



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ekesa v Life Care Hospitals Ltd (Civil Case 2 of 2018)  
[2023] KEHC 657 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 657 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL CASE 2 OF 2018  
DK KEMEL, J  
FEBRUARY 3, 2023  
(FORMERLY BUNGOMA ELRC NO.54 OF 2018)**

**BETWEEN**

**APPOLO MULIANGA EKESA ..... PLAINTIFF**

**AND**

**LIFE CARE HOSPITALS LTD ..... DEFENDANT**

**RULING**

1. The Defendant/applicant filed a notice of motion dated 18.1.23 expressed to be brought under Section 3A, 44(I) (II) and 94 of the *Civil Procedure Act* and Order 21 Rule 8(2), Order 22 Rule 6, Order 22 Rule 22 and Order 51 Rule 1 of the *Civil Procedure Rules 2010* seeking the following reliefs:
  - (1) Spent
  - (2) Spent
  - (3) That the decree of this court extracted by the plaintiff be set aside *ex debito Justitiae*.
  - (4) The warrants of attachment and sale of property given on 10.1.23 be lifted, raised and or set aside *ex debito Justitiae*.
  - (5) That the proclamation of attachment by Eshikhoni Auctioneers done on 12.1.23 be lifted, raised and or set aside *ex debito Justitiae*.
  - (6) That the costs of and incidental to this application be borne by the Respondent.



2. The application is supported by the grounds set out on the face thereof and the supporting affidavit of Protus M Maina, the Defendant's director strategic initiative and legal affairs sworn on even dates. The defendant's gravamen is *inter alia*; that the Applicant is in the process of appearing against the judgement of this court delivered on the 28.11.22; that the plaintiff might have extracted and been issued with a decree by this court without, presenting the draft for approval by the defendant in contravention of Order 21 Rule 8 92) of the [Civil Procedure Rules](#) thus denying the Applicant the opportunity to have the terms of the decree settled; that on the basis of irregularly extracted decal, the Respondent obtained warrants of attachment and Sale of Property dated 10.1.23 without leave of the court to execute the decree before the costs are ascertained by taxation in contravention of Section 94 of the [Civil Procedure Act](#); that the rules of procedure are the handmaidens of justice and hence this court should not countenance flouting of the same just because it is expedient for the plaintiff while trampling on the rights of the Defendant; that the plaintiff has already proclaimed the Applicant's equipment which might be carted away anytime upon expiry of the seven days; that the Applicant is the biggest hospital in Bungoma relied upon by the residents of Bungoma town and within the county as a referral hospital and that if its equipment are carted away, the said residents will suffer great prejudice as they would be denied the much needed health care services; that it would be in the interest of justice to grant the application so that a proper decree is issued. In accordance with the law and that taxation of costs be done as provided in the law to ascertain the total amount due to the plaintiff to enable the Applicant settle the same or exercise its right of appeal against the judgement within the confines of the law.
3. The application is strenuously opposed by the plaintiff/Respondent whose learned Counsel filed grounds of opposition dated 18.1.23 *inter alia*; that the application is frivolous, vexatious and an abuse of the court process; that there is no resolution attached from the Board of Directors/Management giving authority to Rufus M Maina to swear and depone on their behalf that the decree drawn herein agrees with the contents of the Judgement's that the contents of the notice of motion and the affidavit in support amount to an admission to the execution process; that there is no appeal pending and further that there is no pending application for stay of execution under Order 4(2) Rule 6 of the [Civil Procedure Rules](#) and hence the orders sought cannot be granted.
4. Parties herein filed and exchanged submissions but were each given a brief opportunity to highlight their respective submissions.
5. Vide submissions dated 26.1.23, learned counsel for the Defendant/Applicant raised three issues for determination to wit; whether the plaintiff/Respondent complied with Order 21 Rule 8 92) of the [Civil Procedure Rules](#); whether the plaintiff adhered to the procedure as provided for under section 94 of the [Civil Procedure Act](#) and lastly; who should bear the costs of the applications?

As regards the first issue, it was submitted that the plaintiff failed to comply with Order 21 Rule 8 92) of the [Civil Procedure Rules](#) when he failed to forward the draft decree to the Defendant and thus denied it the opportunity to verify whether the same was in conformity with the judgement. Reliance was placed in the cases of [Equity Bank Ltd Vs Capital Construction Ltd and 3 others](#) [2014] eKLR and [China Wu yi Co Ltd v Belgo Holding Ltd](#) [2018] eKLR.

With regard to the second issue, it was submitted there was non-compliance with Section 94 of the [Civil Procedure Act](#) as no leave of court was obtained, for purposes of executing the decree before costs are ascertained. Reliance was placed in the case of [Joel Mutuma Kirimi and another vs The standard Digital and Another](#) [2020]eKLR. It was submitted that the action of the plaintiff will expose the Defendant to multiple execution a mischief that section 94 of the [Civil Procedure Act](#) Sought to cure.



Learned counsel sought for the setting aside of the warrants of attachment as they were obtained irregularly by the plaintiff.

6. Vide Skeletal submissions dated 18.1.23, learned counsel for the plaintiff submitted that the Defendant has failed to demonstrate that the decree issued by the court does not tally with the content and letter of the judgment. It was submitted that the decree issued captures the content of the judgment. Reliance was placed in the case of *Florence Cherugut v Chptum Murei Annah* [2022] eKLR. It was finally submitted that the defendant has not sought for an order of stay pending appeal but has only challenged the execution of the decree yet they haven't pointed out any errors in it. Learned counsel submitted that the court cannot set aside a lawful execution process and in any case the Defendant seems to suggest in their affidavit that it is ready to settle the sums once they are ascertained or exercise its right of appeal against the judgment.
7. I have given due consideration to the application as well as the submissions of learned counsels. I have also considered the authorities cited. It is not in dispute that this court rendered its judgement on the 28.11.22 and that a decree was subsequently prepared by the Deputy Registrar and was issued on the 10.1.23. It is also not in dispute that the plaintiff upon being issued with the decree took out. Warrants of attachment containing the decretal sums, interest, further court fees, court collection fees, without including taxed costs. It is also not in dispute that the defendant is not seeking for a stay of execution pending appeal but one for stay pending the issuance of a proper decree and taxation of costs. I find the following issues necessary for determination namely;-

- (i) Whether the warrants of attachment of movable property were obtained procedurally.
- (ii) Whether a stay of execution should issue.

8. As regards the first issue, it was contended by the Defendant/Applicant that the decree was obtained without a draft decree being served upon the Applicant and further that the proclamation and warrants of attachment of movable properties were rather premature as the same were obtained prior to taxation of bill of costs and further that there was no leave of the court contrary to the provisions of section 94 of the *Civil Procedure* Order 21 Rule 8 92) of the *Civil Procedure Rules*.
9. Section 94 of the *Civil Procedure Act* provides:

“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 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.”

Learned counsel for the Applicant cited the case of *Kartar Singh Dhupar and Co Ltd v Lianard Holdings Ltd* [ 2017] eKLR to buttress his view that the costs should be ascertained first before execution can be commenced. In the said case, the court held as follows:

“The mischief sought to be addressed by Section 94 of the Civil Procedure Act, is to protect a judgement debtor from suffering multiple execution, one in respect of the principal sum and the other for the costs after ascertainment in respect of the same suit.”



The court in the aforesaid case also cited the case of *Bamburi Portland Cement Co Ltd v Hussein* [1995] LLR 1870 (CAK) where Shah JA stated 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.”

10. Collorally to section 94 of the *Civil Procedure Act* is Order 21 Rule 8 92) of the *Civil Procedure Rules* which also requires that the draft decree should be exchanged between the litigating parties before the same goes for execution. The said Rule Provides as follows:

“Any party to a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it; without undue delay,” and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgement, shall sign and seal the decree accordingly.”

The above provision was reiterated in *Equity Bank Ltd Vs Capital Construction Ltd and 3 others* [2014] eKLR where the court held.

“Order 21 Rule 7 92) as read with Order 21 Rule 8 92) provides that any party to the suit shall prepare a draft decree in accordance with Rule 7 92) and present the same to the other party or parties for approval, with or without amendment. It also provides at rule 8(2) that if the draft is approved, the same shall be forwarded to the Registrar who shall sign and seal the decree if he is satisfied that the draft decree is in accordance with the judgment. It is further provided at Rule 8 93) that the Registrar may approve the decree if within seven days of service of the draft decree on the other parties, no approval or disagreement is filed and or received.”

Looking at the provisions of Order 21 Rule 8 92) of the *Civil Procedure Rules*, it is clear that the rule is not couched in mandatory terms as the word used in “may”. The role of the Deputy Registrar is to check if the decree actually corresponds to the judgement of the court and that even if the draft decree has been approved by the parties, the Deputy Registrar can reject it if it does not confirm to the judgment. Ordinarily a judgement contains the final order from which a decree ensues and that a party can easily extract the same and further that if that party fails to share with the other party such failure does not render the execution process illegal or null and void as long as the said decree conforms with the judgement. The judgement herein was delivered on the 28.11.22 and that the sums claimed in the plaint were awarded as the decretal sum and which was indicated on the decree. I find the decree is in consonance with the judgement and hence the execution which have commenced should not be halted as they are a product of a court order. Indeed, once a judgement is delivered the same ought to take effect immediately. It is also noted that the Applicant has indicated that it is ready and willing to pay the monies as long as the total amounts which consist of ascertained costs have been taken through



the requisite procedure. I am in agreement with the view of Mabeya J in [Joel Mutuma Kirimi Another Vs The Standard Digital and Another](#) [ 2020]eKLR when he held thus:

“The decree in the present case conforms with the judgement. There is no dispute as to its contents. I therefore do not foresee any justifiable reason to set it aside. Once costs are taxed, the same can be amended accordingly to include the costs.”

Even though the Applicant has claimed that it is likely to be exposed to multiple execution, I find the claim as trifling in that the warrants of attachment complained of has the amount of the decretal sums as contained in the judgment. The same can be executed as the parties pursue the issue of costs. I see no prejudice whatsoever, suffered by the Applicant and that the application is a strategy to delay or forestall satisfying the said decree. In any case, the Applicant vide its supporting affidavit has indicated that it is ready to settle the decree or opt to proceed with an appeal to the court of Appeal.

11. As regards the second issue, it is noted that the applicant has expressly indicated that it is not seeking for stay of execution pending an appeal but only stay pending ascertainment of costs. As no stay is being sought pending appeal, the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#) will be deluded into. The Applicant has maintained that the execution is likely to interfere with the hospital services and seeks for stay pending a proper decree being issued. However, as noted above the decree in question confirms with the judgement of this court delivered on 28.11.22. The issue of costs will be addressed by the parties once the bill of costs is ascertained. It is also instructive that the Applicant is silent about the rights of the Respondent who is the successful party and also entitled to the fruits of his judgment. Under the circumstances, I find that the Applicant has not met the threshold for an order of stay of execution pending a fresh, decree and ascertainment of costs.

12. In view of the foregoing observations, it is my finding that the Applicant’s application dated 18.1.23 lacks merit. The same is dismissed with costs to the Respondent.

**DATED AND DELIVERED AT BUNGOMA THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**D. KEMEI**

**JUDGE**

**In the presence of**

**Mungeri for Defendant/Applicant**

**B’wonchiri for plaintiff/Respondent**

**Kizito Court Assistant**

