



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO 37 OF 2016

STEPHEN G. ITUNGA.....1ST APPELLANT

ZIPPORAH MBAI.....2ND APPELLANT

NICHODEMUS KIMULE.....3RD APPELLANT

VERSUS

DAVID ALLI.....RESPONDENT

(Being an Appeal from the Ruling delivered by Honourable CA Ocharo Principal Magistrate on the 5th April 2016 in Machakos CMCC No. 99 of 2012)

BETWEEN

DAVID ALLI.....PLAINTIFF

-VERSUS-

STEPHEN G. ITUNGA.....1ST DEFENDANT/APPLICANT

ZIPPORAH MBAI.....2ND DEFENDANT/APPLICANT

NICHODEMUS KIMULE.....3RD DEFENDANT/APPLICANT

RULING

1. On 26th May, 2020, this Court dismissed this appeal with costs to the Respondent. Subsequently an application was filed seeking the release of the sum that had been deposited in a joint account pending the determination of the appeal to the Respondent and that application was allowed by consent on 2nd July, 2020.
2. By an undated Motion on Notice filed herein on 3rd September, 2020, the Appellants are seeking an order that the warrants of attachment and Notice of Proclamation dated 25th August, 2020 be set aside to allow for correct assessment and payment of the decretal sum due to the Respondents.
3. Section 34(1) of the *Civil Procedure Act* provides as hereunder:

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

4. In this case there is no doubt that the subject of the instant application is a question arising between the parties to the suit in which the decree was passed and that question relates to the execution, discharge or satisfaction of the decree. The applicant contends that the amount

claimed in the warrants of attachment and the proclamation are incorrect and that the execution ought not to have proceeded before the costs were taxed.

5. In my view the questions herein fall within the four corners of section 34(1) aforesaid and ought to be determined in the suit in which the decree was passed. That Court is the trial Court.

6. That was the position in **Kenindia Assurance Company Limited vs. Commercial Bank of Africa Limited & Another Nairobi (Milimani) HCCC No. 2012 of 2000** where Mbaluto, J held that:

“Where the issues raised in the suit and the application relate to the claim for fees by the 2nd defendant (auctioneer) for the attachment and proclamation of the plaintiff’s goods in execution of the decree issued in another case, the issues clearly arise between the parties to the said suit and also relate to the execution of the decree in the same suit, they are caught by the provisions of section 34 of the Civil Procedure Act.”

7. Accordingly, this Court is not properly seized of the instant application which is incompetent and I hereby strike it out but with no order as to costs.

8. It is so ordered.

Read, signed and delivered in open Court at Machakos this 7th day of October, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Mwaura for Mr Kariuki for the Applicants

N/A for the Respondent

CA Geoffrey