**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE 87 OF 2003**

**PETER NJOROGE NGAHU (T/A NGAHU ASSOCIATES )…… PLAINTIFF**

***versus***

**TETU HOUSING CO-OP SOCIETY ……..…….……..DEFENDANT**

**RULING**

The application which is the subject of this ruling is a Notice of Motion dated 18th January 2008. The Defendant by that application sought only one prayer thereof. He sought that there be a stay of execution of the judgment delivered on 13th November 2006 pending the hearing and the determination of the intended appeal. In support of that application the Defendant argued that although after judgment was entered the costs were taxed in favour of the Plaintiff, those taxed costs were the subject of an objection filed in this matter. Although the Defendant said that the costs taxed were Kshs. 503,274, I have looked at the ruling of the taxing master and have found that the costs that were allowed were Kshs. 555,138.67. The Defendant further argued that after that taxation a Certificate of taxation was not issued. Accordingly the Defendant said that execution could not proceed without the leave of the court. In this regard the Defendant relied on ***Section 94*** of the Civil Procedure Act.

Section 94 of the Civil Procedure Act reads:-

"***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 ascertain 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 costs shall be ascertained by taxation."***

In **MUNIAFU VS NDWIGA (1990) LLR 5529,** Shah J. as he then was held that Section 94 of Civil Procedure Act gives the High Court discretion to allow execution before taxation. The learned Judge stated:-

"***There has to be in my view an application to the High Court (there being no specific mode provided under section 94) by notice of motion as provided for in Order L Rule 1. Again under Order 50 applications (procedurally) have to be served on the other side (order L Rule 2) unless otherwise stated by court which special and good reasons must exist."***

The learned judge further held that a rule which seemed to take away the discretion given to the High Court by Section 94 was clearly ultravires. The learned judge maintained that position in **BAMBURI PORTLAND CEMENT CO. LTD –VS- HUSSEIN (1995) LLR 1870** when as a Judge of the Court of Appeal observed:-

"***Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court 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 notice of motion. The motion must be served on the other party and heard interpartes."***

That position received the support of a full bench of the Court of Appeal comprising Gicheru JA as he then was, Omolo JA and Shah JA in **LAKELAND MOTORS LTD VS SEMBI (1998) LLR 682**. The Learned Judges of Appeal delivered themselves as follows:-

"***The exercise of judicial discretion by the superior court under Section 94 of the Act necessary requires that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation. This, we think, is the spirit of the observation of Shah, JA, with which we agree, in Bamburi Portland Cement Co. Ltd – vs – Abdulhussein (1995)LLR 2519(CAK) in regard to the application of section 94 of the Act."***

It is clear that the requirements of Section 94 are that the costs be ascertained before execution is undertaken. In this case those costs were ascertained on 19th September 2007. The Plaintiff therefore did not require the leave of the court to execute. Since Section 94 does not require that a certificate of costs be extracted.

It was further argued that the decree issued by the court was a preliminary decree. Being a preliminary decree the Defendant argued that execution could not proceed. I have confirmed that I have perused the decree issued by this court and the same is not a preliminary decree as envisage by order XX of the civil procedure rules. The Defendant further argued the decree was more than one year old and therefore notice to show cause ought to have been issued before prosecution proceeded. In this regard the Defendant was referring the provision of Order XXI Rule 18(1) of the Civil Procedure Rules. Although the Defendant argued that the decree was one year old that in fact is not correct. The application for execution was filed before the expiry of one year. It is that application for execution which resulted in execution being levied against the Defendant. From the reading of the provisions of Order XXI Rule 18(1) makes it clear that it is the application for execution that needs to be filed before the expiry of one year. The Defendant did argue that its execution if allowed to proceed, it would suffer loss because it is a cooperative and an attachment would affect the day to day running of its business. In this regard the Defendant was not specific what loss would be suffered if execution proceeded. The Defendant did rely on the case of **BENSON ONDIMU MASESE vs KENYA TEA DEVELOPMENT AGENCY LIMITED Civil Suit No. 75 of 2004.** In that case the court found that if stay was not granted the Respondent would not be able to repay Kshs. 10 million if the appeal was successful. The Defendant also relied on the case of **SOUTH NYANZA SUGAR COMPANY LIMITED vs SAMUEL OSEWE OCHILLO CIVIL APPLICATION No. NAI 79 of 2003.** In this case the Court of Appeal found that the Respondent had failed to demonstrate his ability to pay Kshs. 3 million if the appeal was successful. The court proceeded to grant stay of execution. Relying on those cases the Defendant said that the Plaintiff would not be able to repay the amount of the decree herein if the appeal was successful. The Defendant referred to the Plaintiff's replying affidavit where the Plaintiff annexed titles to property in his name and bank statements. These, the Defendant argued, did not show the plaintiff's ability to repay. This is because in respect of the property there was no valuation carried out to confirm that the properties had not been charged.

The Plaintiff submitted that execution was carried out before the expiry of one year as required by Order XXI Rule 18(1). The Plaintiff then argued that in considering the present application the court should be guided by the provisions of Order XLI Rule 4. In that regard the Plaintiff relied on the case of **HALAI & ANOTHER vs THORNTON & TURPIN (1963) Ltd (1990) KLR**. The holding of that case was as

follows:-

"***The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."***

The Plaintiff further argued that the Defendant did not show what loss it would incur and further that the Defendant had not shown that the Plaintiff would be unable to repay the decretal amount. The Court of Appeal had occasion to rule on the issue when a party raises fears that it would not be refunded the amount of the judgment if the appeal was successful. This was in the case of **NATIONAL INDUSTRIAL CREDIT BANK LTD vs AQUINAS FRANCIS WASIKE Civil Application No. Nai 238 of 2005 (UR. 144/05).** The court of appeal held as follows;-

"***this court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has."***

It is clear from that holding that the burden of proving that refund would be made shifted to the Plaintiff. I have perused the replying affidavit of the Plaintiff. Although it is correct to state that the Plaintiff failed to annex valuation and search of the properties, the Plaintiff did however annex bank statement which clearly showed the Plaintiff would be able to refund the decretal amount. In considering the application before court as clearly stated in the ***HALAI*** case supra the court discretion for granting stay is fettered by three conditions. One of those conditions is that the application for stay should be made without undue delay. The Defendant waited for a period beyond one year from the date of judgment to make the present application. The Defendant argued that since there had been no application for execution there was no need to make the application for stay and accordingly that there was no undue delay. That interpretation of order XLI Rule 4 is warped. I find that the Defendant after having filed a notice of appeal should have immediately sought stay of execution. Having failed to do so at that time, and having waited for one year before making the application, I am of the view that the application is defeated by that unreasonable delay. On that basis the application is rejected and additionally the court is of the view that the plaintiff is in a position to refund the decretal amount and accordingly the Defendant would not suffer substantial loss.

Accordingly the Notice of Motion dated 18th January 2008 is hereby dismissed with costs to the Plaintiff.

***DATED AND DELIVERED THIS 19TH DAY OF MARCH, 2008.***

**MARY KASANGO**

**JUDGE**