



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MILIMANI LAW COURTS NAIROBI**  
**CIVIL CASE NUMBER 250 OF 2015**

**KARTAR SINGH DHUPAR & CO. LTD.....PLAINTIFF**

**VERSUS**

**LIANARD HOLDINGS LIMITED.....DEFENDANT**

**R U L I N G**

1. This Ruling relates to a Notice of Motion Application dated 1<sup>st</sup> August 2017, filed by the Defendant (herein the “applicant”), under section 3A, 63(e) and 94 of the Civil Procedure Act, and Order 50 of the Civil Procedure Rules. It supported by the grounds thereto and an Affidavit sworn by the Applicant dated the same date of the Application.
2. The Applicant is seeking for orders that there be a stay of execution of the decree and warrants of attachments and sale of moveable property of the Applicant pending the hearing and determination of the suit and that the preliminary decree and the said warrants of attachments be set aside. The costs of the “suit” be provided for.
3. The background facts of the case are the Plaintiff’s (herein “the respondent”), filed a Notice of Motion Application dated 18<sup>th</sup> June, 2015, seeking for summary judgment. On 24<sup>th</sup> February 2017, the Court delivered its ruling on the Application and entered a partial judgment in favour of the Respondent in the sum of Kshs 17, 918, 142. 52 with interest at 17% until payment in full, and a further sum of Kshs 4,213,126.95 as retention sum. The rest of the claim was ordered to go to trial.
4. The Applicant avers that the Respondent has obtained a decree and warrants of attachments in respect of the partial judgment delivered herein and a proclamation notice given to him. He argues that under section 94 of the Civil Procedure Act, a party cannot execute a preliminary decree without the leave of Court. That the Respondent’s advocate did not forward the draft decree to the Applicant’s Advocate for approval with the aim of “stealthily and surreptitiously” attaching the Applicant’s property and that the Applicant has filed an Appeal Number 107 of 2017 against the decision delivered herein and it has high chances of success. Therefore the need to stay execution as prayed.
5. The application was opposed based on grounds of opposition and Notice of Preliminary Objection filed by the Respondent on 2<sup>nd</sup> August 2017. The Respondent argues that the Application is misconceived, bad in law, as it has failed to disclose material and relevant information and is made on grounds not satisfying the requirements of section 3A, 63(e) and 94 of the Civil Procedure Act, Laws of Kenya. That the

grounds advanced by the Applicant are inapplicable to invoke the discretion of the Court.

6. The Respondent further averred that the Application is defective ab initio, incompetent and is supported by a fatally and incurably defective affidavit, (in particular paragraphs 6,7,8, and 10), as it does not comply with the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010.

7. The Respondent, argued that section 94 of the Civil Procedure Act, recognises two levels of execution before taxation; for the substantive sum awarded in the judgment and in relation to costs after they are taxed. That, there cannot be a Bill of Costs in relation to a portion covered by the preliminary decree as there was no order for costs made in favour of the plaintiff or against the Defendant and therefore there can be no Bill of Costs in relation to the remaining portion of the claim when it has not been concluded as that stage has not reached.

8. Finally the Respondent argued that as there is no conservatory or injunctive orders in place, the pendency of the Appeal does not preclude the Respondent from seeking to enforce a valid judgment of the Court. That the Applicant applied for stay of execution for 30 days and the Court gave 14 days from 24<sup>th</sup> February 2017, to file a formal application for stay of execution, however that period lapsed on 9<sup>th</sup> March 2017 without the Applicant filing the Application and neither has he to date. Therefore the Respondent being a successful litigant is entitled to the fruits of its judgment as “*justice is a double edged sword*”.

9. The Parties addressed the Court orally on this Application. I have fully considered their respective arguments herein and I find the main issues raised by the parties for determination are whether:

*i) leave of the Court is required under section 94 of the Civil Procedure Act;*

*ii) the application is misconceived, bad in law, and is made on grounds not satisfying the requirements of section 3A, 63(e) and 94 of the Civil Procedure Act, Laws of Kenya;*

*iii) the application is supported by a fatally and incurably defective affidavit, in particular paragraphs 6,7,8, and 10, as it does not comply with the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010, and*

*iv) the orders sought should be granted and who should bear the costs*

10. I wish to make preliminary observation in relation to the documents filed by the Respondent before I deal with the issues raised. I note that the Respondent chose to oppose the application vide grounds of opposition and a notice of preliminary objection. However the Respondent averred to factual matters in said documents. These matters would have been well addressed in a Replying Affidavit and/or submissions. The law is clear that a preliminary objection and/or grounds of opposition relates purely to matters of law.

11. In the Court of Appeal decision of; **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd [1969] E.A. 696**, Law, JA (as he then was) stated as follows:

***“I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a ‘preliminary objection’ which it was not. So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”(Emphasis mine)***

Newbold P, in the same matter observed that:

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point**

**of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.**

12. Hon. Justice Onyancha in the case of **El-Busaidy v. Commissioner of Lands & 2 others [2002] 1KLR 508** stated that:

**“The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff’s pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff’s facts as pleaded. Clearly therefore, the Defendant’s preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction.”**

13. Be that as it were, I shall now consider the issues raised by the Applicant. The first issue relates to the provisions of section 94 of the Civil Procedure Act. These provisions states that:

***“94. 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”.***

14. The provisions of section 94 of the Civil Procedure Act have been a subject of Courts consideration in various cases. I shall consider some of these principles before I deal with the arguments of the Parties on the same herein. The courts have held that before execution proceeds the leave of the Court must be granted. The leave is granted at the discretion of the Court and ought to be as a result of an Application either orally at the passing of the decree or thereafter formally. This gives the opposing party an opportunity to be heard.

15. In the case of; **Muniafu Vs Ndwiga (1990) Llr 5529**, Shah J. as he then was, held that Section 94 of Civil Procedure Act gives the High Court discretion to allow execution before taxation. The learned Judge stated:-

***“There has to be in my view an application to the High Court (there being no specific mode provided under section 94) by notice of motion as provided for in Order L Rule 1. Again under Order 50 applications (procedurally) have to be served on the other side (order L Rule 2) unless otherwise stated by court which special and good reasons must exist?”***

16. This was also the finding in the case of; **Bamburi Portland Cement Co. Ltd v Hussein (1995) LLR 1870 (CAK)** where Shah JA stated as follows:-

***“Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.”***

17. In the case of; **Lakeland Motors Ltd Vs Sembi (1998) LLR 682**, the Court of Appeal observed that:-

***“The exercise of judicial discretion by the superior court under Section 94 of the Act necessarily required that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation.***

***This, we think, is the spirit of the observation of Shah J.A, with which we agree in Bamburi Portland Cement Co. Ltd Vs Abdulhussein (1995) LLR 2519 (CAK) in regard to the application of Section 94 of the Act.”***

18. The mischief sought to be addressed by section 94 of the Civil Procedure Act, is to protect a judgment debtor from suffering multiple executions, one in respect of the principal sum and the other for the costs after ascertainment in respect of the same suit, as observed by Justice Odunga in the case of, Erad Suppliers & General Contractors –Vs- NCPB observed that:

***“In my view, the necessity for leave to be obtained where a party intends to execute before taxation is to obviate situations where a judgment debtor is likely to be confronted with two sets of execution proceedings. In respect of the same decree i.e. for the principal sum and for costs. This is a recognition of the fact that in a civil action the main aim is compensation and the process should not be turned into a punitive voyage. Therefore where there are no costs to be paid or where a party entitled to costs has abandoned or waived the same, in my view, Section 94 of the Civil Procedure Act does not apply. If the Respondent was not aware that the claimant was not keen on the said costs now it is aware and that would render that ground unnecessary.”***

19. The applicant herein referred the Court to the decision in Shamsher Kenya Ltd V Body & Soul Limited [2006] Eklr where the Court associated itself with the finding above and held that:

***“ the plain reading of section 94 of the Civil Procedure Act, shows that it is (sic) of general application when a party seeks to execute a decree before costs are ascertained. It does not exclude judgments obtained under the provisions of Order XXXV Rule1 (a) of the Civil Procedure Rules,”***

20. As aforesaid, this Court in exercise of its original jurisdiction entered a partial judgment on a Notice of Motion Application dated 18<sup>th</sup> June 2015, in favour of the Respondent as herein stated. The Application was brought inter alia under the provisions of Order 36, Rules 1, 2, 5, 8 and 9, Order 13 (2), Order 51 Rules 1, 3, 4, 10 and 16 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and Section 63 (e) of the Civil Procedure Act, (Cap) 21 Laws of Kenya and Article 159 of the Constitution of Kenya, 2010] and the inherent powers of the Court

21. The Plaintiff/Respondent was seeking for orders therein for summary judgment as below stated:

a) That Summary Judgement be entered in favour of the Plaintiff against the Defendant in the sums claimed in Paragraph 20 (KSHS. 34,228,867.88), Paragraph 36 (Kshs. 12,534,702.00), Paragraph 37 (Kshs. 3,467,556.00), Paragraph 40 (Kshs. 6,025,429.76.), and Paragraph 41 (Kshs. 3,301,000.00) which add up to Kshs. 59,557,555.00 as pleaded for in the said Paragraphs of the Plaint dated and filed in Court on 22<sup>nd</sup> May 2015.

b) That further and in the alternative, Judgement be entered in favour of the Plaintiff against the Defendant as prayed for in the Plaint dated and filed in Court on 22<sup>nd</sup> May 2015 or otherwise as the Court thinks fit, or for such sum as this Court may deem appropriate at this stage.

c) That Judgement be entered in favour of the Plaintiff and/or alternatively the Plaintiff will also claim for further accrued interest on all the pleaded sums as from 10<sup>TH</sup> May 2015 thereon until payment in full.

d) That the Costs of this Application be paid by the Defendant to the Plaintiff.

e) *That the Costs of this suit be paid by the Defendant to the Plaintiff.*

f) *That the Plaintiff be at liberty to apply for and the Honourable Court be pleased to grant any further Orders and Directions as may be just and expeditious for the disposal of the application/suit herein.*

22. It is therefore evident that the partial judgment was granted pursuant to the provisions of Order 36, Rules 1, 2, 5, 8 and 9, of the Civil Procedure Rules. In the case of **Shamsher Kenya Ltd (supra)** the Court stated as follows:

***“It is my view however, if a party seeking summary judgment desires to execute when judgment is entered, he must incorporate in the application for judgment a prayer for an order to execute for the sums sought in the application and if he fails to do so, he cannot execute before costs are ascertained unless leave is obtained.”***

23. I entirely concur with this observation of the Court and the legal principles in the above referred to authorities. That to execute a decree before costs are ascertained the leave of the Court is required under section 94 of the Civil Procedure Act. Indeed section 94 of the Civil Procedure Act being a Statutory provision overrides the provisions of Order 36 referred to herein. In this case there is no evidence that such leave was ever sought and granted in this matter.

24. Although the Respondent argued that section 94 of the Civil Procedure Act applies in matters where costs are awarded and ascertained, that section must be read together with Order 36 Rules 1, 2, 5, 8 and 9, of the Civil Procedure Rules as stated herein.

25. Be it as it were, it is not in dispute that indeed there is a valid judgment herein that has not been set aside. It is also a fact that the filing of an Appeal without a stay does not automatically stay execution of the valid judgment. As rightfully argued by the Respondent “justice is double edged sword”.

26. The resultant of all this is that, the execution levied by the Respondent was irregular as the leave of the Court was not obtained. In that regard I allow the Notice of Motion Application in terms of prayer 4 thereof. The respondent is at liberty to move the Court procedurally if execution of the partial judgment has to proceed.

27. I decline to stay execution of the decree herein pending the hearing and determination of the suit as prayed for in that no arguments have been advanced for the same and even then, when the Court delivered the ruling herein on 24<sup>th</sup> February, 2017, the Applicant was granted 14 days stay of execution pending the filing of a formal Application for the same and they did not. To grant prayer 3 is to allow stay through a “back door”.

28. I award the applicants Costs of this application.

29. All in all I declined to grant prayer 3 of the Application, I allow prayer 4 with Costs to the Applicant.

30. It is so ordered.

**Dated, delivered and signed in an open court on this 31<sup>st</sup> day of October 2017, at Nairobi.**

**G.L.NZIOKA**

**JUDGE**

**In the presence of :**

Mr. Omino for Mr. Masese for the Applicant

Mr. Billing for the Respondent

Teresia-----court assistance