

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 200 of 2008

FLEX AIR CARGO LIMITEDPLAINTIFF

VERSUS

DELTA CONNECTIONS LIMITED.....DEFENDANT

RULING

1. By a ruling dated 5th December 2008, judgment on admission was entered in favor of the Plaintiff for the sum US\$ 42,815.50 together with interest at court rates in its equivalent in Kenya Shillings. The Plaintiff was also awarded costs of the application. The Plaintiff proceeded to execute the decree which prompted the filing by the Defendant; the Chamber Summons dated 10th March 2009, seeking the lifting of the attachment of the Defendant's goods which were proclaimed by Keysian Auctioneers. They also sought for an order restraining the Plaintiff from executing the preliminary decree. That application was determined by the ruling dated 30th April 2009, by **Lessit J.**
2. The applicant has now applied by a Notice of Motion dated 28th July 2009, for leave to execute the preliminary decree dated 10th February 2009 before the ascertainment of the costs. This application is based on the grounds indicated on the body thereto, and the supporting affidavit by **Bootsy Mutiso** sworn on 27th July 2009. Counsel for the applicant also filed written submissions, and urged the court to allow the application because the Defendant has not satisfied the decree despite several demands made. Further, the decree has not been set aside.
3. The applicant's attempts to execute the decree were opposed by the Defendant who sought to have the execution invalidated and the ruling delivered on 30th April 2009 **Lesiit, J.** the execution was declared irregular. However the Judge declined to grant an order for stay of execution pending the hearing of the counterclaim and the appeal. As matter stands now, the Plaintiff can proceed with the execution of the decree, but with the leave of the court.
4. By opposing this application for leave, the defendant is asking for the review of the order by **Lesiit, J** without making a formal application. In any event the Defendant is pursuing an appeal and the issue of stay of execution of the preliminary decree has already been determined. An earlier application was struck out erroneously and that cannot be construed as a bar to filing another application. The matter was not determined and the court should therefore determine this application and grant the leave sought to enable the Plaintiff derive the benefits of its litigation.
5. This application was opposed by the Defendant's counsel who relied on the affidavit sworn by Sally Ndegwa sworn on 18th September 2009. They also filed a Notice of Preliminary Objection and arguments in regard to the Preliminary Objection were incorporated in the response, in the interest of judicial time, counsel also filed written submissions. Counsel was of the view that the present application was res judicata because the Plaintiff had filed another application dated 7th May 2009, seeking for similar orders which application was struck out erroneously.
6. Counsel relied on the case of **Kanorero River Firm Limited & 3 others vs. National Bank of Kenya [2002] KLR page 207 where** Justice Ringera held that the doctrine of res judicata applies to both

suits and applications whether they be final or interlocutory. Counsel for the Defendant submitted that the Plaintiff should have applied for the review of the orders that struck out the wrong application.

7. On the merit of the application for execution, **Section 94** of the **Civil Procedure Act**, confers a discretionary power to the court to allow execution before ascertainment of costs. However, the applicant has to bring the application within the provisions of the law. The Plaintiff was faulted for engaging in an irregular execution of the preliminary decree before obtaining the leave of the court. The Defendant has not been difficult, but had to object to the irregular mode of execution.

8. Moreover, the Defendant also has a liquidated counterclaim against the Plaintiff, which is still outstanding and pending determination. The Defendant is willing to have the money deposited in court pending the determination of the counterclaim.

9. The first issue to determine in this application is whether the application before me is res judicata. I agree that the doctrine of resjudicata applies to both suits and application, and it is well defined under **Section 7** of the **Civil Procedure Act** in the following words:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

9. The application dated 7th May 2009 was struck out, interestingly, both counsel agreed that it was erroneously struck out. That is why the Plaintiff filed the application that is before me dated 28th July 2009. In my opinion, nothing turns out of an application which was struck out by the court erroneously. Firstly, the issues raised in that former application, were not adjudicated upon. Secondly, the application was struck out by mistake.

10. This now leads me to consider the merit of this application, under **Section 94** of the **Civil Procedure Act**, the court may grant leave for execution of the decree before the ascertainment of the costs. Going by the previous proceedings in this matter, I find judgment on admission was entered in favor of the plaintiff for the sum US\$ 42,815.50 on 5th December 2008. The Defendant applied for stay of the execution and the court declined to grant stay of execution but nullified the execution proceedings which were undertaken without the leave of the court. The Plaintiff has now brought them before the court seeking leave to execute before the ascertainment of the costs. I see no justifiable reason why the order should not be granted.

11. Accordingly the plaintiff is hereby given leave to execute for the preliminary decree dated 10th February 2009 before the ascertainment of the costs. The costs of this application shall be in the cause.

RULING READ AND SIGNED ON **4th December 2009** AT NAIROBI.

M.K. KOOME

JUDGE