



**Birech v Fuji Motors EA Limited & another (Civil Suit
10 of 2014) [2026] KEHC 13 (KLR) (7 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 13 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 10 OF 2014
RN NYAKUNDI, J
JANUARY 7, 2026**

BETWEEN

JOHN KIMELI BIRECH PLAINTIFF

AND

FUJI MOTORS EA LIMITED 1ST DEFENDANT

SB HOLDINGS LIMITED 2ND DEFENDANT

RULING

1. What is pending before this Honourable Court for determination is a Notice of Motion Application dated 4th December 2025 brought pursuant to section 94 of the [Civil Procedure Act](#) in which the Plaintiff/Applicant is seeking the following orders: -
 - a. Spent
 - b. That the Honourable Court be pleased to order the decree to be executed forthwith before ascertainment of the Plaintiff's party and party costs.
 - c. That costs of this of this application be provided for.
2. The Application is premised on the grounds on the face of it among others: -
 - a. That the judgement was entered against the defendants ex-parte.
 - b. That the ascertainment of costs is delaying the execution of the decree as the Defendants have commenced to carryout acts of disposal of assets to delay or defeat the execution of the judgement.
3. The Application is supported by the annexed affidavit sworn by John Kimeli Birech, the Plaintiff/Applicant who deponed as follows: -



- a. That I am the Plaintiff and the decree holder in this matter.
 - b. That the ex-parte judgement in this suit was entered on 9th August, 2024.
 - c. That the Plaintiff's party and party bill of costs was lodged for taxation.
 - d. That while the plaintiff's party and party bill of costs awaits the delivery of ruling on the 20th January 2026, I have reliably learnt that the defendants are in the process of disposing and committing acts of wastage of their assets to obviate the successful execution of the judgement.
 - e. That the action by the Defendants will have trifling effect on the on the realization of the fruits of the decree in this matter which has been in court for the last 11 years.
 - f. That I stand to suffer astronomical losses based on the magnitude of the decree in the event I will be unable to execute.
 - g. That I pray that the court orders that the decree be executed forthwith prior to the ascertainment of costs based on its jurisdiction under section 94 of the *Civil Procedure Act*, Cap 21.
 - h. That I pray that the court considers that execution ought to be commenced forthwith owing to the upcoming Recess of the Superior Court and the exclusion of time running contained in Order 50 rule 4 of the Civil Procedure Rules 2010.
4. I take note that at the time of writing this ruling, the Defendants had not filed any response to this Notice of Motion Application in the court's file and in the Case Tracking System (CTS) despite service by the Plaintiff. I will decide this application on the merits regardless.

Analysis and Determination

5. I have read and considered the Notice of Motion Application and the Affidavit in support of the same. There is one issue manifest for determination being;
- Whether the Application to order the decree to be executed before ascertainment of the Plaintiff's party and party costs is merited?
6. The applicable law in this application is section 94 of the *Civil Procedure Act* which provides as follows:
-
94. Execution of decree of High Court before costs ascertained
- Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.
7. The court in the case of *Bamburi Portland Cement Co Ltd Vs Hussein* [1995] LLR 1870 (CAK) where 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 judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard interpartes. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar



the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.”

8. Similarly, in the case of *Kartar Singh Dhupar & Co Ltd Vs Lianard Holdings Ltd* [2017] eKLR, the court held as follows:

“The mischief sought to be addressed by Section 94 of the *Civil Procedure Act*, is to protect a judgement debtor from suffering multiple execution, one in respect of the principal sum and the other for the costs after ascertainment in respect of the same suit.”

9. Corollary to section 94 of the *Civil Procedure Act* is Order 21 Rule 8 (2) of the Civil Procedure Rules which also requires that the draft decree should be exchanged between the litigating parties before the same goes for execution. The said Rule Provides as follows:

“Any party to a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it; without undue delay,” and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgement, shall sign and seal the decree accordingly.”

10. The above provision was reiterated in *Equity Bank Ltd Vs Capital Construction Ltd and 3 others* [2014] eKLR where the court held.

“Order 21 Rule 7(2) as read with Order 21 Rule 8(2) provides that any party to the suit shall prepare a draft decree in accordance with Rule 7(2) and present the same to the other party or parties for approval, with or without amendment. It also provides at rule 8(2) that if the draft is approved, the same shall be forwarded to the Registrar who shall sign and seal the decree if he is satisfied that the draft decree is in accordance with the judgment. It is further provided at Rule 8(3) that the Registrar may approve the decree if within seven days of service of the draft decree on the other parties, no approval or disagreement is filed and or received.”

11. The purpose of section 94 of the *Civil Procedure Act* is to strike a balance between procedural orderliness and substantive justice, particularly in circumstances where insisting on taxation of costs before execution would occasion undue delay, prejudice or injustice to a successful litigant. The Court is guided by the long-standing principle that litigation must come to an end and that a successful party is entitled, as of right, to enjoy the fruits of his judgment. In the present case, several compelling factors militate in favour of granting the orders sought. First, the judgment was delivered as far back as 9th August 2024 and the suit itself has been pending for over 11 years. Justice delayed, in such circumstances, risks becoming justice denied. Second, the Applicant has deponed, without rebuttal, that the Defendants have embarked on acts of disposal and wastage of assets with the clear intention of frustrating execution. While the Court must exercise caution when dealing with allegations of asset dissipation, the absence of any response or denial from the Defendants lends credence to the Applicant’s apprehension.

12. Third, taxation of costs is a collateral process which, though important, should not be allowed to hold hostage the execution of a substantive decree, particularly where the decree does not relate to costs alone but to substantive reliefs already crystallized by judgment. In the case of *Ekesa v Life Care Hospitals*



Ltd (Civil Case 2 of 2018) [2023] KEHC 657 (KLR) (3 February 2023) (Ruling), the Court held as follows;

As regards the second issue, it is noted that the applicant has expressly indicated that it is not seeking for stay of execution pending an appeal but only stay pending ascertainment of costs. As no stay is being sought pending appeal, the provisions of Order 42 Rule 6 of the Civil Procedure Rules will be deluded into. The Applicant has maintained that the execution is likely to interfere with the hospital services and seeks for stay pending a proper decree being issued. However, as noted above the decree in question confirms with the judgement of this court delivered on 28.11.22. The issue of costs will be addressed by the parties once the bill of costs is ascertained. It is also instructive that the Applicant is silent about the rights of the Respondent who is the successful party and also entitled to the fruits of his judgment. Under the circumstances, I find that the Applicant has not met the threshold for an order of stay of execution pending a fresh, decree and ascertainment of costs.

13. Further, section 94 of the *Civil Procedure Act* expressly contemplates circumstances such as the present one, where it is necessary to permit execution “forthwith”, save for the portion relating to costs. The Applicant is not seeking to execute costs prematurely, but merely the decretal sum pending taxation. Upon a careful consideration of the Application, the supporting affidavit and the applicable law, this Court is satisfied that the Applicant has demonstrated sufficient necessity to warrant execution of the decree prior to ascertainment of party and party costs. The interests of justice demand that the Plaintiff/Applicant be allowed to enjoy the fruits of his judgment, while the Defendants retain the protection afforded by the law in respect of costs.
14. Consequently, this Notice of Motion Application is merited and accordingly, the following orders of this Court shall abide: -
 - a. An order be and is hereby issued that the decree herein dated 9th August 2025 be executed save for the portion relating to party and party costs.
 - b. An order be and is hereby issued that the execution in respect of party and party costs shall remain stayed pending taxation and ascertainment of the said costs.
 - c. There shall be no order as to the costs of this application.
 - d. There shall be a status conference on 26th January 2026 to confirm compliance with the aforesaid orders.
15. It is so ordered.

DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 7TH DAY OF JANUARY 2026

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R. NYAKUNDI

JUDGE

