



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 511 OF 2010**

**HUAWEI TECHNOLOGIES (K) LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**CANNON ASSURANCE (KENYA) LTD.....1<sup>ST</sup>DEFENDANT/APPLICANT**

**MARTIN MBURU T/A LIGEN**

**INSURANCE AGENCIES.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling relates to a Notice of Motion Application (herein “the Application”), dated 24<sup>th</sup> January 2018, filed by the 1<sup>st</sup> Defendant (herein “the Applicant”). It is brought under the provisions of Section 1A, 1B, 3A of the Civil Procedure Act, Order 42 Rule 6, Rule 22 (2), Order 51 Rule 1, of the Civil Procedure Rules and all the enabling provisions of the Law.
2. It is supported by the grounds thereon and the supporting affidavit dated 24<sup>th</sup> January 2018, sworn by Martha Mutoro, the Legal officer of the 1<sup>st</sup> Applicant’s Company. The Applicant is seeking for orders that a temporary injunction be issued restraining the Plaintiff (herein the “1<sup>st</sup> Respondent”), and/or its agents and in particular Recovery Concept Auctioneer (herein “the Auctioneer”) from proceeding with execution of the judgment delivered herein on 12<sup>th</sup> April, 2017, pending the hearing and determination of the intended Appeal.
3. It is averred that, the Applicant filed an Application dated 19<sup>th</sup> December 2017, seeking to set aside a decree issued herein on 8<sup>th</sup> December 2018, and the warrants of attachment of the Applicants moveable property issued by the Auctioneer. On 16<sup>th</sup> January, 2018, the parties recorded a consent order on the Application where upon the Application was allowed and the decree and warrants were set aside.
4. That the Respondent extracted a fresh decree and is illegally proceeding to execute a nonexistent decree even before obtaining an order of the Court to proceed with execution as the costs are not determined. Further, it has instructed the Auctioneer to obtain warrants of attachment which were served on the Applicant on 18<sup>th</sup> January 2018 and the notice period thereof expires on 25<sup>th</sup> January 2018, when the property will be sold.
5. The Applicant avers that it lodged a notice of Appeal in the Court of Appeal, on 23<sup>rd</sup> April, 2017, and in compliance with the consent order it has deposited in Court Kshs Ten Million only (Kshs 10,000,000). Hence the prayers sought for herein be granted.
6. However the Application was opposed vide an Affidavit in reply dated 9<sup>th</sup> February, 2018, sworn by Wangalwa Oundo, of the firm of M/S Wanalwa Oundo &Co. Associates, which has conduct of this matter on behalf of the Plaintiff/Respondent. He deposed that the Applicant is merely is seeking to cause confusion in this matter with a view to scuttle the eminent execution.
7. That the issue of stay pending Appeal was heard and determined vide the Court’s ruling of 7<sup>th</sup> November 2017 where the Court ordered that:-

*i) That the Applicant pays the Respondent 50% of the decretal sum (to be determined by the Parties) or based on the figure referred to herein by the Applicant, within 30 (thirty) days of this order and the balance of the decretal sum to be paid into an interest earning account in a reputable Bank, held in the joint names of the Counsels of the Parties within 60 (sixty) days of this order;*

*ii) The Applicant to pay the costs of this Application to the 1<sup>st</sup> Respondent; and*

*iii) Failure to comply with the orders given under (i) above, execution to issue forthwith.*

8. That upon default to comply with the above orders and/or appeal against them, execution started fresh and as a result of non-compliance and/or disobedience of the Court orders above, the Applicant cannot run to Court for protection. That Equity requires, "He who goes to Equity must go with clean hands." That since the ruling of the Court of 7<sup>th</sup> November 2017, the Applicant has resorted to filing multiple Applications to challenge execution instead of obeying the Court orders.

9. The Respondent further argued that the Applicant has misdirected itself of the import of the consent recorded by the parties. That by allowing the Applicants Application dated 18<sup>th</sup> December, 2017, the parties reverted back to the state of the matter as provided for by the orders of the Court on 7<sup>th</sup> November 2017.

10. It was further argued that the Applicant is faulting the procedure of execution yet it has not complied with Order 9 Rule 9 of the Civil Procedure Rules, 2010, in that the law firm on record did not seek the Court's leave to come on record. That since delivery of the Judgment, the Applicant has instructed the law firms of:- Muriithi & Ndonge Advocates, MNM Advocates LLP, and Daly and Inamdar Advocates to act for it.

11. However the Applicant filed a supplementary Affidavit arguing that the averments in the replying Affidavit are misleading given that the decree upon which the consent orders were premised was set aside by the order of 16<sup>th</sup> January, 2018. Further the Respondent withdrew the issue of representation on 30<sup>th</sup> January, 2018.

12. The Parties agreed to dispose of the Application by filing submissions. I have considered the same herein. In a nutshell, the Applicant in its submissions reiterated the averments in the Affidavit in support of the Application. However it maintained that there is no valid decree capable of execution following the setting aside by consent of the decree extracted on 8<sup>th</sup> December, 2017, on which the warrants of attachment are based, and which states the amount outstanding to be Kenya shillings Twenty Two Million, Eight Thirty Four Thousand, Seven Thirty Five Hundred and Ninety cents only (Kshs 22,834,735.90). The amount is less the Kenya Shilling Ten Million (Kshs 10,000,000), deposited in Court.

13. The Applicant submitted that it is trite law under Order 21 Rule 8(2) of the Civil Procedure Rules, 2010, that any party can prepare a draft decree for approval by the other party. That the Respondent herein sent the draft decree after commencing execution and after the Court was seized of the Applicant's Application dated 18<sup>th</sup> December 2017. Therefore the Respondent's action was mischievous and intended to give credence to irregularity and abuse of the Court process and that the Applicant returned the draft decree without comments or approval as the order number 2 was erroneous and not based on proceedings before the Court.

14. The Applicant maintained that unless and until there is a legally and properly obtained decree, and determination of costs, there is no legal reasons whatsoever to proceed with execution. That even then, the figure of more than Kenya Shillings Thirty Two Million (Kshs 32,000,000), sought is a large sum of money and the illegal execution should not be allowed to proceed. The Applicant reiterated the willingness to provided security as required by the law so long as the execution process is proper and regular.

15. However in response submissions the Respondent submitted that, the prayers sought for in this Application extend to inter parties stage only. Further, the Auctioneer is not even a party to the suit. That the prayers herein are the same as those dealt with in the ruling of the Court on 7<sup>th</sup> November, 2017. Therefore the prayer seeking for the stay is res judicata. The Court cannot therefore grant the same as it will amount to sitting on its own matter on Appeal, and that the Applicant can only appeal against the same. That as the Respondent submitted that the Applicant is not challenging the validity of the judgment, and neither the ruling of 7<sup>th</sup> November, 2017, and should not be granted the Orders sought.

16. I have considered the Application in total and I find that the issues that have arisen for consideration are whether:-

*i) the law firm representing the Applicants are lawfully on record;*

*ii) the orders in the Application are spent;*

*iii) the court orders of 7<sup>th</sup> November 2017, have been complied with or disobeyed;*

*iv) there execution process impugned is regular and proper;*

*v) the orders sought can be granted; and*

*vi) who bears the costs?*

17. As regard the 1<sup>st</sup> issue, it does occur that the firm representing the Applicant did not comply with the procedural law requirements of Order 9 Rule 9 of the Civil Procedure Rules, 2010, which clearly stipulates that, where an Advocate comes on record after judgment, he must obtain a Court order to that effect or consent from the previous party or Advocate on record. The provisions are couched in a mandatory form and cannot be compromised by the parties as averred by the Applicant that the Respondent withdrew the issue of representation on 30<sup>th</sup> January, 2018. The purported withdrawal cannot cure the non-compliance with the procedural law. If the law firm did not comply then all the pleadings filed including this Application are null and void ab initio.

18. Be that as it were, the Respondent should have raised the at the onset. It cannot allow the Application to proceed to full hearing and raise the issue thereafter. That amounts to an afterthought and is stopped under the doctrine of estoppel.

19. All the same I shall consider the merits of the Application. First and foremost the prayers 1, 2, and 3 were sought pending the hearing and determination of the Application. Therefore they are generally spent. That leaves basically prayer 4 seeking for a temporary injunction to restrain the Respondent from proceeding with execution of the judgment herein, pending the hearing and determination of the intended Appeal. As aforesaid, the Respondent argues in that regard, this Application is res judicata.

20. For ease of understanding, the 1<sup>st</sup> Respondent argument, is that, the Applicant herein filed a Notice of Motion Application dated 25<sup>th</sup> April 2017, under the provisions of Order 42 Rule 6, Order 22 Rule 22, Order 51 Rule 1, Section 1A, 1B, 3A of the Civil Procedure Act and all the enabling provisions of the law, seeking for orders that, there be stay of execution of the Judgment delivered on 12<sup>th</sup> April 2017, against it pending the hearing and determination of the Appeal and the costs of the Application be provided for.

21. That it is therefore clear that the Application herein and the one dated 25<sup>th</sup> April 2017, are seeking basically for the same prayers. In fact both Applications are premised on the same provisions of the law.

22. Be that as it were, it does occur that the Respondent conceded that the decree being set aside commenced fresh execution proceedings that have given rise to this Application. What is clear in this matter is that, the parties are playing cat and mouse game. The Respondent commences execution, and the Applicant faults it. The Respondent sets it aside and commences a fresh one and the Applicant takes it on again. In the meantime the real issue of execution is left to lie aside. That kind of conduct cannot be accepted and/or encouraged by the Court. In my opinion it is not just a waste of the otherwise scarce and unavailable judicial time but it is an abuse of the Court process.

23. This Court delivered a ruling on the subject issue on the 7<sup>th</sup> November, 2017. The orders made have not been complied with. If I may use the biblical analogy (with due respect and no offends intended), instead of the parties herein moving forward to "Cannan" they have chosen to retreat back to "Egypt". And when faced with the Red sea they rush back to Court.

24. The Applicant knows that execution must be carried out within the ambit of the law. If it is not, it will be set aside. The Applicant on the other hand must comply with the orders of the Court issued on 7<sup>th</sup> November before filing a similar Application disguised as an injunction order. In fact the Provisions relied on and submissions tendered by the Applicant do not deal with an injunction relief.

25. It is therefore in the interest of justice that I order the parties herein comply with the Court orders delivered on the 7<sup>th</sup> November, 2017. It simply means that the Applicant has to pay *the Respondent 50% of the decretal sum (to be determined by the Parties) or based on the figure referred to by the subject Applicant, within 30 (thirty) days of this order and the balance of the decretal sum to be paid into an interest earning account in a reputable Bank, held in the joint names of the Counsels representing the Parties within 60 (sixty) days of this order. It does occur that Kenya shillings Ten Million (Kshs. 10,000,000) was subsequently paid. That money should be paid to the Respondent and the balance be deposited as ordered. In default the Respondent should proceed with execution but lawfully. The decree should be properly processed and having the parties in a nutshell taken back to 7<sup>th</sup> November 2017, ruling/orders. The execution herein is set aside accordingly. As per the order of 7<sup>th</sup> November 2017, the Applicant shall bear the costs of the subject Application.*

26. *It is so ordered.*

***Dated, delivered and signed in an open Court on this 18<sup>th</sup> day of June 2018 at Nairobi***

***GRACE L. NZIOKA***

***JUDGE***

In the presence of:-

Mr. Wangalwa for the Plaintiff/Respondent

No Appearance for the 1<sup>st</sup> Defendant/Applicant

Mr. Ogedo for the 2<sup>nd</sup> Defendant/Respondent

Fred                      Court Assistant