



**REPUBLIC OF KENYA**

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

**CORAM: D. S. MAJANJA J.**

**CIVIL SUIT NO. 23 OF 2004**

**BETWEEN**

**DANIEL PAUL ONKANGI.....1<sup>ST</sup> PLAINTIFF**

**JUSTUS ORARE ONSONGO.....2<sup>ND</sup> PLAINTIFF**

**ELIZABETH GESARE OKORE.....3<sup>RD</sup> PLAINTIFF**

**WILFRED NYANG'AU OGOTI.....4<sup>TH</sup> PLAINTIFF**

**AND**

**KENYA POWER & LIGHTING CO. LTD.....DEFENDANT**

**RULING**

1. I have considered the application dated 15<sup>th</sup> March 2019 and I am constrained to set aside the execution process *ex debito justitiae* for the following reasons.

2. First, the parties entered into a consent dated 17<sup>th</sup> September 2018 in which they agreed that there shall be an order of stay pending appeal on condition that the sum of Kshs. 2.5 million is deposited in a joint interest earning account in the names of the advocates for the parties. There is no evidence of default on record.

3. Second and more importantly, the application for execution filed on 19<sup>th</sup> November 2019 is for taxed costs of Kshs. 292,995/=. There is no basis for executing for taxed costs only in light of the orders of stay pending appeal. Had there been default, execution would be for the entire decretal sum.

4. Third, it is apparent from the record that the application for execution was not minuted and considered by the trial magistrate. An application for execution is like any other application save for the fact that it is prepared in a specific form. It must be minuted in the proceedings and dealt with like any other application by allowing or dismissing it. Had the Deputy Registrar considered this perhaps, the warrants would not have been issued (see **Actionrich Investment Company Limited v. Joseph Otieno Onyango & 4 Others [2016] eKLR**).

5. Fourth, the decree having been made on 3<sup>rd</sup> October 2017, was more than one year old. In terms of Order 22 rule 18 of the Civil Procedure Rules, execution could not issue unless a notice to show cause was issued.

6. For the reasons I have set out, the attachment is null and void and it is lifted forthwith. I decline to award costs save that the decree holders shall bear their own costs including costs of the auctioneer.

**DATED and DELIVERED at KISII this 25<sup>th</sup> day of March 2019.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Advocate for the applicant.