Shah v National Bank of Kenya Limited (Civil Appeal 103 of 2013)
[2023] KEHC 1324 (KLR) (Civ) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1324 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 103 OF 2013

CW MEOLI, J

FEBRUARY 23, 2023

BETWEEN

MAHENDRA KUMAR SHAH ..... APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED ..... RESPONDENT

(Being an appeal from the ruling of Hon. Obulutsa, CM) delivered on 27th September 2012 in Nairobi Milimani CMCC No. 12552 of 2003)

JUDGMENT

1. This appeal emanates from the ruling delivered on September 27, 2012 in Nairobi Milimani CMCC No. 12552 of 2003 (hereafter the lower court suit). On December 4, 2003 National Bank of Kenya Limited the Plaintiff in the lower court, (hereafter the Respondent) filed a suit against Mahendra Kumar Shah the Defendant in the lower court (hereafter the Appellant) seeking the sum of Kshs. 310,514.08/- plus interest at the rate of 6% per month until payment in full, costs and interest at court rates on both. It was averred that at all material times, the Appellant was indebted to the Respondent on account of a banking and or credit card facility granted by the Respondent to the Appellant at his own request on agreed terms and conditions.

2. Further, that it was a fundamental term of the afore-stated agreement that the Appellant enjoyed the facility subject to his adherence to the envisaged and or express terms of the particulars whereof were within the Appellant's knowledge. That in breach of the agreement afore-stated terms, the Appellant had failed to regularize the attendant account and or facility and as of February 25, 2003 was indebted to the Respondent to the tune of Kshs. 310,514.08/- which sum continued to attract interest at the rate of 6% per month until payment in full.

3. On May 6, 2005, the Defendant entered appearance but did not file a defence. On 17.07.2006 upon request by the Respondent exparte judgment was entered against the Appellant with the direction regarding interest as follows:

> " F.p (formal proof) on rate of interest otherwise at court rates from date of filing suit"

4. The Respondent then proceeded to extract a decree dated August 1, 2006 and warrants of attachment on September 11, 2006 in execution of the decretal amount. The Appellant was thus prompted to move the court vide a motion dated September 29, 2006 seeking inter alia that there be stay of attachment and sale of the attached properties and that the *exparte* judgment, decree and all subsequent proceedings and orders be set aside.

5. The Appellant thereafter moved the court *vide* another motion dated February 20, 2008 seeking *inter alia* a review of the orders made on the July 17, 2006 on grounds of new issues of law and fact to be determined before formal hearing; and that the plaint dated March 24, 2003 was fatally defective and should be struck out. On May 2, 2008 when parties appeared in court in respect of the motion dated February 20, 2008, counsel appearing for the Appellant withdrew the Appellant's motion dated September 29, 2006 and an order was endorsed to the foregoing effect.

6. Thereafter, pursuant to a ruling delivered on November 12, 2008), the trial court dismissed the Appellant's motion dated February 20, 2008 on the basis of a preliminary objection raised by the Respondent's counsel. The court directed that costs would abide the hearing on the issue of interest. The lower court suit then proceeded for formal proof hearing on October 10, 2011 after which judgment was entered on November 17, 2011 in favour of the Respondent against the Appellant for Kshs. 310,514.80/- plus interest at the rate of 6% and costs of the suit.

7. The Appellant consequently moved the court vide a motion dated May 22, 2012 seeking among others that the warrants of attachment and sale issued to Messrs. Samuel Mugendi t/a Clear Real Traders Auctioneers dated May 11, 2012 be recalled and cancelled; and that the honorable court be pleased to declare and find that the decretal sum of Kshs. 310,514.08/- having been paid no interest was chargeable other than interest comprised in the decree until date of full payment. The motion was expressed to be brought inter alia under Order 51 Rule 1 of the *Civil Procedure Rules* (CPR) and Section 1A, 1B & 3A of the *Civil Procedure Act* on grounds on the face of the motion amplified in the supporting affidavit of Appellant.

8. He deposed that on July 17, 2006 the trial court issued interlocutory judgment to the tune of Kshs. 310,514.08/- with the question of interest being left for trial. That through his advocates Messrs. Jivanjee Advocates, he forwarded to the Respondent's advocates Messrs. Mose & Mose Advocates various cheques totaling Kshs. 421,323/-.

9. He further contended that the decree sought to be executed comprised the paid decretal sum of Kshs. 310,514.08/-, costs and interest from December 4, 2003 until May 31, 2012. That the court record did not reflect the payment already made, the Respondent having fraudulently and deliberately failed to disclose to the court that the decretal sum had been paid thereby causing the court to issue warrants for recovery of monies already paid. He contended that in the absence of an order for interest the Respondent could not charge interest on any outstanding interest from the decretal sum already satisfied . And that it would be egregiously unfair to allow the auctioneer to oppress him at the behest of the Respondent.

10. The Respondent opposed the motion through a replying affidavit dated July 5, 2012. Parties thereafter disposed of the motion by way of written submissions. By a ruling delivered on September 27, 2012,

the trial allowed the motion in part by ordering that the warrants of attachment issued to Clear Real Traders Auctioneers be recalled for rectification to reflect Kshs 310,514/- that has already been paid whereas the prayer seeking an order that the decretal sum had already been fully settled was dismissed with costs in the cause, thus provoking the instant appeal which is based on the following grounds:-

1. "That the learned magistrate erred in law in allowing execution for decree that was already paid.
2. That the learned magistrate erred in law and in ordering the Appellant to pay the principal amount on the decree twice for the same order.
3. That the learned magistrate erred in law in ordering payment against a decretal sum that was already paid in absence of an order of interest on interest.
4. That the learned magistrate erred in law in ordering payment of for costs that had already been paid by the Appellant, essentially the Appellant paid the costs twice.
5. That the learned magistrate erred in law in allowing the Respondent to execute against the Appellant claims that were ex turpi causa.
6. That consequently the learned magistrate's decision occasioned a miscarriage of justice." (sic)

11. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decisions in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2007] eKLR and *Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited* [2014] eKLR on the question of finality of litigation. Submitting on the first ground of appeal, it argued that the decree drawn in execution was erroneous as the decretal sum was fully paid as of November 1, 2006 and upon payment of the principal sum, interest could not accrue hence the calculation on interest beyond November 1, 2006 was illegal. Further that the decretal sums in the warrants of attachment comprised the decretal sum of Kshs. 310,514.08/- and interest until 30.05.2012 which was illegal due to the foregoing reason advanced.

12. Regarding the second ground of appeal, it was argued that at the time of the hearing of the lower court suit the Appellant had already settled the decretal sum in full inclusive of interest accrued. That the trial court's pronouncement in its judgment that the principal amount would only attract interest of 6% was erroneous for requiring the Appellant to fulfill the same order twice. Addressing the court on the third ground of appeal it was argued that there was no order for payment of interest on interest and the position in law is that interest accrues on the principal and is payable upon the outstanding principal. That as at December 2006 there was no outstanding principal on which interest could be charged hence the calculation of interest until May 31, 2012 was grossly misconceived and unlawful and the resultant warrants of attachment erroneous and illegal. In the alternative counsel argued that in the event interest was payable, as per the judgment the interest payable was a flat 6% meaning that the Appellant had overpaid the decretal sum as at December 2006.

13. Submitting on the fourth ground of appeal, counsel reiterated his submission on the first ground of appeal and went on to contend that it is strange and that a party to litigation can be condemned to pay costs twice on the same subject cause. It was further argued that the Respondent seeks to enrich itself unfairly and illegally at the expense of the Appellant. Addressing the court on the maxim *Ex turpi causa non oritur actio* counsel cited the English decision in *Holman v Johnson* (1775-1802) ALL ER 98 and Order 21 Rule 7 (2) of the *Civil Procedure Rules* to submit that the Respondent's action of failing to give credit for payments already done, seeking to recover a decretal sum already paid, seeking to recover costs under the wrong schedule at an inflated rate and seeking to unjustly enrich itself should not be aided by this court.

14. Counsel further argued that having established that the Appellant has already settled the decretal sum prior to the illegal execution, it is only just that the overpaid amount of Kshs. 2,376,574.08/- be refunded to the Appellant. Finally, calling to aid the decision in *John Florence Maritime Services v Cabinet Secretary for Transport* [2015] eKLR counsel submitted that the issue of interest was *res judicata* as of August 1, 2006 and the subsequent formal proof hearing in respect of the matter of interest was without jurisdiction and the resulting judgment of the court and the subsequent execution proceedings were a nullity in themselves. In conclusion, this court was urged to allow the appeal with costs.

15. The Respondent failed and or opted not to file submissions despite being given ample opportunity to do so.

16. The court has perused the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.

17. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

18. Reviewing the lower court record, the Appellant's motion that is the subject of this appeal was expressed to be brought among others under Section 1A, 1B & 3A of the *Civil Procedure Act* and Order 50 Rule 1 of the *Civil Procedure Rules*. The trial court in partially allowing the Appellant's motion rendered itself as follows :-

> " ...The court record shows that the Defendant had earlier filed an application on 20.02.2008 for an order that the suit had been compromised on account of the payments done which application was dismissed.
>
> Even when the matter proceeded for final formal proof, the judgment that was entered was for the principal amount and 6% interest per month. When the application of 20.02.2008 was dismissed, the defendant filed Civil Appeal 645/2006 for stay of proceedings of the lower court and the appeal was again was dismissed. The defendant did not state that there had prior application made and an appeal filed.
>
> The court has looked at the decree and the application for execution, it is clear the amount paid of 310,514/= was not deducted. The warrants of attachment has a column indicating "less paid on account" which is not filled.
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> To that extent, the application will have merit to the effect that the warrants of attachment issued to clear Deal Traders Auctioneers will be recalled for rectification to reflect the 310, 514/= that has already been paid. The others prayers that the decretal amount has been fully paid will be dismissed. Costs will be in the cause." (sic)

19. The grant or refusal to set aside or vary such judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially. Therefore, in considering this appeal, the Court is guided by the principles enunciated by Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR stated:

> " This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (supra):
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> > "A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice".
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> See; *United India Insurance Co. Ltd v. East African Underwriters (K) Ltd* [1985] E.A 898: -

20. The court is called upon to determine whether the trial court misdirected itself and as a result arrived at a wrong decision. In that regard the court will have to determine whether the trial court ought to have recalled and or cancelled the warrants of attachment and sale dated May 11, 2012 issued to Messrs Samuel Mugendi t/a Clear Real Traders Auctioneers; and whether interest other than interest comprised in the decree was chargeable after the decretal sum of Kshs. 310,514.08 was paid in 2009.

21. From the record of the lower court, judgment was entered on July 17, 2006 with an order to the effect that "f.p (formal proof) on rate of interest otherwise at court rate from date of filing suit." The Respondent thereafter proceeded to apply and extract a decree dated August 1, 2006 that was for the principle sum of Kshs. 310,514.08/- with costs and interest on the principal amount at the rate of eight (8) percent per annum from December 4, 2003 to the July 17, 2006 making the total decretal sum payable Kshs. 411,323.08/-. Indeed, warrants of attachment were subsequently extracted and subsequent attempts at execution apparently prompted the Appellant to move the court.

22. The judgment of the court and clear directions concerning interest require no explanation or interpretation. The trial court was essentially giving the option to the Respondent to take the judgment sum with interest at court rates or to prove the rate claimed in the plaint by way of formal proof. As endorsed, the exparte judgment entered against the Appellant was not indicated on the record to be an interlocutory one, nor was the initial extracted decree described as a preliminary decree.

23. The above notwithstanding, the suit proceeded for formal proof hearing on October 10, 2011, on the question of interest and another judgment was rendered on November 17, 2011 as follows:

> " I would therefore find in the absence of any evidence to the contrary that the Plaintiff has proved his case. I would therefore enter judgment for Kshs. 310,514/- plus interest at the rate of 6%. Costs of the suit is also awarded to the Plaintiff."

24. Pursuant to the foregoing judgment, another decree dated April 27, 2012 was extracted. Pursuant to the second decree warrants of attachment dated May 11, 2012 indicating the total decretal sum payable by the Appellant to be Kshs. 2,216,021.44/- were issued to Messrs. Samuel Mugendi t/a Clear Real Traders Auctioneers for purposes of execution. Thus prompting the Appellant's motion dated May

22, 2012. By his motion the Appellant sought to demonstrate that the decretal sum was long settled and that it would be unconscionable to allow execution to proceed on the subsequent warrants of attachment.

25. The Appellant at paragraphs 2, 3, 4, 5, & 6 of his supporting affidavit swore that; -

> " 2. On 17th July 2006 the Honourable Court issued
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> interlocutory judgment against me for Kshs. 310,514.08 reserving the issue of interest for trial.
>
> 3. Through my advocates then Messes M. Jivanjee advocates, I forwarded payment to the Plaintiff through their advocates on record Messrs Mose & Mose advocates, as follows:
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> i. Kshs. 193,132.00 forwarded on 20th July 2006;
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> ii. Kshs. 117,382.00 forwarded on 1st November 2006;
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> iii. Kshs. 110,809.00 forwarded on 7th December 2006.
>
> Now jointly produced and marked MKS- 1 are copies of the correspondence.
>
> 4. The decree sought to be executed herein against me comprises the paid decretal sum of Kshs. 310,514.08, costs and interest thereon from the 4th December 2003 until 31st May 2012. It essentially seeks payment of sums already paid, as shown above. The Plaintiff seeks unjust enrichment from me fraudulently.
>
> 5. I have been advised by my advocates on record Messrs Ochieng', Onyango, Kibet & Ohaga advocates and which advice I truly believe that to extent that the court record does not reflect the payments aforesaid, the Plaintiff fraudulently failed to disclose to the Honourable Court that the decretal sum has been paid and have in this deliberate enterprise caused the Honourable Court to issue warrants for recovery of monies already paid.
>
> 6. I have further been advised by my advocates on record Messrs Ochieng', Onyango, Kibet & Ohaga advocates and which advice I truly believe that there having been no order for Interest on interest the Plaintiff cannot charge interest on any outstanding interest from the decretal sum already satisfied." (sic)

26. In the exparte judgment in respect of which the first decree was extracted, interest was to be at court rates or otherwise to be proved by way of formal proof. Section 26 (1) of the *Civil Procedure Act* provides that;-

> "(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

27. The direction was clearly in exercise of the court's discretion under section 26 and 27 of the *Civil Procedure Act*. The purport of the direction was that if the Respondent settled on interest awarded at court rates, the judgment was final, but if it opted to go to formal proof of the interest sought in the plaint, the judgment was interlocutory. Having elected to extract a final decree on the basis of interest at court rates, and attempting execution thereon, the Respondent could not also exercise the option of formally proving a different interest rate.

28. In *CFC Stanbic Limited v John Maina Githaiga & Another* [2013] eKLR the Court of Appeal observed that:-

> " Sections 26 and 27 of the *Civil Procedure Act*, [CPA], lay down the law relating to the grant of interest and the setting of effective dates thereof. The said provisions provide that the court has a wide discretion to grant interest and to determine the effective dates of payment of such interests.
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> In *Shah v Guilders International Bank Ltd*, [2003] KLR, the Court of Appeal regarding S 26 (1) of the *CPA* held:
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> > "This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:
> >
> > (1) the period before the suit is filed;
> >
> > (2) the period from the date the suit is filed to the date when the court gives its judgment; and
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> > (3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix.
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> > We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the court has not discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."
> >
> > Accordingly, the High Court should in its discretion award and fix the rate of interest payable.
> >
> > Regarding the issue of the commercial rate of interest applicable and the total amount of interest payable could only, in our view, be proved with evidence. From the record, the respondent did not produce any documentary evidence to show the contractual rate of interest applicable. Accordingly, the interest payable would, therefore, be discretionary as provided for by S 26 of the *CPA* and subject to evidence produced to support the claim....."

29. In my considered view, once the Respondent extracted the decree on the exparte judgment, it accepted the rate of interest granted at the discretion of the court that entered that judgment. The alternative would have been for the Respondent to proceed to formal proof in respect of the 6% interest claimed in the plaint. The Respondent could not enjoy both options, and in instalments as purported by subsequent proceedings. The issue of interest was settled with the extraction of the first and final decree and the court was rendered *functus officio* and barred from reopening the issue. The formal proof proceedings in my view were erroneous and inconsequential in the circumstances. Besides, there is

uncontroverted evidence that by the date of the formal proof the entire principal sum and interest under the first decree had been paid to the Respondent.

30. As to the meaning and effect of a decree, Section 2 of the *Civil Procedure Act* states that :

> " ...decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—
>
> (a) any adjudication from which an appeal lies as an appeal from an order; or
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> (b) any order of dismissal for default: Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;
>
> Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final".

31. The Supreme Court of Kenya in expounding on the doctrine of *functus officio* in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others v IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by *Daniel Malan Pretorius, in "The Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832*:

> " The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

32. The Supreme Court also relied on the holding in the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 to the effect that;

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

33. For the foregoing reasons, the judgment on interest delivered on November 17, 2011 was a nullity, a finding that the court appealed from did not have the jurisdiction to make. Was the decretal sum of Kshs. 310,514.08 fully paid as of 2012 or not and was further interest chargeable beyond the interest comprised in the initial decree until full payment? From the respective depositions in support of and opposition to the motion, it is not contested that the Appellant settled a total of Kshs. 421,323/- vide various cheques with the last one being forwarded on December 7, 2006. These payment were on the decree issued on August 1, 2006 totaling Kshs. 411,323/-.

34. The trial court correctly applied itself when it acknowledged the fact that the decree issued on 27.04.2012 did not factor in the payment of the sum of Kshs. 310,514.08/- claimed in the plaint. However, the court erred when it failed to find that a total sum of Kshs. 421,323/- having been settled by the Appellant as at December 7, 2006 and no interest could be charged on the principal sum thereafter. The decretal sum pursuant to the decree issued on August 1, 2006 having been settled in full as at December 7, 2006, interest could not be charged on an already settled principal sum. Interest cannot be charged on interest.

35. The Appellant accuses the Respondent of unjust enrichment and seeks an order for the sum of Kshs. 2,376,574.08/- to be refunded to him. Specifically, the prayer in the memorandum of appeal was to the effect that; -

> " d). The Honorable court be pleased to order rebate to the Appellant by the Respondent with interest of the sums paid on execution of the decree in Nairobi CMCC No. 12552 of 2003 amounting to Kshs. 2,376,574.08 save for the sums that the Honorable court will find due as actual interest payable" (sic)

36. While it is evident that the second decree and execution thereon were irregular albeit premised on court orders, the question of refund of excess payments to the Respondent by the Appellant was not canvassed before the lower court in respect of the motion dated May 22, 2012 and cannot be entertained in this appeal. That matter lies with the executing court before which it can be canvassed pursuant to the provisions of Section 34 of the *Civil Procedure Act*.

37. The sum total of the findings of this court are firstly that, the decretal sum of Kshs. 310,514.08 having been paid prior to the formal proof hearing, no interest was chargeable or payable by the Appellant other than interest comprised in the initial decree, until the date of full payment and, secondly, that the warrants of attachment and sale issued to Messrs. Samuel Mugendi t/a Clear Real Traders Auctioneers were irregular. In allowing the appeal, the court will set aside the ruling of the lower court and substitute therefor an order allowing in its entirety the Appellant's motion in the lower court dated May 22, 2012 with costs. Judgment is accordingly entered for the Appellant in these terms together with the costs of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr.Wepo

For the Respondent: Ms.Gesare h/b for Mr. Ngugi

C/A: Carol