



**Malde v Mutsimoto Motor Company Ltd (Cause 19 of 2020)
[2023] KEELRC 593 (KLR) (14 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 593 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 19 OF 2020
HS WASILWA, J
MARCH 14, 2023**

BETWEEN

RASHMI MALDE CLAIMANT

AND

MUTSIMOTO MOTOR COMPANY LTD RESPONDENT

RULING

1. This Ruling is in respect Respondent's Notice of preliminary objection dated on the September 30, 2022 raised in respect of the Claimant's Bill of costs. The grounds of the Preliminary objections were as follows; -
 1. That the claimant's party and party Bill of costs is fatally defective as it offends the mandatory provisions of Section 94 of the Civil Procedure Act and Rule 32(2) of the Employment and Labour Relations Court Rules.
 2. That the claimant proceeded to extract decree and execute it without leave of the Court in contravention of Section 94 of the Civil Procedure Act. The said Execution was declared irregular and in contravention of the law pursuant to the ruling delivered by Hon Justice Hellen Wasilwa on June 14, 2022.
 3. That the claimant has waived her right to costs by reason of having executed the decree without taxing costs.
2. In response to the Preliminary Objection, the Claimant filed a response to the Preliminary Objection dated October 4, 2022 stating that the Court does not have the mandate or power to make a determination on the right of the claimant to have her costs taxed before this Court and that the power of the Court rests with only taxing and ascertaining arithmetically, the costs payable.



3. He stated that the issue of the right of the claimant to have her costs taxed was ventilated by the Applicant by their application dated February 1, 2022, which court returned a verdict that costs be taxed and interest ascertained. He added that the application herein is used as a decoy by the Respondent to delay the payment of what is due to the claimant.
4. The preliminary objection was disposed of by written submissions with the applicant filing on the October 25, 2022 and the Claimant/ Respondent on the November 9, 2022.

Applicant's Submissions.

5. The Applicant submitted on two issues; whether the Preliminary Objection is merited and who should bear costs of the Preliminary Objection.
6. On the first issue it was submitted that Preliminary objection concerns itself with pure points of law as wa held in the locus classicus case if *Mukhisa Biscuit Manufacturing Co Ltd V West End Distributors* (1969) E A 696.
7. on the above case law, the Applicant submitted that Rule 31 and 32 of the *Employment and Labour Relations Court (Procedure) Rules* provide for execution of Orders and decree in accordance with execution procedure provided for under the *Civil Procedure Rules*. He argued that judgement was delivered by the Court on December 16, 2021 in favour of the claimant, however the claimant did not follow the rules on extraction of decree under Order 21 Rule 8 of the Civil Procedure Rules. That warrants of attachment were obtained by the claimant on January 25, 2021 before costs were ascertained in line with section 94 of the *Civil Procedure Act*.
8. It was submitted that section 94 of the *Civil Procedure Act* provides that if a part intends to execute a decree or an orders before costs are taxed or agreed upon, then they ought to seek leave of Court. Without such leave, the applicant submitted that the applicant waived their right to costs. In this they relied on the case of *Bamburi Portland Cement Company Limited V Imranali Chandbhai Abdulbussein* [1996] eklr where the Court held that; -

“I would like to end by making some pertinent observations as regards the execution of the decree. 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 inter partes. Order 21 r 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. I concur in the orders proposed by my learned brother Omolo, JA.”

9. They also relied on the case of *Vincent Edward Njoroge V Kenol Kobil Limited* [2018] eklr where the Court had this to say;

“Now in respect of the Application by the Applicants to now proceed with taxation of costs vide their Application dated June 22, 2018, the position of the law is as provided for under Section 94 of the Civil Procedure Act. Section 94 of Civil Procedure Act envisages that if a Decree Holder wishes to proceed with execution before taxation, leave of Court should be sought. Where in any case the Decree Holder proceeds with execution without leave of Court, he is in effect intimating that he is waiving his right to costs. This was the finding of the Court in the cited cases (see Bullion Bank Limited vs James Kinyanjui and Another



2006) eKLR, Quality Centre Limited vs USL (T) Limited (formerly known as Uchumi Supermarkets (Tanzania) Limited and Another (2017) eKLR and African Committee Services Limited vs Kenya Civil Aviation Authority and 2 Others (2014) eKLR. That being the position of the law, the Decree Holder waived his own rights to costs and therefore his Application to proceed to tax his costs cannot be allowed. If this Court were to allow the said Application, it will be encouraging 2 entries of execution which is vexing to the Judgment Debtor and thus an abuse of the Court process. This in my view settles the issues pending before me and I decline to allow the Application to allow taxation of costs to proceed.”

10. It was submitted that the mischief which was being cured by section 94 of the *Civil Procedure Act*, is the danger a judgment debtor will be exposed to multiple execution proceedings as was stated in *Kartar Singh Dhupar & Co Ltd V Lianard Holdings Limited* [2017] eKLR and the case of *African Commuter Services Ltd V Kenya Civil Aviation Authority & 2 others* [2014] eKLR where the Court held that:-

“My view of the matter is, the mischief sought to be addressed by Section 94 was to protect a judgment debtor from suffering multiple executions in respect of the same suit; i.e one in respect of the principal sum and the other for the costs after ascertainment. In this regard, if it is shown to the satisfaction of the court that the judgment creditor has foregone or waived costs and that the execution is for the principal sum and interest only, there is nothing in law, in my view, that bars the court to record such a fact and make an order accordingly.”

11. Based on the above, the applicant submitted that the claimant executed the decree and obtained the entire decretal sum of Kshs 670,000, and since the execution were partly done without first ascertaining costs, the right of the claimant to costs were duly waived and he cannot be allowed to have a second bite of the jerry. He prayed for the Preliminary Objection to be allowed with costs to the Applicant.

Respondent’s Submissions.

12. The Respondent submitted on two issues; whether the Preliminary objection was made in bad faith and whether the same is merited.
13. On the first issue, it was submitted that preliminary objection was raised late in the day because the Bill of costs in which the preliminary objection was raised on, is dated January 10, 2022 and the Respondent waited until September 30, 2022, a day before the Bill of costs came for taxation that he raised the Preliminary Objection. He argued that the Applicant has raised this Preliminary Objection to stop Taxation of the Bill of costs which he is entitled to. He argued further that the chronology of the events that led to the filling of this suit is a clear testament of the applicant’s hesitancy on paying the claimant what is due to him
14. On whether the Preliminary Objection is merited, the Respondent submitted that the issues raised in the Preliminary Objection are similar to those raised in the application of February 1, 2022 and that the Applicant has not yet paid interest as intimated in its application. It was argued that the applicant had initially made an application seeking for stay of execution which was granted before execution was completed as such no payment was made pursuant to the Proclamation. He argued further that, the Preliminary objection in so far as it argues the application of Section 94 of the *Civil Procedure Act* on this matter is res judicata.
15. It was submitted that the execution proceedings which the Applicant is relying on heavily in seeking to have the Bill of Costs dismissed, was declared by this Court to have been irregular and in fact that the decretal sum was not paid as a result of the said Execution proceedings because, the Court had granted stay of execution and within that period, the Applicant paid the decretal sum. He argued thus that



- since the execution proceedings were declared illegal, the same was void and the Applicant cannot rely on them to object to the taxation of the Claimant/ Respondent's Bill of costs.
16. The Respondent submitted further that the claimant has not waived his right to costs as is required under the Act. He then urged this Court to be persuaded by their argument and dismiss the Preliminary Objection. He added that the case of *Bamburi Portland Cement Company Limited V Imranali Chandbhai Abdulbussein* [1996] eklr relied upon by the Applicant can be qualified from the issues raised by the Applicant in the Preliminary object as such unrelated to the matter at hand.
 17. I have examined all averments and submissions of the parties herein.
 18. Vide an application dated February 1, 2022, this court ordered stay of execution in respect of execution that was set to proceed indicating that it was irregular.
 19. The court further directed vide court's ruling of June 14, 2022 that issues of interest on decretal sum also needed to be determined in totality before proper execution and payment of any monies owing.
 20. The ruling of June 14, 2022 in effect stayed execution. In the circumstances, no execution proceeded and the effect was that the claimant reverted to where she was before execution was initiated.
 21. By virtue of this position then, the claimant respondent herein was free to commence fresh execution proceedings and even proceed to tax their bill of costs before proceeding further.
 22. The contention by the applicant is that the taxation that the claimant has initiated was waived by the process of execution.
 23. That would indeed have been true had the applicant not applied to arrest execution which this court allowed.
 24. Since no other execution has proceeded, then the respondent claimant is still free to tax their bill of costs before the DR and proceed to execute for any monies owing as the case may be.
 25. It is my finding that the preliminary objection then lacks merit as no execution has proceeded since stayed by court.
 26. Costs of this application will be for the respondents herein.

RULING DELIVERED VIRTUALLY THIS 14TH DAY OF MARCH, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Maragia for claimant – present

Konosi for Respondent – present

Court Assistant - Mathew

