



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 2577 OF 1990

DUNCAN NDERITU NDEGWA.....PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED.....1ST DEFENDANT

I. Z. ENGINEERING CONSTRUCTION LIMITED.....2ND DEFENDANT

RULING

On 1st August, 2013 the court entered judgment herein in favour of the Plaintiff against the defendants. On 13th August, 2013, the Plaintiff's advocates wrote to the Deputy Registrar requesting to be allowed to execute the decree before taxation of costs. According to the record, the request was granted on 15th August, 2013 by the Deputy Registrar.

After receiving the go ahead from the Deputy Registrar to apply for execution before taxation of costs, the Plaintiff's advocates drafted a decree and presented the same to the Deputy Registrar for signing and sealing. The decree was signed and sealed by the Deputy Registrar on 16th August, 2013 a day after the Plaintiff's request to execute the decree before taxation was granted. On 19th August, 2013 the Plaintiff applied for execution and was issued with warrants of attachment and sale on 20th August, 2013.

On 23rd August, 2013, the 1st Defendant applied for stay of execution of the decree pending appeal on among other grounds that the whole execution process was marred by irregularities in that the Plaintiff did not obtain leave of the court to execute the decree before taxation and that the decree was extracted without following the procedure laid down in the Civil Procedure Rules for preparation of decrees which required that the decree be forwarded to the opposite party in draft for approval before the same is presented to the Deputy Registrar for formal approval and sealing.

The 1st Defendant's application for stay of execution was dismissed on 31st March, 2014. In the ruling, the court did not deal with the issues that the 1st Defendant had raised concerning the irregularity of the execution process. The court left the issue to be dealt with in separate proceedings. The court stated as follows:-

“The issues raised as to the regularity or otherwise of the decree and warrants of attachment issued herein are better addressed in separate proceedings.”

What is now before me is the 1st Defendant's application dated 10th April, 2014 in which the 1st Defendant has sought reliefs:

1. THAT owing to exceptional circumstances, this application be certified urgent and be heard ex parte in the first instance.
2. THAT Leave be and is hereby granted to the 1st Defendant/Applicant's Notice of Motion Application dated 10th April, 2014 filed under section 3A and 9A of the Civil Procedure Act, Order 21 Rule 7, Order 49 Rules 1 and , Order 51 Rules 1 of the Civil Procedure Rules to be heard urgently during this High Court's Easter Vacation.
3. THAT there be, ex parte in the first instance, stay of execution of the decree dated 16th August, 2013 and the warrants of attachment issued by this Court on 4th April, 2014 pending the hearing and determination of this application.
4. THAT this Court declare that the decree as drawn dated 16th August, 2013 at the behest of the Plaintiff without having submitted it to the 1st Defendant for its approval or input is contrary to the Judgment and as such null and void.

5. THAT this Court orders that in the premises, since the Decree dated 16th August, 2013 is patently illegal, contrary to the Judgment and Order 20 Rule 7 of the Civil Procedure Rules then the warrants of attachment issued under it are equally illegal and a nullity and ought not to be a foundation for attachment.

6. THAT this Court in terms of Order 20 Rule 7 to approve the decree as shall be drawn by the input of both the advocates of the parties contrary to the current decree that was drawn unilaterally at the bidding of the Plaintiff and which is inconsistent with the judgment.

7. THAT this Court does confirm and declare that the warrants dated 4th April, 2014 are null and void the same having been issued without jurisdiction and in breach of Section 94 of the Civil Procedure Act as this court has not considered it necessary that the decree passed in its original civil jurisdiction should be executed before the amount of costs incurred in the suit can be ascertained by taxation.

8. THAT this Honourable Court does declare that the Deputy Registrar of this court's purported grant of authority to the Plaintiff's advocate's letter dated 13th August, 2013 for the dispensation of taxation of costs at that stage and to allow for execution to proceed against the 1st Defendant prior to taxation of costs was without jurisdiction, a usurpation of powers that the law does not vest in a Deputy Registrar, ultra vires and thus null and void.

9. THAT the warrants of attachment dated 4th April, 2014 issued pursuant to the Deputy Registrar's illegal authorization of execution of decree to proceed in this case before taxation be and are hereby cancelled and no other warrants to be allowed to issue on that authorization of the Deputy Registrar issued on or about 15th August, 2013.

10. THAT such further or other order be made as are just and expedient.

11. THAT the Plaintiff's advocates do bear the costs of this application and the auctioneers costs incidental on the illegal warrants of attachment.

The 1st Defendant's application was brought on the grounds set out on the face thereof and on the supporting affidavit of Gloria Robai Khafafa sworn on 10th April, 2014. In summary, the 1st Defendant has contended that the execution process that was initiated by the Plaintiff through the decree that was issued on 16th August, 2013 was irregular, null and void for the reasons that the decree that was extracted by the Plaintiff was not in accord with the judgment of the court and that the same was not sent to the 1st Defendant's advocates for approval before being signed and sealed by the Deputy Registrar. The 1st Defendant has also contended that the Plaintiff made an application for execution before taxation without leave of the court.

The application was opposed by the Plaintiff through a replying affidavit sworn on 30th April, 2014. In response to the issues raised by the 1st Defendant, the Plaintiff contended that he applied to the Deputy Registrar to dispense with taxation before execution and the application was granted. On the issue of the approval of the decree, the Plaintiff has contended that it is not mandatory for a decree to be forwarded to the opposite party for approval before being sent to the Deputy Registrar for execution and sealing. The Plaintiff contended that it was enough if the decree was drawn in accordance with the judgment. The Plaintiff has contended that the decree complained of was drawn in accordance with the judgment of the court and as such the 1st Defendant was not prejudiced by the fact that the same was not sent to its advocates for approval.

The application was argued before me on 25th September, 2017. The 1st Defendant's advocate submitted that the whole execution process was marred with irregularities. The 1st Defendant urged the court to set aside the decree and recall the warrants of attachment and sale so that the Plaintiff may start the execution process afresh. In reply, the Plaintiff's advocate submitted that the decree complained of was drawn in accordance with the judgment of the court and that the approval of the decree by the opposite party was not mandatory. The Plaintiff urged the court to disallow the application.

I have considered the 1st Defendant's application together with the affidavit filed in support thereof. I have also considered the affidavit in reply to the application and the submission of counsel. The facts giving rise to the present application are not in dispute. It is not disputed that the court delivered judgment in favour of the Plaintiff on 1st August, 2013. It is also not in dispute that the Plaintiff's advocates extracted a decree from the said judgment and presented the same to the Deputy Registrar for signing and sealing. It is also not disputed that the decree that was presented by the Plaintiff to the Deputy Registrar was not forwarded to the 1st Defendant's advocates for approval. It is also not disputed that the said decree was signed and sealed by the Deputy Registrar lack of approval by the 1st Defendant's advocates notwithstanding. It is also not disputed that the Plaintiff made an application for execution before taxation of his costs and that he did not obtain leave of the court for that purpose having been allowed to do so by the Deputy Registrar.

What I need to determine is the effect of the Plaintiff's failure to have the decree approved by the 1st Defendant's advocates and to obtain leave of the court before commencing execution before taxation of costs. Finally, I need to consider whether the 1st Defendant is entitled to the reliefs sought.

Section 34(1) of the Civil Procedure Rules provides as follows:-

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.”

I am satisfied that the 1st Defendants' application is properly before me. Order 21 Rule (8) (2) of the Civil Procedure Rules provides that any party in a suit may prepare a draft decree and present it to the other party for approval with or without amendments or to reject it. Order 21 Rule 8(3) of the Civil Procedure Rules provides that if the party to whom a draft decree has been sent for approval does not indicate whether he agrees with the draft decree or not within 7 days, the party who has drafted the decree shall notify the Deputy Registrar of that position and if the Deputy Registrar is satisfied that the decree is drawn in accordance with the judgment, he shall sign and seal the same. This procedure was not followed in this particular case. I am not in agreement with the Plaintiff that the procedure set out in Order 21 Rule 8 of the Civil Procedure Rules for the preparation of decrees and orders is discretionary. In my view the rule was meant to ensure fair play in the preparation of the ultimate document that contains the binding and executable decision of the court. It was also meant to prevent disputes over the import of court decisions. The rule provides an inbuilt procedure for determining such disputes. I am of the considered view that the Deputy Registrar has no power to sign and seal a decree which has been drafted by a party and has not been sent to the other party for approval. A decree signed and sealed without following the procedure set out in Order 21 Rule 8 of the Civil Procedure Rules is in my view a nullity and the same applies to all other proceedings undertaken on the strength of such a decree.

I am in agreement with the 1st Defendant that the decree that was issued herein on 16th August, 2013 was not in accordance with the judgment of the court. The errors in the decree are apparent on the face thereof. It is also clear that the interest payable on the amount that was awarded for loss of profits is inflated. The calculation of interest under that item is wrong. The aggregate sum of Kshs.13,918,333.33 indicated as loss of profits for 278 months and 11 days cannot all attract interest from the date of filing suit on 28th May, 1990 since the amount was accruing monthly. On my estimate, the Plaintiff has inflated interest under that item by several millions.

In the case of Highway Furniture Mart Limited Vs. Permanent Secretary Office of the President & Another (2006) eKLR the court while commenting on Order XX Rule (6) and (7) of the Old Civil Procedure Rules which has been reproduced in Order 21 rules 7 and 8 of the current Civil Procedure Rules stated as follows;

“By Order XX Rule 6(1) the decree should agree with the Judgment and by order XX Rule 7, in case of dispute the decree is settled by a Judge before it is issued by the court. A decree which is not in conformity with the judgment is liable to be reversed and set aside for a party to the suit cannot suffer because of the errors committed by the court. The court would, however be factus officio if the decree conforms with the judgment, which is not the case here. The decree in this case was in our view a nullity as it included a very large claim of over Kshs.30 million which was not awarded in the judgment of the court.”

Order 22 Rule 7 (2) of the Civil Procedure Rule provides for the particulars that must be contained in an application for execution. One of the particulars that must be provided by a decree holder in an application for execution is the amount of costs awarded if any. This means that a decree holder cannot apply for execution until the costs have been ascertained. There is no doubt from the material on record that the Plaintiff was aware of this requirement. Section 94 of the Civil Procedure Act provides that a decree can only be executed before the costs of the suit has been ascertained with leave of the court. This position was confirmed in the Court of Appeal case of Bamburi Portland Cement Co. Ltd. -Vs- Imrani Chandhai Abdulhusein, Mombasa Court of Appeal Civil Appeal No. 83 of 1995 that was cited by the 1st Defendant in its application. The Plaintiff did not obtain the leave of the court to file an application for execution before taxation. The Deputy Registrar is not the High Court envisaged under Section 94 of the Civil Procedure Act. The purported consent that was granted by the Deputy Registrar to the Plaintiff to apply for execution before taxation on an application the Plaintiff had made by way of a letter was granted without jurisdiction and was in itself a nullity. In the court of Appeal Case of Kabitao Karanja vs. Attorney General, Nyeri Civil Appeal No. 310 of 1997, the court stated that;

“Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order.”

It follows from the foregoing that the application for execution that was made by the plaintiff without leave of the court and the warrants of attachment that were issued by the court were all irregular, null and void.

In the final analysis, I am satisfied that the 1st Defendant's application dated 10th April, 2014 has merit. In the case of Highway Furniture Mart Ltd. vs. Permanent Secretary Office of the President & another (Supra), the court stated as follows;

“The superior court had a duty to see that the appellant only recovered what it was entitled to under the judgment and had jurisdiction to set aside the decree which was a nullity ex debitojustitiae. Moreover, the superior court had inherent equitable jurisdiction to prevent the appellant from unjustly enriching itself at the great expense of the respondent and from the public.”

I have said enough to show that the orders sought in the Notice of Motion dated 10th April, 2014 are for granting. The application is allowed in terms of prayers 4, 5, 6, 7, 8 and 9 thereof. The Plaintiff shall start a fresh the process of preparing the decree in accordance with Order 21 Rule 8 of the Civil Procedure Rules. The plaintiff shall also pay the costs of the application and the auctioneers costs incidental to the warrants that were issued irregularly herein.

Delivered and Dated this 19th Day of April, 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Ms. Kariuki Owesi for the 1st Defendant

No appearance for the 2nd Defendant

Mr. Waweru Court Assistant