

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 164 of 2008

DIAMOND TRUST BANK (K) LTD..... PLAINTIFF

VERSUS

SARABJIT SINGH SEHMI..... DEFENDANT

R U L I N G

On 22nd October 2008, this court entered summary judgment in favour of the plaintiff. The defendant was ordered to pay the plaintiff the sum of Kshs.4,384,158.42 plus interest at the rate of 24% per annum upto the date of filing suit. Thereafter, the applicable interest rate would be the court rate. The plaintiff was awarded costs of the suit and of the application. The plaintiff extracted the decree of the court on 7th November 2008. The decree was signed by the deputy registrar of the court on 13th November 2008. On 18th November 2008, the plaintiff wrote to the deputy registrar of this court requesting for the issue of warrants of attachment and sale before the ascertainment of as according to the plaintiff, it was apprehensive that the defendant would frustrate the recovery efforts if the plaintiff's costs were to be taxed. There is no evidence that the deputy registrar of the court granted the plaintiff's request to execute against the defendant before its costs were taxed.

On 16th December 2008, warrants of attachment of movable property in execution of decree for money and warrants of sale in execution of decree for money were issued to Mssrs Keysian auctioneers at the request of the plaintiff. The said warrants excluded the costs to be paid to the plaintiff. However, it included interest of Kshs. 570, 780/= which was calculated by an officer of this court. The said firm of auctioneers duly executed against the defendant by proclaiming the defendant's property. The defendant filed an application pursuant to Section 94 of the Civil Procedure Act and Order XXI Rule 20(1) of the Civil Procedure Rules seeking the recall and cancellation of the said warrants of attachment and sale. The defendant contends that the said warrants were irregularly issued and without compliance with the due process of the court. The defendant sought other prayers in the application that are not germane to the above prayer. This court will render its decision in regard to the legality of the warrants of attachment only. The defendant will be at liberty to present the other prayers in the application at the appropriate time after the delivery of this ruling.

Although the plaintiff strenuously opposed the defendant's application, it was clear to this court that the plaintiff had short circuited the due process of the court by purporting to execute against the defendant before its costs were taxed. Section 94 of the Civil Procedure Act requires a party who wishes to execute a decree of the court before his costs are ascertained by taxation, to apply to the court for such dispensation. A party, who is desirous of executing a decree before his costs are taxed, is required to make an application to the court before the decree issued in his favour can be executed. Such a party is required to make such application to the judge and not to the deputy registrar of the court. Under the powers delegated to the deputy registrar under Order XLVIII of the Civil Procedure Rules, the deputy registrar of this court cannot dispense with the mandatory requirement in regard to taxation of costs before execution of a decree of this court can be levied. In the present application, although the plaintiff purported to seek dispensation from the deputy registrar of the court to execute against the defendant before taxation of its costs, such dispensation was not in actual fact given. The plaintiff therefore executed the decree of this court before taxation without leave of the court.

In the premises therefore, I will allow the part of the defendant's application that seeks the recall and the setting aside of the warrants of attachment issued to Messrs Keysian Auctioneers. The said warrants of attachment of movable property in execution for decree for money and the warrants of sale of property in execution for decree for money issued by the deputy registrar of this court on 16th December 2008 are hereby recalled and cancelled. They were issued without the authority of this court. If there are any orders that have been issued pursuant to the said warrants of attachment and sale, the same are hereby set aside. As it was the plaintiff that applied for the issuance of the said warrants, it shall pay the auctioneer's costs. The defendant shall be paid the costs of this application.

DATED at NAIROBI this 3rd day of JUNE 2009.

L. KIMARU

JUDGE