



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. 367 OF 2000**

**WILLSESDEN INVESTMENT LTD.....PLAINTIFF**

**VERSUS**

**KENYA HOTEL PROPERTIES LTD .....DEFENDANTS**

**RULING**

Before the court is an application by Notice of Motion dated 28<sup>th</sup> May, 2010 and brought under Sections 1A, 1B, 3A, 26, 27, and 94 of the Civil Procedure Act; Sections 27 and 28 of the Auctioneers Act; Order XXI Rules 18 and 19 of the Civil Procedure Rules; and all other enabling provisions of the law. By the application, the applicant moves the court essentially for Orders that –

- 1) There be a stay of execution of the decree in the present suit in any manner whatsoever by Keysian Auctioneers and/or any other agent or servant of the Plaintiff or payment of any bank guarantee pending the hearing and determination of this application.**
- 2) The warrant of attachment issued to Keysian Auctioneers and the auctioneer Muganda Wasulwa, trading as Keysian Auctioneers be summoned and cross examined on how he executed the warrants without physical inspection of the goods allegedly proclaimed.**
- 3) The court be pleased to make any orders against the Auctioneer, as an agent of the court, in accordance with the Auctioneers Act**
- 4) The court do order that the decree be executed after the taxation of the defendant's costs of the appeal and the superior court as awarded in the final decree, and the costs be set off from the properly calculated decretal sum as computed in accordance with the decree.**

**5) Any further orders in the interest of justice.**

**6) The costs of the application be awarded to the Defendant in any event at the higher scale.**

The Application is supported by the annexed Affidavit of MARIANNE NDEGWA JORDAN and is based on the grounds that –

**a) The Plaintiff obtained warrants of attachment contrary to Order XXI Rule 18 of the Civil Procedure Rules which requires that a notice to show cause should be issued when the decree is more than a year old.**

**b) The Plaintiff in its execution application, has compounded simple interest instead of applying a rate of a simple interest on the decretal sum which has grossly exaggerated the decretal sum.**

**c) The Plaintiff has included costs in its execution application when in actual fact the court of appeal only awarded half the costs to the Defendant who substantially succeeded in reducing the judgment of the superior court.**

**d) The Plaintiff has added interest on costs at a rate of 14% when no such interest was awarded to the Plaintiff.**

**e) The Plaintiff proceeded to execute the decree before the Defendant's costs were taxed contrary to the mandatory provisions of section 94 of the Civil Procedure Act.**

**f) The overriding principles of justice beg that the decretal sum be ascertained and the defendant costs be taxed and set off from the decretal sum.**

Opposing the application by way of a Replying Affidavit, Ben Muli, a Director of the Plaintiff Company, avers that the Defendants are guilty of serious material non disclosure of several facts in this matter. These include, *inter alia*, the fact that the Defendant did not disclose the true decisions of the Court of Appeal to this court, nor that the matters now being raised were determined by the Court of Appeal and the High Court; that the costs in this matter have already been taxed by consent in the High Court and a certificate of cost issued.

At the hearing of the application Mr Gichuhi appeared for the Applicant while the Respondent was represented by Mr Nowrojee appearing with Mr Athuok. After considering the pleadings and the submissions of all counsels, I find that the main issues to be determined are whether the warrants for execution of the decree were obtained contrary to Order XXI Rule 18; whether the Plaintiff has compounded simple interest instead of applying a rate of simple interest on the decretal sum; whether the Plaintiff has included costs in its execution application whereas the Court of Appeal awarded half the costs to the defendant; whether the plaintiff has added interest on costs at 14% when no such interest was awarded to the Plaintiff; and whether the intended execution was contrary to Section 94 of the Civil Procedure Act.

With regard to the allegation that the Plaintiff has compounded simple interest instead of applying a rate of simple interest on the decretal sum, I note that Section 27(2) of the Civil Procedure Act gives the court or judge discretion to award interest on costs at any rate not exceeding 14% per annum, and such interest should be added to the costs and are recoverable as such. In their plaint in the Superior court, the Plaintiffs, who are now the Respondents in this application, only sought costs of the suit. Their claim did

not include any prayer for interest on costs. Consequently, they were not granted interest on cost and could not have been granted such a relief without having prayed for it. In the event, the Respondent's claim for interest on taxation/cost at 14 % per annum from 1<sup>st</sup> March, 2000, to 31<sup>st</sup> January, 2010 is untenable and should not be allowed.

In respect of interest on the decretal amount, I note from the application for execution of the decree that the Respondents claimed interest from 15<sup>th</sup> September, 1995, to 31<sup>st</sup> January, 2010 at 12 % per annum. In its judgment, the Court of Appeal awarded the Respondent the sum of Kshs 22,729,800/- with interest at court rates from September, 1995 to the date of full payment. The appellant was also awarded half the costs of the appeal and half the costs in the superior court. Since the Respondent's award was reduced by the Court of Appeal to Kshs 22,729,800/- with interest at court rates, I find that the interest rate claimed at 12 % was not unreasonable. For that reason, I find it improper for the applicants to allege that the said interest was not awarded to the Respondents.

Regarding the factual execution of the decree, the Applicant alleged that this was premature in view of lack of compliance with the provisions of Section 94 of the Civil Procedure Act. That Section states as follows -

**“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 cost shall be ascertained by taxation”.**

This section has been the subject of judicial consideration both in the High Court and also in the Court of Appeal and there are several authorities on its interpretation. Suffice it to refer to **BAMBURI PORTLAND CEMENT CO LTD v HUSSEIN** [1995] LLR 1870 (CAK) in which Shah, J.A, said of this Section –

**“Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation, leave must be obtained from the High Court, and such leave may be sought informally at the time judgment is delivered, but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter partes...”**

It is clear from this statement that before execution proceeds in the absence of taxation, the court ought to give leave for the same to proceed. It is also clear from the learned judge's pronouncement that for such leave to be granted, which grant is always made at the discretion of the court, the same ought to be as a result of an application either orally at the passing of the decree or thereafter upon a formal application. The later procedure will give the opposing party an opportunity to be heard.

There is no evidence that such leave was obtained in this case before the purported execution, and therefore I find that the said execution was indeed premature. Having noted that the Applicant in this matter was awarded by the Court of Appeal half the costs of the appeal and half the costs in the High Court, and in order to accord the parties herein an even and level playing ground, I find it prudent that the issue of costs should be settled and set off between the parties in order to facilitate execution at once instead of leaving the parties to execute piece meal.

In that regard, I note that in Paragraph 10(e) of her supporting affidavit, MARIANNE NDEGWA JORDAN deposed as follows –

**“The Plaintiff should be patient and have the correct decretal amount ascertained and have the costs taxed and set off from the decretal amount. An estimate of the decretal sum before set off of cost shows that as at 31<sup>st</sup> January, 2010, when the execution application was filed, the decretal sum**

**was Kshs 61,979,918.37 and not Kshs 117,995,230.50 as per the execution application.”**

I also note that in prayer 7 of its application, the Applicant moves the court for any further orders in the interests of justice. The phrase “***interests of justice***” operates both ways and refers to the interests of all the parties concerned. In this case, since the defendant has acknowledged and conceded that as 31<sup>st</sup> January, 2010, the decretal sum was Kshs 61,979,918.37 and not Kshs 117,995,230.50 as per the execution application, I find it fair and proper, in the interests of justice, that the respondent be paid forthwith the said sum of Kshs 61,979,918.37 upfront, pending the determination of the other dues after taxation.

For the above reasons, I am constrained to make the following orders –

**(i) The applicant to pay the Respondent the sum of Kshs 61,979,918.37 forthwith, the said amount to be recovered from the Bank Guarantee issued by the Development Bank of Kenya Ltd in the first instance.**

**(ii) The parties to tax their respective bills within two months after which the Applicants’ costs of the appeal and in the superior court be set off from a properly calculated decretal sum as computed in accordance with the decree.**

**(iii) Execution to await and follow taxation.**

**(iv) In the circumstances of this case, I don’t think it would be fair or proper to order costs to any of the parties. I therefore direct that each party will bear its own costs.**

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of November, 2010.**

**L NJAGI**

**JUDGE**