



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 108 OF 2016**

**TAIDORA TATA ERNEST.....PLAINTIFF/RESPONDENT**

**= VERSUS =**

**AFRICANUS OKADA OMADEDE..... DEFENDANT/APPLICANT**

**RULING**

1. The defendant who is the applicant has brought the application dated 17<sup>th</sup> February 2020 under the provisions of section 3A of the Civil Procedure Act. He seeks the following orders;

**a) That the Deputy Registrar do execute documents on the part of the respondent transferring a portion measuring 2½ of L.R S.TESO/APOKOR/758 to the applicant.**

**b) The County Land Registrar do dispense with requirements of production of original title deed L.R S.TESO/APOKOR/758 during transfer process.**

**c) That costs of this application be provided for.**

2. The application is premised on the groundsthat;

*(i) The period of six months to compensate the applicant with Kshs.750,000/= expired on 17<sup>th</sup> January, 2020.*

*(ii) The respondent on his own accord has not executed transfer documents of L.R S.TESO/APOKOR/758 to transfer the same to the applicant.*

*(iii) This honourable Court is vested with powers to authorize its Deputy Registrar to execute all transfer documents on behalf of the respondent and also order for dispensation of production of title deed.*

*(iv) The County Land Registrar to dispense with production of title deed in respect of L.R S.TESO/APOKOR/758.*

3. The applicant deposed that the respondent failed to compensate the applicant within six (6) months as set in the judgment. Consequently, the Deputy Registrar should be authorized to execute the transfer documents in respect of 2¼ acres of L.R SOUTH TESO/APOKOR/758 in favour of the applicant.

4. The plaintiff/Respondent opposed the application vide the replying affidavits of J. V. Juma advocate and the Respondent. Mr. Juma deposed that they were served with party & party bill of costs set for taxation on 9/10/2019 which date was not convenient to them. That on 5/3/2020 at 1.50pm they were served with a decree which had been issued on 15/8/2019 and certificate of costs certified on 14/10/2019. That on receipt of the two documents, they immediately issued a cheque for Kshs.750,000/= awarded to the applicant's advocates which cheque was banked.

5. The Respondent in her Replying Affidavit sworn on 3/3/2020 denied that she defaulted in the payment of Kshs.750,000/= since she had not been served with the decree. That the applicant cannot execute the decree in instalments as he has not yet taxed his bill of costs. That she had deposit the sum of Kshs.750,000/= pending receipt of the certificate of costs to enable her satisfy the decree.

6. Mr. Jumba counsel for the applicant submitted that compensation in lieu of transfer was to be done within 6 months which lapsed on January 2020. That time was running from the date of judgment and extraction of the decree was not the sole responsibility of the decree holder. That the cheque sent to their office was returned less their taxed costs.

7. Mr. J. V. Juma advocate for the Respondent submitted that the Respondent was always willing to pay the sum awarded. That execution of the decree includes costs. Mr. Juma submitted further that they never received communication that the bill was taxed as drawn and a certificate issued on 14/10/2019. That if the applicant felt that payment was made late, then they should have returned the cheque unbanked. He added that no explanation has been given why a decree extracted in August 2019 was only served on 5<sup>th</sup> March 2020.

8. The issue raised by the Respondent is;

(i) *Whether or not time had not lapsed since she had not been served with a decree.*

(ii) *Whether or not the Applicant is estopped from demanding for the transfer having received part payment in terms of costs.*

9. The defendant/applicant did not refute the claim that he had not served the decree on the Respondent. His defence is that the judgment was read in the presence of counsel and that the extraction of the decree is not the sole responsibility of one party. In this instance, it is the applicant who has moved the Court to execute the decree. This in my view shifted the responsibility upon him to extract and serve the decree he intended to execute upon the Respondent.

10. At the time of filing this application, the decree had not been served yet a decree had been extracted and issued far back on 15<sup>th</sup> August 2019. Similarly, the party and party costs were taxed exparte on 9/10/2019 and certificate of costs issued on 14/10/2019. The same was also not served upon the Respondent.

11. In the Case of *Muniafu 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. He stated thus;

***“There has to be in my view an application to the High Court (there being no specific mode provided) 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”.***

Also in the case of *Bamburi Portland Cement Company Limited Vs Hussein (1995) CAK*, 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 judgement 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 interparties.”***

12. In light of the provisions of section 94 discussed in the case law cited above, the applicant was required to seek leave of the Court to execute the decree before the taxation. Since he did not do so, the present application cannot be deemed to be the one seeking for leave to execute as the bill was already taxed. The applicant having obtained the certificate of costs thus ought to have notified the Respondent by effecting service upon her. Having not done so, he cannot turn around to benefit from his default.

13. The second issue is whether the applicant is estopped from declining receiving the compensation having banked the cheque sent to them. The Applicant’s advocate acknowledged receipt of the cheque for Kshs.750,000/= which he decided to bank, deduct the taxed costs of Kshs.180,235. He then did another cheque for the balance and returned to the Respondent’s counsel. The Respondent submitted that they had not banked the cheque sent to them.

14. The applicant received the impugned cheque after 5/3/2020 which date found this application pending. They decided to receive monies for their costs but reject the rest on account of compensation because the Respondent did not comply with the terms of the judgement. In my view, if the applicant felt the Respondent was in default, then he ought not to have received part-payment before determination of this application. I am in agreement with the plaintiff that the applicant is estopped from rejecting the payment. This view is in linewith the provisions of section 94 of Civil Procedure Act that required leave to execute before taxation.

15. In light of the observations I have made herein, I conclude that the application is lacking in merit. The same is dismissed with costs to the plaintiff/respondent.

**Ruling dated, signed and delivered at BUSIA this 17<sup>th</sup> day of September, 2020.**

**A. OMOLLO**

**JUDGE**