



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1167 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 27th September, 2018)

VINCENT EDWARD NJOROGE.....APPLICANT/CLAIMANT

VERSUS

KENOL KOBIL LIMITED.....RESPONDENT

RULING

1. On 17/10/2017, the Parties entered a consent dated 11/10/2017 and filed in Court on 13/10/2017. The Court ordered the matter settled in terms of the said consent. The consent was in the following terms:-

“By Consent”-

1. The Garnishee Order Nisi against the KICB Bank Kenya Limited and Stanbic Bank Kenya, the Garnishees herein issued by this Honourable Court on 2.10.2017 be and are hereby lifted and set aside.

2. The Claimant’s Application dated 2.10.2017 be and is hereby marked as settled”.

2. The Application dated 2.10.2017 which stood settled was the Garnishee Application filed by the Decree Holder herein.

3. Following the above consent, an order was extracted dated 19.10.2017 in terms of the above consent.

4. On 8/2/2018, the Claimant/Applicants filed an Application under Certificate of Urgency indicating that the order issued on 19.10.2017 painted a different picture as to what was agreed upon by the consent dated 11.10.2017 and filed in Court on 13.10.2017. The Applicants contend that the order issued on 19.10.2017 has the effect of the marking the matter as settled yet costs of the suit have not yet been taxed.

5. The Applicants then want this Court to review and/or set aside the order issued on 19.10.2017 marking this matter as settled.

6. The Respondent opposed this Application through their Replying Affidavit. They contend that on 17.10.2017, the consent was adopted as an order of the Court and matter was marked as settled.

7. They aver that the dispute between the Parties was settled on payment of the entire decretal sum to the Claimant and recording of the consent in Court on 19.10.2017.

8. They aver that there are no reasonable grounds to warrant the setting of the order issued on 19.10.2017 which they aver reflects the order made by J. Ndolo on 17.10.2017 and has no errors as alleged.

9. The Respondents oppose the Application and want it dismissed.

10. The Respondents submitted that Section 94 of the Civil Procedure Act Cap 21 Laws of Kenya expressly states 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”.

11. They aver that where a Decree Holder wishes to execute before taxation of costs, leave of Court must be obtained at the time of delivery of Judgement or through a formal Application. They cited **Bullion Bank Limited vs James Kinyanjui and Another (2006) eKLR** and also **Bamburi Portland Cement Company Limited vs Abdul Hussein (1995) LLR 1870 CAK** and aver that the rationale behind this requirement is to enable the Judgement Debtor to be heard before assessment of costs is allowed.

12. In a 3 Judge bench decision of **Lakeland Motors Limited vs Harbhajan Singh Sembi (1998) eKLR**; it was held as follows:-

*“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 CHANDBHAI ABDULHUSSEIN, Civil Appeal No. 83 of 1995 (unreported) in regard to the application of Section 94 of the Act.....”***

13. The Respondent submit that by proceeding to execute before taxation, the Decree Holder waived his right to costs as costs as held in **Quality Centre Limited vs USL (T) Limited (formerly known as Uchumi Supermarkets (Tanzania) Limited and Another (2017) eKLR AND African Commuter Services Limited vs Kenya Civil Aviation Authority and 2 others (2014) eKLR** where the Court opined as follows:-

“Let me now determine the Judgement Creditors Application for leave to execute the Decree given by this Honourable Court on 6th October 2016 and issued on 26th October 2016 before Taxation. This Application finds a home under Section 94 of The Civil Procedure Act:-.....An objective of this requirement is that the Judgment Debtor should not be vexed or burdened by multiple execution. It is stated by Anbalagan Thirumal, in an Affidavit sworn on 2nd December 2016 in support of the Application, that the Applicant has abandoned its Bill of Costs that was to be filed in the original Court. If the Judgement Creditor will not be pressing for Costs that there would be no reason not to grant that order as the Decree as it is now stands is the whole and complete Decree. Costs will never be part of it”

14. The Applicant/Decree Holder insist that they are entitled to costs as costs follow the event.

15. I have considered the averments of both parties plus the submissions filed. I note that the order of this Court by J. Ndolo on 17.10.2017 did not determine the claim. The order was clear that what was determined was the Application dated 2.10.2017 which was the Garnishee Application.

16. That being the case, the order extracted dated 8/2/2018 was erroneous in as far as it stated that the entire claim had been determined when in any case, the issue of costs was pending and had not been determined. That order is therefore erroneous and should be corrected to read the correct position as ordered by J. Ndolo on 17.10.2017.

17. Now in respect of the Application by the Applicants to now proceed with taxation of costs vide their Application dated 22.6.2018, the position of the law is as provided for under Section 94 of the Civil Procedure Act.

18. 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.**

19. 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 Judgement Debtor and thus an abuse of the Court process.

20. This in my view settles the issues pending before me and I decline to allow the Application to allow taxation of costs to proceed.

21. There will be no order as to costs.

Dated and delivered in open Court this 27th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Joba holding brief for Omondi for Claimant – Present

Miss Onyango holding brief for Wetende for Respondent