



**Maxam Limited v Heineken East Africa Import Company Limited & another;
Equity Bank (Kenya) Limited (Interested Party) (Commercial Case 29 of 2016)
[2024] KEHC 13213 (KLR) (Commercial and Tax) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 29 OF 2016
JWW MONG'ARE, J
OCTOBER 29, 2024**

BETWEEN

MAXAM LIMITED PLAINTIFF

AND

HEINEKEN EAST AFRICA IMPORT COMPANY LIMITED 1ST DEFENDANT

HEINEKEN INTERNATIONAL BV 2ND DEFENDANT

AND

EQUITY BANK (KENYA) LIMITED INTERESTED PARTY

RULING

Introduction and Background

1. The court is being called upon to determine three applications; The Plaintiff's Notice of Motion dated 6th June 2024, the Interested Party's Notice of Motion dated 2nd July 2024 and the 1st Defendant's Notice of Motion dated 3rd July 2024. The application dated 6th June 2024 is made under Order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 3A and 94 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and the Plaintiff seeks the following orders:

1. Spent
2. That the Decree Holder/ Applicant be and is hereby granted leave to execute the decree of this Honourable Court issued on 15th August 2019 before taxation and final determination of its Bill of Costs dated 1st August 2019.
3. Spent



4. That an order be and is hereby issued, directing the Chief Executive Officer and the Board of Directors of Equity Bank (Kenya) Limited to immediately pay to the Applicant and its Advocates Messrs Nyachoti & Company respectively into their bank accounts whose details are set out hereunder, a total sum of Kshs. 1,799,978,868.00/= in accordance with the bank guarantee dated 10th December 2019 (Ref: EBKI/OOO/OBG/000023219) issued to this Honourable Court pursuant to the stay orders of 14th November 2019 in respect of the Judgment of this Honourable Court delivered on 29th July 2019.
 - a. Amount - Kshs. 1,614,978, 868.00/=
Maxam Limited
Account Bank: Absa Bank Kenya Plc
Account Number: 2041307164
Account Branch: Thika Road Mall
 - b. Amount — Kshs. 185,000,000.00/=
Nyachoti & Company Advocates
Account Bank: Ncba Bank
Account Number: 1746030079
Account Branch: Riverside
5. That Honourable Court do issue any such further orders as it may deem fit in the circumstances of this case.
6. That the costs of this Application be provided for.
2. This application is grounded on the facts on its face and the supporting affidavit of the Plaintiff's Managing Director, Ngugi Kiuna, sworn on 6th June 2024. It is opposed by the 2nd Defendant through the undated replying affidavit of its proxy holder Mariia Afanaseva. The application dated 2nd July 2024 by the Interested Party seeks to set aside the order of the court dated 7th June 2024 that enjoined it in this suit. The application is supported by the affidavit of Samuel Wamaitha sworn on 2nd July 2024 and is also supported by the 2nd Defendant through the affidavit of Ikoha Muhindi, an advocate in conduct of this matter on behalf of the 2nd Defendant sworn on 30th July 2024. It is opposed by the Plaintiff through the replying affidavit of Ngugi Kiuna sworn on 10th July 2024. The application dated 3rd July 2024 is made under sections 1A, 1B & 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and the 1st Defendant seeks to set aside the orders of this court issued on 7th June 2024. It is opposed by the Plaintiff through the replying affidavit of Ngugi Kiuna sworn on 10th July 2024. The applications have been canvassed by way of written submissions which are on record.
3. The background and chronology of events leading to the present applications are common to the parties but I will briefly highlight the same for ease of reference and context. The Plaintiff filed this suit on the premise that on 21st May 2013 it entered into a distribution agreement with the 1st Defendant for the distribution of the Heineken lager beer brand in Kenya but that the said agreement was irregularly and unlawfully terminated in sometime in 2016. The Plaintiff sought, among other reliefs, an order declaring the Termination Notice unlawful and irregular, an injunction restraining the Defendants from terminating the Distributorship Agreement, and special damages for loss of business and profits.



4. On 29th July 2019, the court (Makau J.,) delivered the judgment in this matter where the Plaintiff was awarded inter alia Special damages for loss of business as more specifically tabulated in paragraph 12 in the plaint of Kshs. 1,799,978,868.00 and an order was issued directing the taking of accounts in respect of loss of profits occasioned to the Plaintiff by reason of reduced volumes of sales as well as reduced profit margins from September 2017 until the date of the judgment and the Plaintiff was awarded special damages for the loss of profits to be tabulated. Subsequently, the Respondents filed an application for stay of execution of the judgment pending appeal, under Order 42 Rule 6 of the Civil Procedure Rules. The application was heard and determined on 14th November 2019 where the court (Okwany J.,) stayed the execution of the decree and judgment on condition that the Defendants deposit the full decretal sum awarded to the Plaintiff in an interest-bearing account in the joint names of the parties' advocates in a financial institution with good standing. The financial institution was to be agreed upon by counsel and in default of agreement, the Court was to appoint such financial institution. In the alternative, the Defendants were to provide a bank bond for the full decretal sum from any reputable bank as a guarantee for the due performance of the decree within 30 days from the date of the ruling.
5. Consequently, the Respondents procured a bank guarantee dated 10th December 2019("the Guarantee") from the Interested Party where it "irrevocably and unconditionally" guaranteed the court that it will "...notwithstanding any objection which may be made by our customers, immediately pay to you or such person as you may direct such an amount as you may in such lawful notice require, not exceeding Kenya Shillings One Billion, Seven Hundred And Ninety Nine Million, Nine Hundred And Seventy Eight Thousand, Eight Hundred And Sixty Eight (KES 1,799,978,868.00/=) (The Guaranteed Amount) upon presentation by you of your declaration indicating that it has been signed by an authorized officer of the High Court of Kenya and stating that the appeal of our customers in the high court civil case no. 29 of 2016 was unsuccessful and that our customers have been definitively summoned by the High Court to pay. an amount equal to the amount of the demand hereunder."
6. Thereafter, the Defendants filed appeals at the Court of Appeal which were determined in the appellate court's decision of 24th May 2024 in Heineken East Africa Import Company Limited & another v Maxam Limited [2024] KECA 625 (KLR). The appellate court inter alia affirmed the award of Kshs. 1,799,978,868.00/= and precipitated the filing of the application by the Plaintiff. On 7th June 2024, the court(Mabeya J.,) allowed the prayer seeking to enjoin the Interested Party to enable it substantively respond to the application. It is this order that prompted the Interested Party and the 1st Defendant to file their applications as they seek to set aside this order.
7. The Plaintiff's application is grounded on the fact that since the Defendants' appeal was dismissed, the Guarantee is due for payment immediately as per the terms set out therein and as indicated hereinabove in settlement of the Judgment sum of Kshs. 1,799,978,868.00/= guaranteed and secured thereby. The Plaintiff therefore seeks an order of this Court to compel the Interested Party to honour its obligations under the Guarantee by immediately paying a sum of Kshs. 1,799,978,868.00/= to the Plaintiff and its Advocates, Messrs Nyachoti & Company into the aforestated bank accounts.
8. In response, the 2nd Defendant urges that the Plaintiff's prayer for leave to execute the decree before taxation is premature as the Plaintiff is yet to obtain an order from the Court of Appeal upon which it can proceed to enforce the decree arising from this court. As such, the 2nd Defendant states that the decree is yet to crystallize and that the conditional stay orders of the court issued on 14th November 2019 remain in full force and effect. That the Plaintiff's application is therefore premature, a non-starter and a waste of this court's judicial time.



9. The 2nd Defendant avers that the above notwithstanding, it has filed a Petition of Appeal before the Supreme Court, being Supreme Court Petition No. E028 of 2024 – Heineken International B.V v Heineken East Africa Import Company Limited and Maxam Limited as well as application for stay of execution of the Court of Appeal Judgment, being Supreme Court Application No. E021 of 2024 and the application is currently before the Supreme Court for directions. That the 2nd Defendant has also been served with a Petition of Appeal filed by the 1st Defendant being Supreme Court Petition No. E027 of 2024 —Heineken East Africa Import Company Limited v Heineken International B.V and Maxam Limited. That the 1st Defendant has equally filed an application for a stay of execution and on 20th June 2024, the Supreme Court issued directions on both the 1st Defendant’s Petition and stay application and directed that parties return to court on 5th July 2024 for further directions. To this end, this the 2nd Defendant contends that the Court runs the risk of issuing conflicting directions and/or decisions to that of the Supreme Court concerning the Kshs. 1,799,978,868.00/=, which would not only be unfortunate but may embarrass this Court and waste precious judicial time. In the circumstances, it reiterates that the application is therefore premature and that the Court should await the further directions to be issued by the Supreme Court on the Defendants’ stay applications before issuing any further directions on the application.
10. The 2nd Defendant states that without prejudice to the foregoing, it has also noted that the Plaintiff seeks to vary the express orders issued in both the Decree and the Court of Appeal judgment as in the application, the Plaintiff has sought that the Kshs. 1,799,978,868.00/= awarded as special damages be paid into two different bank accounts, with directions that Kshs.1,614,978,868.00 be paid to the Plaintiff and Kshs. 185,000,000.00/= to be paid directly to the Plaintiff’s counsel. That this runs afoul of the court’s and the Court of Appeal’s judgment that the sum be paid to the Plaintiff. The 2nd Defendant states that the orders set out in a judgment can only be varied either by appeal or by an application review which the Plaintiff has not invoked and that it cannot therefore purport to vary the orders in both the court’s Judgment, the resultant Decree, and Court of Appeal Judgment without following the laid down procedure under law, and should this Court grant the said request, then it will be perpetuating an illegality.
11. The 2nd Defendant contends that in seeking leave to enforce this court’s Judgment before taxation, the Plaintiff has withheld key information concerning the status of the taxation proceedings. That it is not in dispute that the Plaintiff filed its bill of costs dated 1st August 2019 but the Bill was stayed by the Court vide the conditional stay order dated 14th November 2019, staying the enforcement of the Decree and that the Plaintiff has however failed to mention that on 4th June 2024, the Bill came up for mention before Hon. Noelle Kyanya (Deputy Registrar) for directions on the Bill. Notably, this was merely 2 days before the Plaintiff filed the present application and that during the said mention, the Deputy Registrar issued directions with respect to the filing of written submissions relating to a Preliminary Objection raised touching on the Bill and directed that the parties return to court to confirm compliance on 9th July 2024. That while the Plaintiff on one hand claims that taxation of the Bill has taken a long time, the Plaintiff has not complied with the Deputy Registrar’s directions on the Bill and that this is evident from the record of proceedings of 4th June 2024.
12. In any event, the 2nd Defendant states that the prayer for leave sought, if granted, will expose the Defendants to multiple executions, which inevitably increases the amount of costs and time that they will expend in these execution proceedings.
13. The 1st Defendant’s application to set aside is premised on the grounds that the Court allowed the joinder of the Interested Party to the application without according the parties hereto an opportunity to be heard. That the Guarantee contains express terms on how it can and should be called in and



that these conditions have not been adhered to. Accordingly, that the application is premature and the Plaintiff is underserving of the orders sought as it has concealed the fact that it has commenced taxation proceedings, and the matter was scheduled for mention on 9th July 2024. As the Interested Party's application more or less mirrors the 1st Defendant's application and that the Plaintiff's response relies on the same facts I have already summarized above, I will not highlight the same. I have also gone through the submissions and note that they regurgitate the positions summarized above and therefore, I will only make relevant references to them in my analysis and determination below.

Analysis and Determination

14. The court is being urged to determine whether to set aside its orders of 7th June 2024 enjoining the Interested Party, whether to grant leave to the Plaintiff to execute the decree of the court before taxation and whether the Interested Party should be compelled to honour the Guarantee. I agree with the 1st Defendant's submission that Order 51 Rule 15 of the Rules provides that the court may set aside an order made ex parte and that any orders obtained as a consequence of non-disclosure of material facts are liable to be set aside. The 1st Defendant states that the Plaintiff failed to disclose that taxation proceedings were ongoing and that parties had appeared before the Taxing Master on 4th June 2024, one day, before the Respondent filed the Motion dated 6th June 2024 seeking leave to execute before taxation. However, I find that this information was already known to the court as the same is available on the record and therefore, the Plaintiff did not have to disclose that taxation proceedings were ongoing and it cannot be accused of material nondisclosure. The court made the ex parte orders of 7th June 2024 while fully cognizant that taxation proceedings were ongoing and that parties had appeared before the Deputy Registrar on 4th June 2024. The record is clear that the enjoinder of the Interested Party was meant to enable the Interested Party substantively respond to the application and had nothing to do with the ongoing taxation proceedings. For these reasons, I find no reason to set aside the ex parte orders as there was no material non-disclosure by the Plaintiff.
15. I now turn to the Plaintiff's application that seeks leave to execute before taxation and that that Interested Party be compelled to honour the Guarantee. I do not think it is in dispute that section 94 of the [Civil Procedure Act](#) grants the court discretion to allow execution of a decree before the amount of the costs incurred in the suit can be ascertained by taxation as follows:

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“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.”

16. Kuloba J., in *Mercedes Sanchez Rau Tussel v Samken Ltd, Abercrombie & Kent Ltd & Mohammed Osman Maalim* [2002] KEHC 543 (KLR) held that it is the judgment debtor who should furnish the court with facts which would show that partial execution of a judgment without waiting for taxation of costs would entail injustice or hardship or other substantial harm to them. That the court would not uphold mere technical objections for their own sake, when the justice of the case requires enforcement of a judgment without waiting for the ascertainment of costs by a taxing officer. The Defendants stated that this application is premature as the Plaintiff is yet to obtain an order from the Court of Appeal upon which it can proceed to enforce the decree of this court and that the parties have not agreed on



the form and substance of the draft order issued by the Court of Appeal. I reject this contention by the Defendants and find that this is a technical objection that the court in Mercedes Sanchez Rau Tussel v Samken Ltd, Abercrombie & Kent Ltd & Mohammed Osman Maalim (supra) frowned upon in denying a decree holder its right to enforce its judgement. The form and substance of what should be in a decree is not a valid reason to stop a decree-holder from executing a decree. Whereas the purpose of Order 21 Rule 8(1) of the Rules is to ensure that the decree corresponds with the judgment, a court is not bound by the agreement of the parties on the contents of a draft decree. The confirmation by the court's Deputy Registrar, and not the parties, is what is paramount to ensure that the approved decree is in accordance with the Judgment (See David Mutemi Ngumi v Kamili Packers Limited [2019] KEELRC 1745 (KLR)). Therefore, in absence of evidence from the Registrar of the Court of Appeal that the decree therein does not conform to the judgment of the Court of Appeal, I see no reason why the Plaintiff should not be allowed to execute the judgement of this court. In any event, the decree does not alter the import of the Court of Appeal judgement in Heineken East Africa Import Company Limited & another v Maxam Limited (supra) that largely dismissed the Defendants' appeal and affirmed the award of Kshs. 1,799,978,868.00/=, a position that has not been disputed by the Defendants.

17. The Defendants further raised the ground that stay orders of 14th November 2019 remain in force until the Court of Appeal issues a decree in respect of the judgment in Heineken East Africa Import Company Limited & another v Maxam Limited (supra). However, the ruling of the Court dated 14th November 2019 only allowed the stay of execution of the court's judgment pending the outcome of the appeal. Since the appeal has been determined, the stay orders have automatically been vacated and the Defendants cannot cling on the fact that a decree is yet to be issued for them to continue enjoying the stay of execution orders. The Defendants have also raised the ground that they have filed applications at the Supreme Court seeking to stay execution of the Court of Appeal judgement and that this court ought to await the Supreme Court's decision to avoid an embarrassing situation where this court may issue conflicting orders to that of the apex court.
18. I take judicial notice that the Supreme Court has already rendered itself on the appeals and the stay applications in Heineken East Africa Import Company Limited & another v Heineken International BV & 2 others [2024] KESC 59 (KLR) by stating that they have no jurisdiction to determine the appeals and that the applications seeking stay of execution were dismissed. This decision, I believe strikes the last nail in the Defendants' litigation coffin in this matter and their quest to stop the execution of the decree stops at this point.
19. On whether the Guarantee has crystallized, I find in the affirmative and note that all that needed to happen for the same to be called in was a declaration by the Court's Deputy Registrar stating that the Defendants' Appeal was unsuccessful and that the Defendants have been definitively summoned by this Court to pay an amount equal to the amount of Kshs. 1,799,978,868.00/=. This court therefore directs the Deputy Registrar to call in the Guarantee from the Interested Party and that this sum of Kshs. 1,799,978,868.00/= shall be paid to the court for onward transmission to the Plaintiff in the manner indicated in its application.

Conclusion and Disposition

20. In the foregoing, I make the following dispositive orders:
 1. The 1st Defendant's and Interested Party's Applications dated 3rd July 2024 and 2nd July 2024 respectively are dismissed.
 2. The Plaintiff's Application dated 6th June 2024 is allowed in its entirety as follows:



- a. Leave be and is hereby granted to the Plaintiff to execute the decree of the Court issued on 15th August 2019 before taxation and final determination of its Bill of Costs dated 1st August 2019.
- b. An order be and is hereby issued, directing the Chief Executive Officer and the Board of Directors of Equity Bank (Kenya) Limited to pay to the Deputy Registrar of the Court, within 30 days from the date of this ruling, a total sum of Kshs. 1,799,978,868.00/= to be held by the court for and on behalf of the Plaintiff and in accordance with the bank guarantee dated 10th December 2019 (Ref:EBKI/000/OBG/000023219) issued to this Honourable Court pursuant to the stay orders of 14th November 2019 in respect of the Judgment of this Honourable Court delivered on 29th July 2019.
- c. The Deputy Registrar shall thereafter remit to the Plaintiff the said Kshs. 1,799,978,868.00/= in the following manner:
 - I. The sum of Kshs. 1,614,978, 868.00 to
Maxam Limited
Account Bank: Absa Bank Kenya Plc
Account Number: 2041307164
Account Branch: Thika Road Mall
 - Ii. The Sum Of Kshs. 185,000,000.00
Nyachoti & Company Advocates
Account Bank: Ncba Bank
Account Number: 1746030079
Account Branch: Riverside
3. This ruling serves as a demand and the declaration that the Defendants' Appeal has been unsuccessful and that the Defendants are now liable to pay the sum of Kshs. 1,799,978,868.00/= to the Plaintiff.
4. The Defendants shall bear the costs of the applications which are assessed at Kshs. 150,000.00/= and are payable to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF OCTOBER 2024

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Nyachoti for the Plaintiff.

Mr. Vctor Mailu for the 1st Defendant.

Ms. Aisha Abdalla and Mr. Sebayiga for the 2nd Defendant.

Ms. Oduor holding brief for Mr. Ochieng Oduol for the Interested Party.

Godfrey - Court Assistant

