



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 76 OF 2003**

**JUDITH DEBORAH CAVE SHAW .....PLAINTIFF**

**VERSUS**

**ROBERT FRANCIS SHAW.....DEFENDANT**

Coram: Mwera J

Gross for plaintiffs

Kinyanjui for defendant

Njoroge, court clerk

**RULING**

About to be determined is a notice of motion dated 6.10.10 by the plaintiff. It was brought under sections 1A, 1B, 3A, 34 (1), 63(e), 94 of the Civil Procedure Act and the now repealed Order L rule 1 of the Civil Procedure Rules. The motion had ten (10) prayers set out in an alphabetical order. But therein it was stated that the court do hear the parties and give orders in respect of prayers B, C, D, E, F and G as set out below:

**“ B. That the assets of Robertshaw Manufacturing Company Ltd (“the Company”) and in particular Land Reference No. 1159/155 (Original No. 1159/40/3) and Land Reference No. 1159/296 (Original No. 1159/154) respectively (“the properties”) be valued by Knight Frank valuers or any other such registered valuer as may be appointed by this Honourable Court pursuant to the judgement and decree herein given by the Honourable Mr. Justice Waweru on 4<sup>th</sup> June 2004.**

**C. That the Respondent and the company by itself or through its officers directors, servants, agents and/or employees do offer and accord the said Knight Frank Valuers or any other such registered valuer as may be appointed by this Honourable Court hereinabove unrestricted access and courtesy required to efficiently and effectively conduct a complete and comprehensive valuation of the company properties.**

**D. That the value of the company properties and which shall be determined by either the said Knight Frank Valuers or any other such registered valuer as may be appointed by this Honourable Court hereinabove be deemed without any further inquiry by the parties to be the value of the company properties for the purposes of determining the extent of the Respondents pecuniary liability towards the Applicant, under and for the purposes of executing the judgement and decree**

given herein by the Honourable Mr. Justice Waweru on 4<sup>th</sup> June 2004.

**E. That the costs of the valuation of the company assets and or properties by either the said Knight Frank or any other such registered valuer as may be appointed by this Honourable court hereinabove be borne by the Respondent.**

**F. That there be a stay of the Respondent's Notice of Motion application dated 21<sup>st</sup> June 2010 pending inter partes hearing and final determination of the Applicant's Notice of Motion application dated 16<sup>th</sup> September 2010, in respect of prayers A, B, C, D and E above.**

**G. That the Applicant Decree – Holder be and is hereby granted leave to forthwith execute the judgement delivered by the Honourable Mr. Justice Waweru on 4<sup>th</sup> June 2004 and the Decree issued by the Deputy Registrar of this Honourable Court on 17<sup>th</sup> July 2004 except so much thereof as relates to the costs before the Party and Party costs awarded to the Plaintiff/Decree Holder can be definitively ascertained by taxation of the plaintiff's Bill of Costs dated 31<sup>st</sup> August 2004 filed herein on the same date or otherwise determined.”**

There were 3 prayers H, “F” “G” which seemingly the court was not asked to determine. Simply put, the 6 prayers to be determined (B,C,D,E,F & G) are to the effect that:

- i) the two properties – CR No. 1159/115 and 296 belonging to Robert Shaw Manufacturing Co. Ltd, the company, be valued by M/s Knight Frank valuers or such a registered valuer as to be appointed by the court;**
- ii) the value determined be accepted as the basis of determining the extent of the respondent's pecuniary liability to the applicant for the purposes of executing the decree herein;**
- iii) the costs/expenses of the valuation exercise be borne by the respondent;**
- iv) hearing of the respondent's Notice of Motion dated 21.6.10 be held in abeyance until the applicants' motion dated 16.9.10 is finally determined; and**
- v) the applicant be granted leave to execute the decree before taxation.**

It can be added that the court do order and direct the respondent and the employees/directors of the company to allow the valuer to do its work successfully. If the paraphrase of the 6 prayers be as close to what was quoted above as possible then these are the grounds on which they were premised.

It was stated that on 4.6.2004 Waweru J gave judgement in this case that the respondent do pay the equivalent of 12% of the value of the assets of this company to the applicant. The learned judge ordered that the company's assets be valued and on 27.4.05 one Ameer Kassim Lakha put that value at sh 47,943,745/= in an affidavit filed in Nairobi HC DC 18/2000 pursuant to an order by Justice Koome. That cause was between the 2 litigants herein.

The respondent herein challenged Waweru J's award of 12% of the total value of the company's assets to the respondents, in Nairobi Civil Appeal 157/04. The value of the assets was stated in the affidavit sworn by Ameer Lakha and placed before the Court of Appeal. The value of the 2 company's properties was put at sh. 47,400,000/= by Knight Frank valuers in their report of 27.1.05. The respondent challenged Ameer Lakha's authority to value the company assets by filing a replying affidavit sworn on 19.3.2010.

That on 19.3.10 the Court of Appeal dismissed Nairobi C.A. 157/04 as against Waweru J's judgement, thereby affirming the applicant's pecuniary interest in the matrimonial home. Following that the respondent made an offer of sh. 5,753,249/40 being 12% of the value as per Ameer Lakha's affidavit. When the applicant reacted to that by a letter of 5.7.10, the respondent instead filed a notice of motion dated 21.6.10 for orders that he deposit sh. 3,450,000/= in full and final satisfaction of the decree

herein. That application did not annex a valuation report of the company assets to back the proposed sum of sh. 3.45m. The applicant therefore considered that proposal to constitute her 12% equivalent of the value of the company's assets and therefore inadequate and unacceptable. The reason was that the court has never determined the extent of the 12% equivalent in the company assets, hence this application which includes the stay of hearing the respondent's application of 21.6.10 seeking an order that the proposal of sh 3.45m be ordered as the full and final settlement of the decree. The grounds then went on to touch on the leave to execute before taxation under section 94 of the Civil Procedure Act and the pending bill of costs.

A supporting affidavit by the applicant more or less re-echoed the grounds set out above, annexing the judgement of Waweru J, a valuation by Ameer Lakha, the offer of sh. 5.7m etc.

The respondent filed a replying affidavit in opposition to the present motion and in support his own application dated 21.6.10, proposing to pay sh. 3.45m to the plaintiff as full and final settlement. Grounds of opposition to it were filed on 10.11.10.

In the replying affidavit the respondent reacted that the present application, dated 6.10.10 followed his own dated 21.6.10. He considered it a frivolity and probably an afterthought. To him, the decision of the Court of Appeal on 19.3.10 finally determined the matter in dispute and from there he offered the applicant a sum that represented a fair share due to her as per Waweru J's judgement. Attempts to review the basis of that judgement should be resisted the way the Court of Appeal did when it found that any valuation reports by Knight Frank through Ameer Lakha, were after the judgement of Waweru J and the learned had not had advantage of them by way of evidence, save the balance sheet of the company for the year ending 31<sup>st</sup> December 1991. That indeed this court must consider itself functus officio in the matter as it stands now. There was reference to Dulu J's orders to the effect that the application dated 21.6.10 by the applicant, be heard alongside the current motion. That has not taken place and probably the parties will consider the effect of this ruling and decide accordingly. The respondent maintained that sh. 3.45m offered was a fair apportionment of the assets of the company at the close of business on 31.12.1991 and no other needs be put forth to compute the 12% value ordered by Waweru J.

The plaintiff insisted in her submission that Waweru J directed that the valuation of assets of Robert Shaw Manufacturing Co. Ltd be carried out and that the defendant do pay a sum equivalent to 12% of the total value of the assets. To this court that is what appears to be the elaboration of what had been put in the affidavits.

The respondent's position is that the Court of Appeal did not envisage reopening of the valuation exercise after the judgment of Waweru J, who had only the balance sheet of 31.12.91 before him when he delivered his judgement on 4.6.04. From all the foregoing 2 positions emerge: Should 12% of the value of the company's assets be pegged on a valuation of the company's assets to be done now as the plaintiff prays OR that that percentage be computed according to the balance sheet of the company as at 31.12.1991 or a fair share thereof according to the respondent proposed at sh. 3.45m?

The position this court takes is that it began handling this matter when Waweru J was on a posting at Machakos High Court. His Lordship is now back in Nairobi and so it is only prudent that he interprets his judgement of 4.6.04 to the parties and direct the mode of its execution.

That should be a straight forward matter, the parties can put before the learned judge in a precise and concise manner for an early decision. But for this court and as at this stage it observes that for some seven years the plaintiff can be said not to have benefitted in any way from that judgement herein. It will thus be fair and just for this court to order and it orders that the respondent do make a payment to her in advance of sh. 2,000,000/= (Two million) for her use, in the next 14 days. When the basis of calculating her full entitlement up to 12% of the assets of the company has been determined, the balance may be ordered to be paid accordingly. The parties may consider to canvass other aspects of their case as shall be directed. Mention before Waweru J in 7 days from now. Costs to abide the cause.

Delivered on 5/5/11

**J. W. MWERA**

**JUDGE**