REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 37 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

JOYCE WAMBUI KARUU....................................CLAIMANT
VERSUS

KENYA NUT COMPANY LIMITED.............RESPONDENT

RULING

The application before me for determination is dated 4th September 2019 and filed under certificate of urgency on the same date. The application seeks the following orders –

1. Spent.

2. Spent.

3. *That there be a stay of execution against the judgment and decree delivered on 26th January, 2018 by this honourable court and/or any further proceedings pending the inter-partes hearing and final determination of this application.*

4. *That an order do issue setting aside and/or vacating the warrants of sale of property issued on 22nd August, 2019 and the proclamation notice issued on 29th August 2019 by*

Bemac Auctioneers at the instance of the Claimant.

5. *That this court be pleased to review and/or set aside the judgment and decree delivered on 26th January 2018 by the Onyango J.*

6. That costs of this application be costs in the cause.

The application is supported by the grounds on the face thereof and affidavit of EZEKIEL OCHIENG, the Legal Officer of the respondent. In both the grounds and affidavit, the respondent/applicant states that the claimant has commenced execution without taxing the bill of costs and without issuing to the respondent a notice to show cause as required under Order 22 Rule 18(1)(a) of the Civil Procedure Rules and the execution is thus irregular. Further, that the claimant did not prepare the decree in accordance with the Civil Procedure Rules.

The claimant/decree holder opposes the application and filed a replying affidavit of LOURINE L. OCHOGO, Counsel handling the matter from the firm of Gakoi Maina and Company Advocate on behalf of the claimant. She deposes that the application is frivolous, vexatious and an abuse of court process. That judgment and decree was entered against the respondent/applicant on 26th January 2018 in favour of the claimant in the sum of Kshs.368,976. That the claimant's Counsel wrote to the respondent to make good the decretal sum so the respondent is aware of the judgment. That the draft decree was prepared by Counsel for the claimant and forwarded to the respondent's advocates to approve but there was no response hence on 6th May 2019 Counsel for the claimant sent the draft decree to the Deputy Registrar. The deponent states that the warrants of attachment and execution by Bemac Auctioneers is regular. That the application is intended to deny the claimant the fruits of her judgment, that the court should not salvage a litigant who willingly sleeps on his rights, that equity aids the vigilant and not the indolent and that litigation must come to an end. The claimant prays that the application be dismissed.

The application was disposed of by way of written submissions.

In its submissions dated 29th January 2020 and filled on 30th January 2020, the applicant submits that taxation of bill of costs is a prerequisite to execution as provided under Section 94 of the Civil Procedure Act as read with Rule 32(2) of the Employment and Labour Relations Court

(Procedure) Rules 2016. That where a party seeks to execute before taxation, the party must seek leave of the court. The applicant relies on the decision in **Bullion Bank Limited v James Kinyanjui & Another [2006] eKLR** where the court affirmed the said principle when it stated;

> *"...Section 94 of the Civil Procedure Act is as follows:-*
>
> > *"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."*
> >
> > *It is clear that before execution proceeds in the absence of taxation the court ought to give leave, for the same to proceed. It is also clear that for such leave. to be granted which leave is granted at the discretion of the court the same ought to be as a result of an application either orally at the passing of the decree or thereafter formally and this would give the opposing party an opportunity to be heard. This indeed was the finding of the. judgment of Shah JA in the case* ***Bamburi Portland Cement Co. Ltd v Hussein (1995) LLR***
>
> ***1870 (CAK)*** *as follows:-*
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> > *"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 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."*
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> *This finding found favour in the. judgment, of the Court of Appeal in the case of* ***Lakeland Motors Ltd v Sembi (1998) LLR 682 (CAK).*** *The. court, made the following finding:-*
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> > *"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 Shall, J.A., with which we agree, in* ***Bamburi Portland Cement Co Ltd v Abdulhussein (1995) LLR 2519 (CAK)*** *in regard to the application of section 94 of the Act.*
>
> *It is therefore clear that the execution undertaken by the plaintiff before taxation was in contravention with Section 94 of the Civil Procedure Act…"*

On reviewing the judgment and setting aside the decree the applicants submitted that Rule 33 of the Employment and Labour Relations Court (Procedure) Rules provides for the circumstances when the court may review its judgment which includes mistake or error apparent on the face of the record and for any other sufficient reasons. To emphasise this point, the applicant relied on the decision in **Peter Wambugu Kariuki and 16 Others v Kenya Agricultural Research Institute [2018] eKLR** where the court stated –

> *"...Both section 16 of the Industrial Court Act, 2011 and Rule 32(1) of the Industrial Court (Procedure) Rules 2010 under which the appellants premised their application for review confer wide jurisdiction on the Court to review and vary or set aside, its Judgment. Both provisions do not however stipulate timelines within which to seek such relief. Section 16 of the Act provides as follows:*
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> *"The Court shall have power to review its Judgment, awards, orders or decrees in accordance with the Rules".*
>
> *Rule 32(1) of the (Procedure) Rules, on the. other hand provide as follows:*
>
> *(1) a person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling:-*
>
> > *(a) if there is a discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the knowledge of that, person or could not be produced by that person at the time when the decree was passed or the order made; or*
> >
> > *(b) on account, of some mistake or error apparent on the face of the record; or*
> >
> > *(c) on account of the award, judgment or ruling being in breach of any written law; or*
> >
> > *(d) if the award the judgment, or riding requires clarification; or*
> >
> > *(e) for any other sufficient reasons."*

It further relied on the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**, where the Court of Appeal, observed;

"A review may be granted whenever the Court considers that it is necessary to correct an apparent, error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter nor can it. be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot, be a ground for review."

The appellants relied on prerequisite (b) and (e) of Rule 32 of the Industrial court (Procedure) Rules. These are the sub rules that donate the right to seek review on account of existence of a mistake or error apparent on the face of the record and on the ground of existence of some other sufficient reason."

The applicant submitted that there was an error on the face of the record as the court awarded the claimant prayers not pleaded in the claim. It submitted that it is a well established principle that courts will not grant what is not pleaded, relying on the decision in **David Sirongo Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR** where it was held that

"...It is well established in our jurisdiction that the court will not grant a remedy which has not been applied for and that it will not determine issues which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot, be allowed to raise a different case from that which it has pleaded without due amendment being made. That way none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

The court on its part, is itself bound by the pleadings of the parties. The. duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would he out. of character were it. to pronounce any claim or defence not made by the. parties as that would he plunging into the. realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence, not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

It is on the foregoing submissions that the applicant prays for grant of orders as prayed.

For the claimant it is submitted in the submissions dated 24th January 2020 and filed on 31st January 2020 that the instant application is brought in bad faith and with the sole purpose of denying the claimant the fruits of her judgment that was delivered on 26th January 2018.

The claimant submitted that the principals guiding the court when deciding an application for stay of execution were set out in the case of **Machira t/a Machira and Company Advocates v East Africa Standard (No. 2) (2002) KLR 63** which was quoted with approval in the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** that;

"...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

It is submitted that the decision in the judgment was made after hearing the parties and there is no error on the face of the record. Further that the applicant has not explained the delay of 9 months in filing the instant application.

On the provisions of Order 42 the claimant submitted that no sufficient cause has been shown by the applicant for the grant of the orders sought in the application. The claimant relies on the decision in **Abdi Ali Noor v Transami (Kenya) Limited** and **Motres Limited v Akamba Road Services Limited & Another** where the applicant was required to deposit the entire decretal sum in court as a condition for stay of execution.

Determination

Having considered the application together with grounds and affidavit in support thereof and the replying affidavit filed in opposition thereto, having further considered the submissions filed by both parties, the issue for determination is whether the applicant is entitled to the prayer sought in the application.

The applicant seeks two main reliefs. The setting aside or vacation of the warrants of sale of property issued on 22nd August 2019 and the review/setting aside of the judgment and decree delivered on 26th January 2018.

Prior to the two main issues being determined, the applicant sought stay of execution, which was granted at the ex parte stage.

On the setting aside and vacation of the warrants of sale, it is the applicant's averment that the same is irregular.

Section 94 of the Civil Procedure Act provides as follows in respect of execution before costs are ascertained –

94. 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.

Further, Order 22 Rule 18 of the Civil Procedure Rules provides as follows –

[Order 22, Rule 18.] Notice to show cause against execution in certain cases.

(1) Where an application for execution is made—

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43,

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor having changed his employment since a previous order for attachment.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

It is not in contest that the judgment herein was delivered on 26th January 2018 and decree issued on 6th May 2019. The warrants of attachment were issued on 22nd August 2019.

Prior to the decree being issued, the claimant's Counsel had written to the respondent's Counsel on 11th May 2018, 21st June 2018 and 23rd August 2018 seeking payment of the decretal sum and costs.

The claimant's Counsel further wrote to the respondent's Counsel on 26th October 2018 seeking approval of the decree. There was no response to any of the letters.

In view of the fact that the dree was issued on 6th May 2019, no notice to show cause was necessary as a year had not lapsed since the date of the decree. Order 22 Rule 18 is thus not applicable.

Section 94 would however bar the claimant from executing the decree before taxation without leave of the court. As was observed by the court in the case of **Bullion Bank Limited** (supra), it is clear that before execution proceeds in the absence of taxation, a party must obtain leave of the court. No execution can proceed until after taxation or if before taxation, without the leave of the court.

To this extent, the warrants of sale of property in execution of decree for money issued to Bemac Auctioneers was irregular.

On the prayer for review and or setting aside of judgment, Section 16 of the Employment and Labour Relations Court Act provides that –

16. Review of orders of the Court

The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.

Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 further provides for the circumstances under which the court may review its decree or order as follows –

> **33. Review**
>
> **(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—**
>
> > **(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;**
> >
> > **(b) on account of some mistake or error apparent on the face of the record;**
> >
> > **(c) if the judgment or ruling requires clarification; or**
> >
> > **(d) for any other sufficient reason.**
>
> **(2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.**
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> **(3) A party seeking review of a decree or order of the**
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> **Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.**
>
> **(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.**
>
> **(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.**
>
> **(6) An order made for a review of a decree or order shall not be subject to further review.**

In the instant application, the applicant seeks review on grounds that there is an error apparent on the face of the record. Error apparent on the face of the record was defined by the Court of Appeal in **National Bank of Kenya Limited v Ndungu Njau** supra as one that is self evident and one which should not require an elaborate argument to be established.

In **Nyamogo and Nyamogo Advocates v Kogo**, an error apparent on the face of the record was described as one which has to be established without a long drawn process of reasoning and one that cannot be the subject of two different opinions.

The applicant has submitted that in its judgment this court granted an award that had not been prayed for. In the judgment the court stated as follows; –

> ***"The maximum compensation provided under Section 49 (1)(c) is 12 months' salary.*** ***<u>The respondent argued that the claimant did not pray for compensation for unfair termination. This in my view is a matter of semantics as the claimant prayed for compensation for loss of earnings, which arose from her summary dismissal.</u>***
>
> ***Having found the summary dismissal unfair and taking into account the claimant's long service of 18 years, I award her maximum compensation in the sum of Kshs.368,976/=. The respondent will also pay claimant's costs of the suit. The decretal sum will attract interest at court rates unless paid within 30 days from date of judgment. The Respondent will deduct from the amount awarded the sum of Kshs.56,007/= which the claimant admitted having been paid."***
>
> [Emphasis added]

This cannot be an error on the face of the record. The court applied itself to the submissions made by the parties and consciously decided to grant the prayer for compensation. Specifically, the court noted that a prayer for compensation for unfair termination and compensation for loss of earning was essentially the same, the difference being a matter of semantics. This can therefore not be an error or mistake on the face of the record as the court did not make a mistake or an error.

Further, Rule 33 provides that an application for review must be made within a reasonable time where an appeal lies but has not been preferred. The instant application was filed on 4th September 2019 for a judgment delivered on 26th January 2018, a period of almost 20 months. The respondent/applicant was aware of the judgement as the claimant wrote several letters to the applicant seeking payment. It took no action and ignored letters from the claimant to Counsel until the Auctioneer came calling. No mention has been made of the reasons for the inordinate delay. The court would thus agree with the claimant that this is an afterthought made only because of the execution process and to beef up the applicant's application for stay of execution. I would thus agree with the claimant that this particular prayer is mischievous and made in bad faith. The applicant did not have to wait for execution to file an application for review.

The application for review is thus dismissed as there is no merit in the same.

In the final analysis I would grant the application only on the grounds that the claimant did not seek leave of the court before applying for execution.

The respondent/applicant will bear the costs of this application in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE