



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

Civil Case 444 of 2004

SHAMSHER KENYA LTD..... PLAINTIFF

VERSUS

BODY & SOUL LIMITEDDEFENDANT

RULING

This application dated 6.1.2006 brought under Sections 63(e) and 94 of the Civil Procedure Act, Order 21 Rule 22(1), Order 41 Rule 4 and Order 50 Rule 1 of the Civil Procedure Rules seeks primarily an order that execution proceedings be set aside *ex debito justitiae* and that there be a stay of execution pending the hearing and determination of a proposed appeal.

The primary grounds for the application are that as the costs in the suit have not been ascertained, execution could only be levied with the leave of the court under Section 94 of the Civil Procedure Act which leave has neither been sought nor obtained rendering the execution herein irregular and that as the applicant intends to appeal it will be greatly prejudiced and will suffer hardship and substantial loss if execution is allowed to proceed. There is a supporting affidavit sworn by one Ume Manfred Meyer the applicant's Managing Director. Annexed to this affidavit are 3 exhibits including copies of the warrant of attachment, Notice of Appeal and a letter from Life Fitness addressed to the respondent showing that the respondent has lost the franchise for the supply of gym equipment.

The respondent opposed the application on the basis of a replying affidavit sworn by one Rahim Samji its Sales Director and a supplementary affidavit by the same director. The main reasons for opposing the application are that no leave to levy attachment is required before taxation of costs where summary judgment has been entered and that the respondent is financially sound and is capable of refunding the sums awarded if the respondent's appeal succeeds.

The application was canvassed before me on 30.3.2006 by Mr. Ohaga Learned Counsel for the applicant and Ms Mbanya, Learned Counsel for the respondent. The Learned counsels elaborated their respective clients' positions taking in the affidavits.

I have carefully considered the application, the affidavits by both parties, the annexures to the same affidavits, the submissions by both Learned counsels and the cases cited. Having done so, I take the following view of the matter. There is no dispute that on the respondent's application summary judgment was entered for part of the respondent's claim. There is also no dispute that the issues of interest and costs were reserved until the final determination of the suit. The respondent's view is that in the circumstances of this case no leave of the court was required to execute before taxation under Section 94 of the Civil Procedure Act. The applicant is of a contrary view.

Section 94 of the Civil Procedure Act reads:-

“94. 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 costs shall be ascertained by taxation.”

And Order XXXV Rule 1(1) (a) reads:

“1(1) In all suits where the plaintiff seeks Judgment for

(a) a liquidated demand with or without interest;

Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed or part thereof, and interest”

AND Rule 5 provides:

“5. If it appears that the defence set up by the defendant applies only to a part of the plaintiff’s claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount realized or any part thereof into court, the taxation of costs, or otherwise as the court thinks fit and the defendant may be allowed to defend as to the residue of the plaintiff’s claim.”

A plain reading of Section 94 of the Civil Procedure Act shows that it of general application when a party seeks to execute a decree before costs are ascertained. It does not exclude judgments obtained under the provisions of Order XXXV Rule 1(a) of the Civil Procedure Rules.

Rule 5 of Order XXXV of the Civil Procedure Rules at a casual glance may suggest that on the entry of summary judgment execution should follow unless it is subject to the terms set out in the said Rule. This would seem to be contrary to the express terms of Section 94 of the parent Act. In my view however, if a party seeking summary judgment desires to execute when judgment is entered, he must incorporate in the application for judgment a prayer for an order to execute for the sums sought in the application and if he fails to do so, he cannot execute before costs are ascertained unless leave is obtained. As counsel for the applicant correctly submitted even if the said Rule 5 of Order XXXV expressly provided for automatic execution on the entry of summary judgment, it would be null and void to that extent as that would be contrary to the express provisions of Section 94 of the Civil Procedure Act which is the substantive legislation under which the Rules were made.

In Muniau – vs – Ndwiga [1990] LLR 5529, Shah J as he then was held that Section 94 of the 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 for 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 Sections 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 a notice of motion. The motion must be served on the other party and heard inter partes.”

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 -v- 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 necessarily 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, J.A., 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 plain therefore that on the authority of Section 94 of the Civil Procedure Act and the above decisions, the execution, levied by the respondent before costs were ascertained was irregular as leave was not obtained. The same is hereby set aside. I do not therefore have to decide this application under Order 41 Rule 4 of the Civil Procedure Rules.

Costs to the applicant.

Orders accordingly.

DATED AT NAIROBI THIS 10TH DAY OF MAY 2006.

F. AZANGALALA

JUDGE

10.5.2006

DATED AND DELIVERED ON 10TH DAY OF MAY, 2006.

M. KASANGO

JUDGE

10.5.2006

Read in the presence of:-