



**Malde v Mutsimoto Motors Company Ltd (Cause 19 of 2020)  
[2022] KEELRC 88 (KLR) (14 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 88 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 19 OF 2020  
HS WASILWA, J  
JUNE 14, 2022**

**BETWEEN**

**RASHMI MALDE ..... CLAIMANT**

**AND**

**MUTSIMOTO MOTORS COMPANY LTD ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Respondent/applicant's application dated 1<sup>st</sup> February, 2022, filed under certificate of urgency on even date via the firm of Konosi and Company advocates pursuant to Section 3 of the *Employment and Labour Relations Court Act*, sections 1A, 1B and 3A of the *Civil Procedure Act*, Rule 17 and 32 of the *Employment and Labour Relation Court Procedure Rules*, 2016 and all other enabling provisions seeking the following orders;
  - 1) Spent.
  - 2) That this Honourable Court be pleased to stay the execution of the decree dated 16<sup>th</sup> December, 2021 and issued on 14<sup>th</sup> January, 2022 pending the taxation of costs payable to the Claimant.
  - 3) That this Honourable Court be pleased to stay the execution of the decree dated 16<sup>th</sup> December, 2021 and issued on the 14<sup>th</sup> January, 2022 pending the hearing and determination of this Application.
  - 4) That this honorable Court be pleased to issue such other Order or further directions as it may deem fit and necessary for the ends of justice to be met.
  - 5) That the costs of the Application and the Auctioneers charges be paid personally by the Claimant's Advocates.
2. The application is supported by the followings grounds; -



- (a) That this Court delivered judgement on the 16<sup>th</sup> December, 2021 in favour of the Claimant. Subsequently and pursuant to the request of the Claimant, the decree was extracted on the 14<sup>th</sup> January, 2022, without following the procedure of extraction of decrees and Orders at Order 21 Rule 8 of the Civil Procedure Rules.
  - (b) Warrants of attachment were obtained by the Claimant on the 25<sup>th</sup> January, 2020 without ascertaining costs as per section 94 of the Civil Procedure Act.
  - (c) Pursuant to the said warrants which the applicant termed as illegal, Hegeons Auctioneers proclaimed the Respondent's Properties on the 27<sup>th</sup> January, 2022 and is to be removed for sale on the 8<sup>th</sup> February, 2022, unless the stay Orders are granted.
  - (d) That the Applicant is apprehensive that the auctioneer will proceed to sell its properties to their detriment. Further that the Auctioneers are now demanding for their cost of Kshs 170,240 which amount is unjustified in the circumstances.
  - (e) It is averred that the Applicant's Advocates on the 31<sup>st</sup> January, 2022 wrote a letter to the Claimant informing them that the warrant were illegal and demanding for withdrawal of the same which was never done.
3. This Application was supported by the affidavit of Ken Korir, the Respondent's Human Resource manager, deposed upon on the 1<sup>st</sup> February, 2022 which basically reiterates the grounds of the Application.
  4. In opposing the application, the Claimant/ Respondent herein filed undated replying Affidavit on the 21<sup>st</sup> February, 2022 and stated that as much as the drawn decree did not exhibit a draft, there is nothing under Order 21 Rule 8 of the Civil Procedure Rules that makes such a decree unlawful or illegal. Furthermore, that the Court was guided by Order 21 Rule 8(7) of the Civil Procedure rules to confirm the Decree as it was consistent with the judgement of the Court, in any case that the Applicant never raised any concerns on the decree or faulted the same as such the issues raised herein are without any basis.
  5. On the issue regarding warrants of attachment obtained in violated of section 94 of the Civil Procedure Act, the Claimant stated that the Applicant herein wrongly interpreted the said provision of the law and avers that section 94 of he of the Civil Procedure Act condones executing a Decree even before the ascertainment of costs save for instances when costs are to be executed and in any event the said section used the word "May" which illustrate that the same was not compulsory. He therefore urged this Court to direct the Applicant to deposit the entire decretal sum and interest as they await execution of costs.
  6. On the issue of loss and damage as a result of removal of property and payment of auctioneers charges, the Respondent avers that the instruction of an auctioneer to executive the decree was based on the actions of the Applicant refusing to pay the decree when they were fully aware of the same. It was also stated that the Applicant has not stated that the auctioneer's costs are excessive and unascertained as such that the costs are due and payable in accordance with the law and its only proper that the Applicant be compelled to pay the costs of the Auctioneers as well.
  7. The Respondent also faulted the applicant application and stated that the affiant who swore the supporting affidavit has not exhibited any authority from the company to show that he has powers to represent the Applicant and therefore that the Respondent is in breach of Order 4 Rule 1(4) & Order 9 rule 2(c) of the civil procedure Rules, Section 19(a) of the Company's Act and that this Court should struck out this Application for flouting mandatory procedure of the law.



8. On the letter of 31<sup>st</sup> January, 2022 not getting a response, the Respondent avers that the Respondent letter was replied to on the 2<sup>nd</sup> February, 2022 and instead of further dealing with the issue the Applicant rushed to this Court to seek restraining Orders.
9. On the issue of costs, the Respondent avers that it is the Applicant who has been in default of payment from the date of judgement to date and therefore are the ones that ought to shoulder costs.
10. It is the Respondent's case that the Applicant has not objected to the decretal sum, interest therein, further that the Applicant on the 18<sup>th</sup> February, 2022 forwarded a cheque of Kshs. 670,000 to the Respondent's Advocates for payment of decretal sum only without interest and costs. The Respondent added that as much as the decretal sum was paid, they Applicant is not absolved from paying the auctioneers fees.
11. The Applicant responded to the replying Affidavit and filed a Supplementary Affidavit deposed upon Ken Korir, the Respondent's Human Resource manager, on the 21<sup>st</sup> February, 2022 and avers that the Respondent has been paid all the decretal sum of Kshs. 670,000 as such that the Respondent no longer owes the Claimant.
12. This Application was disposed by way of written submissions.

### **Applicant's Submissions.**

13. The Applicant submitted that execution and attachment process was irregular and unlawful since the Respondent failed to follow due process in both extraction of the decree and attachments. It was argued that section 94 of the *Civil Procedure Act* came to place to cure instances like this were the Respondent partly execute decree before costs are ascertained and probably execute costs later after taxation subjecting a party to double execution proceedings. In support of this argument the Applicant relied on the case of *Musa Mohamed Lalevi & 2 others v East Africa Portland Cement Company Limited* [2021] eKLR and the case of *Kartar Singh Dbupar & Co Limited v Lianard Holdings Limited* [2017] eKLR.
14. The Applicant also submitted that the Respondent ought to bear the Auctioneers costs because they are the ones that irregularly and unprocedurally obtained execution documents and went ahead to execute in total disregard to the law.
15. It was submitted in conclusion that since the process of extraction of decree and execution was unlawful, the Respondent ought to pay for the costs of this Application.

### **Respondent's Submissions**

16. The Respondent submitted that the Applicant has paid the decretal sum only without interest when clause 4 of the agreement forming the Court Judgement provides for interest that should accrue from the date the said money fell due and not from the date of judgement.
17. The Respondent also submitted with regard to the auctioneer's charges and argued that the auctioneer's charges came about due to default by the Applicant who failed to pay the decretal sum when the same was due and not objected to.
18. It was further submitted that the issue of illegality of extraction of Decree as per Order 21 Rule 8 of the *Civil Procedure Rules* has been overtaken by events more especially when the Applicant paid the decretal sum after filling this Application.



19. The Respondent submitted in conclusion that the Applicant is liable to pay the auctioneers fees and interest earned by the decretal sum together with costs as contemplated in the judgement which this Court should compel them to pay.
20. I have examined the averments and submissions of the parties herein. The applicant have faulted the process of execution of the decree indicating that the decree was extracted in contravention of orders 21 Rule 8 of the CPR.
21. Order 21 Rule 8 of the CPR states as follows;

“ 8. Preparation and dating of decrees and orders [Order 21, rule 8.]

- (1) A decree shall bear the date of the day on which the judgment was delivered.
  - (2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
  - (3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
  - (4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.
  - (5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate Court and reference to the registrar and judge in the subrules shall refer to magistrate.
  - (6) Any order, whether in the High Court or in a subordinate Court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.
  - (7) Nothing in this rule shall limit the power of the Court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the Court to approve a draft order at the time of making the order.”
22. Rules 31 & 32 of the ELRC (Procedure) Rules 2016 on the other hand state as follows;-

- “ 31. The Registrar shall draw, seal and issue an order or decree of the Court.
  - (1) An order or decree shall be drawn in accordance with the decision of the Court and shall specify clearly in paragraphs the relief sought and granted, any other determination and costs, if any.
  - (2)
  - (3) An order or a decree shall specify the date on which the judgment was delivered.



32. The Registrar shall issue an order in execution of a decree.”  
(1)
23. The main contention by the applicant is that the Respondent Claimant proceeded to extract the decree and execute it without leave of the Court in contravention of the law in particular Section 94 of the CPA which states as follows;-
- “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.”
24. My understanding of this provision is that since taxation of costs has not been done in this case, leave of the Court to execute the decree must be sought before this Court.
25. The Claimant never applied to execute the decree at the time the Judgment was pronounced and neither has an application been made before this Court to allow execution before taxation.
26. The Claimant having proceeded as above, proceeded irregularly and in contravention of the law.
27. The Respondents having proceeded to execute the decree irregularly, stay of execution is granted as prayed.
28. As concerns auctioneers costs, I direct that these be shared equally between the parties since the Respondent applicants were still owing the Claimant at the time of attachment and the Claimant had proceeded irregularly.
29. Matter of interest on the decretal sum should also be determined in totality for proper execution and payment of any monies owing.
30. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF JUNE, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Maragia for the Claimant – present

Ekesa holding brief for Konosi for the Respondent – present

Court Assistant - Fred

