



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 374 OF 2010**

**KARURI STORES PHARMACEUTICALS LIMITED.....PLAINTIFF**

**- VERSUS -**

**ACACIA MEDICAL CENTRE LIMITED.....DEFENDANT**

**RULING**

1. The plaintiff seeks leave of the court to execute the Preliminary Decree prior to the determination of the remaining portion of the claims against the defendant.
2. The claim against the defendant was for the sum of Kshs. 8,662,726/66 together with interest thereon at the rate of 2.5% per month until payment in full.
3. The plaintiff also prayed for the costs of the suit.
4. Upon being served with the plaint, the defendant filed a Defence on 27<sup>th</sup> July 2010. In the said Defence, the defendant admitted owing to the plaintiff, the sum of Kshs. 7,493,105.59.
5. However, the defendant categorically denied the plaintiff's contention that there was an agreement between the parties, pursuant to which the defendant was to pay interest at the rate of 2.5 % per month.
6. About a month after filing the Defence, the defendant filed an application dated 23<sup>rd</sup> August 2010. Through that application, the Defendant sought orders which would enable it to pay the admitted sum of Kshs. 7,493,105.89, by monthly instalments of Kshs. 405,000/- each.
7. Ann Gitau, the General Manager of Acacia Medical Centre Limited, swore an affidavit, reiterating that the defendant owed the plaintiff, the sum of Kshs. 7,493,105.89/-.
8. Ms Gitau explained that the defendant was facing lean economic times, which made it impossible for the defendant to pay the debt at one go. It was for that reason that the defendant asked that it be allowed to pay the debt through monthly instalments.
9. On 19<sup>th</sup> November 2010, the parties recorded a consent in the following terms;

***“By consent;***

***Judgement be entered for the plaintiff against the defendant for the admitted sum of Kshs. 7,493,105.89 plus interest at 1.5% per month from 30/9/2009 until payment in full”.***

10. It is noteworthy that although the parties recorded a consent on admitted portion of the claim, the defendant's application dated 23<sup>rd</sup> August 2010 was not addressed in the consent order recorded on 19<sup>th</sup> November 2010.
11. However, on 18<sup>th</sup> February 2011, the parties filed a consent letter, which addressed that

- application. It was a term of the said consent that the defendant would settle the admitted claim of Kshs. 7,493,105.89, by monthly instalments of Kshs. 405,000/-, with effect from 20<sup>th</sup> March 2011.
12. According to the plaintiff, the defendant has now failed to honour the terms of the consent order, pursuant to which the defendant was supposed to make monthly payments of Kshs. 405,000/- each.
  13. In its response to the application for leave to execute the preliminary decree, the defendant got its General Manager, Anne Gitau, to swear a replying affidavit.
  14. She confirmed that the defendant had *“intermittently failed to honour the terms of the consent”*.
  15. According to the defendant, the plaintiff’s application was made in bad faith, with the intention of hurting the defendant financially.
  16. The defendant asserted that it did not intend to either obstruct or to delay the execution of the preliminary decree.
  17. The defendant requested that it be allowed to continue paying the balance by monthly instalments.
  18. By the calculations put forward by the defendant, they should have paid off the whole balance within 6 months, from August 2013.
  19. If the defendant’s said contention was accurate, it would follow that there cannot be any balance still outstanding. The balance would have been cleared by January 2014.
  20. If, for any reason, there is still some balance outstanding, that would, in my considered opinion, be a manifest demonstration of the defendant’s lack of seriousness in paying-off the loan.
  21. I cannot understand how the defendant, who asked that it be allowed to pay Kshs. 405,000/- every month, can now turn around and say that by insisting that the balance be paid now, the plaintiff was being unfair, unjust and prejudicial.
  22. If only the defendant had honoured its own words, there would never have arisen the need for the preliminary decree to be executed.
  23. Pursuant to Section 94 of the Civil Procedure Act, the High Court has jurisdiction to grant leave to a decree-holder to execute a decree before taxation of the Bill of Costs.
  24. Section 94 reads as follows;

***“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 amounts of the costs shall be ascertained by taxation”.***

25. Before the court grants leave for execution before the taxation of the costs, it should be satisfied that such execution was necessary.
26. Secondly, Section 94 recognizes that when execution is levied before taxation, there would be two levels at which execution would issue. The first level would be for the substantive relief awarded in the judgement, whilst the second level would be in relation to costs after those are later taxed.
27. That would imply that there ought not be a situation wherein there were more than the 2 levels of execution.
28. If the preliminary decree was executed now, there would still remain the possibility that after the plaintiff prosecutes the remaining portion of its claim, there might yet arise a further Decree. That further decree would also need to be executed, unless it was satisfied by the defendant. In the result, there was a possibility of more than one decree being executed. Such a situation does not appear to have been envisaged by Section 94 of the Civil Procedure Act.
29. Of course, I am not suggesting that the preliminary decree was not final, in relation to the portion of the claim it deals with. There is obviously finality about the determination of the portion of the claim which was admitted by the defendant.
30. Therefore, the defendant ought to have honoured the consent orders pursuant to which it was supposed to have paid the judgement-debt. I say so because the finality of the preliminary decree cannot be set aside.
31. The defaults on the part of the defendant are causing frustration and anxiety to the plaintiff.
32. And even though the defendant talks of the financial difficulties it was facing, justice cannot be

- expected to look kindly at only party or the other. Justice cuts both ways.
33. When the defendant defaults, because of financial strains, that has a direct consequence on the plaintiff.
  34. And when the defendant had made an offer, which it thereafter failed to honour, the plaintiff was prejudiced, because it would have been expected that the plaintiff would have made plans on the strength of the promise from the defendant.
  35. But then again, it is now almost 5 years since judgement was granted on the basis of the admitted amount.
  36. There has been no explanation by the plaintiff, as to why it had not taken steps to prosecute the balance of the claim.
  37. The defendant has also submitted that the plaintiff has not explained why the costs have not been taxed. However, I think that the answer to that submission is that the costs of a case are usually taxed in one Bill of Costs. There cannot be a Bill of Costs in relation to the portion covered by the preliminary decree, and thereafter another Bill of Costs in relation to the remaining portion of the claim, when it had been concluded.
  38. In my understanding, if a party has obtained a preliminary decree and he wishes to execute it, before determination of the costs (through taxation) he may have to abandon the remaining part of the claim.
  39. Thereafter, the said party could set out to persuade the court that it was necessary to execute the decree before taxation.
  40. In this case, the plaintiff has not satisfied the court that it was necessary for it to execute the preliminary decree prior to the taxation of the costs.
  41. I therefore dismiss the plaintiff's application dated 5<sup>th</sup> July 2013.
  42. However, as regards costs, I order that each party should pay his own costs. I so order because I find that it would not be fair to punish the plaintiff for trying to speed up the process of recovering the decretal amounts due to it. An award of costs to the defendant may be construed as a reward to a party who has failed to keep its promise. I hold the view that the defendant's conduct is not deserving of a reward.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> day of June 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Shah for Rimni for the Plaintiff

Nyaribo for the Defendant

Collins Odhiambo – Court clerk.