



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 32 OF 2014.**

**HOLY REDEEMED APOSTOLIC MINISTRIES INTERNATIONAL**

**JAPHETH B. KIRORI.....PLAINTIFF/APPLICANT.**

**-VERSUS-**

**NEWSPRING OF LIFE GOSPEL MINISTRIES**

**JONATHAN A. O. WABALA.....DEFENDANT/RESPONDENT.**

**RULING**

1. The application before me brought is dated 17/2/2016. It is a Motion brought under sections 1A, 1B, 3A, 63 (e) of Civil Procedure Act (cap 21) Article 47 of the Constitution of Kenya 2010 and all other provisions of law. The **HOLY REDEEMED APOSTOLIC MINISTRIES INTERNATIONAL, JAPHETH B. KIKORI** – filed it against the defendant – **NEWSPRING OF LIFE GOSPEL MINISTRY, JONATHAN A. O. WABALA** – seeking various orders. The application first came before me *ex parte* on 25/2/2016 and I dealt with prayers 1 and 2. These two prayers are therefore moot at this stage. What is up for consideration therefore are prayers 3 and 4.

2. Prayers 3 and 4 are as follows;

Prayer 3: That upon inter partes hearing of this application this honourable court be pleased to set aside in toto the execution process levied herein recall the warrants and declare the execution levied to be null and void ab-initio.

Prayer 4: That costs of this application be provided for.

3. According to the plaintiff execution warrants were wrongly issued as no certificate of costs was issued or taxation done to provide the basis for costs stated to be Kshs.43,855/= The warrants of execution were therefore said to have been procured unprocedurally. It was averred that the auctioneers have already proclaimed and might proceed to attach motor vehicle UAV 221 A.

4. The supporting affidavit states, inter alia, that no taxation has ever been done in this matter (ELC. NO. 32/2014). The deponent however intimated awareness of such cost being assessed in Civil Appeal No. 9 of 2014. The appeal was filed by the plaintiff but later withdrawn. It is the plaintiff's position that execution for such costs cannot be done in a separate file.

5. The defendant responded vide a replying affidavit filed on 13/4/2016. According to the defendant, the execution herein does not relate to this case. It relates to the appeal that the plaintiff has referred to. And the costs were not awarded in this case. They were awarded in that appeal. The defendant pointed out that

the court of Appeal is never involved in execution. Its orders or executable instruments are normally remitted back to the trial courts for execution. That is why execution herein was done that way. There was nothing irregular or unprocedural about it.

6. The application was canvassed by way of written submissions. The plaintiff's submissions were filed by way of written submissions. The plaintiff's submission was filed on 20/7/2016. According to the plaintiff, the issue is only one viz:

***Whether a warrant can be executed without a decree being extracted***

And the plaintiff's position is clear: It can't. The cases of **EUNICE NAFULA TEMBA VS MULTIPLE HAULIERS (E.A LTD: CIVIL APPEAL NO. 71 OF 2010 and JACKSON KIANGI VS KASIKWA MUKUNA & others (2005) eKLR**, were availed to buttress this point.

7. The respondent filed submissions on 18/7/2016. It was reiterated that execution proceedings herein are for recovery of costs in the court of Appeal. The costs were duly taxed and a certificate of costs was duly given and remitted to this court for execution.

8. The defendant pointed out the provisions of section 4 of the Appellate Jurisdiction Act (cap 9) which enjoin that execution of judgment of the Court of Appeal may be done as judgment of the High court. And such judgment includes decrees, order, sentence, or decision according to interpretation contained in section 2 of the same Act.

9. The defendant further pointed out that if the plaintiff is aggrieved by any wrongful attachment, it should have recourse to objection proceedings in accordance with Order 22 rules 51 and 54 of Civil Procedure Rules, 2010.

10. I have considered the application, the response made, and the rival submissions. I am in general agreement with the defendants as regards the facts obtaining and the law applicable. The facts are as easy as pie. The plaintiff filed an appeal. It later withdrew it. It was slapped with costs. It failed to pay. Execution because inevitable in the circumstances. The execution complained of is meant to realize these costs. The costs amount to Kshs. 43, 855 and emanated from the court of Appeal. They didn't arise from this case. The defendant has not alleged that they did.

11. And the law is as stated by the defendant. Such execution is normally done in courts from which appeals were preferred. The costs herein do not relate to any judgment given. They arise from a withdrawn appeal. And while the plaintiff would want to talk of a decree, it is clear the defendant was acting on an order from which a certificate of costs had been raised.

In my view, the plaintiff mis-apprehends the law and thereafter mis-interprets it.

12. And the defendants further correctly points out the procedural law to follow in case of wrongful attachment. It is clear that the owner of the wrongfully attached items needs to take out objection proceedings in accordance with Order 22 Rules 51 and 54 of Civil Procedure Rules. More specifically the applicable law is to be found in Order 22 Rules 51, 52, 53, and 54 of Civil Procedure Rules, 2010. If the application herein is meant to obviate such attachment, the plaintiff has obviously adopted the wrong approach.

13. It is curious also how the plaintiff started with various issues to be addressed in the application but ended up with only one issue for determination in the submissions. And that one issue itself wrongly assumes that a decree should have been extracted. The fact of the matter is that what was to be extracted was an order, not a decree. And that order was actually extracted and followed with the appropriate certificate of costs. The fact that the plaintiff could only ultimately zero – in on only one issue seems to me to be a realization that all the other issues were resting on quick sand.

14. The position that emerges is then clear: The factual and legal foundations of the plaintiff's application

are wrong. The application is therefore found unmeritorious and is hereby dismissed with costs.

**A.K KANIARU**

**JUDGE**

**DATED AND DELIVERED ON 27<sup>TH</sup> DAY OF SEPTEMBER, 2016.**

**IN THE PRESENCE OF;**

**PLAINTIFF.....**

**1<sup>ST</sup> DEFENDANT.....**

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

**COUNSEL.....**

**JUDGE.**