



**Katendeigwa v D.Light Limited (Employment and Labour Relations Cause
770 of 2019) [2023] KEELRC 2606 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2606 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 770 OF 2019
BOM MANANI, J
OCTOBER 26, 2023**

BETWEEN

GEORGE KATENDEIGWA CLAIMANT

AND

D.LIGHT LIMITED RESPONDENT

RULING

Background

1. The claimant has a judgment in his favour against the respondent which was delivered on June 22, 2023. In a bid to execute the said judgment, the claimant moved the court by way of an application dated October 9, 2023 for Garnishee orders.
2. The application was brought under certificate of urgency and heard ex-parte in the first instance. The court proceeded to issue an order nisi which was extracted and served on the respondent and the Garnishee, Stanbic Bank Ltd.
3. Upon service of the order, the respondent filed the application dated October 16, 2023. The application challenges the competence of the Garnishee proceedings.
4. The thrust of the application is straight forward. According to the respondent, the claimant commenced execution of the court's decree before costs of the case had been ascertained and without leave of the court. It is the Respondent's contention that the aforesaid execution process violated section 94 of the *Civil Procedure Act* which requires that execution of a decree before ascertainment of costs be done only with the court's leave.
5. The Claimant has opposed the application. According to him, section 94 of the *Civil Procedure Act* does not outlaw execution of a decree before ascertainment of costs. On the contrary, it (the provision) empowers the court to allow execution of part of such decree that does not relate to costs.



6. The claimant contends that he has a valid decree against the respondent. It is his case that the decree has not been satisfied. The claimant avers that the respondent has neither applied to set aside the decree nor appealed against it. Therefore, the respondent has a legal obligation to settle the said decree.
7. The claimant contends that he wrote to the respondent to pay the amount in the decree but got no favourable response. In the premises, he was entitled to invoke the compulsive methods provided in law to enforce payment.
8. The claimant avers that it is within his knowledge that the respondent maintains an account at Stanbic Bank. Therefore, he applied for Garnishee orders to attach the funds in the said account to satisfy the decree.
9. The claimant contends that under Order 23 of the *Civil Procedure Rules*, all that an applicant is required to demonstrate for the court to issue a Garnishee Order is that he has a valid decree against a Judgment Debtor which remains unsatisfied and that a third party is holding funds on behalf of the Judgment Debtor which can satisfy the decree either wholly or in part. Once these conditions are met, the court which issued the decree may issue a Garnishee Order to attach the funds that are held by the third party.
10. In the instant case, the claimant contends that he has a valid decree against the respondent. He further contends that the respondent has an account with Stanbic Bank where the claimant believes that there are funds that can satisfy the decree. Therefore, he meets the conditions for the issuance of a Garnishee Order under Order 23 of the *Civil Procedure Rules*.

Analysis

11. Section 94 of the *Civil Procedure Act* provides as follows: -

“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.”
12. The above provision applies to execution proceedings before the Employment and Labour Relations Court by virtue of rule 32(2) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 which provides as follows: -

“Rules on execution of an order or decree shall be enforceable in accordance Civil Procedure Rules.”
13. There is no doubt that section 94 of the *Civil Procedure Act* contemplates a scenario where the court’s decree may be executed without ascertainment of costs. The court has discretion to allow such execution process.
14. However, it appears to me that the law requires such execution to be undertaken only with the leave of the court. The question that requires to be addressed is how this leave should be sought.
15. Case law indicates that the application for leave may be lodged either orally or in writing. The Decree Holder may orally apply for the order at the point of delivery of judgment. However, where the application is made thereafter, it must be lodged in writing.



16. Case law also indicates that where the application is lodged after the date of delivery of judgment, it must be served on the Judgment Debtor. According to precedent, this is intended to give the Judgment Debtor an opportunity to ventilate on the request.
17. The Court of Appeal in *Bamburi Portland Cement Company Limited v Imranali Chandbbai Abdulbussein* [1996] eKLR expressed itself on the matter 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 inter parties.”
18. This decision was followed by the Court of Appeal in *Lakeland Motors Ltd v Sembi* (1998) [1998] eKLR, where the learned Judges observed as follow: -

“The exercise of judicial discretion by the superior court under section 94 of the Act necessarily requires that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation. This, we think, is the spirit of the observation of Shah, J.A., with which we agree, in *Bamburi Portland Cement Company Limited v. Imranali Chandbbai Abdulbussein*, Civil Appeal No 83 of 1995 (unreported) in regard to the application of section 94 of the Act.”
19. The aforesaid decisions were later followed by the High Court in *Kartar Singh Dhupar & Co. Ltd v Lianard Holdings Limited* [2017] eKLR where the court observed as follows: -

“I entirely concur with this observation of the court and the legal principles in the above referred to authorities. That to execute a decree before costs are ascertained the leave of the Court is required under section 94 of the *Civil Procedure Act*. Indeed section 94 of the *Civil Procedure Act* being a statutory provision overrides the provisions of Order 36 referred to herein. In this case there is no evidence that such leave was ever sought and granted in this matter.”
20. In the instant case, the decree that is sought to be executed was issued pursuant to the court’s judgment that was delivered on June 22, 2023. The court record shows that after the date of delivery of the judgment, no other proceedings were taken in the cause until September 20, 2023 when the claimant filed the Bill of Costs and listed it for taxation on November 6, 2023.
21. The record does not show that the claimant applied for leave to execute the court’s decree before taxation of costs that is scheduled for November 6, 2023. There is no evidence that the court issued an order for leave to execute the decree before taxation.
22. Whereas it is true that the court has discretion to order execution of its judgment before ascertainment of costs, it cannot do so suo moto. The Decree Holder must move it.
23. According to the decisions that I have referred to earlier on in this ruling, such request must be made in writing if it was not lodged at the time that the judgment was delivered. Further, the application must be served on the Judgment Debtor.
24. This procedure has not been followed in the impugned execution proceedings before me. As indicated earlier, after the court delivered its judgment, the only other thing that the claimant did in the cause



before he filed the Garnishee application was to lodge the Bill of Costs and set it down for taxation on November 6, 2023.

25. In *James G. K. Njoroge t/a Baraka Tools & Hardware v Kenya Cement Marketing Co Ltd* [2009] eKLR, the court held that Garnishee proceedings are execution proceedings. As such, they are subject to section 94 of the *Civil Procedure Act*. The court held that Garnishee proceedings which are commenced before ascertainment of costs and without leave of the court are premature. The learned Judge observed as follows:-

“Are the present garnishee proceedings premature and invalid for want of leave under section 94 of the Act?”

Under section 94 of the Act, a decree-holder in the High Court is not entitled to execute a decree passed in exercise of the court’s original civil jurisdiction before ascertainment of costs of the suit by taxation, unless the court gives leave for such execution. Garnishee proceedings are in essence special proceedings in execution of decree; but they are execution of decree proceedings nevertheless. There cannot issue any garnishee proceedings unless there is a decree in place capable of being executed. Order 22 of the Rules complements rather than ousts Order 21 in matters of attachment of debts in execution of decree.

I have perused the court record herein, including the ruling of Kubo, J of September 3, 2008 upon a preliminary objection to the present application. I cannot find in that ruling, as urged for the Decree-Holder, any indication that the issue of section 94 of the Act was dealt with in that ruling. The Decree-Holder has not urged that he has taxed his costs or obtained leave of the court under section 94 of the Act to execute the decree before taxation of costs. The execution proceedings by way of the present garnishee proceedings are clearly premature.”

26. This is the unfortunate position which the Decree Holder in the instant case finds himself in. It is true that he has a decree which the Judgment Debtor is yet to satisfy. It is also true that the Judgment Debtor has neither applied to set aside the decree nor appealed against it. Yet, there is no evidence that the claimant obtained leave to execute the decree before ascertainment of costs. As such, the Garnishee proceedings that are pending in the cause are premature and therefore invalid. It is so declared.
27. The court acknowledges the right of the claimant to enforce the decree. However, he must do so in accordance with the law. He has to either await ascertainment of costs in the cause or apply, by way of a written application, for leave to execute before ascertainment of costs. Until this is done, any attempt at executing the decree will be irregular.

Determination

28. Having regard to the foregoing, I reach the conclusion that the Garnishee proceedings in the cause were commenced prematurely.
29. As a result, I make the following orders:-
- a. The Garnishee proceedings commenced through the application dated October 9, 2023 are premature and therefore invalid.
 - b. The order of Garnishee Nisi that was issued on October 11, 2023 is thus vacated.
 - c. There is no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 26TH DAY OF OCTOBER, 2023.



B. O. M. MANANI

JUDGE

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M Manani

