



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Old Mutual Life Assurance Company Limited (Commercial Case 389 of 2004)
[2023] KEHC 1056 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 389 OF 2004
DAS MAJANJA, J
FEBRUARY 17, 2023**

BETWEEN

JOSEPH KANGUCHU MWANGI PLAINTIFF

AND

OLD MUTUAL LIFE ASSURANCE COMPANY LIMITED DEFENDANT

RULING

1. The defendant has moved the court by the notice of motion dated November 22, 2022 seeking orders, inter alia, that the proclamation dated November 18, 2022 and warrants of attachment dated November 2022 be set aside and that the court sets off the decretal amount it owes to the plaintiff with the outstanding debt for loan arrears that is owed to the defendant.
2. The application is supported by the affidavit of the defendant's group secretary and legal counsel, Nannette Miingi, sworn on November 22, 2022 and opposed by the plaintiff through his affidavit sworn on December 7, 2022 and the grounds of opposition dated December 7, 2022.
3. In order to deal with defendant's plea, it is necessary to set out the background of the suit albeit briefly. The plaintiff filed suit against the defendant seeking a permanent injunction restraining the defendant from selling Land Parcel Nairobi/Block 82/3265 ("the suit property"), accounts be taken on the plaintiff's commission and mortgage and damages for breach of contract. After hearing on the suit, Gikonyo J, in the judgment dated March 3, 2015 held that the defendant was not entitled to sell the suit property as the notices issued were not valid. The court however noted that, "If the chargee issues proper notices in law, there is nothing which prevents them from selling the suit property." The court then reserved the issue of assessment of damages.
4. The task of assessment of damages ultimately fell on Tuiyott J, who, in the judgment dated April 28, 2020, awarded the plaintiff Kshs 2,415,880.79 with interest and costs. In the judgment, the learned



judge observed, “The defendant will still be at liberty to proceed with enforcement remedies available to it as chargee if, after taking into account the damages due from it to the plaintiff, a debt is still owing.”

5. The defendant’s case is that it has now recalculated the outstanding loan whilst incorporating the outstanding commission due to the plaintiff and there remains a deficit of Kshs 10,980,344.87 with interest thereon. It states that once the decree in this matter was settled, the parties engaged in without prejudice negotiations towards resolving the amount owed to each party whereupon the defendant withheld sale of the suit property. It claims that despite the negotiations, the plaintiff went ahead to execute the decree to its detriment as it does not owe the plaintiff any money after what is owed to it by the plaintiff is set off. In its view, if execution proceeds, the defendant stands to suffer irreparable loss as the plaintiff does not have any assets from which the defendant can recover the loan amount.
6. The plaintiff opposes the defendant’s application on the ground that the defendant seeks to review the judgment of the court yet the judgment and the decree did not grant the defendant a right of set off. He points out that the defendant did not file any set off. He is not agreeable to a set off and demands to be paid the decretal sum as ordered by the court. He states that he is entitled to the fruits of the judgment and should now be allowed to proceed with execution.
7. From the respective positions, the issue for determination is whether the court should stay execution to allow for a set-off as contended by the defendant. The starting point for resolution is the matter is the judgment and the resultant decree which has been issued and which states as follows:
 1. That the sale of the suit properties be and is hereby restrained on the notices issued herein.
 2. That they may however, issue fresh notices and sell the charged property unless the debt is repaid in full.
 3. That the defendant shall pay the plaintiff Kshs 2,415,880.79 with interest thereon at court rates from the date of filing this suit.
 4. That the defendant shall pay the costs of the suit.
8. Since the decree has been settled, the parties’ rights and obligation must flow from the court’s determination. It is clear the decree recognizes the defendant’s right to issue notices and sell the suit property and the right of the plaintiff to receive Kshs 2,415,880.79, interest and costs. There is no right of set off reserved in the decree and non can be implied or imposed by the court as this would amount to varying the terms of the decree. Each party is entitled to pursue its rights as stated in the decree hence there is no basis for the court to stay execution or order a set-off. The defendant has a security in its hands which it is entitled to sell to recover what is due to it.
9. The notice of motion dated November 22, 2022 is therefore dismissed with costs to the plaintiff assessed at Kshs 30,000.00.

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

D S MAJANJA

JUDGE

Court Assistant: Mr M Onyango

Mr Chege instructed by Amolo and Gacoka Advocates for the plaintiff.

Ms Koech instructed by Nyiha, Mukoma and Company Advocates for the defendant.

