

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
ARB. CAUSE NO. E064 OF 2023

BETWEEN

EDUCOR KENYA LIMITED.....

.....APPLICANT

AND

SMART START KINDER ACADEMY LIMITED.....

RESPONDENT

RULING

Introduction and Background

1. By an application dated 28th May 2025, the Applicant seeks to suspend or set aside the Proclamation Notice dated 27th May 2025, that the Auctioneer's costs be borne by the Respondent and that the Applicant be granted leave to pay the decretal sum in installments of Kshs.500,000.00/= every four months after the Respondent's Party and Party Bill of Costs is heard and determined. The application is supported by the grounds on its face and the supporting affidavit of the Applicant's director, PRISCA MUYODI, sworn on 28th May 2025 and it is opposed by the Respondent through the replying affidavit of its director, KARIM MANJI, sworn on 12th June

2025. The parties have also filed written submissions in support of their respective positions that I have considered together with the pleadings and I will make relevant references to them in my analysis and determination below.

Analysis and Determination

2. From the parties' submissions, I find that the following are the issues falling for the court's determination:

- i. Whether the execution of the Award is unlawful and/or premature following the pending taxation of Bill of Costs.*
- ii. Whether the Respondent can proclaim assets subject of a floating charge.*
- iii. Whether the Proclamation Notice should be set aside or suspended.*
- iv. Whether the Applicant should be granted leave to pay the decretal sum and costs in instalments of Kshs. 500,000.00 every four months.*
- v. Whether the Auctioneer's costs should be borne by the Respondent.*

Execution pending taxation of Bill of Costs

3. The Applicant states that the execution initiated by the Respondent is unlawful and premature for reasons that the

Respondent failed to seek leave from the Court under **section 94** of the ***Civil Procedure Act*** which is required when a party intends to execute a decree before the costs of the suit have been ascertained through taxation. That no decree was served upon the Applicant prior to the issuance of the proclamation notice and that the party and party bill of costs has not yet been heard or determined, making the current attempt at recovery premature. On its part, the Respondent states that the execution is lawful and not premature as it is only executing for the principal Award sum and agreed arbitration costs, not the untaxed costs of this court. It submits that the Applicant is misleading the court by suggesting otherwise and it contends that **section 94** of the ***Civil Procedure Act*** applies only to this court's original jurisdiction. That because this matter involves the recognition of an arbitral award, the court is not sitting in its original jurisdiction, making **section 94** inapplicable.

4. The Respondent submits that costs awarded in an arbitral award are distinct from subsequent court costs and are enforceable immediately upon recognition without awaiting taxation of separate court proceedings. It denies the Applicant's claim of non-service, noting that the Applicant was kept aware of the impending execution through correspondence and had even requested a copy

of the Decree as early as August 2024 to lodge an appeal. The Respondent states that the Applicant has shown bad faith by failing to adhere to a previous consent on costs and making empty promises of payment that never materialized.

5. **Section 94** of the **Civil Procedure Act** provides that:

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.

6. The Applicant has cited the court's decision of **Equity Bank Limited v Adopt A Light Limited [2015] KEHC 8142 (KLR)** where the late Ochieng' J., (as he was then) held as follows:

57. Although that could be the simple and direct answer on the issue of jurisdiction, that cannot be the whole answer. I so find because although the arbitral process determines

the issues placed before it, the Arbitration Tribunal must have resort to the High Court when executing the Decree.

58. In those circumstances, and because there are no specific rules or guidelines on how exactly the Decree extracted from the tribunal's decision would be executed, there must be an acknowledgement, (albeit unstated), that the Rules and Procedures governing execution at the High Court, would be applicable.

59. I also hold the view that the task of taxing a Bill of Costs is not, of itself, a hindrance to the execution of a Decree. It could only become a hindrance if the process was manipulated, so as to give rise to delays.

60. I appreciate the fact that when a Decree is executed before the costs are taxed, that implies that the process of execution cannot have taken into account the costs which are payable by the Judgment-Debtor.

61. In the result, when execution is carried out before taxation, there is likely to a rise a serious practical challenge on how to go about recovering costs.

62. Such a practical challenge could be resolved through seeking leave of the court to execute the Decree before taxation of the Bill of Costs. But that presupposes that

Section 94 of the Civil Procedure Act is applicable in cases where the decision of the Arbitration Tribunal was being executed by the High Court.

63. Yet, that statutory provision is not one of those which have been expressly recognized in the Arbitration Act, as being applicable to arbitral processes.

64. Practicability suggests that Section 94 of the Civil Procedure Act ought to apply when a Decree extracted from a decision of an arbitral tribunal was to be executed. However, that fact alone cannot grant jurisdiction to the court, if there was no jurisdiction provided by law.

7. The Applicant also cites the decision of Dr. Mugambi J., where she held as follows in **Rubis Energy Kenya PLC (Formerly Kenol Kobil Limited) v Downstream Energy Limited; KCB Bank Kenya Limited & 5 others (Garnishee)** [2024] KEHC 5946 (KLR):

It ordinarily follows that an execution process starts once costs have been ascertained. Section 94 provides exceptions to this rule so as to facilitate immediate execution where the court considers it necessary but even then, such a decree must have been passed in the exercise of this court's original civil jurisdiction.

16. *This cardinal point was emphasized in the case of Equity Bank Limited v Adopt A Light Limited, [2015] eKLR, where it was held that the High Court, when facilitating the execution of a decree from an arbitral award, is not exercising its original civil jurisdiction. I align with this holding. Since the decree in this matter arose from an arbitral award, the court did not exercise its original jurisdiction.*

17. *Therefore, it is my finding that section 94 of the Civil Procedure Act does not apply, and the court lacks jurisdiction to allow the execution of the decree until taxation is finalized.*

8. From the above, **section 94** only applies to decrees passed in the exercise of this court's original civil jurisdiction. In this case, the court was not exercising its original jurisdiction but rather exercising its jurisdiction to recognize and enforce an arbitral award under **section 36** of the **Arbitration Act** and I align with the court holdings above that because the decree arose from an arbitral award, the court did not exercise original jurisdiction, and therefore **section 94** did not apply. As **section 94** does not apply at all to decrees arising from arbitration, then the Applicant's entire argument that execution is premature because costs are

unascertained under **section 94** collapses immediately as this provision is inapplicable and the Respondent does not need to comply with a section that the court has no jurisdiction to invoke.

9. Even if I were to ignore the jurisdictional issue, which I am not, the Applicant's argument conflates two different types of "costs." The decretal sum of Kshs. 5 million from the Arbitral Award, plus the agreed arbitration costs of Kshs.541,044/= are final, ascertained and due. They are not subject to the pending taxation in respect of this court's party and party costs and if **section 94** were to apply, which it does not, it would only potentially stay the execution of the costs portion of the decree but it would not prevent the execution of the principal award and agreed arbitral costs which are already ascertained. The Respondent has very clearly separated these amounts and that they are executing for the principal sum and the agreed arbitration costs, not the untaxed costs of this court.

10. In the foregoing, it is my summary finding that based on the very same authorities relied upon by the Applicant, **section 94** does not apply to decrees arising from arbitral awards because this court is not exercising its original civil jurisdiction. Therefore, the Respondent is not required to seek leave or wait for the taxation of this court's costs before executing the principal sum and the

agreed arbitration costs. The Applicant's argument is clearly a misinterpretation and misapprehension of **section 94** and I find that the execution of the Award is not unlawful and/or premature following the pending taxation of Bill of Costs.

Proclamation of assets subject of a floating charge

11. The Applicant contends that the assets targeted by the proclamation are already subject to a Floating Charge in favor of a third-party lender and that proceeding with execution would ignore these statutory mandates and risk irreversible prejudice to the rights of the secured creditor. The Applicant states that the Respondent is prioritizing hasty recovery over due process and the legal hierarchy of debt satisfaction. In response, the Respondent submits that its status as a decree holder takes precedence over the alleged floating charge and that a decree holder has priority over a floating charge that has not yet crystallized. It depones that the Applicant failed to provide evidence such as the appointment of a Receiver to prove the charge in favor of *KCB Bank* has crystallized and without such proof, the claim of priority for the bank is speculative and unsubstantiated.

12. The Respondent has cited the decision of **Lochab Brothers v Kenya Furfural Co Ltd [1983] KECA 51 (KLR)** where Chesoni Ag. JA., accepted that *“A debenture usually creates a floating*

charge on a company's assets, and only where the charge has been crystallised - eg by appointment of a receiver by seizure and sale do the rights of the debenture holder have priority over those of the execution creditor." Essentially, a floating charge is dormant until it crystallizes and this typically happens through specific events, most notably the appointment of a receiver or the company going into administration. It is only after crystallization does the charge attach to the specific assets and gain priority over an execution creditor and before crystallization, the company is free to deal with its assets, and judgment creditors are free to attach them.

13. Whereas the Applicant has provided evidence of the existence of a floating charge, it has provided no evidence that the charge has crystallized. There is nothing exhibiting a notice of appointment of a receiver, a notification that the bank has seized the assets, and no evidence that the company is in administration or liquidation. In the absence of crystallization, the rights of the execution creditor have priority and the Respondent is correct to label the Applicant's claim as speculative. The Applicant's argument that proceeding with the execution would cause irreversible prejudice to the Bank is also misplaced as the Bank has not come to court to claim its alleged priority or to stop the sale and it has not filed any objection

proceedings. If the bank's security had indeed crystallized the bank has the statutory power to appoint a receiver or intervene and in the absence of such intervention, the court cannot assume the bank's rights are being violated. As the floating charge is yet to crystalize, I find that the Respondent was at liberty to proclaim the property subject of the floating charge.

Setting aside of the proclamation

14. Having found that **section 94** of the **Civil Procedure Act** is inapplicable in this case, that the proclamation is not premature and that the Respondent can proclaim the property subject of a floating charge that is yet to crystallize, I find that there is no valid basis of setting aside the Proclamation.

Leave to pay the decretal sums in instalments

15. The Applicant seeks the court's intervention to allow for a structured payment plan in installments of Kshs.500,000.00/= every four months and that this payment schedule is proposed to begin only after the Respondent's party and party bill of costs has been formally taxed and determined. The Respondent opposes the Applicant's proposal to pay in installments stating that under the **Arbitration Act**, the court's jurisdiction is limited strictly to the recognition and enforcement of the award. It contends the court has no supervisory jurisdiction to order installment payments for an

arbitral award, and doing so would be an unlawful expansion of its authority. That even if the court had jurisdiction, the Respondent states that the Applicant has not shown sufficient cause, failed to offer any security, and has not made even a partial payment to demonstrate good faith.

16. On the court's jurisdiction, I associate myself with this court's (Gikonyo J.) ruling in **Wasika v Omita & another [2025] KEHC 9274 (KLR)** that this court has jurisdiction to entertain the present application following the recognition of an award as a judgment of the court and a decree is issued thereafter. Turning to the merits of this case, **Order 21 Rule 12** of the **Civil Procedure Rules** provides as follows:

'After passing of any such decree, the Court may on the application of the judgment-debtor and with the consent of the decree holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by installments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise as it thinks fit'

17. From the aforementioned provision, the court's power to grant leave to pay the decretal sum in instalments is discretionary.

Therefore, the power must be exercised based on principles and not on a whim. In **Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260**, the court underscored that *“The Court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and installments should be directed where the defendant shows his bona fides by offering to pay anything like a fair proportion of his debt at once.”* The court further elaborated that *“Whilst the courts must be zealous of the creditor's rights, they must consider each case on its merits and exercise the discretion accordingly... Hardship to a debtor might in some circumstances be taken into consideration on an application for payment by instalments; it is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor.”*

18. Going through the pleadings, I find that the Applicant has failed to make a case for payment of the decretal sum in installments for a number of reasons. One, the Applicant proposes to pay Kshs.500,000.00/= every four months whereas the decretal sum plus interest currently stands at approximately Kshs. 7.6 Million. The problem is that at that rate, it would take the Applicant roughly 5 years to clear the debt and yet it is offering to pay less

than 7% of the debt upfront. In my view, this is not a fair proportion and I consider it a token gesture that primarily serves to delay execution rather than genuinely satisfy the decree.

19. Two, from the record, the Applicant clearly delayed the arbitration process, it unsuccessfully tried to set aside the arbitral award, it signed a Consent to pay costs of Kshs. 250,000.00/= within 7 days and breached it and it has not paid a single cent towards the principal sum of Kshs. 5 million since 2021. This is not a debtor acting in good faith but rather using every procedural tactic to avoid payment and I am inclined to agree with the Respondent that it did not come to court with clean hands.

20. Three, the Respondent has been waiting for this money since 2021, the debt is now accruing interest but that is cold comfort to a business that has been kept out of its funds for nearly 5 years. Allowing a 5-year payment plan for a debt of this age would cause unreasonable prejudice to the Respondent. Whereas the Applicant claims hardship because it is a school and income is seasonal, it has had years to plan for this payout and the fact that they have an existing loan with KCB supports the view that it has financial commitments but it does not excuse it from honoring a court decree. Financial difficulty, without a genuine proposal

backed by immediate payment, is not a sufficient ground for installments.

21. Lastly, I find that the Applicant has not shown sufficient cause to persuade the court to allow it to pay the decretal amount in installments. Save for showing an existing loan which it had when it contracted the debt and a seasonal income which is a normal feature of running a school, it has not offered security, nor has it explained why it could not at least save during the school terms to pay this debt further demonstrating that this is but a litigation tactic to stall execution.

22. As such, I find that the court's discretion should be exercised in favour of the Respondent to allow it to finally enjoy the fruits of its judgment.

Auctioneers' costs

23. Having found that the proclamation is lawful and procedural, I find that there is no basis for the Respondent to bear the auctioneers' costs of a debt that is owed to it by the Applicant

Conclusion and Disposition

24. In the upshot, I do not find merit in the Applicant's application dated 28th May 2025 and the same is dismissed with costs assessed at Kshs.30,000.00/= in favour of the Respondent. It is so ordered.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
19TH DAY OF FEBRUARY 2026**

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Mwangi for the Applicant.
2. Mr. Munene for the Respondent.
3. Amos - Court Assistant