



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 70 OF 2014

ECO BANK LIMITED.....PLAINTIFF

-V E R S U S-

ELSEK & ELSEK (KENYA) LIMITED.....1<sup>ST</sup> DEFENDANT

ELSEK & ELSEK CONSTRUCTION LIMITED.....2<sup>ND</sup> DEFENDANT

OSMAN ERDINC ELSEK.....3<sup>RD</sup> DEFENDANT

DENIS ELSEK.....4<sup>TH</sup> DEFENDANT

RULING

1. The parties in this case entered into a consent dated 29<sup>th</sup> September 2014 as follows:

*1. THAT judgement be and is hereby entered against the Defendants jointly and severally for a sum of Kenya Shillings Fifty million (Kshs.50, 000,000/=) in full and final settlement of this matter;*

*2. THAT the decretal sum of Kenya Shillings Fifty million (Kshs.50, 000,000/=) be liquidated by way of monthly installments of Kenya Shillings Five Million (Kshs. 5,000,000/=) commencing from 15<sup>th</sup> January 2015 and therefore on the 15<sup>th</sup> day of each subsequent month until payment in full;*

*3. THAT each party shall bear its own costs of the suit;*

*4. THAT the Plaintiff shall cause the removal of the Defendants from the Credit Reference Bureau default database in respect to the debt herein upon filing of this consent judgment in court on or before 7<sup>th</sup> October 2014;*

*5. THAT in the event of a default of payment of any one installment on its due date:*

*a. The entire amount agreed in this consent Judgment (Kshs. 50,000,000/=) plus interest at the rate of 23% per annum from the date of filing suit shall become due and outstanding and a Judgment for this sum shall be entered in favour of the Plaintiff;*

***b. The Plaintiff shall be at liberty to execute for the said amount (5a) herein; and***

***c. The Defendants shall pay the costs of the suit.***

That consent was adopted by court as an order of the court on 16<sup>th</sup> December 2014.

2. The Plaintiff by its application for execution filed in court on 20<sup>th</sup> April 2015 warrants of attachment of the defendant's goods were issued to sure auctioneers. It is not disputed that the said auctioneers proclaimed the defendants good. It is that proclamation that seems to have provoked the defendant's Notice of Motion dated 27<sup>th</sup> April 2015 which is under consideration.

3. The only prayers being considered in that application are:

**a. The warrants of attachment and sale be set aside as a matter of right.**

**b. The application for execution of the decree and the warrants of attachment and sale be declared null and void ab initio and be set aside as a matter of right.**

4. Looking at those prayers it becomes clear that the defendants are not challenging the consent per se but rather the process of execution of the decreed undertaken by the plaintiff. It is because of the non challenge of the consent that I will not delve too much in some of the defendants arguments, for example the issue whether or not the plaint as pleaded as against the 2<sup>nd</sup> defendant is a nullity. It is also for that reason that I will not consider the plaintiff's authorities which discussed the conditions under which a consent judgment may be set aside by the court.

5. There are four issues that I shall consider which are raised by the defendants in support of their application. They are; should execution process be stayed because:

**1. The Plaintiff executed the decree before taxation of the costs;**

**2. The plaintiff failed to cause the removal of the defendants from the credit reference database;**

**3. The plaintiff attached goods that did not belong to the defendant; and**

**4. The plaintiff failed to forward the draft decree to the defendants for approval.**

6. On the first issue I start by stating that the Law is very clear on when execution can take place. Section 94 of the Civil procedure Act Cap 21 provided:

**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.**

7. The consent judgment reproduced above provided that once the defendants defaulted in the payment of installments as agreed they were to bear the costs of the suit. Those costs were not determined in that consent. It was therefore necessary for the plaintiff to have those costs determined by taxation. In my view the plaintiff erred to have failed to have those costs taxed. The plaintiff further erred to have unilaterally ascertained those cost and to have had them included in the amount of Kshs 50 million. The plaintiff's execution application indicated those costs to be Kshs 1,024,085.00 it is not clear where that figure came from. By virtue of section 94 cap 21 the plaintiff needed to obtain the court's leave to execute the decree before taxation. This requirement was discussed by Justice F. Azangalala (as he then

was, now a court of appeal judge) in the case SHAMSHER KENYA LTD –V- BODY & SOUL LIMITED [2006] eKLR thus in Bamburi Portland Cement co. Ltd –vs- Hussein [1995] LLR 1870 when as a Judge of the court of Appeal observed:

**“Section 94 of the Civil Procedure Act requires that for**

**execution of a decree before 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 way of a notice of motion. The motion must be served on the other party themselves as follows:-**

**That position received the support of a full bench of the Court of Appeal comprising Gicheru JA as then was, Omolo JA and Shah JA in Lakeland Motors Ltd – vs- Sembi [1998]LLR 682. The Learned Judges of Appeal delivered themselves as follows:-**

**“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.”**

**It is plain therefore that on the authority of Section 94 of the Civil Procedure Act and the above decisions, the execution, levied by the respondent before costs were ascertained was irregular as leave was not obtained. The same is hereby set aside.”**

8. My response to the first issue, identified above, is that execution should not only be stayed but should set aside because the plaintiff failed to obtain the court leave to execute the decree before taxation.

9. The second issue considers what the defendants’ alleges is that plaintiff’s failure to have them removed from the credit reference bureau listing.

10. The defendants attached to the affidavit in support of the application sworn by Osman Erdinc Elsek, the Credit bureau reports by Metropol and by TransUnion. My observation is that report of TransUnion was as made on 24<sup>th</sup> July 2014, which was Long before the consent judgment was executed. It is therefore irrelevant in this matter. In respect of the report of Metropol it is a report in respect of the company “Elsek And Wlsek Kenya Limited.” That company is not any of the defendants in this matter. That report does not advance the defendants’ submission in respect of the second issue.

11. It follows therefore that two reports do not advance the defendants’ contention that the plaintiff failed to abide by the consent, that is, failed to have them removed from the credit bureau listing. Indeed the plaintiffs exhibits “EH 11” and “EH 12” show that Metropol by their email of 14<sup>th</sup> October 2014 and Transunion by their email of 24<sup>th</sup> October 2014 confirmed to the Plaintiff that the defendants’ names had been delisted from their lists. The defendants did not dispute the plaintiff evidence on that score, that the plaintiff had complied with the consent by having the defendants delisted from the bureau of defaulters.

12. Even if the plaintiff had failed to de-list the defendants from those bureau, such failure, it at all, cannot lead to setting aside execution of the decree. If there was such failure by the plaintiff the defendants would have to seek the court’s finding that the plaintiff was in contempt of the court order but such failure cannot lead to setting aside of execution process.

13. On the third issue the defendants through the affidavit of Osman Erdinc Elsek deponed that the goods proclaimed by the auctioneer were located in the premises of a company called Elsek production Ltd, which company is not a party in this action. Further that the Motor vehicles also proclaimed by the auctioneers belonged to third parties.

14. The simple response to those deposition is that it is not open to the defendants to raise objection to

attachment on the ground that the goods attached belong to a third party. Order 22 Rule 51, 52 and 53 of the Civil Procedure Rules makes it very clear that an objection to attachment should be made by the one who alleges the attached good belong to him and not the judgment debtor. On that ground alone I find in respect of the third issue against the defendants.

15. It did not escape my attention, as I considered the third issue that the copy of record in respect of Motor vehicle KBW 488 in the name of Owuor Moses, annexed to the affidavit of Osman Erdinc Elsek, did not relate to any of the motor vehicles that are the subject of the auctioneer's proclamation.

16. Order 21 Rule 8(2) (3) and (4) of the Procedure Rules sets out the steps to be followed when a decree is drawn. Under sub rule (2) of that order it requires a draft decree be sent to the opposite party for approval. If it is approved and the registrar of the High Court is satisfied that it is drawn up in accordance with the court's judgment, the registrar shall sign and seal the decree. Sub-rule (3) provides that where the opposite party fails to approve the draft decree within seven days of delivery, the registrar on being notified of that failure shall sign and seal it once he confirms that it conforms to the judgment.

17. The plaintiff, has not denied it did not forward the draft decree for approval as provided under the above mentioned Rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. It would only lead to the setting aside of the execution if the decree was shown not to conform to the judgment. In this case I have perused the consent and I do not find there to be any deviation of that consent with the decree drawn, signed and sealed by the registrar. In that regard the fourth issue is answered in the negative.

18. In the end I find that there is merit in nullifying the execution application filed on 20<sup>th</sup> April 2015 and the warrant of attachment and sale dated 21<sup>st</sup> April 2015 for having being issued before taxation without leave of the court. To that extent the defendants Notice of Motion dated 27<sup>th</sup> April 2015 succeeds and the costs thereof shall be borne by the plaintiff.

**DATED and DELIVERED at MOMBASA this 30<sup>TH</sup> day of JULY, 2015.**

**MARY KASANGO**

**JUDGE**

**Coram**

**Before Justice Mary Kasango**

**C/A Kavuku**

**For Plaintiff:**

**For Defendants:**

**Court**

**Ruling delivered in their presence/absence in open court.**

**MARY KASANGO**

**JUDGE**

