



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL SUIT NO. 13 OF 2013**

**MOINDI ZAIPELINE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KARATINA UNIVERSITY.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**MOI UNIVERSITY.....2<sup>ND</sup> DEFENDANT**

**RULING**

By a motion dated 27<sup>th</sup> January, 2017, the applicant sought in the main for an order for stay of execution of a decree in respect of party and party costs awarded to the plaintiff on 8<sup>th</sup> of December, 2016 pending the hearing and determination of a notice of motion dated 5<sup>th</sup> February 2016 filed by the applicant in the Court of Appeal apparently in **Civil Appeal No. 52 of 2014**. The applicant also asked for an order that the proclamation dated 26<sup>th</sup> of January 2016 together with the warrants of attachment issued in respect thereof be released and/or lifted and the plaintiff be ordered to bear the costs of the attachment.

The motion was initiated under **sections 1A, 1B, 3A**, of the **Civil Procedure Act, Cap. 21** and **order 22 rule 22** of the **Civil Procedure Rules**.

The basis of the applicant's application is that on 14<sup>th</sup> April, 2015, the Court of Appeal awarded party and party costs to the plaintiff who apparently was the appellant in **Nyeri Civil Appeal No. 52 of 2014**. In the applicant's understanding, the Court of Appeal did not determine who between the defendants was to bear the costs. It therefore filed an application in that court to determine which of the two defendants was responsible for the appellant's costs.

Apart from the application filed in the Court of Appeal, the 2<sup>nd</sup> defendant is said to have, on its part, filed an application in the Supreme Court apparently seeking to stay the judgment of the Court of Appeal in which the appellant was awarded costs.

Considering both the applications in the Court of Appeal and in the Supreme Court have some bearing on the order of the costs, it is the applicant's case that the plaintiff shouldn't execute on costs until those two applications have been disposed of. However, the plaintiff's auctioneers have proceeded to attach the applicant's assets in execution of the decree on costs. It has alleged that, in any event, the attachment is in violation of **order 22 Rule 13(4)** of the **Civil Procedure Rules** in the sense that the value of the proclaimed assets is way beyond the sum of Kshs 167,357/=, the costs payable to the plaintiff.

These grounds are evident on the face of the motion and have also been deposed to in the affidavit sworn on 27<sup>th</sup> of January 2017, by the applicant's counsel Anne C. Mumbi, in support of the motion.

Mr Charles Muchemi Karweru, counsel for the plaintiff, swore a replying affidavit opposing the applicant's motion. According to the learned counsel, the prayers in the plaintiff's suit, including the prayer for costs, were against the defendants, "jointly and severally" and therefore the issue of who between the defendants was to bear the costs need not arise; in a nutshell, there was no doubt or any basis for ambiguity on whom this burden laid once the plaintiff's suit was allowed. An intervention by way of slip rule was, in the circumstances, unnecessary.

Of the two major grounds upon which the applicant's application is based, my impression of the first one is that it is misconceived. If, for some reason, the applicant is not clear who between the defendants should bear the plaintiff's costs and has taken a step further to file an application in the Court of Appeal to determine that particular issue, then I cannot understand why it did not ask the same court to stay its order on costs pending the determination of the application before it. It is logical that if the Court of Appeal is properly seized of the matter, and I have no doubt it is, then it must be equally seized of jurisdiction to pronounce itself on any issue arising in that application including whether it can grant a temporary stay of execution of its order on costs of the appeal and of the suit.

To be precise, none of the provisions of the law cited by the applicant in its application provides it with the alternative that it has adopted to move this court in the manner it has: neither provision states that if an applicant is dissatisfied or mistaken as to the tenor or import of an order on costs, or any other order by the Court of Appeal for that matter, he can seek for a stay of that particular order in the High Court pending the interpretation of that order by the Court of Appeal. I suppose that the Court of Appeal would be best placed to stay its order if circumstances so warrant.

Be that as it may and without pretending to pre-empt the outcome of the applicant's application in the Court of Appeal, I have had occasion to peruse the plaintiff's plaint and in particular the paragraph in respect of the prayers and the Court of Appeal's judgment allowing the plaintiff's suit. The suit by the plaintiff was against the defendants with the applicant as the 1<sup>st</sup> defendant. She couched her prayers as follows:

***REASONS WHEREFORE the plaintiffs seek (sic) judgment against the defendants jointly and severally for:***

***a. ....***

***b. ...***

***c. ...***

***d. Costs of the suit.***

The language the plaintiff adopted is explicit that if the suit was allowed as prayed in the plaint, the plaintiff has the alternative to proceed either against any of the defendants separately or against both of them jointly in execution of the judgment of the court which, as the Court of Appeal will show, included judgment on costs. In allowing the plaintiff's appeal, the Court of Appeal stated thus in its judgment:

***The appellant shall have the costs of the suit before the High Court and in this appeal.***

By so stating, the Court of Appeal no doubt granted prayer (d) of the appellant's prayers in substance and in the form in which it was expressed; that is to say, that the plaintiff was not only entitled to costs but also that defendants were severally and jointly liable for those costs. I suppose that if the Court of Appeal had any reason to excuse one defendant from liability and was thus persuaded to order the other to bear the costs, it would have stated so in clear and unambiguous terms. The upshot of all these is that there is neither factual nor legal basis to withhold execution on costs on the pretext that it is not clear on whom the incidence of costs falls.

That said, there is some force in the applicant's contention that the execution of the decreed costs is either

unlawful or illegal because the value of the assets attached or proclaimed is far more than the amount the plaintiff is seeking to recover. The warrant of attachment of movable property in execution of a decree for money issued by this court on 23<sup>rd</sup> of January, 2017 shows that the amount due to the plaintiff is the sum of Kshs 169,807/=. The estimated value of the goods attached as per the proclamation of attachment issued by the plaintiff's auctioneers is in excess of Kshs 1,000,000/=. The applicant itself exhibited a valuation report of one of the assets attached, a motor vehicle registration number KBR 150 S showing that it was valued at Kshs 2,010,000/= as at 16 September, 2016. The auctioneers assessed the value of the same vehicle at Kshs 750,000/=. Irrespective of whether one looks at the assessment given by the plaintiff's auctioneers or that given by the applicant itself, it is clear that the variance between the amount for which execution is sought and the value of the goods attached is about Kshs 1,000,000/=; in my humble view, the variance is too wide and most certainly flies in the face of the proviso to **order 22 rule 13(4)** of the **Civil Procedure Rules** which requires the value of the goods attached to be as close as possible to the amount of the decree. To understand that proviso it is necessary to reproduce the entire rule 13 here; it states as follows:

***13. (1) On receiving an application for the execution of a decree as provided by rule 7 (2), the court shall ascertain whether such of the requirements of rules 7 to 9 as may be applicable to the case have been complied with; and, if they have not been complied with, the court may reject the application, or may allow the defect to be remedied there and then or within a time to be fixed by it.***

***(2) Where an application is amended under subrule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.***

***(3) Every amendment made under this rule shall be signed and dated by a judge or registrar.***

***(4) When the application is admitted, the court shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application:***

***Provided that in the case of a decree for the payment of money the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.***

If the amount due under the decree is only Kshs 169,807/= it cannot be said that the value of the goods attached, even by the plaintiff's auctioneers own estimates, corresponds as nearly as possible with the amount due under the decree. For this reason, and for this reason alone, I am persuaded that prayer 5 of the applicant's motion dated 27<sup>th</sup> January, 2017 is merited and it is hereby allowed. Since the application is allowed only in part, parties shall bear their own respective costs.

**Signed, dated and delivered this 23<sup>rd</sup> day of June, 2017**

**Ngaah Jairus**

**JUDGE**