



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 299 OF 2009

**AFRICAN BANKING CORPORATION LIMITED.....PLAINTIFF/
RESPONDENT**

VERSUS

NESTAR LIMITED (Under Receivership).....1ST DEFENDANT/RESPONDENT

STAR TECHNOLOGIES LIMITED

(Under Receivership).....2ND DEFENDANT/RESPONDENT

SHEZAD TEJANI..... 3RD DEFENDANT/RESPONDENT

SALMA JAHANGIR TEJANI.....4TH DEFENDANT/RESPONDENT

SHELIMA JAHANGIR TEJANI.....5TH DEFENDANT/RESPONDENT

NASIM JETHA.....6TH DEFENDANT/RESPONDENT

STAR TRACK LIMITED.....7TH DEFENDANT/RESPONDENT

RULING

Execution before taxation of costs

[1] The Plaintiff has applied to be allowed to execute the Decree issued herein on 7th November, 2013, against the 3rd Defendant before the amount of costs has been ascertained. The Motion is dated 12th November, 2013 and is supported by the grounds on the face of the application. The Plaintiff shall be referred to as the Applicant and the 3rd Defendant as the Respondent.

[2] The Applicant urged one sole ground; that by the very nature of these proceedings, which relate to tracing of funds that were illegally obtained from the Applicant, it is only a matter of utmost necessity, that the Decree herein should be executed with expedition. The Applicant is convinced that the course it has taken is in the interest of justice. He prays that the court do allow it to execute the Decree it holds in its favour before costs of the suit have been ascertained.

[3] The 3rd Defendant against who the decree is to be executed opposed the application through averments in his Replying Affidavit sworn and notarized on 8th March, 2014. His major discontent with the application is that it seeks to enforce the decree issued on 7th November, 2013, which is itself bad in law, for reasons that; 1) the decree requires furnishing of security by the 3rd Defendant for his appearance, as well as a permanent injunction, and there is no way an injunction can be granted and at the same time an order for security is made; 2) the decree relate to a decretal sum which is owed by independent legal entities, i.e. the 1st and 2nd Defendants; 3) that, by seeking to execute the decree herein against the Respondent, who is just a director of the 1st and 2nd Defendants, the Applicant is trying to pierce the corporate veil without just cause; 4) that there was no legally binding contract of guarantee between him and the Applicant and so the decree cannot be enforced against him; 5) the proper cause should have been to prove the debt to the receivers of the 1st and 2nd Defendants so that their debt can be considered during liquidation rather than seeking to execute the decree herein against him; 6) that contrary to known business procedures in lending, the Plaintiff did not ask for or receive any security or formal guarantee for repayment of its debt, it only received a mere promise from the director that the company will repay the debt owed; and 7) it is in the interest of justice that the application dated 12th November, 2013 should be dismissed.

COURT'S RENDITION

[4] The ultimate question I must answer is, whether this is a fit case to allow execution of a decree before costs have been ascertained. But before I get there, I reckon that the Respondent has raised a number of issues which are of preliminary significance. It is only appropriate in the circumstances; that I determine those issues *in limine* and then make a pronouncement on the major task at hand, i.e. whether the decree herein should be executed before costs are ascertained.

[5] The Respondent is sending mixed signals by making statements which completely obscures the reality of things herein. In paragraph 3 of his affidavits he contends... ***that the decree issued on 7th November, 2013 which the application seeks to execute is bad in law because it requires the furnishing of security for my appearance, as well as the issuance of a permanent injunction, and there is no way an injunction can be sought and be granted, and at the same time an order for security be made***”. Then in paragraphs 4, 6, 7 and 8, the Respondent avers that the said decree is for payment of a sum of Kshs. 21,000.000 and he gives reasons why he should not be made to pay the decretal sum by way of execution. I am not able to make sense of the first statement. But whatever its purport, I have perused the formal decree drawn up and sealed by the court, and by that decree; 1) the defence by the 3rd Defendant was struck out; 2) judgment in the sum of Kshs. 21,000.000 together with interest at court rate was entered in favour of the Plaintiff as against the 3rd Defendant; and 3) the 3rd Defendant was to pay costs of the suit with interest at court rate until payment in full. The decree was drawn up following the default by the 3rd Defendant to comply with the orders of the court issued on 19th July, 2013. The orders by the learned Judge Mabeya were specific at paragraph 29 (b) as follows:

b. On prayer number 6, the 3rd Defendant do within 45 days from the date hereof deposit a sum of Kshs. 21,000,000/= in an interest earning account with KCB High Court Branch, Nairobi in the joint names of Counsels for the Plaintiff and the 3rd Defendant in this suit as security for his appearance failing of which his Defence shall be struck out and judgment be entered accordingly.

Accordingly, the averment in paragraph 3 of the Replying Affidavit by the Respondent is not a reflection of the correct state of affairs herein and, therefore, indefensible. I reject that argument.

[6] I will handle all the other reasons advanced together, not because they are inextricable, but because I think they are not arguments which may conceivably be preferred as grounds in

opposing an application such as the one before me for reasons that I shall state later. For better appreciation of my arguments yet to be stated, let me recap those reasons advanced by the Respondent again. They are:

- a) ***That the decree relate to a decretal sum which is owed by independent legal entities, i.e. the 1st and 2nd Defendants;***
- b) ***That, by seeking to execute the decree herein against the Respondent, who is just a director of the 1st and 2nd Defendants, the Applicant is trying to pierce the corporate veil without just cause;***
- c) ***That there was no any legally binding contracts of guarantee between him and the Applicant and so the decree cannot be enforced against him;***
- d) ***That the proper cause should have been to prove the debt to the receivers of the 1st and 2nd Defendants so that their debt can be considered during liquidation rather than seeking to execute the decree herein against him;***
- e) ***That contrary to known business procedures in lending, the Plaintiff did not ask for or receive any security or formal guarantee for repayment of its debt, it only received a mere promise from the director that the company will repay the debt owed; and***
- f) ***That it is in the interest of justice that the application dated 12th November, 2013 should be dismissed.***

[7] With tremendous respect, consider the following uncontroverted facts: The application before me is for leave to execute a decree before costs are ascertained. The decree herein has not been set aside. The defence by the 3rd Defendant was struck out and has not been reinstated. There is no appeal which the 3rd Defendant preferred against the decree herein or the orders of the court issued on 19th July, 2013. There are no orders of stay of execution of the decree or an application for review of the orders herein. Invariably, I fair conclusion would be that; the grounds which have been advanced in opposition to the instant application may seem very powerful in the way they are presented and, therefore, attractive; but the reality is that some of the grounds are profitable only in an application or appeal to set aside the decree herein or the orders made on 19th July, 2013, and others in the trial in the event the Respondent is successful in setting aside the decree and his defence is reinstated for trial. In light thereof, those arguments are most feeble in so far as they are urged in opposition to an application for leave to execute a decree before ascertainment of costs. I am also not dealing with an application or appeal in that particular behalf, and so the court may not judicially exercise jurisdiction over the matters raised by the 3rd Defendant. I also discern from the Ruling by Judge Mabeya, that some of these issues were raised by the 3rd Defendant in the application dated 29th April, 2009 and he took the view that those issues were only feasible in the trial. For purposes of this application, those grounds are not useful. I am, therefore, inclined to move forward and determine the ultimate question as formulated above; i.e. whether execution should be allowed in this case against the 3rd Defendant before costs are ascertained.

[8] I think yes. The nature of the proceedings, as read from the pleadings and the observation by Mabeya J in the Ruling dated 19th July 2013 is that the matters complained of by in the suit may have been as a result of fraudulent scheme to conceal the companies' assets thereby frustrating the realization of any judgment of the court which might be obtained against the companies herein. The learned judge almost proclaimed the Respondent to be the architect of those fraudulent schemes. Given the said circumstances, and the conduct of the 3rd Defendant, at least his failure to comply with orders of the court issued on 19th July, 2013, there is every

indication that there is necessity to allow execution of the decree herein before costs are ascertained to prevent any further delay in the vindication of court orders and right of the decree-holder to its decree. The upshot is that I allow the application dated 12th November, 2013, and accordingly grant the Applicant leave to execute the decree dated 7th November, 2013 against the 3rd Defendant before costs of the suit are ascertained. It is so ordered.

Dated, signed and delivered in court at Nairobi this 19th day of May, 2014

F. GIKONYO

JUDGE