



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 222 of 2001**

**MOBIL OIL KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**WELDWELL LIMITED.....DEFENDANT**

**R U L I N G**

By a notice of motion filed on the 8<sup>th</sup> January 2008, Weldwell Limited, the defendant, has moved this court under Order XLI Rule 4 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, for orders as follows: -

- (a) That there be a stay of execution of the decree herein pending the hearing and determination of this application;
- (b) That there be a stay of execution of the decree herein pending the determination of the defendant/applicant's intended appeal against the ruling delivered herein on 15<sup>th</sup> June 2006, on such terms as appear just and proper;
- (c) That the decree issued by this Honourable Court on 18<sup>th</sup> October 2006, be struck out and a fresh decree in accordance with the draft proposed by the defendant be issued.
- (d) That the attachment already levied pursuant to the warrants of attachment and sale issued herein on 5<sup>th</sup> December 2007 be raised and the plaintiff do bear the costs of such attachment;
- (e) That the costs of this application be awarded to the defendant.

The application is premised on 3 main grounds: i.e. that the defendant's appeal has good prospects of success; that the defendant stands to suffer substantial and irreparable loss should a stay of execution not be granted; and that the decree issued is a nullity for want of conformity with the judgment made by the court and is thus incapable of execution as sought by the plaintiff.

The application is supported by an affidavit sworn by Mohamed Khaku the defendant's Manager In Charge of Accounting and Finance. The gist of the affidavit is that, following the judgment of Emukule J. delivered on 15<sup>th</sup> June 2006, in which he entered judgment in favour of the plaintiff and dismissed the defendant's counterclaim, the defendant filed a notice of appeal and also applied for typed copies of the proceedings to facilitate the lodging of the appeal. In the meantime, on 9<sup>th</sup> October 2006, the plaintiff's advocate wrote to the defendant's advocate forwarding a draft decree for approval. The letter and the draft decree was received by the defendant's advocate on 13<sup>th</sup> October 2006.

On the 18<sup>th</sup> October 2006, before the defendant's advocate acted on the draft decree, the same was approved by the Deputy Registrar. It is the defendant's contention that the draft decree was irregularly approved as the defendant did not have the mandatory 7 days period within which to consider and approve the draft decree. The defendant further contends that the decree approved by the Deputy Registrar is defective as it does not reflect the judgment of the court.

Mr. Ogunde who argued this application on behalf of the defendant submitted that the decree was not drawn in conformity with Order XX Rule 6 of the Civil Procedure Rules, and therefore ought to be replaced with a compliant decree. Relying on two authorities i.e.

- *HCCC NO.2736 of 1990 (Nairobi) Rebah N. Mumaju vs James Nganga Ndwiga.*
- *HCCC NO.757 of 1995 (Mombasa) Mohamed Mohamed Al-Amin & Abdulrazak Omar Al-amin Mohamed Abdalla Mohamed.*

Mr. Ogunde maintained that the decree drawn by the plaintiff and approved by the Deputy Registrar, not being in agreement with the judgment, is a nullity. Mr. Ogunde further relied on the case of *Samaki Industries (Nairobi) Limited v Samaki Industries (Kenya) Limited 1996 LLR 2492*, in which the Court of Appeal dealing with a decree which omitted the particulars of the counterclaim and the determination of the court thereon, ruled that the same was incurably defective and must be struck out.

Mr. Ogunde reiterated that the defendant had exhibited a draft memo of appeal which shows that there are serious issues of law to be raised; He maintained that the defendant was likely to suffer irreparable loss if the execution is not stayed.

The plaintiff has raised 5 grounds of objection to the application as follows: -

1. The defendant's application is misleading, frivolous, vexatious and incompetent in that the defendant is guilty of unreasonable delay and as such is not entitled to the orders sought;
2. The defendant's application is inter alia for the stay of execution of a money decree and it is trite law that such of stay of execution ought not to be granted unless for good cause which the defendant has failed to demonstrate;
3. The defendant's application is made in bad faith and is designed to delay the plaintiff's execution of the decree in its favour by this honourable court;
4. If the defendant's application is granted it will cause injustice to the plaintiff in that it will be unjustly prevented from enjoying the fruits of its judgment and it is in the interests of justice that it be permitted to do so;
5. Consequently, the defendant's application is not only incurably defective but also amounts to an abuse of the process of this Honourable Court and ought therefore to be dismissed with costs.

Mr. Amin who appeared for the plaintiff submitted that the applicant had not complied with Order XLI Rule 4 (2) (a) of the Civil Procedure Rules, which provides the conditions for granting a stay of execution. He maintained that the delay in filing the application was excessive and totally unreasonable as the decree was forwarded to the defendant, but defendant took no action until 3 months later, and that even after being informed of the approval of the decree, defendant took no action until the plaintiff applied for execution of the decree.

Relying on *Kenya Shell Limited v Kibiru & Another [1986] K L R 410*, Mr. Amin submitted that an order for stay of execution ought not to be granted as the decree was a money decree capable of being repaid.

Mr. Amin also relied on *County Council of Meru South v Festus Munyua HCA NO. 50 of 2004*

**(Meru)**, where Sitati J. dismissed an application for stay of execution on the grounds that it had not been shown that substantial loss would be suffered by the applicant if an order of stay of execution is not granted. It was further submitted that the decree drawn was in accord with the judgment as there was no order for dismissal of the counterclaim in the judgment.

Finally, Mr. Amin submitted that the defendant had not offered any proper security.

Order XX Rule 6 (1) of the Civil Procedure Rules states as follows: -

***“6 (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and description of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.”***

In this suit as can be deduced from the pleadings and the judgment there were two claims, the main claim which was plaintiff’s claim against the defendant for Kshs.1,505,389/40 due and owing for goods delivered, or in the alternative, Kshs.1,187,985/20 being the amount of a dishonoured cheque and Kshs.317,404/20 being net sum due and owing for products sold and delivered. The second claim is the defendant’s counterclaim against the plaintiff for accounts to be taken, and payment of the amount found to be due to the defendant on the taking of accounts as well as special damages of Kshs.825,000/=, and interest.

The decree which was drawn by the plaintiff and approved by the Deputy Registrar is the one was exhibited as Annexure MK – 5 to the affidavit of Mohammed Khaku. It is evident from the face of the decree that it gives the particulars of the main claim, but makes no mention of the counterclaim or the court’s determination thereon. The defendant’s complaint that the decree approved by the Deputy Registrar did not comply with Order XX Rule 6 (1), is therefore not without justification. Mr. Amin submitted the omission of the counterclaim in the decree was justified as there was no order for dismissal of the counterclaim in the judgment. Whereas that might explain why the decision of the court on the counterclaim in the decree it does not explain why the particulars of the counterclaim were not given in the decree.

Moreover, a perusal of the judgment which was exhibited as annexure MK3 to the affidavit of Mohammed Khaku, reveals that there was clear determination of the counterclaim by the court. For instance at Page 32 of the judgment, the court after considering the defendant’s prayer for taking of accounts clearly concludes ***“I therefore decline to make any order for an account beyond what I have already found”***.

Regarding the claim for special damages and set off, the trial judge again makes a clear determination at Page 34 in the following conclusion:

***“I therefore dismiss the claim for special damages but allow a set off in the sum of Kshs.355,280/= from the proved claim of Kshs.1,187,985/40.”*** The contention of Mr. Amin that there was no order for dismissal of the counterclaim cannot therefore hold and must be rejected.

In the case of ***Samaki Industries (Nairobi) Limited vs Samaki Industries (K) Limited (1996) LLR 2492***, the Court of Appeal dealing with a similar situation in which the decree was completely silent on the counterclaim, held that the decree was incurably defective. Needless to state that the decree herein as drawn was also incurably defective.

Further, Order XX Rule 7 of the Civil Procedure Rules, provides the procedure for the preparation of the decree. Rule 7 (2) gives either party the liberty to draft the decree and submit to the other party for approval, after which the draft is to be submitted to the Registrar whom if satisfied that the decree is drawn in accordance with the judgment signs and seals the decree.

Rule 7 (3) is of particular significance as it provides that: -

***“If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other party, the registrar on receipt of notice in writing to that effect, if he is satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.”***

In this case it is evident that the defendant received the draft decree on 13<sup>th</sup> October 2006, and the draft decree was signed by the Deputy Registrar on the 18<sup>th</sup> October 2006, by which date the defendant had not responded on the draft decree. The defendant did not therefore have the mandatory 7 days within which to consider and respond to the draft decree.

Secondly, as observed above, the draft decree was not in conformity with the judgment, and the Deputy Registrar did not therefore discharge his obligation of ensuring that the decree was in accordance with the judgment.

It was contended that the defendant exercised unreasonable delay in responding to the draft decree or taking action after being informed of the approval of the decree. That may well be so. It does not however change the fact that the draft decree approved and signed by the Deputy Registrar is incurably defective and cannot be the subject of execution proceedings. The Warrants of Attachment and Sale issued on 5<sup>th</sup> December 2007 based on the defective decree must therefore be lifted.

Regarding the defendant’s prayer for an order of stay of execution pending the determination of the defendant’s intended appeal, the conditions upon which such an order can be made are clearly spelt out under Order XLI Rule 4 (2) of the Civil Procedure Rules as follows: -

***“(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.***

***(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

In this case the judgment was delivered on 15<sup>th</sup> June 2006, i.e. over 18 months ago. A notice of appeal was duly filed on 27<sup>th</sup> June 2006; The defendant did not however, make its application for stay of execution until 8<sup>th</sup> January 2008. The defendant’s explanation for the delay in filing the application is contained in paragraph 14 of the affidavit of Mohammed Khaka, wherein he depones that defendant believed that the judgment would not be executed by the plaintiff pending appeal, and that in any case there was no valid decree upon which execution could be premised.

In my view, that explanation is not plausible given the conduct of the plaintiff which showed that it was anxious to execute the decree. The plaintiff not only had its Bill taxed but also had a decree duly approved by the Registrar. All these were steps towards the execution of the decree. Indeed, the steps culminated in the issuance of Warrants of Attachment and Sale. The defendant had therefore no reason to assume that the plaintiff would not proceed with execution of the decree simply because a notice of appeal had been filed by the defendant.

Indeed, Order XLI Rule 4 (1) is quite clear that no appeal can operate as a stay of execution of the judgment appealed from unless ordered by the court. Moreover, the fact that the decree sought to be executed was a nullity cannot provide any excuse for the delay as the defendant could not ignore the defective decree but ought to have immediately come to court to challenge it as it finally did. In the premises, I find that the defendant has not made the application for stay of execution without unreasonable delay.

It was further contended that the defendant would suffer substantial loss in its business if the order of stay of execution is not granted as its cash flow would be affected, the amount of the decree being quite substantial and that it may be difficult to recover the decretal sum if the appeal is successful as the plaintiff’s Company no longer carries on business in Kenya.

As per the Warrant of Attachment and sale the total amount came to about Kshs.2.5 Million. In my considered view this sum is not so substantial as to justify an inference that the plaintiff would not be able to refund the amount if required to do so, nor am I persuaded that payment of this amount would cause serious cash flow to the defendant's business.

I come to the conclusion that the defendant has failed to satisfy the conditions provided under Order XLI Rule 4 (2) of the Civil Procedure Rules. His application for an order of stay of execution pending appeal cannot succeed.

The upshot of the above is that I make the following orders: -

- (i) The application for an order of stay of execution pending appeal is rejected.***
- (ii) The decree issued by the court on 18<sup>th</sup> October, 2007 being a nullity is struck out.***
- (iii) The Warrants of Attachment and Sale issued on 5<sup>th</sup> December 2007, being based on a defective decree are hereby lifted.***
- (iv) The defendant is awarded half the costs of the application.***

***Dated this 20<sup>th</sup> day of February 2008.***

**H. M. OKWENGU**

**JUDGE**

**Delivered this 21<sup>st</sup> day of February, 2008 in the presence of:**

S. Amin for Respondent.

Ms. Mutea for Applicant.

**J. W. LESIIT**

**JUDGE**