



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 784 OF 2007**

**REPUBLIC.....PLAINTIFF**

**VERSUS**

**THE COMMISSIOER OF POLICE..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**BENJOH AMALGAMATED LIMITED.....3<sup>RD</sup> RESPONDENT**

**AND**

**KENYA COMMERCIAL BANK.....EX PARTE APPLICANT**

**RULING**

1. By a Notice of Motion dated 2<sup>nd</sup> May 2014, the applicant herein, Kenya Commercial Bank seeks in substance an order that Warrants of Attachments herein dated 23<sup>rd</sup> April, 2014 be set aside and the proclamation date 28<sup>th</sup> April, 2014 be lifted. It further seeks a permanent injunction restraining the 3<sup>rd</sup> Respondent whether by itself, servants, agents, employees or otherwise, howsoever from executing and/or purporting to execute as against the Applicant or at all, its taxed costs herein. The applicant also sought an order that the costs occasioned by the application be borne by the 3<sup>rd</sup> Respondent's Advocates and/or Messrs. Warren Traders personally on an indemnity basis.
2. The application was bed on the grounds on the body of the application and supported by an affidavit sworn by **Bonnie Okumu**, the Head of Legal of the Applicant on 2<sup>nd</sup> May 2014.
3. The applicant's case was that by a ruling dated 19<sup>th</sup> November, 2014, this Court granted an order whose effect was that the taxed costs awarded to the 3<sup>rd</sup> Respondent herein against the Applicant in this suit in the sum of Kshs 632,537/- was set off against the sum of Kshs 20,592,191.33 being costs awarded to the Applicant against the 3<sup>rd</sup> Respondent herein in Civil Suit No. 205 of 2009. Thus the 3<sup>rd</sup> Respondent owes the Applicant the sum of Kshs 19,959,654.33.
4. According to the Applicant, there are no taxed costs outstanding capable of execution either as sought by the 3<sup>rd</sup> Respondent or at all.
5. That notwithstanding pursuant to the warrants of attachment purportedly issued by this Court on 23<sup>rd</sup> April, 2014 Messrs. Warren Traders attended the Applicant's premise and wrongfully

proclaimed the Applicant's property in execution of the said sum of Kshs 563,810.00 as well as auctioneers costs of Kshs 138,381/-.

6. According to the deponent, the said warrants were neither signed nor sealed by this Court.
7. Apart from that the order being executed was issued on 1<sup>st</sup> September, 2010, more than one year hence a Notice to Show Cause was necessary before execution could issue.
8. In opposition to the Application, the 3<sup>rd</sup> Respondent filed the following grounds of opposition:

**1. THAT there is no known law that allows for a set-off of claims between two separate Claimants.**

**2. THAT a bill of shillings Six Hundred Thousand (Kshs. 600,000/=) still survives in favour of the 3<sup>rd</sup> Respondent.**

**3. THAT a certificate of taxation dated the 1<sup>st</sup> day of September 2010 awarded a sum of Kshs. 561,360/= as Party to Party Costs as against the *Ex-parte* Applicant being Kenya Commercial Bank.**

**4. THAT this court on 24<sup>th</sup> January 2012 with further costs which costs have yet to be paid.**

**5. THAT the application is frivolous, unmeritorious and calculated to abuse the due process of law.**

**6. THAT the same arguments were placed before this honourable court on 6<sup>th</sup> July 2010 in their synopsis which dismissed with costs.**

**7. THAT the application is incompetent and an abuse of the due process of law as under Advocates Remuneration Order Act there is no provision for innovation of the Civil Procedure Rules i.e. for stay of execution.**

**8. THAT the application is wrongly before this honourable court as paragraph 62A of the Advocates (Remuneration) Order the only remedy available to the Applicant is to file a reference to ventilate any dissatisfaction.**

**9. THAT under Section 44 of 51 of the Advocates Act and paragraph 13(1) of the Advocates (Remuneration) Order Act this court has not aided the Applicants reference hence the same has been misplaced.**

**10. THAT the Advocates Remuneration Order does not provide for an appeal and the only remedy is a reference under paragraph 11 of the order which can ventilate any dissatisfaction.**

**11. THAT failure by the Applicants to file a reference opposed to coming under the Civil Procedure Rules and failing to ventilate the application through a reference and invoking the Civil Procedure has made the Applicants application defective and bad in law.**

**12. THAT the Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules, it does not provide for an appeal from any sort of decision or set-off by the Taxing Master.**

**13. THAT the basic principal of procedural law is that appeals to the High Court can be only where a right of appeal has been conferred by Statutes and for Taxation there is no such procedure.**

**14. THAT there is trite law that any complaint or obligation about any decision of the Taxing Master whether it relates to a point of law taken with regard to taxation of any item in the bill of costs is ventilated by way of a reference to the judge in accordance with paragraph 11 of the Advocates Remuneration Order.**

9. When the application came up for hearing on 10<sup>th</sup> July, 2014, only **Mr. Amoko** learned counsel for the applicant appeared. While reiterating the foregoing, learned counsel submit that the objections raised to this application were the same objection raised during the hearing of the application giving rise to the decision in which the aforesaid costs were offset which application was considered by the Court and allowed pursuant to Order 22 Rule 14(1)(b) of the **Civil Procedure Rules** and that no appeal was preferred against the said decision.
10. Learned Counsel therefore prayed that the application be allowed on an indemnity basis for the improper invocation of procedure.
11. I have considered the foregoing. By his ruling dated 19<sup>th</sup> November, 2012, **Warsame, J** (as he then was) held that pursuant to Order 22 rule 14(1)(b) aforesaid it would be just and equitable to set off the smaller sum of cost that is owed to the 3<sup>rd</sup> Respondent against the larger sum owed to the Applicant. The learned Judge consequently allowed the application.
12. The effect of the said ruling was that the cost taxed herein in favour of the 3<sup>rd</sup> Respondent was offset against the sum due to the applicant from the 3<sup>rd</sup> Respondent in HCCC No. 205 of 2009. Consequently there is no sum due from the applicant herein to the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent was therefore in error to attempt execution of the said sum which had been offset.
13. Apart from that it is clear that the order being executed was more than 1 year old. Order 22 rule 18 of the **Civil Procedure Rules** provides:

1. *Where an application for execution is made—*

*(a) more than one year after the date of the decree;*

*(b) against the legal representative of a party to the decree; or*

*(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him: Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:*

*Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.*

*(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.*

*(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.*

14. It follows that without a Notice having been issued pursuant to the foregoing or such notice dispensed with the process of the execution was unprocedural and unlawful.

15. I have perused the Court file and whereas the warrants of sale were signed and sealed by the Court, the Warrants of attachment were not.
16. I also wish to draw the parties' attention to the procedure for execution. On receipt of an application for execution, the court should make an order pursuant thereto as required under the provisions of **Order 22 Rule 13(4)** of the Civil Procedure Rules. In the case of **Mandavia vs. Rattan Singh Civil Appeal No. 27 of 1967 [1968] EA 146 Duffus**, JA stated that:

**“The words “formal order for attachment and sale of property may be made by the Registrar” in Order 48, rule 3 must mean that the Registrar has to actually consider the application before him and then make the necessary orders to effect the attachment of the sale. Formal order here does not mean that the registrar has only to prepare and issue a formal order which has in fact already been made by the judge, as for instance whether he draws and signs a decree after the judgement or as in this case an order after the judge has decided an application. In such cases, the registrar does not “make” the order, he only prepares the order already “made” by the judge. Rule 3 must empower the Registrar to consider the proceedings before him and then in his discretion himself make an order. In a sense this will usually only be a formal order as a judgement has already been obtained and, if not settled, execution against the judgement debtor’s property will follow as a matter of course without dispute, and the rule goes on to make it clear that if any dispute arise, then on the objection being taken in the manner provided, the matter will be taken over and dealt with by a judge. Order 48, rule 4 provides that for the purposes of rules 2 and 3 the registrar shall be deemed a civil court, so that in effect a registrar sitting to deal with applications or proceedings under rule 3 would be the presiding officer of a civil court, and a civil court here must mean a tribunal where civil issues are settled and not just a body that is only going to put into formal phraseology an order already made on an issue tried and disposed of by a judge. Form 27 in Appendix D of the schedule to the rules sets out the form of the notification of sale under rule 61 and this does provide for the signature by “judge” but in this connection it is to be noted that judge is defined in section 2 of the Civil Procedure Act as meaning “the presiding officer of a civil court” and this would include the deputy registrar when he is acting under the provisions of Order 48 rule 3...It is clear that Order 48 rule 3 confers on the registrar not merely the power to make formal orders of attachment and sale, but also to conduct ‘proceedings thereunder’, at any rate until some formal objection is taken by motion on notice whereupon all further proceedings are to be before a judge. This must be the position here since the intention of this rule is to allow the registrar to conduct the necessary proceedings, and issue the appropriate directions and orders so as to carry out an execution by way of attachment and sale of property, provided that the proceedings are not contested. Therefore the expression “formal orders for attachment and sale of property” include not only the actual orders for the attachment and sale but any other consequential orders, which are necessary to effect this purpose, and this includes an order made under rule 61.**

17. In **Kimani Karoki vs. Justus Gakumi Gakunga Nairobi HCCC (Commercial and Admiralty Division) No. 815 of 2010**, this Court expressed itself as follows:

**“..this Court’s decision my view the expression Rule 13(4) of Order 22 as read with Order 49 rule 5 of the Civil Procedure Rules must empower the registrar to consider the proceedings before him and then in his discretion himself make an order. Since the registrar acts as a court in these proceedings he should judicially consider the application by either allowing it or rejecting it. He should then make a formal order authorising the execution. This was a very serious omission on the part of the registrar since it was his duty to consider and give directions as to how the execution is to be carried out. He would conclude by making a formal order before issuing warrant of attachment to the bailiff/auctioneer. The Registrar has supervisory powers over the court bailiffs/auctioneers and has to oversee execution proceedings since he is the one who issues the orders and directions. Section 48 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provides that where any Act or Decree confers on any person to do or enforce the doing of any act or thing all such**

**powers shall be understood to be also given as reasonably necessary to enable the person to do or enforce the doing of the act or thing. Accordingly, the registrar has to act reasonably in ensuring that the directions he has given are carried out, if they are flouted, he can legitimately intervene except where the execution proceedings are themselves challenged and when this happens, the matter goes to the judge.”**

18. It follows that without a minute made on the Court file by a Deputy Registrar pursuant to a formal application for execution, any warrants issued pursuant thereto are in my view null and void and the execution proceedings herein are bound to be set aside.
19. In the result the application dated 2<sup>nd</sup> May, 2014 succeeds and the Warrants of Attachment and Sale issued herein are set aside. I further grant a permanent injunction restraining the 3<sup>rd</sup> Respondent whether by itself, servants, agents, employees or otherwise, howsoever from executing and/or purporting to execute as against the Applicant or at all, its taxed costs herein.
20. With respect to costs, in **Truth, Justice and Reconciliation Commission vs. The Chief Justice of the Republic of Kenya & Bethwel Kiplagat Nairobi High Court Judicial Review Case No. 7 of 2012, Warsame, J** (as he then was) while dismissing the application opined that exemplary costs as a deterrent against frivolous and vexatious public interest litigation must be a mechanism which can be employed to ensure public resources are not wasted on frivolous and useless litigations. The learned Judge held that it is depressing to note that on account of such cases innumerable days and time are wasted which would otherwise have been spent on disposal of cases by genuine litigants with matters which are dear to them rather than for meddlesome interlopers having absolutely no grievances for personal gain or as a proxy of others or for extraneous motivation who break the queue by wearing a mask of public interest litigation. This according to the learned Judge wastes valuable time of the Court as a result of which genuine litigants standing outside the court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards courts resulting in loss of faith in the administration of justice. The learned Judge in the circumstances of that case proceeded to dismiss the application with costs to be paid by the Commissioners of the applicant personally.
21. In this case it is clear that the execution process which was put into motion was clearly unwarranted no justification has been attempted by the 3<sup>rd</sup> Respondent at all.
22. Accordingly I award the costs of the instant application to the applicant against the 3<sup>rd</sup> Respondent on an indemnity basis.

**Dated at Nairobi this 16<sup>th</sup> day of July 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the absence of the parties.***

**Cc Kevin:**