Makwata Construction and Engineering Company Ltd v Limuru Girls School (Miscellaneous Civil Application 532 of 2015) [2024] KEHC 16037 (KLR) (Commercial and Tax) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16037 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION 532 OF 2015

A MABEYA, J

DECEMBER 20, 2024

BETWEEN

MAKWATA CONSTRUCTION AND ENGINEERING COMPANY LTD ..... DECREE HOLDER

AND

LIMURU GIRLS SCHOOL ..... JUDGMENT DEBTOR

RULING

1. Before Court is the application dated 29/7/2023 by the judgment debtor brought under Orders 20, 23, 49(7)(viii) (ix) of the *Civil Procedure Rules* 2010, section 3A and 63E of the *Civil Procedure Act* and section 4(4) of the *Limitation of Actions Act* Cap 22 Laws of Kenya and the inherent jurisdiction of the Court.

2. The application sought orders to the effect that the judgment debtor had fully liquidated the judgment debtors claim or in the alternative the decree holder be ordered to render accounts.

3. The application was supported by the affidavit of Teresa Mwangi sworn on 29/7/2023. She deponed that the matter emanated for an arbitral award of Kshs 4,794,977.30 with interest of 18% p.a. That the judgment debtor had made payments totaling Kshs. 11,043,923/- towards settlement of the decretal amount.

4. That despite the settlement of the said amount, the decree holder had instructed the Mbusera Auctioneeers to proclaim the judgment debtor's property wherein it claimed interest of Kshs 9,058,443/-. That the auctioneer had proclaimed the motor vehicles, computers and office furniture which would paralyze the school learning. It was the judgment debtor's case that the execution proceedings were irregular and had the effect of causing hardship to the school.

5. The decree holder opposed the application vide a replying affidavit of Patrick Anyangu Makwata sworn on 3/10/2023. He stated that the judgment debtor's advocates wrote to the decree holder on 3//10/2022 disputing the amounts due and claiming to have completed the payments. The decree holder wrote back demanding a sum of Kshs 8,677,901.94 being interest on the principal sum plus the auctioneer's fees and further court fees. That the decree holder upon getting no communication instructed the Mbusera Auctioneers to recover the balance of the decretal sum. That the judgment debtor has been indolent in making payments to satisfy the decree.

6. In a rebuttal the judgment debtor filed a supplementary Affidavit sworn by Teresa Mwangi on 30/10/2023. She deponed that there was a mutual understanding between the decree holder and the School that the principal sum and the interest accrued was to be liquidated in installments at the beginning of each school term. That between 05/02/2020 till 15/01/2021, due to COVID 19 there was closure of schools which affected the School financially. It was contended that in the final award, the decree holder was awarded Kshs 359,358.85 being interest on delayed payments.

7. It was contended that by 18/09/2019, the school had already paid Kshs 5,000,000/- therefore the principal sum had been fully paid and could not be said to be outstanding. That the School had paid a further Kshs 6,248,946/- as interest and the demand of Kshs 8,677,901.94 as interest amounted to unjust enrichment.

8. This application was canvassed by way of written submissions which I have duly considered. The judgment debtor submitted that the execution process was illegal since the process of execution commenced on 27/3/2023 being 17 years after the final award and 7 years 8 months since leave to execute was granted. Counsel submitted that there was no notice to show cause against the school was issued contrary to Order 22 rule 18.

9. Further, it was the judgment debtor's submissions that in line with section 4(4) of the *Limitation of Actions Act*, any action upon a judgment after 12 years from the date the judgment is delivered is barred. That time started running when the judgment was delivered.

10. With regard to the interest on the principal sum, counsel submitted that there was no outstanding money upon which the interest was pegged on and there was no basis upon which the decree holder demanded the sum of Kshs. 9,058,443.57. That based on section 4(4) of the *Limitation of actions Act* interest claimed more than 6 years was illegal. Counsel submitted that this was a clear case where the in duplum rule could apply.

11. The decree holder submitted that an arbitral award could not be termed as judgment of the court under section 4(4) of the *Limitation of Actions Act* unless it is enforced as a decree. In view of this, time started running from 19/2/2016 and the same was due to lapse in 2028. For this reason, the execution of the decree could not be said to be statute barred.

12. That section 4(4) of the *Limitation of Actions Act* could not be interpreted to limit the accrual of interest to only 6 years as misrepresented by the judgment debtor but as at the time the interest became due. It was submitted that since the judgment debtor defaulted in making payments in 27/7/2022 six years would lapse on 27/7/2028.

13. Counsel submitted that the interest on the decretal sum had accrued to Kshs 8,630,959.14 making the total amount plus interest to be Kshs 13,425,936.44. That as at the date of attachment, the total amount was Kshs.18,316,816.16. That the decree was not time barred and the judgment debtor was well within its rights to recover the decretal sums.

14. On whether the execution was regular, it was submitted that the judgment debtor was well aware of the decree and had made partial payments therefore could not be said to have no knowledge of the decree.

15. I have considered the rival averments, the submissions on record and the authorities cited. A brief background to the matter is that the parties were engaged in arbitral proceedings which conclusion was an award published in favour of the decree holder for Kshs 4,794,977.30 plus interest at 18% per annum in 2007.

16. The judgment debtor made periodic payments amounting to a sum of Kshs 11,043,923/- to date. The judgment debtor was of the view that the decretal sum had been paid in full and the same information was communicated to the decree holder. The decree holder refuted this fact and proclaimed the assets of the judgment debtor which include school vehicles, office equipment and computers.

17. The judgment debtor's contention was that the decree holder ought to have sent a notice to show cause since the application for execution was made more than one year after the date of decree. The judgment debtor further challenged the execution process stating that it was barred by virtue of section 4(4) of the *Limitation of Actions act*.

18. The decree holder on its part contended that time started running from the time the award was adopted as a judgment of the Court and not the time when the award was published by the tribunal. With respect to interest, it was submitted that time started running upon default and not when judgment was issued.

19. From the foregoing, the first issue the Court will address is the competency of the execution process. Order 22 Rule 18 of the *Civil Procedure Rules* provides: -

> " 18(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 as 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".

20. In *Metro Petroleum Ltd vs. Turbo Highway Eldoret Ltd* [2006] eKLR, the court held that: -

> " It is clear that between 24.11.2004 and 22.2.2006 a period in excess of one year had elapsed. Accordingly, the court should have issued a notice to the defendant to show cause why the

decree should not be executed against it. I have not traced a copy of such NTSC in this record. I take it therefore that no such notice was issued. I have not also seen reasons recorded dispensing with the requirement of the NTSC. In the premises, the execution in question having occurred without compliance with the rules regarding NTSC is irregular".

21. In the present case, it is not in dispute that the decree is order than 1 year. The record shows that there was no service of any Notice to show cause as required under Order 22 Rule 18 of the *Civil Procedure Rules*. The requirement for issuance of such notice is not optional but mandatory. It is meant to notify a judgment debtor of the impending execution and give him an opportunity to respond or show cause why the execution should not proceed. Failure to comply with that requirement therefore makes any execution proceedings arising therefrom to be not only irregular but illegal.

22. On the issue of charging interest, the judgment debtor relied on section 4(4) of the *Limitation of Actions Act* which provides that: -

> "(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

23. In *Assia Pharmaceuticals Ltd v Kenya Alliance Insurance Co. Ltd* (Civil Case 1605 of 1999) [2021] KEHC 19 (KLR) (Commercial and Tax) (21 July 2021) (Ruling), it was held that: -

> "The *Limitation of Actions Act* provided the limitation periods for different claims. Regarding claims for interests on court judgments, it provided six years from the date the interest became due for actions relating to arrears of interest with regard to a judgment debt. The word "action" in section 4(4) of the *Limitation of Actions Act* had been judicially construed to include execution proceedings. The use of the word "may" meant that the provision was not couched in mandatory terms."

24. It is apparent from the foregoing provision that interest in a judgment cannot be recovered after the expiry of six years from the date it becomes due. According to section 4(4) of the *Limitation of Actions Act*, time begins to run from the moment of default in payment.

25. The judgment in this case was entered in 2016. The time for payment of the decretal sum together with interest thereon started to run from the date of the judgment. Liability to pay arose once costs were assessed and execution thereof commenced. That is sometimes in 2017 when the applicant tried to challenge the decree. In this regard therefore, time began to run in the year 2017 when there was default in paying the decretal sum.

26. As seen from the Assia Phamaceutiucal's case, the provision is permissive and not mandatory. This gives the Court the discretion to either enforce the requirement or not depending on the circumstances of each case. In the present case, the award was made in 2007. The respondent waited for 9 years before it moved to have the same recognized as a judgment of the Court. There was no explanation why the delay. Although it is the obligation of a judgment debtor to comply with the terms of a decree, including the payment of any interest awarded, I do not think that it is just for an award holder to wait indefinitely then have the award recognized after so many years and then charge and recover colossal

interest. I think that is the scenario which the provision sought to prevent. The Court therefore finds that no interest is recoverable six years after 2017 when default occurred.

27. In the present case, the applicant has paid in excess of double the amount of its claim. The decree holder has not disputed the payments claimed to have been made by the judgment debtor. The decree holder did not show how the alleged balance is arrived at. In this regard, it is proper that accounts be taken as prayed with the Deputy Registrar taking into consideration the 6 year bar stated above.

28. Accordingly, I find that the application succeeds and the warrants are hereby discharged for the execution was irregular. Further, prayer 4 for rendering accounts also succeeds. Costs to the applicant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE