



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 92 OF 2008**

**A.W (Suing through mother and  
next friend M.N.N).....PLAINTIFF**

**VERSUS**

**GATHUTHI TEA FACTORY.....1<sup>ST</sup> DEFENDANT**  
**JOHN MUKIRA GATHURI.....2<sup>ND</sup> DEFENDANT**

**RULING**

**GATHUTHI TEA FACTORY LIMITED** and **JOHN MUKIRA GATHURI**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein, respectively took out the Motion dated 12<sup>th</sup> November 2010 pursuant to the provisions of *Sections 3A* and *94* of the Civil Procedure Act and *Order XXI rules 22* and *25* of the Civil Procedure rules in which they applied for the following orders:

1. ***THAT the application herein be certified urgent and service of the same be dispensed with in the first instance.***
2. ***THAT pending the hearing of this application herein there be a stay of execution of the decree issued by this court and the subsequent warrants of attachment issued on 5/11/2010.***
3. ***THAT the warrants of attachment issued by the Honourable court on 5/11/2010 be set aside as the same were issued irregularly.***
4. ***THAT there be a stay of execution of the decree issued by this court on 24/9/2010 pending the taxation of costs in the matter herein.***
5. ***THAT the plaintiff be ordered to meet the Auctioneers fees.***
6. ***THAT the plaintiff be ordered to pay cost of this application.***

The Motion is supported by the affidavit of Gitobu Muriithi. M.N. N, the Plaintiff herein, filed a replying affidavit she swore and a further affidavit of John Gachuri Kariuki to oppose the Motion.

The main ground argued in support of the Motion is that the warrants of attachment issued on 5<sup>th</sup> November 2010 are irregular because the same were issued before costs were taxed as required under *Section 94* of the Civil Procedure Act. The Plaintiff on her part stated that she is not interested in pursuing costs hence the provisions of *Section 94* of the Civil Procedure Act do not apply.

I have considered the oral submissions made by learned counsels from both sides. I have further taken into account the grounds set out on the face of the Motion plus the facts deponed in the affidavits filed for and against the Motion. The history of this dispute began when the 1<sup>st</sup> Defendant's Motor

Vehicle registration No KAQ 766X driven by the 2<sup>nd</sup> Defendant knocked down the Plaintiff while he was lawfully walking along Othaya-Gatugi road on 11<sup>th</sup> December 2005. The Plaintiff through his next friend and mother, M. N. N, filed a compensatory suit before the Chief Magistrate's Court, Nyeri i.e. Nyeri C.M.C.C.C. No. 67 of 2007. The aforesaid suit was later transferred to this court for hearing and determination. The suit was heard whereupon this court gave the Plaintiff judgment in the sum of Ksh.4,390,940 together with interest and costs. The Plaintiff has now applied for the execution of the decree by way of attachment and sale of the 1<sup>st</sup> Defendant's movable assets. The 1<sup>st</sup> Defendant is now before this Court seeking to have the order of execution to be set aside because it was issued before the costs were taxed. The Plaintiff admits that costs have not been taxed. She has deponed that she is not interested in pursuing costs. I have perused the application for execution of the decree and it is apparent that the Plaintiff has sought to execute to recover further court fees in the sum of Ksh.35,000/=. This in itself is costs in form of reimbursement. It cannot therefore be true that the Plaintiff has waived her right to recover costs. With respect, I agree with the submissions of the Defendants that the decree herein was executed before taxation in contravention of *Section 94* of the Civil Procedure Act. The Plaintiff is required to seek for leave before execution where costs have not been taxed. The Plaintiff did not obtain such an order. In **LAKELAND MOTORS LTD. =VS= SEMBI [1998] L.L.R. 682 [C.A.K.]**, the Court of Appeal expressed itself as follows:

***“The exercise of judicial discretion by the superior court under section 94 of the Act necessarily requires 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 v Abdulhusein (1995) LLR 2519 (CAK) in regard to the application of section 94 of the Act.”***

Having come to the conclusion that the Plaintiff purported to execute the decree in contravention of *Section 94* of the Civil Procedure Act, the question is what order should this court issue? I have already set out the orders sought by the Defendants. In the circumstances of this case, a fair order to issue is to stay further execution of the decree until costs are taxed. Costs of the Motion is awarded to the 2<sup>nd</sup> Defendant.

***Dated and delivered at Nyeri this 11<sup>th</sup> day of February 2011.***

**J. K. SERGON  
JUDGE**

In open court in the presence of Mr. Nguringa for the Respondent Gitibi for the Applicant.