



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COURTS**  
**CIVIL SUIT NO. 16 OF 2014**

**BIRD'S PRINTERS, OFFICE STATIONERY**

**& EQUIPMENT LTD.....1<sup>ST</sup> PLAINTIFF**  
**DOVETAIL LTD..... 2<sup>ND</sup> PLAINTIFF**  
**GIMCHAR LTD..... 3<sup>RD</sup> PLAINTIFF**  
**WAVETEC EZCO LTD.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT**  
**NAIROBI COUNTY SECRETARY.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiffs/ applicants hereinafter referred to as the applicants has filed the Notice of Motion dated the 23<sup>rd</sup> April 2014. The application is brought under Section 1, 1A, 1B, 3, 3A, & 94 of the Civil Procedure Act, Cap 21 & Order 22 rules 6 of the Civil Procedure Rules, 2010 & the inherent power of the Court. The applicants seeks the following orders that;

1. That this Honorable Court be pleased to grant leave to the Plaintiff/Applicants to execute the Preliminary Decree herein issued on the interlocutory Judgment entered on 4<sup>th</sup> March 2014.
2. Leave be granted to execute the Preliminary Decree herein issued against the Nairobi County Government.
3. Costs be in the cause.

The motion is based on grounds stated on the face of the application together with the evidence of the applicants as contained in the annexed deposition, and such oral submissions made in Court. The grounds are that;

1. The Plaintiffs have obtained interlocutory judgment in their respective claims in this suit, and while awaiting the formal proof of the remainder of their respective claims from damages, interest, and costs, the Plaintiffs are entitled to execute as against the Defendants for the preliminary decree already issued.

2. No execution for the Preliminary Decree herein made can proceed without the leave of the Court as provided by law.
3. The oppression visited upon the Applicants by the Defendants' deliberate withholding of the Applicants' payments subject of these proceedings cannot otherwise be mitigated and in the result, the Plaintiffs are entitled to enjoy the fruits of their interlocutory judgment so secured.
4. The Defendants having duly appointed their Advocates on record signified by that act that they took notice of the pendency of these proceedings having been duly served, and in the face of their lack of any response, the Plaintiffs cannot wait indefinitely when the applicable law permits the grant of leave to execute the already secured preliminary decree.
5. The taxation of costs is not possible at this stage, as the assessment of damages in formal proof is still pending.
6. The Applicants cannot execute the Preliminary Decree in the circumstances without leave.
7. The Defendants are not keen on honouring contractual obligations with the Plaintiffs as pleaded herein, and in the face of their lack of a Defence, they cannot enjoy the unfair and oppressive state of keeping back the Plaintiff's lawfully due funds while the Plaintiffs remain empty handed in spite of this Court's interlocutory judgment in the Plaintiff's favor, and the arising preliminary decree.
8. The Plaintiffs' financial liabilities arising from the breached contractual obligations with the 1<sup>st</sup> Defendant have escalated to the point of auctioneers levying distress claim against the Plaintiffs. It is just and proper that leave be granted as sought for the Plaintiffs' just relief.
9. Jurisdiction is granted to this court to so order.

The application is supported by the affidavit of GABRIEL O. MADUNG a director of the 2<sup>nd</sup> Plaintiff DOVETAIL LTD. He has the consent and authority of my co-Plaintiffs to swear the affidavit. This is what he deposes in brief that; this suit was filed on 24<sup>th</sup> January, 2014, and their Advocates advised them that they duly served the Defendants with the process; that the Defendants upon being duly served with process instructed their Advocates on record known as P.W. Murage Advocates, who filed their Memorandum of Appearance on 14<sup>th</sup> February, 2014; that their Advocate then waited for the service of the Defence by the Defendants' said advocates who did not file any Defence to date, prompting the application for interlocutory judgment against the Defendants; that judgment was entered on 4<sup>th</sup> March 2014, and that is what we wish to execute; that the Plaintiffs having obtained interlocutory judgment in our respective claims in this suit, and while awaiting the formal proof of the remainder of our respective claims for damages, interest, and costs, are entitled to execute as against the Defendants for the preliminary decree already issued, thus they seek the leave of the Court as provided by law, hence the application; that the oppression visited upon each of us by the Defendants' deliberate withholding of their respective payments subject of these proceedings cannot otherwise be mitigated and they believe that they are entitled to enjoy the fruits of their interlocutory judgment so secured; that the Defendants have no interest in settling their just claim except seeking to delay the due and proper payments endlessly; that the Defendants' lack of any response to their claim is an express admission of our just and proper claims and they cannot wait indefinitely; that the taxation of costs is not possible at this stage, as the assessment of damages in formal proof of their respective claims is still pending; that their financial liabilities arising from the breached contractual obligations with the 1<sup>st</sup> Defendant have escalated to the point of auctioneers levying distress claims against some of them.

The Respondents filed a Notice of Preliminary Objection dated the 22<sup>nd</sup> May 2014 stating the following grounds; that the application goes against the spirit of the County Government Act No. 17 of 2012, the orders sought are purely speculative, that application is misconceived and an abuse of the Court Process, the orders sought are premature and that the application should be dismissed with costs to the Respondents.

The Respondents counsel did not attend the hearing of the application despite being present when the court gave the date for inter partes hearing.

I have perused the court file and I note the following; the applicants filed their plaint dated the 31<sup>st</sup> of December 2013. In the said plaint the plaintiffs seek that the judgment be entered for them against the

defendants jointly and severally for;

1. A mandatory injunction to issue compelling the defendants' to;
  - a. Forthwith pay the 1<sup>st</sup> Plaintiff the sum of Kshs. 2,964,942.85
  - b. Forthwith pay the 2<sup>nd</sup> Plaintiff the sum of Kshs. 3,588,898/=
  - c. Forthwith pay the 3<sup>rd</sup> Plaintiff the sum of Kshs. 3, 001,164/=.
2. Damages for the nonpayment of the specified respective sums under paragraph 1 above to the date of the making of the order
3. Damages for breach of contract.
4. Costs of the suit.

The plaintiffs monetary claims are stated at paragraphs 6 to 21 of the plaint. On the 4<sup>th</sup> March 2014, the Deputy Registrar upon the request of the plaintiffs through a request for judgment under Order 10 rules 4 (2) of the Civil Procedure Rules 2010, entered interlocutory judgment against the 1<sup>st</sup> and 2<sup>nd</sup> defendants having been served with the summons to enter appearance and having failed to enter appearance or file defense within the prescribed period. The matter awaits formal proof. Meanwhile the applicants file filed the application under consideration.

The application is brought under order 22 rule 6 which provides that;

***'Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:***

***Provided that, where judgment in default of appearance or defense has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution'.***

The applicants seek a preliminary decree. The Civil Procedure Act defines a decree as follows ;

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91” ,

The applicants have interlocutory judgment against the 1<sup>st</sup> and 2<sup>nd</sup> defendants under order 10 rule 4 (2). Order 10 rule 4(2) provides that;

***(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.***

The applicants seek a mandatory injunction to compel the defendants to pay the sums claimed, plus they have a claim for damages for breach of contract and damages for non- payment the sums claimed. Are the applicants' entitled to a preliminary decree? A mandatory injunction is only granted if a party has a clear case and the case is incontrovertible (**See Malindi Air Services vs. Halima Abdinoor Hassan Civil Application No. 202 of 1998 Nairobi**) . The applicants have interlocutory judgment and under order 10 rules 4 (2) they are to fix the matter for formal proof. I have looked at their exhibits annexed to the plaint, they show their correspondence and documents of the works said to be done by the

applicants. In the supporting affidavit of the applicants they do not refer to the specific documents in their bundle attached to the plaint that shows the amounts claimed, do they expect the Court to go through the said documents and sort out their claim? In my view this is a matter that needs to go to formal proof so that the applicants can prove their claims against the defendant/ respondents.

The applicants would have been entitled to a preliminary decree in a clear case where there is evidence that the respondents acknowledged the sum owing or judgment was entered for specific sums against the defendants. I therefore decline to grant the leave sought, let the applicants fix the matter for formal proof. Costs shall be in the case.

Orders accordingly.

Dated signed and delivered this **9<sup>th</sup>** day of **July** 2014.

**R. E. OUGO**

**JUDGE**

In the presence of;

.....For the Plaintiff/ Applicants

.....for the Defendants/ Respondents

.....Court Clerk