



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 13 OF 2012

EQUITORIAL COMMERCIAL BANK LTD.....PLAINTIFF

-V E R S U S-

JODAM ENGINEERING WORKS LIMITED.....1ST DEFENDANT

SHADRACK KIEMA MUTUA.....2ND DEFENDANT

ESTHER NDUKU KIMULI.....3RD DEFENDANT

RULING

1. The Court by its Ruling dated 20th March 2014 struck out the Defendant's Defence and entered Judgment for Plaintiff for Kshs. 5,396,017.85 plus interest and costs of the suit. Defendant filed a Notice to appeal against that Ruling on 1st April 2014.
2. Plaintiff has now filed a Notice of Motion dated 10th April 2014 praying of an order that it be granted leave to execute the decree before taxation. The application is brought under Section 94 of the Civil Procedure Act Cap 21 which provides-

“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.”

Plaintiff's Submissions

3. Referring to the affidavit in support of the application, Plaintiff's Learned Counsel stated that the amount outstanding and owed by the defendants taking into account the interest accrued is Kshs. 10,252,433.95. That due to congestion of taxation of Bill of Costs the Plaintiff may have to wait before recovering the amount due. That accordingly it will be in the interest of Defendants to settle the amount due at the earliest opportunity. Learned Counsel for the Plaintiff submitted that

the Defendants had not sought stay of execution pending appeal.

Defendants' Submissions

4. Defendants' Learned Counsel submitted that Defendants being aggrieved with the Courts Ruling of 20th March 2014 had filed a Notice of Appeal. To enable Defendant file that appeal they had sought certified copies of proceedings and a Certificate of Delay. Defendants relied on the case **FERDINARD NDUNG'U WAITITU -Vs- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC) & 8 OTHERS (2014)eKLR** to advance their argument that once a party files a Notice of Appeal the rest of the process that is providing the proceedings and Certificate of Delay is dependent on the High Court and Defendant cannot be blamed for not having filed its appeal. Defendant's Counsel was of the view that an application for stay pending appeal could only be filed in the Court of Appeal, which is presently not possible because Defendant have not filed the Record of Appeal having not received proceedings. Further that to allow Plaintiff's application would render Defendants' appeal nugatory.

Analysis and Determination

5. The Defendants have indeed filed a Notice of Appeal against the Ruling of 20th March 2014. But filing such a Notice, by virtue of the provisions of Order 42 Rule 6(1) does not operate as stay of execution. The Defendant is also in great error to submit that an application for stay pending appeal can only be filed in the Court of Appeal. That submission is not supported by the Civil Procedure Rules. Order 42 Rule 6(1) of those Rules provides that a party can apply for stay in the Court appealed from as well as to the Court where the appeal is preferred. The bottom line here is that the Defendant has failed to obtain stay of execution. This finding calls to my mind the holding in the case **VIOLET JEPTUMM RAHEDI -Vs- ALBERT KUBAI MBOGORI (2014)eKLR** where the Court stated the following while considering an application under Section 94-

“I note that there is no stay of execution of decree and none has been sought. An intention to appeal against the judgment, or even an appeal already duly filed, cannot be a good reason to refuse the application at hand. Whether execution is pursued before or after taxation of the Plaintiff's costs the Defendant's obligation to satisfy the decree will always be there, unless the judgment is overturned on appeal, an unlikely event on the issue of liability, given the circumstances of this case. It is also not lost on me that it may take a while, in the ordinary course of business, for that taxation to take place.”

6. The provisions of Section 94 donate a discretion to allow the decree to be executed before taxation. I take cognizance that Defendant's debt related to an overdraft facility granted to the 1st Defendant and guaranteed by the 2nd and 3rd Defendants. That overdraft was granted to the 1st Defendant on 25th March 2009. That is more than 5 years ago. Judgment having been entered for Plaintiff by the Ruling of 20th March 2014 and since todate it has not been stayed it is only right the Defendants do begin to pay it, even before taxation.
7. Accordingly orders are hereby made as follows-

a. Leave is hereby granted to the Plaintiff to execute judgment before taxation.

b. Plaintiff is awarded costs of Notice of Motion dated 10th April, 2014.

DATED and DELIVERED at MOMBASA this 26TH day of JUNE, 2014.

MARY KASANGO

JUDGE