

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. E10 OF 2021

EMAKHWALE CONSTRUCTION CO.
LTD.....APPELLANT/RESPONDENT (DECREE-HOLDER)

-VERSUS-

WARM & BARNHILL COMPANY
LTD.....RESPONDENT/APPLICANT (JUDGMENT-DEBTOR)

RULING

1. The Court is called upon to determine the Notice of Motion dated 15th September 2025, in which the Respondent/Applicant seeks, principally:
 - I. Protection from execution;
 - II. Directions regarding compliance with this Court's orders issued on 14th December 2024 and 14th May 2025;
 - III. A finding that failure to comply with the said orders is attributable to advocates and not the Applicant.
2. The application is strenuously opposed by the Appellant/Respondent (decree-holder), who characterizes it as an abuse of the court process intended to delay execution.
3. On 14th December 2024, this Court ordered the Respondent to deposit the decretal sum in a joint interest-earning account in the names of both parties' advocates within 90 days.
4. Subsequently, on 14th May 2025, the Court extended time for compliance up to 15th May 2025 at 5:00 p.m., with a clear default clause permitting execution.
5. It is not disputed that:
 - I. No joint account was opened;
 - II. No decretal sum was deposited;
 - III. The timelines set by the Court lapsed without compliance.

Issues for Determination

6. The issues that arise are:
 - a) Whether there was non-compliance with court orders;
 - b) Who bears responsibility for such non-compliance;
 - c) Whether the affidavit sworn by the Appellant's director is competent;
 - d) Whether the Applicant is entitled to protection from execution;
 - e) What orders should issue.

Analysis

- a) **Whether there was non-compliance with court orders.**

7. There is no contest that the orders of 14th December 2024 and 14th May 2025 were not complied with. The law regarding obedience of court orders is firmly settled.

8. In **Hadkinson v Hadkinson, the English Court of Appeal (per Romer LJ)** held:

In Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another, the court emphasized:

'It is the plain and unqualified obligation of every person to obtain it unless and until that order is discharged.'

9. Further, the Court of **Appeal in Shimmers Plaza Limited v National Bank of Kenya Limited** reinforced that:

'court orders must be obeyed as issued, parties cannot choose which orders to comply with or ignore.'

10. The Court also draws guidance from **Republic v Principal Secretary Ministry of Defence Ex Parte George Kariuki Waithaka**, where it was held that failure to comply with court orders strikes at the heart of the rule of law.

11. The Applicant was under a clear, time-bound obligation which was not met. There was outright non-compliance.

b) Who bears responsibility for the non-compliance

12. The Applicant contends that failure arose from lack of coordination between advocates in opening the joint account. This argument is not persuasive. While it is true that advocates facilitate the opening of joint accounts, the legal duty to comply with court orders rests squarely upon the litigant.

13. **In Teachers Service Commission v Kenya National Union of Teachers & 2 Others**, the court held that:
'Parties cannot hide behind their advocates to avoid compliance with court orders.'

14. Similarly, **in Savings & Loan Limited v Susan Wanjiru Muritu Nairobi HCCC No 397 of 2002**, the Court observed:

15. A litigant has a duty to follow up on their case and ensure compliance; mistake of counsel and not a carte blanche to disobey court orders.

16. **The Court of Appeal in Bi-Mach Engineers Limited v James Kahoro Mwangi** further clarified that:

'A party cannot simply blame counsel where there is evidence of inaction or indifference on their party.'

17. In the present case no evidence of structured attempts to open the account has been exhibited; no formal correspondence between advocates has been properly placed before the Court; and the Applicant did not seek timely intervention of the Court before expiry of timelines.

18. The failure cannot be shifted to counsel. The Applicant bears primary responsibility.

c) **Competence of the Appellant's director's affidavit**

19. The Applicant challenges the affidavit on grounds of hearsay. The applicable principle is found under Order 19 Rule 3 of the Civil Procedure Rules and Section 5 of the Oaths and Statutory Declarations Act.

20. **In Kisya Investments Ltd & Others v Kenya Finance Corporation Ltd**, the court held that:

'Affidavits may contain statements based on information and belief provided the source is disclosed'

21. Further, in **Life Insurance Corporation of India v Panesar, the East African** Court of Appeal held that defects in affidavits do not necessarily render them inadmissible unless they go to substance.

22. While it is correct that an advocate would be better placed to depone on professional communications, a director may competently depone on:

- I. Instructions given;
- II. Knowledge derived from company records;
- III. Steps taken or not taken.

23. The affidavit is not fatally defective, though portions touching on advocate communication carry reduced evidential weight.

d) **Whether the Applicant is entitled to protection from execution**

24. The Applicant seeks equitable relief. Such relief is discretionary and governed by established principles. In **Samvir Trustee Limited v Guardian Bank Limited Nairobi HCCC No 795 of 1997**, the Court held:

'The applicant must demonstrate sufficient cause and must approach the court with clean hands.'

25. Similarly, in **Macharia t/a Macharia & Co Advocates v East African Standard (No 2)**, the Court stated:

'Equity does not aid the indolent.'

26. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others** emphasized;

'Extension of time and discretionary reliefs are not rights but remedies available to destroying parties who demonstrate diligence.'

27. In addition, in **Kenya Shell Limited v Kibiru & Another**, the Court held that a successful litigant is entitled to the fruits of judgment and should not be unnecessarily deprived of the same.

28. In the present case the Applicant disobeyed clear court orders despite multiple opportunities were granted and no credible evidence of diligence or good faith effort is demonstrated.

29. Granting protection would encourage disobedience of court orders, prejudice the decree-holder and undermine the authority of the Court.

30. The Applicant has not met the threshold for equitable protection.

Determination

31. The Court finds that:

- There was clear and inexcusable non-compliance;
- The Applicant bears responsibility;
- The application lacks merit and is largely a delay tactic;
- The Applicant is not entitled to protection from execution.

Orders

32. Accordingly, the Court orders:
- i. The Notice of Motion dated 15th September 2025 is dismissed with costs.
 - ii. The Appellant/Respondent is at liberty to proceed with execution forthwith.
 - iii. The Applicant's directors shall appear before the Deputy Registrar for purposes of execution, if necessary.
 - iv. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF APRIL, 2026.

S.N MBUNGI

JUDGE

In the presence of:-

CA: Velma

The Respondent present in court.

Other party absent.

Advocate also absent.s