



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO 158 OF 2019

NEEM PROPERTIES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

WELLS FARGO LIMITED.....DEFENDANT/APPLICANT

RULING

The application is dated 10th November 2021 and is brought under Sections 1A, 1B, 3A and 94 of the Civil Procedure Act seeking the following orders;

1. This application be certified urgent and it be heard ex-parte in the first instance.
2. Pending the hearing and determination of this application and or further orders of the court, there be a stay of the execution of the judgment of this court dated 25th May 2021 and all consequential orders including the proclamation of the defendant's items by Kameta Enterprise Auctioneers on 5th November 2021 together with the warrants of attachment and sale issued by the court on 4th November 2021 to Kameta Enterprises Auctioneers.
3. The warrants of attachment and the warrants of sale issued by the court on 4th November 2021 to Kameta Enterprises Auctioneers be cancelled and the proclamation of the defendant's items by Kameta Enterprise Auctioneers on 5th November 2021 be set aside.
4. The plaintiff to bear the costs of the proclamation and this application on a full indemnity basis.

It is based on the grounds that the court delivered a judgment on 25th May 2021 in which it awarded the plaintiff the sum of Kshs 1,000,000 as general damages for trespass and costs of the suit amongst other reliefs. On 11th August 2021, the defendant presented to the Plaintiff's Advocates cheques for the total value of Kshs 1,000,000 in settlement of the judgment amount. They declined to receive the payment on the contention that the Defendant must pay the costs (which have not been agreed or taxed) together with the judgment sum. The Defendant's Advocates engaged the Plaintiff's advocates with a view to agreeing the costs and requested them to file and serve their client's itemized bill of costs for consideration but they refused to do so. They also refused to file their party and party bill of costs for taxation by the court. The Defendant's effort to make payment into court pursuant to the provisions of Order 22 Rule 1 of the Civil Procedure Rules were also unsuccessful as the Court indicated that this court only be done with a court order. On 5th November 2021, Kameta Auctioneer visited the defendant's premises and purported to issue a proclamation on various items in execution of warrants issued by this court on 4th November 2021. The execution is irregular and contrary to Section 94 of the Civil Procedure Act which bars the execution of a decree before taxation without leave of the court. The plaintiff did not seek leave of court to execute the award of general damages prior to taxation of their costs. The sum of Kshs 1,045,008 being executed by the plaintiff against the defendant includes an interest of Kshs 45,008 on the sum of Kshs 1,000,000 which was not awarded by the court. In addition to the proclamation being improper, the auctioneer has also purported to proclaim goods far in excess of the judgment sum. The Plaintiff's actions are irregular and a blatant abuse of the court process which must not be countenanced. That this application has been brought without unreasonable delay.

The Respondent stated that the instant Notice of Motion Application is frivolous, vexatious and otherwise a waste of the Court's time. That the prayers sought by the Defendant to wit stay of the proclamation of the Warrants of Attachment of Sale issued on 4th November 2021 have been overtaken by events. That cancellation of the Proclamation of the Warrants of Attachment of sale as sought by the Defendant will amount to a mere academic exercise as the Defendant has already effected payment of the decretal amount plus costs. That the Defendant honoured the Warrants of Attachment of Sale issued on 4th November 2021 by issuing the Auctioneer with cheque Number 000468, 000469 and 004070 dated 9th August 2021 and 11th November 2021 for the sum of Kshs. 1,045,008.00. That on or about 17th November 2021 the Auctioneer delivered to the Plaintiff's Advocates on record the said Cheques being cheque Number 000468, 000469 and 004070 for the sum of Kshs. 1,045,008.00 thus settling the Plaintiffs claim with respect to the decretal sum and interest thereon. That the Defendant's payment is an admission of its debt to the Plaintiff with respect to the decretal sum and the interest thereon. That the Defendant's instant

Application is an abuse of this Honourable Court's process and mandate. That the Defendant's Application, in its very nature, contradicts the overriding objectives under Section 1A and B of the Civil Procedure Act, 2010 and the Judicial Principles provided for under Article 159 (2)(b) of the Constitution of Kenya, 2010. That prosecuting the instant Application will be tantamount to allowing the Court to venture into acts tantamount to a mere academic exercise. That the Honourable Court is vested with jurisdiction to strike out the Defendant's instant Application by virtue of the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010.

This court has considered the application and submissions therein. The applicant submitted that the execution is irregular and contrary to Section 94 of the Civil Procedure Act which bars the execution of a decree before taxation without leave of the court. The plaintiff did not seek leave of court to execute the award of general damages prior to taxation of their costs. Secondly, the sum of Kshs 1,045,008 being executed by the plaintiff against the Defendant includes an interest of Kshs 45,008 on the sum of Kshs 1,000,000 which was not awarded by the court. Section 94 of the Civil Procedure Act, which provides as follows;

94. Execution of decree of High Court before costs ascertained

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.

In the case of *Bamburi Portland Cement Co. Ltd vs Hussein* (1995) LLR 1870 the court observed that;

“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 partes.”

The court in *Lakeland Motors Ltd vs Sembi* (1998) LLR 682 stated as follows;

“The exercise of judicial discretion by the superior court under section 94 of the Act necessarily requires 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”.

It is clear therefore that on the authority of Section 94 of the Civil Procedure Act and the above decisions, the execution, before costs were ascertained was irregular as leave was not obtained.

Be that as it may, in the instant case it is a finding of fact that execution is complete and the decretal amount was paid to the plaintiff including a disputed amount on interest. In the case of *Intex Construction Co. Ltd vs Flora Marigu & Another* (2016) eKLR the court held that;

“The Plaintiff's application has been overtaken by events as the motor vehicles have already been sold to third parties. It would be futile to grant the orders sought in this application bearing in mind that the court shall not issue any orders in vain.”

It would be in vain for this court to cancel the proclamation by Kameta Enterprise Auctioneers when the decretal amount has already been settle. The application has been overtaken by events. For this reason, this application cannot be granted. Parties are at liberty to move to the subordinate court before the Deputy Registrar to pursue the issue of costs and overpayment of the decretal amount. Therefore, this application is dismissed with no orders as to costs on this application.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23rd DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE