



REPUBLIC OF KENYA

**HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL
COURTS**

PLAINTIFF **FLEX AIR CARGO LIMITED.....**

VERSUS

DELTA CONNECTION LIMITED..... DEFENDANT

RULING

The Defendant, against whom is a Preliminary Decree dated 5th December, 2008 issued by the Court on 10th February, 2009 after entry of judgment on admission in favour of the Plaintiff, now seeks to have an order issued restraining the Plaintiff from proceeding with the execution of the said Preliminary Decree. The Defendant also seeks the lifting of Warrants of Attachment and sale of moveable property issued by the Court on 26th February, 2009. It also seeks an order directed at the Plaintiff to settle the Auctioneers costs of the attachment.

The application is brought under Order XXI rules 25 and 91 of the civil Procedure Rules and Section 94 of the Civil Procedure Act. The grounds upon which the application is made are cited on the face of the application. The main grounds seem to be grounds (e) (f) (g) (h) and (i) which stipulate as follows:

- (e) It is a mandatory requirement of Section 94 of the Civil Procedure Act that any execution of a decree prior to the ascertainment of cost by taxation should be sanctioned by this Honourable Court.**
- (f) Costs in relation to the preliminary decree have not been taxed and the purported execution of the said Preliminary Decree has been done in blatant disregard of the provisions of section 94 of the Civil Procedure Act and is therefore unlawful and an abuse of process that warrants the intervention of this Honourable Court.**
- (g) Further, the Defendant has a substantial Counterclaim against the Plaintiff arising from the same Agreement and/or transaction giving rise to this suit.**
- (h) The Defendant is entitled to set-off, as against the Plaintiff's partial decree, any amounts found due to it by this Honourable Court.**
- (i) The Defendant is apprehensive that it may not be able to recover any award made in its favour in this suit as against the Defendant as the only known attachable asset of the Plaintiff, being the Beech Craft 1900 C, Registration 5Y/FLX SERIAL NO. UC 65 did crash and was damaged beyond repair in Rumbek, Sudan on 2nd May 2008.**

The application is supported by the affidavit sworn by Sally Ndegwa the General Manager of the

Defendant Company. I have considered this affidavit.

The application is opposed by an affidavit sworn by Christopher Mutuku the Director of the Plaintiff Company dated 23rd March, 2009 and erroneously titled 'Supporting Affidavit'. I have considered this affidavit. I have also considered the submissions by both counsels.

The Plaintiff has conceded that it did not seek the requisite orders of the court to execute the Preliminary Decree. Prayer 3 of the Chamber Summons application is therefore conceded. Prayer 3 seeks to have the Warrants of Attachment and of sale of moveable property issued on 26th February, 2009 lifted. In the circumstances I will allow prayer 3 of the application as prayed together with prayer 5 which deals with charges payable to Keysian Auctioneers, on account of the said warrants.

The prayers now remaining to be considered are prayers 4 and 6 of the application. The question that beckons is whether a court of law can issue an order restraining a Judgment-Creditor from executing against the Judgment-Debtor on the grounds urged by the Defendant/Judgment/Applicant herein.

As the authors of **BLACKS LAW DICTIONARY**, sixth Edition, explain at page 1423:

“A ‘stay’ does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal.”

The words of Law, V.P. in **Western College of Arts and Applied Sciences v Oranga [1976] KLR 63** at page 66 L-D) are apt:

“In the instant case the High Court has not ordered any of the parties to do anything, or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or to restrain by injunction.”

The Applicant in this case is the Judgment-Debtor pursuant to summary judgment entered against the Applicant, and in favour of the Respondent, in the sum of US\$42,815.50. That judgment on admission was entered by this court on 5th December, 2008. In the instant application, the Defendant/Applicant is seeking an injunction to restrain the Plaintiff from proceeding with the execution of the Preliminary Decree which has arisen as a result of the entry of judgment in admission against the Defendant. It is to be remembered that the Plaintiff was seeking the sum of US\$73,503 in prayer (a) of the plaint. There is still a balance of the sum claimed by the Plaintiff awaiting trial. The Defendant has also, since entry of the judgment on admission, amended its Defence to counterclaim for damages in the sum of US\$120,863.62. The Defendant/Applicant's contention is that the Plaintiff should not execute its Preliminary Decree until the suit is heard and finalized since the Defendant has also counterclaimed against the Plaintiff. The Defendant has not cited any case that gives court power to restrain a successful litigant from executing a decree whether preliminary or final. On the other hand the Defendant invokes section 94 which is the section that gives the High Court power to allow a party to execute its decree before costs are ascertained. That section is not applicable to the instant application.

Order XXI rule 25 gives the Court to stay execution pending the suit between the Decree Holder and the Judgment Debtor. The power granted under that rule is merely permissive and not meant for strict application. That means that the court has power to exercise its discretion to decide whether or not to stay execution of a decree pending the suit between the Decree Holder and Judgment Debtor.

The Applicant has argued that the stay sought in this application should be allowed on the ground that it is apprehensive that it may not recover any award made in its favour in this suit against the Plaintiff, as the only known attachable asset of the Plaintiff was the suit Aircraft which has since crashed and been damaged beyond repair. The Plaintiff on the other hand has opposed the application and contends that the Defendant is merely trying to frustrate the Plaintiff from executing in order to frustrate it from getting the fruits of its judgment. The Plaintiff also contends that given the conduct of the Defendant, the court should not exercise its discretion in the Defendant's favour. The Plaintiff has urged that the Defendant

has filed a multiplicity of applications since the entry of judgment on admission.

I have considered the application. I have considered that there is a pending claim against the Defendant by the Plaintiff. I have also taken into account the Defendant's claims for damages which the Defendant has specified in its amended defence to be US\$120,863.62. I have considered the amended defence itself and it is from the amended defence that the Defendant is claiming special damages in the sum of US\$112,275.50. It is also claiming damages for breach of contract in the sum of US\$7,666.02. These are the sums which make up the Defendant's total claim in its counterclaim. The Plaintiff has already succeeded as against the Defendant in part. In fact the Defendant is not challenging the judgment on admission that has been entered against it. I have not been shown any justifiable reason to prevent the Plaintiff from executing its decree in order to obtain the fruits of its judgment. The Defendant's fear that it may have nothing to attach if it succeeds in its counterclaim against the Plaintiff on grounds that the only known assets of the Plaintiff has since been destroyed beyond repair, is not a good ground to stop the Plaintiff from executing its Preliminary Decree. The Plaintiff is a company. There is nothing to show that it has ceased operations, or that it has no other assets. There is no evidence to show that it will be unable to pay the Defendant if judgment is entered against it. I find no basis upon which to restrain the Plaintiff from executing its Preliminary Decree. The Plaintiff should be allowed to execute its decree and enjoy the fruits of its judgment on admission.

In conclusion, regarding the Chamber Summons application by the Defendant dated 10th March, 2009, the Defendant succeeds in part as follows:

1. **Prayer 3 and 5 be and are hereby granted.**
2. **The warrants of attachment and the warrants of sale of moveable property issued on 26th February, 2009 to Keysian Auctioneers be and are hereby lifted.**
3. **The Plaintiff will pay the Auctioneers costs and charges of the attachment.**
4. **Prayer 4 of the application is dismissed.**
5. **Each party will bear its own costs of the application.**

Dated at Nairobi this 30th day of April 2009.

LESIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Kabaka holding brief Ms. Moshweshwe for the Plaintiff

N/A for Mr. Katiku for the Defendant

LESIT, J.

JUDGE