REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 489 OF 2012

PRIME COMMUNCIATIONS LIMITED …….. PLAINTIFF

VERSUS

KENYA MEDICAL LABORATORY

TECHNICIANS & TECHNOLOGISTS BOARD …….. DEFENDANT

R U L I N G

1. According to the parties, there are 3 Applications for determination before this Court. The first is the Defendant's Application dated 12th March 2013 seeking a stay of execution of the Order of this Court dated 23rd January 2013 as well as a stay of proceedings pending the hearing and determination of the Defendant's intended appeal. The second Application was also brought by the Defendant dated 13th August 2013 and is seeking a stay of execution of the said Decree of this Court issued on 1st August 2013 as well as being an application for review of its Order of 1st August 2013. The third Application is that of the Plaintiff, also dated 13th August 2013, seeking leave for the Plaintiff to execute the Preliminary Decree herein as settled by the Court on 1st August 2013. As a secondary prayer, the Application sought the inclusion of the word "Preliminary" on the Decree as above.
2. It would seem sensible to this Court to examine the Applications for determination in date order and to come to a finding in respect of each. However before the Court considers such, it has taken cognizance of the Defendant's Notice of Motion dated 6th June 2013 which was brought under the provisions of **Order 21 rule 8 (2), Order 22 rule 6, Order 22 rule 22 and Order 51 rule 1** of the *Civil Procedure Rules, 2010*. It was also said to be brought under **sections 3A, 44 (1) (ii) and 94** of the *Civil Procedure Act*. Further, on 11th June 2013, the Plaintiff filed an application for leave for the firm of Kinyua Njagi & Co to come on record in place of Odhiambo Oronga & Co which was allowed by consent on 14th June 2013. As it turned out, there was no need for this Court to consider the Application dated 6th June 2013 as it was allowed by consent on 3rd July 2013 after the parties had informed this Court that settlement negotiations as between them were underway.
3. The Defendant's Notice of Motion dated 12th March 2013 was supported by the Affidavit of **Michael Abala Wanga** sworn on even date. Having set out the details of the summary judgement Application by the Plaintiff dated 10th October 2012 including the affidavits for and against, the deponent set about criticising this Court's Ruling in connection with that Application as follows:

> **"13. That in ruling in the way that it did, the court failed to consider the settled law in applications for summary judgement, namely:**

- **It failed to find that the Respondent's Application is premature.**

- **It failed to consider the Replying Affidavit and Further Affidavit filed by the Applicant.**

- **It relied wholly on the Respondent's Supporting Affidavit and Further Affidavit which were controverted by the Applicant's Replying Affidavit and Further Affidavit.**

- **It did not consider that the Applicant had prima facie triable issues in the defence, counterclaim and set-off raised in its Affidavits.**

- **It did not appreciate that once the Applicant raised even a single prima facie triable issue, it was entitled to unconditional leave to defend.**

- **It erred in granting summary judgement, not for lack of triable issues but based on the Applicant's failure to meet the condition imposed on it for leave to defend the suit.**

- **It erred in granting summary judgement on amounts which were in dispute without the Respondent producing any supporting documents.**

- **It erred in granting summary judgement as prayed in the plaint when not all prayers were liquidated.**

- **It erred in not giving directions as ot the balance of the suit which was not liquidated".**

To the Court's way of thinking, all these points raised by the Defendant in its Affidavit were more by way of appeal than in any way supportive of an application for stay other than a poor attempt to show that its proposed appeal may not be rendered nugatory. That affidavit was responded to by the Replying Affidavit of **Hasmita Sharad Patel**, a director of the Plaintiff company, sworn on 16th April 2013. The deponent echoed the remarks of this Court as above by stating that in her opinion, the Defendant was clearly attempting to prosecute the merits of its intended appeal rather than basing its Application on known facts. The deponent went on to accuse the Defendant of delay in pursuing a certified copy of the proceedings as well as the Ruling appealed against. The deponent went on to deny the allegation of the Defendant that the Plaintiff was not incorporated in Kenya, attaching a copy of its Certificate of Incorporation accordingly. In her opinion, the Defendant had been given enough time to settle the amounts due to the Plaintiff but instead had chosen to bring its Application before the Court in order to delay having to make payment.

4. The Defendant's submissions in relation to its Notice of Motion dated 12th March 2013 were filed herein on 2nd October 2013. Having detailed the Application and the grounds in support thereof, the Defendant submitted as regards to the provisions of **Order 42 rule 6** of the *Civil Procedure Rules* and referred to the authority of **Butt v The Rent Restriction Tribunal (1982) KLR 417** as regards the general principles for the granting or refusal of stay. The Defendant submitted that if a stay of execution did not issue, the Defendant, which is a State Corporation, would without doubt, suffer substantial loss as the applicant would in all probability, move in to attach its furniture, computers, printers, photocopiers etc. which were the only assets that it owned and were its tools of trade. The Defendant was of the opinion that its appeal, which it had already filed, had a good chance of success once heard and determined. It noted that its Application had not been brought with unreasonable delay. The Defendant contended that the Plaintiff had grossly exaggerated the amounts owed to it without any justification or supporting documentation. However, the Defendant was ready to give a performance bond or guarantee for the due performance of such Decree or Order as may ultimately be binding upon it pending the hearing of the Defendant's Appeal.
5. To this end, the Defendant referred to the case of **Kundanlal Restaurant v Devshi & Co (1952) 1 EACA 77**. The Defendant referred to its Memorandum of the intended Appeal exhibited as "MAW 13" to its Supporting Affidavit. It maintained that it stood every chance that this Court's Ruling dated 23rd January 2013 could be reversed and that it would be granted unconditional

leave to defend at the full hearing of the suit as it had a *bone fide* Defence that raised numerous triable issues. In this regard, it referred this Court to the authority of **Souza Figuerido & Co Ltd v Moorings Hotel (1959) EACA 425** as well as **Savings & Loan Kenya Ltd v Mary W. Mbugua HCCC No. 2695 of 1997 (UR)**. The Defendant noted that the Plaintiff had twice, in the past, abused the process of the Court by commencing execution without leave. A stay of proceedings would save judicial time by averting numerous interlocutory applications which might in any event render the Defendant's appeal nugatory. To this end, the Defendant referred the Court to the finding of **Nyamu J.** in the case of **Mark Omollo Agencies & 2 Ors v Daniel K. Kaindi & Anor HCCC No. 1061 of 1990 (UR)**. The Defendant concluded its submissions in relation to its Application dated 12th March 2013 by stating that it had raised a legal ground of appeal so that the Plaintiff's application for summary judgement was premature. This Court should not entertain the same. The other legal ground was that since this Court did not find the Defendant's Defence was a sham or did not raise any triable issues, it should have granted the Defendant unconditional leave to defend the suit.

6. It appears from the record that the new advocates for the Plaintiff – J. Harrison Kinyanjui & Co, who came on record for the Plaintiff on 11th June 2013, have overlooked the fact that the Defendant's Application dated 12th March 2013 has never been determined. The Plaintiff's submissions filed on 27th November 2013 referred to the Defendant's Notice of Motion dated 6th June 2013 with no mention of the Application dated 12th March 2013. Presumably, the Plaintiff has mistakenly submitted as regards the Defendant's Application dated 6th June 2013 which, as detailed, was allowed by consent. Be that as it may, in my opinion, I consider the Defendant's Application dated 12th March 2013 to have been overcome by events or at least by its own Applications, the first dated 6th June 2013 which was allowed by consent on 3rd July 2013 and the second dated 13th August 2013 which is before Court. The Application dated 6th June 2013 sought a stay of execution as against the Decree which had emanated, rightly or wrongly, from the Ruling of this Court dated 23rd January 2013. In my view, that Application and the Defendant's said Application dated 12th March 2013 were seeking the same thing, namely a stay of execution of either the Order or the Decree which emanated from the said Ruling of 23rd January 2013. Such having been allowed there appears to be no further reason for this Court to dwell upon the Application of 12th March 2013 more particularly as the Decree issued by the Court on 20th May 2013 was set aside.
7. I should comment, however, that in the Defendant's Notice of Motion dated 12th March 2013, prayer 3 thereof sought a stay of proceedings in this matter pending the hearing and determination of the Defendant's intended appeal. To this end, the Defendant relied upon the authority of **Mark Omollo Agencies** (supra). The Court has an unfettered discretion under **Order 42, rule 6 (1)** to order a stay of proceedings in the event of an appeal or second appeal. The discretion is not limited even by the need to show "sufficient cause" as is necessary for a stay of execution. Further, the mandatory conditions set out in **Order 42 rule 6 (2)** also do not apply to a stay of proceedings – they apply only to a stay of execution. The usual requirement that sufficient cause be shown, substantial loss, bringing of the application without undue delay and the provision of security are applicable only to applications for stay of execution.
8. This Court has unlimited discretion to grant a stay of proceedings subject only to the same being exercised rationally and not capriciously. The main consideration is whether it is in the interests of justice to order a stay of proceedings and on what terms. The Court doing so must consider the merits for ordering or not ordering a stay of proceedings. It must bear in mind such factors as the need for the expeditious disposal of cases, the *prima facie* merits of the intended appeal and whether the application has been brought timeously.
9. In this case, it is quite apparent that not only the Plaintiff but to a certain extent the Defendant had rather forgotten about the application for stay of proceedings. Indeed, the Defendant went ahead and filed its application for stay of execution dated 6th June 2013. That was based upon the Decree extracted and issued by the Court on 20th May 2013. That Application having been allowed by consent, the Plaintiff came before this Court and asked that the Court do settle the Decree herein which was accomplished on 1st August 2013. Now the Defendant has come again with its application dated 13th August 2013. That application seeks a stay of execution of the Decree which the Court settled on 1st August 2013. It also asks for the "Order" of the Court made on 1st August 2013 to be reviewed and indeed that the Decree should be set aside *ex-debito*

justitiae. That Application does not ask for a stay of proceedings. However and in my view, the Defendant, having filed two further Applications in Court since its said Application of the 12th March 2013, it has subjected itself to continuing the proceedings before the Court. As a result, I do not consider that I should order a stay of proceedings at this stage. It is doubtful that the Defendant's intended appeal will be rendered nugatory if a stay is not granted and this Court has to weigh up the balance between staying the proceedings until the Defendant's intended appeal is heard or, should the Plaintiff's Application dated 13th August 2013 be successful, that a stay will prejudice its right to the fruits of its summary judgement.

10. Moving on, the Defendant brought its Application dated 13th August 2013 under Certificate of Urgency, before this Court. The Application sought Orders (as above) firstly, that there be a stay of execution of the Decree issued on 1st August 2013, secondly that the Court should review its Order of 1st August 2013 settling the terms and directing the issuance of the Decree and thirdly, that the said Decree should be set aside *ex debito justitiae*. The Application was brought under the provisions of **sections 2, 3A and 75** of the *Civil Procedure Act* as well as **Order 21 rule 8 (2), Order 22 rules 6 and 22, Order 43 rule 1 (1) (s) 45** and **Order 51 rule 1** of the *Civil Procedure Rules, 2010*. The Application was supported by the following Grounds:

> **"(a) On 23rd January, 2013 the honourable court delivered a ruling on the Respondent's application for summary judgement dated 9th October, 2012 which ruling the applicant is in the process of appealing against.**
>
> **(b) Subsequent to that the Respondent applied for settlement of the terms and issuance of the decree emanating from the said ruling which terms the court settled and consequently issued the decree on 1st August, 2013.**
>
> **(c) The settlement and consequent issuance of the decree herein was in error as it contravenes the provisions of sections 2 (a) and 75 (1) (h) of the Civil Procedure Act and Order 43 Rule 1 (1) (s) of the Civil Procedure rules.**
>
> **(d) the decision of the court on 23rd January, 2013 did not amount to a final adjudication that could result to a preliminary or final decree as it was appealable as an Order of the court.**
>
> **(e) the decision of the court on 23rd January, 2013 only gave rise to an interlocutory order which was challengeable at the full hearing of the matter and was subject to formal proof before a decree could issue.**
>
> **(f) The Honourable court issued the order emanating from the said ruling on 19th February, 2013.**
>
> **(g) the decision of the court could not have resulted to both an order and a decree.**
>
> **(h) In all probability, if the said decree is not stayed and consequently set aside the Respondent may execute the same to the detriment of the Applicant, thus rendering its challenge of the interlocutory orders at the full hearing nugatory and the intended appeal irreversible and nugatory respectively contrary to what was envisioned by the law.**
>
> **(i) the Applicant is a public body with the statutory mandate to regulate and indeed regulates the business and practice of medical laboratory technology in this country and execution against it will leave the said industry unregulated and as such compromise the health standards in the country to the detriment of Kenyas.**
>
> **(j) It is in the interest of justice that this application be granted as pray".**

11. The Affidavit in support of the said Application this time round was sworn by one **Abdulatif Ali** dated 13th August 2013, although the Application itself stated that it was supported by an affidavit sworn by Mr. Wanga. However, the Deponent described himself therein as the Chief Medical Laboratory Technologist and the Registrar of the Defendant. The said Affidavit was almost a carbon copy of the Affidavit sworn by Mr. Wanga in support of the Defendant's Application dated 6th June 2013 except that the deponent was complaining about the Decree which had been settled by this Court on 1st August 2013 as regards its Ruling delivered on 23rd January 2013. The said Affidavit referred to the Order emanating from this Court's Ruling of 23rd January 2013 maintaining that such Ruling could not have resulted in both an Order and a Decree. There was absolutely no mention in the Supporting Affidavit of the Decree which had been settled by this Court on 1st August 2013. At the conclusion of the said Affidavit the deponent stated that he swore the same in support of the application for stay of execution and proceedings pending appeal!
12. In response to the Defendant's Application dated 13th August 2013, the Plaintiff filed a Replying Affidavit sworn by the said Hasmita Sharad Patel on 10th September 2013. Whereas the Defendant had maintained that the settlement and subsequent issuance of the Decree was in contravention of the provisions of **sections 2 (a) and 75 (1) (h)** of the *Civil Procedure Act* as well as **Order 43 rule 1 (1) (s)** of the *Civil Procedure Rules*, the deponent had been advised by her advocates on record that such was not the case. She maintained that the summary judgement herein was a final adjudication in respect of that particular part of the claim unless such was overturned on appeal. The same was not subject to formal proof as it related to a liquidated claim which had been specifically proved by material evidence to the satisfaction of the court at the hearing of the summary judgement application. The deponent went on to say that she had been further advised by her advocates on record that the Defendant was estopped from purporting to challenge the legality of the settled Decree herein, it having participated in the process of the settlement of the same. The Defendant had failed to raise the issues it was now so doing in its Application before Court at the time that the Court was settling the Decree.
13. Mrs. Patel went on to say that not only had the Defendant filed a Notice of Appeal but also had applied to the Court of Appeal for a stay of the Orders emanating from the application for summary judgement. The Defendant had not taken any steps to prosecute its application before the Court of Appeal since the matter was last in Court on 25th April 2013 where it had been adjourned at the Defendant's request. The deponent maintained that she had been advised by her advocates on record that the Defendant was not entitled to seek the Orders before this Court that it was seeking as it had sought the same Orders from the Court of Appeal. It was for the Defendant to decide upon which forum it wished to pursue its application. Mrs. Patel then deponed as to further advice that she had received from her advocates on record which, in the opinion of this Court, would have been better detailed in submissions rather than by way of Affidavit. Contents of affidavits should be confined to facts not to matters on points of law.
14. The Defendant made submissions as regards the law applicable to the review of a Decree or Order with reference to **Order 45 rule 1** of the *Civil Procedure Rules, 2010*. Having set out that rule, the Defendant submitted that there was sufficient reason for this Court to review its Order of 1st August 2013 settling the terms of the Decree issued by the Court on the same date and as a consequence, set the same aside. The Defendant referred to **section 2** of the *Civil Procedure Act* as regards the definition of "decree" which it proceeded to set out as follows:

"decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include –

a. **any adjudication from which an appeal lies as an appeal from an order; or**

b. **any order of dismissal for default:**

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be

appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final".

15. The Defendant laid emphasis on subparagraph (a) as above and maintained that its intended appeal to the Court Appeal lay as an appeal from the Order of this Court of 23rd January 2013 and not in relation to the Decree which would seem to have emanated wrongly from that Order. The Defendant referred to **section 75** of the *Civil Procedure Act* as well as **Order 43 rule 1** which allowed for an appeal from **Order 36 rules 5, 7 and 10**. It submitted that this Court's Ruling of 23rd January 2013 having emanated from an application for summary judgement could only have given rise to an order and not a decree. As such, the order of the court made on 1st August 2013, settling the terms of the Decree, was a mistake or error on the part of the Court and the same should be set aside as no decree whether preliminary or final could have resulted therefrom. The Defendant referred in this connection to the case of **Total Kenya Ltd & Anor. v Kenya Airports Authority & Anor (2006) eKLR** as per **Ransley J.** referring to the decision in **Mandavia v Singh (1965) EA 118**.
16. The Defendant then pointed to the Ruling of this Court delivered on 23rd January 2013 at page 25 and asked the question whether the Court's finding, holding and decision amounted to a final adjudication that could result in a Decree? The Defendant answered the question in the negative. The reason for its so doing was that it maintained that the Court allowed the Defendant to challenge the claim brought against it by the Plaintiff by allowing it to file a defence and challenge the Plaintiff's claim at a full trial albeit on condition. Somewhat curiously, the Defendant then quoted from the **Mandavia v Singh** authority (supra) as follows:

> **"(ii) where an issue such as liability is tried as a preliminary issue and the suit is finally disposed of at first instance, a preliminary decree arises from which an appeal lies;"**

The Defendant maintained that the Ruling of the Court delivered on 23rd January 2013 did not find or dispose of the matter but rather left the issue of determination as to whether the Defendant was actually liable or not, to be finally determined at full trial after the Defendant had defended itself. The condition imposed on the Defendant and a consequence of default to meet the condition imposed by the court, did not change the fact that the Court in its said Ruling did not make a final determination on the Defendant's liability and, as such, only an Order and not a Decree could arise out of the Court's decision. Thereafter, the Defendant cited the case of **William James Baker v Joseph Peter Rush (1964) EA 602** as to what constitutes a Decree. In conclusion, the Defendant submitted that the Court's Ruling of 23rd January 2013 did not conclusively determine the issue of liability in the suit. As a result the Order of this Court given on 1st August 2013 settling the terms and directing the issuance of the Decree should be reviewed and the Decree that emanated therefrom should be set aside as it was a mistake and/or error on the part of the Court to have settled and consequently issued a Decree in respect of an adjudication that was pending conclusive determination.

17. Naturally enough the submissions of the Plaintiff filed on 27th November 2013 took issue with those of the Defendant. The Plaintiff noted that the Defendant had conceded that the Decree herein be settled by the Court on 1st August 2013 and thereafter duly extracted. The Plaintiff then proceeded to apply for Warrants of Attachment and Sale. As regards the settled Decree, the Defendant had not stated in its submissions in what terms it violated **section 2 (a) and 75 (1) (h)** of the Civil Procedure Act as well as **Order 43 (1) (s)** of the *Civil Procedure Rules*. There was no suggestion from the Defendant that if such error existed, it rendered the pronouncement of the Decree fatal. In the Plaintiff's view, the law does envisage a Preliminary Decree. There was no denying the jurisdiction of the Court to issue judgement on admission whether partially or expressly admitted, while awaiting the formal proof of the contested issues. The Plaintiff then went on to say that the Court had no jurisdiction to review the decision which the Defendant has

sought to appeal against. In my opinion, the submissions by the Plaintiff were irrelevant to the Defendant's said Application of 13th August 2013 as the same did not seek any such review of the Court's Ruling of 23rd January 2013 against which an appeal had been proffered, rather a review of its Order of 1st August 2013. Perhaps, the Plaintiff (as observed above) was making its submission based on the context of the Supporting Affidavit of Abdulatif Ali which largely referred to this Court's said Ruling of 23rd January 2013. However, the Plaintiff did maintain that the argument put up by the Defendant that the Court's Order of 1st August 2013 would leave the industry unregulated, was completely without foundation. Further, the Plaintiff made the point that the Defendant's said Application sought that the Court would sit on appeal of its own decision.

18. This Court has been somewhat surprised by the Application of the Defendant dated 13 August 2013. When the parties appeared before Court 23rd July 2013, Mr. Mwongere for the Defendant, submitted that there was a confusion as to the way in which the Decree had been drawn as regards the Court's Ruling of 23rd January 2013. He asked that this Court do settle the Decree more particularly Order No. 2 thereof. Accordingly, the Court obliged and settled the Decree as so requested by Counsel. Now it appears that the Defendant takes issue with the way in which the Court has so settled the Decree. To this end, the Defendant maintains that the settled Decree contravenes the provisions of **sections 2 (a) and 75 (1) (h)** of the *Civil Procedure Act* and **Order 43 rule 1 (1) (s)** of the *Civil Procedure Rules*. The Court finds that the Plaintiff is absolutely right in that this Court has overlooked referring to the Decree as a Preliminary Decree taking into regard to the Explanation to the interpretation of "decree" in **section 2** of the Act. Such is the reason for the Plaintiff making its Application dated 13th August 2013 for correction of the Decree under **section 99** of the Act. However, what the Defendant seems to be getting at is that the decision of this Court on 23rd January 2013 did not amount to a final adjudication that could result in a preliminary or final Decree. I cannot agree with this submission as it is quite clear from the Interpretation under **section 2,** as above, that a Decree may be preliminary where further proceedings have to be taken before a suit can be completely disposed of.

19. In my view, the Court's Ruling of 23rd January 2013 amounted to a partial finding as regards the amount admitted by the Defendant as due and owing to the Plaintiff being Shs. 7,937,750/- (as it had tendered cheques in this amount) together with interest thereon at 1% per month from 11th February 2011 to date. It would seem to me that there is no reason why a Preliminary Decree cannot be drawn up as regards my finding in that regard. However, my said Ruling went a stage further in that this Court gave the Defendant 30 days in which to pay the said amount. The total amount claimed in the Plaint was Shs. 18,476,481/- together with special damages to be particularised at the hearing. The Ruling was explicit in that should the Defendant have not paid the said amount of Shs. 7,937,750/- within 30 days then the whole of the amount claimed in the Plaint, as above, plus interest at 1% per month would become due and payable. As it has turned out, the evidence shows that the Defendant failed to pay the said sum of Shs. 7,937,750/- within the allotted 30 days. Instead, the Defendant has filed application after application in attempts to delay making payment to the Plaintiff to the latter's considerable detriment.

20. **Section 75** of the **Civil Procedure Act** as well as **Order 43 rule 1** of the *Civil Procedure Rules, 2010*, refers to Orders from which an appeal lies. The Defendant has gone to great pains to show that it has a right of appeal arising out of the Ruling of the Court dated 23rd January 2013. This Court wonders at the relevance of such submission as the Defendant's undoubted right of appeal has not in any way been compromised by the issuance of a Decree which counsel for the Defendant himself asked this Court to settle. In my view the authority referred to by the Defendant being **Mandavia v Singh (supra)** can be distinguished from the matter before this Court. In that case, the Court of Appeal considered the position with regard to a preliminary issue being raised before the superior court. It identified such a preliminary issue as to the allegation of misjoinder, limitation, lack of jurisdiction or *res judicata*. The Court went on to say that where a preliminary issue is tried and the suit finally disposed of at first instance, a preliminary decree arises from which an appeal lies. Where a preliminary issue fails and a suit is permitted to proceed, no preliminary decree arises but only an Order.

21. What was before this Court was an application for summary judgement brought by way of Notice of Motion dated 9th October 2012. In my view, there is no way that such an application can be considered as a preliminary issue hence the Ruling of this Court by way of partial judgement. There are still matters as between the parties which required to be tried including the question of

special damages. Further, the Defendant referred this Court to the **William James Baker** case (supra) presumably for the purpose of showing that this Court had not complied with what the authority terms "essential elements" of a decree. These were detailed as:

"(a) there must be an adjudication;

(b) the adjudication must have been given in a suit;

(c) it must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;

(d) such determination must be a conclusive determination." (Emphasis mine).

With due respect to the Defendant, the Ruling of this Court of 23rd January 2013 covered all these 4 elements. In the result, I do not consider that the Defendant's Notice of Motion dated 13th August 2013 to be of merit and I dismiss the same accordingly with costs to the Plaintiff.

22. That leaves the Plaintiff's application of 13th August 2013 for determination. The Application sought two prayers as outlined above and was brought under the auspices of **sections 3A and 94** of the *Civil Procedure Act* as well as **Order 22 rule 6** of the *Civil Procedure Rules, 2010*. The Application was based on the following grounds:

"1. THAT the Preliminary Decree herein was settled by this Honourable Court on the 1st August, 2013 and Decree duly extracted wherein the Plaintiff/ Applicant proceeded to apply for Warrants of Attachment and Sale.

2. THAT the Court duly issued the Warrants of Sale to M/s Bealine Auctioneers who proceeded to proclaim the Defendant/Respondents' movable assets.

3. THAT the Defendant/Respondent's advocates wrote to both the Court and the Plaintiff/Applicant's advocates on record complaining that the Warrants of Sale were irregularly issued without leave of court to execute before costs are ascertained by way of taxation as required under section 94 of the Civil Procedure Act.

4. THAT the Plaintiff/Applicant's advocates on record have confirmed from the Court file that the Plaintiff/Applicant's previous advocates did not apply for leave to execute the decree at the time of delivering the Ruling for Summary Judgment.

5. THAT taxation of costs at this stage is not necessary as Summary Judgment and costs thereof were awarded for only part of the claim herein and as such costs payable can only be determination once the Court pronounces the final judgment.

6. THAT the Plaintiff/Applicant's advocates on record have since instructed the Auctioneers to lift the proclamation in order to facilitate the present application.

7. THAT the Defendant/Respodnent is in contempt of this Court's Order dated 23rd January, 2013.

8. THAT the Plaintiff/Applicant is entitled to enjoy the fruits of its judgment and has made steps to execute the decree herein and the only hindrance is lack of leave to execute the Preliminary Decree which leave it beseeches this Honourable Court to grant.

9. THAT as is evident from the court record the Plaintiff/Applicant took a loan of USD 117,000 from Fidelity Bank in January, 2011 to enable it finance and deliver the services to the defendant/ respondent in furtherance of the contract the subject of the

judgement herein and both its bankers and the guarantors who offered security for the facility are after it to secure payment thereof.

10. THAT the Plaintiff/Applicant can only realize the fruits of its judgment through execution as the Defendant/Respondent has not been keen on settling the decretal amount herein and the Plaintiff/Applicant is apprehensive that its bankers might move to realize the guarantors security for non payment of the loan facility.

11. THAT the learned Honourable Justice Havelock inadvertently omitted to include the word "PRELIMINARY" while settling the decree herein and it is thus in the interest of justice that this Honourable Court directs and/or orders the inclusion of the same in order to reflect the true status of the decree herein as it is only two parts of the Plaintiff/Applicant's claim that were allowed during the application for Summary Judgment while the others are pending Court's determination.

12. THAT it is only fair and just that the application herein be granted".

23. The Plaintiff's said Application was supported by the Affidavit of the said **Hasmita Sharad Patel** sworn on 13th August 2013. The deponent recounted the history of this matter before this Court including its Ruling dated 23rd January 2013, the issuance of the first Decree alongside Warrants for Attachment and Sale as well as details of correspondence between the parties. The deponent then went on to say that in order to enable the Plaintiff to finance and deliver services to the Defendant, it had taken a loan from Fidelity Bank in January 2011. It had been struggling ever since to repay that loan but as the Defendant had not paid it for services rendered, it had been unable to do so and the loan was accruing interest. Mrs. Patel also deponend to the fact that this Court, when it settled the Decree herein, on 1st August 2013 had overlooked describing the same as a "Preliminary Decree" hence the prayer that the word "Preliminary" should be inserted therein. The Defendant filed a Replying Affidavit sworn by the said **Michael Abala Wanga** on 17th September 2013. In my view, the contents of that affidavit added nothing new to what was already before Court in other Affidavits sworn by the Defendant's officials. In fact, the Affidavit contained references to matters of law which are always best left to be dealt with in submissions rather than inserted by parties' advocates in affidavits generally sworn by laymen who would have no knowledge of the legal position.
24. The Plaintiff's submissions as regards its said Application of 13th August 2013 accompanied its other submissions in respect of the other applications before Court filed on 27th November 2013. The Plaintiff first dealt with its prayer to amend the Decree as settled by this Court. It pointed out that the Court had both the statutory and inherent power to give effect to its own decisions whenever it was brought to its attention that there was some default in a formal document extracted or the implementation of a decision that it had pronounced creating an impediment. Under the provisions of **sections 99 and 100** of the *Civil Procedure Act*, the Court could act to uphold the rule of law so as to ensure that the Decree made on 1st August 2013 was properly titled. This was an inadvertent omission apparent on the face of the Decree. The Defendant had not shown that the Court would be acting without jurisdiction or be vesting upon itself power otherwise divested on it by statute or practice. There was no sound basis for opposition to the Plaintiff's Application in this regard.
25. Turning to the provisions of **section 94** of the *Civil Procedure Act*, the Plaintiff pointed out that such confers upon the Plaintiff the right to execute a decree prior to the taxation of costs on reasons to be justified. The Plaintiff maintained that the Defendant's sole opposition to the amendment sought by the Plaintiff to the Decree was to block the execution which the Plaintiff had sought before Court. As regards the reasons for requiring the execution of the decree, the Plaintiff submitted that the execution of the Decree would expedite the repayment of the loan taken by the Plaintiff from the said Fidelity Bank in January 2011. The Defendant seemed to be intent upon stalling the payment of the proceeds. The Plaintiff maintained that commercial agreements ought to be honoured, not frustrated. It added that the Plaintiff conscientiously accorded the Defendant its obligations as contracted yet the Defendant did not appear keen to adhere to the agreed terms of the Contract by performing its obligations. There was a need so that

the Plaintiff could mitigate its financial loss. Finally, the Plaintiff noted that there had been no stay of execution granted by the Court of Appeal even though the Defendant's application before that Court had been filed but had not been prosecuted. There was no current Order issued by the Appellant Court as regards stay of execution. Taking into account its need to repay its banker as aforesaid, the Plaintiff referred to the case of **Commercial Bank of Africa Ltd v. Lalji Karsan & 2 Ors (2013) eKLR** in which my learned brother **Kimondo J.** had held:

"Freezing of the Decree would only offer a temporary and costly relief considering the item of interest".

26. In response to the submissions of the Plaintiff as regards its Application dated 13th August 2013, the Defendant maintained that it was not in the interests of justice or good order for the Plaintiff to be allowed to execute the Decree herein as it would render the Defendant's challenge in relation to the interlocutory Orders at the full hearing, nugatory. It would also render the hearing of the Defendant's Appeal herein irreversible and nugatory. The Defendant submitted that it was trite that a formal expression which did not amount to a final adjudication was not executable until it had been given in the Judgement of the Court. Execution could not be allowed where the sum sought to be executed was unknown as was presently the case here. The Defendant noted that there was pending before this Court, as well as the Court of Appeal, applications for stay of execution of the Ruling and Order granted 23rd January 2013 as well as a stay of the proceedings and an application for the review of the Order settling the terms and directing the issuance of the Decree herein. The Defendant then went on to say that its applications as above should be determined before the present application is heard and determined. In view of the fact that I have as above determined the Defendant's two applications pending before Court, I would seem to have acknowledged with the Plaintiff's submission on this point.
27. As regards the law, it was the Defendant's submission that execution could not issue before a suit is fully heard, determined, with final judgement and decree issued together with costs of the suit being ascertained, except with the leave of the court. It referred to **section 94** of the *Civil Procedure Act* to this end. The Defendant further submitted that this Court could not permit execution where the sum claimed is unknown and where there is a sensible contest to the claim. Thereafter, the Defendant submitted that where the expression of the Court was not conclusive such orders were not executable until such formal expression has been delivered by way of Judgement. It relied upon the case of **Mercedes Sanchez Rau Tussel v Samken Ltd & 2 Ors HCCC No. 4231 of 1992 (as consolidated with HCCC Nos. 4232, 4233 and 4234 of 1992) (unreported).** That case commented fully upon the provisions of **section 94** of the *Civil Procedure Act*. The Defendant concluded that the amount to which the Plaintiff was entitled is unknown and could not be ascertained until the full trial of the suit. Secondly, by the Court granting leave to the Defendant to defend it in respect of the Plaintiff's claim, the same needs be finally determined at a full trial as the Court must have found that the Defendant's had a sensible contest to the Plaintiff's claim. It also maintained that the Ruling of the 23rd January 2013 only gave rise to an Order and not a Decree as had been demonstrated. The summary judgement granted by the Court on the basis of default to meet the conditions set by the court, has been appealed against by the Defendant. It was the Defendant's opinion that there was every probability that the Appellate Court would set aside the Ruling of this Court and consequently if execution was allowed to take place in respect of unascertained amounts, the Defendant's appeal could be rendered nugatory.
28. **Section 99** of the *Civil Procedure Act* reads as follows:

"Clerical or arithmetical mistakes in judgements, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

In this matter, the Plaintiff has made the application to include the word **"Preliminary"** before the word **"Decree"** in the heading to the Decree settled by this Court on 1st August 2013. The Defendant did not seriously attack this application being more concerned as to the execution of the Decree as against it, rather than whether it was a preliminary decree or a final Decree. In my view, this Court

has the discretion to amend any accidental slip or omission as per **section 99** of the Civil Procedure Act as aforesaid. Having perused again what is entitled the "Decree" given by the Court 23rd January 2013 and issued on 1st August 2013, I can see no possible objection to the amendment sought by the Plaintiff and I hereby allow it. The word **"Preliminary"** shall appear before the word **"Decree"** in the heading of the document lodged on the Court file.

29. **Section 94** of the *Civil Procedure Act* reads as follows:

"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".

The section speaks of "a decree" which in line with the interpretation of **section 2** of the Act would necessarily include a Preliminary Decree. From the Affidavit in support of the Plaintiff's Application before Court, I note that it is suffering financial hardship in being unable to repay the monies borrowed from its bankers – Fidelity Bank which were advanced to it, according to the deponent of the said Affidavit, for the purposes of servicing its contract with the Defendant herein. In my said Ruling of 23rd January 2013, I found for the Plaintiff by way of summary judgement in the amount admitted by the Defendant of Shs. 7,937,750/- together with interest thereon at 1 % per month from 11th February 2011. I see no earthly reason why I should not give leave to the Plaintiff to execute as against the Defendant in this amount. I do not accept the submissions of the Defendant that there is no sum certain which cannot be executed by way of Preliminary Decree. Further, in view of the evidence before this Court that the Defendant defaulted and failed to pay the said sum of Shs. 7,937,750/- within 30 days of the date of the said Ruling – 23rd January 2013, I see no good reason why the Plaintiff should not have leave to execute for the balance of the Plaint amount being Shs. 10,875,250/- again with interest at 1% per month from the 11th February 2011 as aforesaid. What remains to be tried at the hearing of this suit in due course is the Plaintiff's claim as against the Defendant for special damages and costs of this suit as detailed in the Plaint.

30. The upshot of all the above and in summary, is that I allow the Plaintiff's Notice of Motion dated 13th August 2013 with costs. As indicated previously, I strike out the Defendant's two Notices of Motion dated 12th March 2013 and 13th August 2013 again with costs to the Plaintiff.

DATED and delivered at Nairobi this 24th day of April, 2014.

J. B. HAVELOCK

JUDGE