



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1158 of 1999

BULLION BANK LIMITED.....PLAINTIFF

VERSUS

JAMES KINYANJUI.....DEFENDANT

PARK ENTERPRISES LTD.....THIRD PARTY

R U L I N G

The Defendant's notice of motion dated 11th April, 2006 is brought under Order XXI of the Civil Procedure Rules and Sections 94 and 3A of the Civil Procedure Act. It seeks an order that the warrants of attachment issued herein against the Defendant be set aside and the execution of the interim decree be stayed pending the final determination of this suit. The Defendant by his affidavit in support stated that judgment was entered against the defendant in favour of the Plaintiff on 27th April, 2005 in the sum of Kshs.4 million. That the balance of the Plaintiff's claim was ordered to proceed to full hearing. That there is a third party in these proceedings. The Plaintiff after the entry of judgment presented a bill of costs for taxation and when it was set down for taxation on 28th July, 2005 on a preliminary objection being raised on behalf of the Defendant the same was stayed. Thereafter the Plaintiff failed to make any application under section 94 of the Civil Procedure Act to seek leave to execute before taxation. He said that he had entered into negotiations with Plaintiff/Decree-Holder and as a result of those negotiations had paid Kshs. 1 million pending the final determination of this case. That however on 24th March, 2006 auctioneers proclaimed his moveable goods be exhibited the proclamation to his affidavit. Thereafter he had various meetings with the Plaintiff's legal officer and as these were proceeding he was surprised to see his goods being advertised for sale on 12th April, 2006. In oral submissions in support of the Defendant's application his counsel stated that section 94 of the Civil Procedure Act made it mandatory for a party wishing to execute a decree before taxation of costs to obtain an order of the court granting leave for such execution to be undertaken. He emphasized that there had to be express order of the court before execution could issue and without such an order or taxation execution was illegal. That application was opposed by the Plaintiff who had through its manager in legal services had sworn an affidavit in reply. The deponent confirmed all that was deposed in regard to the judgment being entered but in regard to section 94 he stated that it was not mandatory to obtain leave and that since the Defendant had paid Kshs. 1 million the Defendant had waived the necessity of such leave being obtained. He said this because in his view the Defendant had bound himself to satisfy the decretal sum. He therefore sought that the interim stay which had been granted to the Defendant be uplifted. In oral submission counsel supported the averments of the Defendants affidavit.

Section 94 of the Civil Procedure Act its as follows:-

“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.”

It is clear that before execution proceeds in the absence of taxation the court ought to give leave for the same to proceed. It is also clear that for such leave to be granted which leave is granted at the discretion of the court the same ought to be as a result of an application either orally at the passing of the decree or thereafter formally and this would give the opposing party an opportunity to be heard. This indeed was the finding of the judgment of Shah JA in the case **Bamburi Portland Cement Co. Ltd v Hussein (1995) LLR 1870 (CAK)** as follows:-

“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. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.”

This finding found favour in the judgment of the Court of Appeal in the case of **Lakeland Motors Ltd v Sembi (1998) LLR 682 (CAK)**. The court made the following finding:-

“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 v Abdulhussein (1995) LLR 2519 (CAK)* in regard to the application of section 94 of the Act.”

It is therefore clear that the execution undertaken by the Plaintiff before taxation was in contravention with section 94 of the Civil Procedure Act. The court therefore grants the following orders:-

1. That execution of the decree herein in the absence of compliance with section 94 of the Civil Procedure Act is hereby stayed.
2. That the costs of the notice of motion dated 11th April, 2006 is granted to the Defendant as against the Plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 27th day of October 2006.

MARY KASANGO

JUDGE