



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.235 OF 2016**

**RUTH WAIRIMU MUGAI .....CLAIMANT**

**VERSUS**

**LEONARD GITHAIGA KAMAU T/A GITUAMBA HOTEL..... RESPONDENT**

**RULING**

The respondent Leonard Githaiga Kamau t/a Githuamba Hotel by application dated 15<sup>th</sup> August, 2019 is seeking for stay of execution of the warrants of attachment issued on 5<sup>th</sup> August, 2019 to M/s Director O Auctioneers and that such warrants were illegal and shall be recalled on the grounds that the claimant unprocedurally and irregularly has taken out the warrants of attachment and sale in execution of the orders issue don 5<sup>th</sup> August, 2019 whereas there is no bill of costs presented and or filed for taxation by the claimant. The respondent was not served with any bill of costs for taxation and which remains not assessed and the warrants of attachment issued to the auctioneers is illegal. No certificate of costs has been issued by the Deputy Registrar.

The application is supported by the affidavit of Leonard Githaiga Kamau who avers that he is the respondent and learnt that the Deputy Registrar Nakuru issued warrants of attachment to M/s Direct O Auctioneers allowing the proclamation of the respondents' property without having addressed the issue of costs between the parties which is irregular and illegal and the application filed should be allowed.

The claimant in reply filed Replying Affidavit and avers that the application by the respondent is in abuse of court process. Upon filing suit on 16<sup>th</sup> June, 2017 the respondent were served entered appearance on 30<sup>th</sup> November, 2017 but failed to file any defence. upon hearing on 31<sup>st</sup> July, 2019 the respondent's representative was in court and upon the claimant closing her case applied to file defence which

was declined on good basis. Judgement October, 2018. The court made various assessed by the labour officer.

was entered for the claimant on 11<sup>th</sup> award and directed underpayments be

On 20<sup>th</sup> February, 2019 the labour officer field the report which was then adopted by the court and on this basis the warrants of attachment were issued.

The respondents continued to absent themselves from court despite being served and returns filed.

Under section 94 of the Civil Procedure Act the court can on good basis allow for execution before costs are assessed. The court has discretion. The claimant should not be denied the fruits of judgement.

Both parties field written submissions.

It is not contested by the claimant that there is no bill of costs which has been filed or assessed and a certificate of costs issued. What is apparent to the court is that the claimant has since filing her claim been attending court in the absence of the respondent.

As correctly submitted by the claimant, section 94 of the Civil Procedure Act provides that;

***94. 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***

In **Petition No.3 & 4 of 2019 Hosea Sitienei & another versus University of Eldoret & Others** the court held that Section 94 of Civil Procedure Act gives the court discretion to allow execution before taxation. Good reason(s) must be made for the court to allow such process. In **Bamburi Portland Cement Co. Ltd versus Hussein (1995) LLR 1870 (CAK)** the court stated that;

*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. Order 21 Rule 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.*

Without moving the court on good reasons, without obtaining leave to proceed with part execution and before costs can be ascertained in irregular. A Deputy Registrar has no power to waive the requirements of section 94 of the Civil Procedure Act. Any rules of the court which allow such a waiver by the Deputy registrar are subsidiary to the written law and *ultra vires*.

Even where the respondent failed to attend court on several occasions that is not a justifiable ground to circumvent the provisions of section 94 of the Civil Procedure Act. The Warrants of Attachment issued before costs between the parties can be taxed is unlawful.

**Accordingly, Application dated 15<sup>th</sup> August, 2019 is hereby allowed; the warrants of attachment issued to M/S Direct O Auctioneers on 5<sup>th</sup> August, 2019 are hereby found irregular, illegal and thus recalled;**

**The claimant shall meet the costs due to the respondent.**

Delivered at Nakuru this 23<sup>rd</sup> day of January, 2020.

**M. MBARU**

**JUDGE**

In the presence of: .....