



**Mwangi v Kenya Commercial Bank (Civil Suit 552 of 2003)
[2023] KEHC 1349 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 552 OF 2003
A MSHILA, J
FEBRUARY 17, 2023**

BETWEEN

FRANCIS NJOROGE MWANGI APPLICANT

AND

KENYA COMMERCIAL BANK RESPONDENT

RULING

1. The Applicant herein brought the instant application dated February 9, 2022 under sections 1A, 1B and 94 of the *Civil Procedure Act* and Order 22 Rule 16 of the *Civil Procedure Rules* seeking leave to execute the decree prior to the taxation of the party and party costs. He also prayed for the costs of the application.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Francis Njoroge Mwangi of the same date as follows;-
 - a. On October 21, 2020, a judgment was delivered in this matter on the following terms;-
 - i. An account be taken in respect to all the sums advanced by the Defendant to the plaintiff by an independent firm of accountants appointed by both parties and in the absence of consensus, the relevant professional body shall appoint one considering the interest rate regime applicable under the law;
 - ii. Upon conclusion of the exercise, any sums established to be due and payable shall be paid by the party liable to pay;
 - iii. Disposal of any charged suit property shall await the outcome of the account taking exercise;



- iv. Costs shall abide the outcome of who owes what.
 - b. The parties by consent appointed m/s Nyenge and Company to conduct the independent accounting exercise. Upon conclusion of the accounting exercise, the firm reported that the sum of Kshs 1,639,786.045 is due and owing to the applicant together with interest at the rate of 16.5% with effect from December 31, 2000.
 - c. The Applicant's advocates wrote a letter dated January 13, 2022 to the Defendant's advocates requesting for payment of the said sum. The Defendant refused to pay.
 - d. The Applicant is now aged 82 years with deteriorated health. He suffers from hypertension, diabetes mellitus and attendant health issues. He is incurring huge medical costs that he is unable to keep up with.
 - e. Taxation of the costs in the matter will take at least 6 months which delay will occasion the applicant irreparable loss and damage. The Applicant therefore prays that leave to execute the decree be granted prior to ascertainment of costs of the suit.
3. In response to the application, the respondent filed replying affidavit dated May 9, 2022 sworn by Lilian Sogo stating the following:-
 - a. Judgment dated October 21, 2020 was indeed delivered directing parties to have accounts taken by an independent professional body. An independent professional body was agreed upon by the parties which body reported that Kshs 1,639,786.00 was due to the applicant.
 - b. The expert report is not a judgment of the court and therefore the prayer for execution of the decree cannot stand. The Applicant is not a decree holder in the meaning of section 2 of the [Civil Procedure Act](#).
 - c. The Respondent is willing to pay the sum of kshs 1,639,000 but the applicant's advocates refused and insisted that parties should first agree on the applicable interest rate before any payments could be done. Interest was not a prayer in the suit.
 4. The Applicant filed supplementary affidavit stating that the expert did not determine interest since it was not part of his brief. The judgment awarded interest to the applicant at the prevailing CBK rates until payment in full. The Applicant instructed m/s Interest Rates Advisory Centre Ltd which concluded that the total interest would be kshs 5,026,276.
 5. The parties were directed to canvass the application by way of filing and exchanging written submissions which are summarized as follows:-

The Applicant's Case

6. The Applicant averred that the judgment dated October 21, 2020 directed parties to appoint an independent expert to recalculate the applicant's account with the respondent. The mutually appointed expert concluded that Kshs 1,689,786 was due to the applicant as at December 31, 2000. The judgment also directed that interest rate would be the prevailing CBK rate.
7. The Applicant is advanced in age and his health is failing. The court has the power under section 94 of the [Civil Procedure Act](#) to grant leave to the successful litigant to execute a judgment before taxation of the Bill of Costs. The Applicant relied on [Mercedes Sanchez Rau Tussel v Samken Ltd & 2 Others \[2002\]eKLR](#); [Bamburi Portland Cement Co Ltd v Hussein \[1995\] KLR 1870 \(CAK\)](#) and [Bruce Joseph Bockle v Coquero Limited \[2017\]eKLR](#).



Respondent's Case

8. The Respondent conceded that the parties settled on a mutual professional body as directed by the court and that the expert report stated that Kshs 1,639,786 was due to the plaintiff. The Respondent however submitted that the applicant has not extracted the decree and the matter and therefore he cannot invoke section 94 of the *Civil Procedure Act*.
9. The opinion of an expert is not a judgment and therefore execution cannot issue based on such mere opinion. There is still the pending issue of interest which the applicant has gone forward to calculate unilaterally amounting to Kshs 5,026,276. Only when the issue of interest is solved is when the Applicant can proceed with the execution process. When the issue of interest is resolved, the exact sum due will be determined either by consent of through being formalized by the court.
10. The Applicant cannot execute a judgment without a decree and the respondent urged the court to dismiss the application with costs to the respondent.

Issue for Determination

11. The application raises only one issue for determination; whether the application is merited for leave to be granted to execute the defence prior to determination of the taxation of party and party costs.

Analysis

12. Section 94 of the *Civil Procedure Act* provides;-

' 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.'

13. This provision allows the court grant leave for execution of a decree before costs of the suit are ascertained. In the instant application however, no decree was attached. The applicant only makes reference to the judgment dated October 21, 2020. The applicant also mentions in its submissions that there is a decree dated February 7, 2022 but the same was not attached in the application.

14. After a Judgment is delivered, a 'decree' is extracted by the parties with the approval of the Court. In the interpretation section of the *Civil Procedure Act*, Section 2, 'decree' is defined as follows:-

' Decree' means the formal expression of an adjudication which so far as regard the Court expressing it, conclusively determines the rights of parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final;'

15. In *Rubo Kimngetich Arap Cheruiyot v Peter Kiprof Rotich [2006]eKLR* the court observed;-

' It is the decree as a legal instrument which is executable and not the judgment by itself. It is my view that in a suit what is executable is the 'Decree' of the Court. I have carefully perused the court record and find that no decree has ever been drawn, approved and signed by the Court through the Deputy Registrar or otherwise.



It is trite law that no execution of any decree can take place without such a decree coming into existence i.e. drawn, approved and signed and sealed by the Court.'

16. To the extent that there is no decree in this matter, this court is satisfied that the application is lacking in merit and must fail.

Findings and Determination

17. In the light of the forgoing this court makes the following findings and determinations

- i. The application is found to be devoid of merit and it is hereby dismissed.
- ii. Each party to bear their/its own costs.

18. Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

HON.A.MSHILA

JUDGE

In the presence of;

Mr. Gakungu for the Defendant/Respondent

No appearance for the Appellant

