Section 2** of the **Civil Procedure Act** defines a **Decree** to be either preliminary or final. The **Decree** sought to be executed herein is obviously preliminary as there is an outstanding claim by the Plaintiff.

12.. From the matters deponed to in the **Supporting Affidavit**, which are uncontroverted, I consider that it is necessary that the preliminary **Decree** passed on **2nd March, 2017** herein be executed before settlement of the rest of the claim and the issue of costs. I will thus allow the application with costs.

It is so ordered.

DATED, SIGNED, and DELIVERED at MOMBASA on this 25th day of November, 2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE