



REPUBLIC OF KENYA



**KENYA LAW**  
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**Savla & another v Shah (Civil Case 319 of 2016)  
[2023] KEHC 26847 (KLR) (Civ) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26847 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 319 OF 2016**

**AN ONGERI, J**

**DECEMBER 21, 2023**

**BETWEEN**

**SONAL MOTICHAND SAVLA ..... 1<sup>ST</sup> PLAINTIFF**

**MRADULA MOTICHAND SAVLA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BHAVESH PREMCHAND SHAH ..... DEFENDANT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 19/5/2022 seeking the following orders;
  - i. This application be certified urgent and service of this application be dispensed *ex-parte* in the first instance for purposes of granting prayer b) and c) herein.
  - ii. This honourable court be pleased to set aside/vacate or discharge the warrant of attachment pursuant to a decree dated 14<sup>th</sup> July, 2017 and a warrant of arrest issued on 4<sup>th</sup> October, 2021.
  - iii. This honourable court be pleased to grant an order that the defendant/applicant's passport be released to him.
  - iv. Any other orders that the court may deem fit.
  - v. Costs of this application be in the cause.
2. The application is based on the following grounds;



- i. That a consent judgment was recorded in court in favour of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/respondents against the defendant/applicant on 14<sup>th</sup> July 2017 in the sum of USD.200,000.00 plus costs and interest.
  - ii. That the defendant/applicant was unable to settle the decretal sum which led to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/ respondents extracting a decree for execution and a warrant of arrest dated 4<sup>th</sup> October, 2021 was issued.
  - iii. That as a result of the warrants issued, the defendant/ applicant was directed to submit his passport to the High Court pending settlement of the decretal sum.
  - iv. That subsequently, the defendant/applicant's advocates and the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/respondents erstwhile advocates, Odera Were Advocates, got into discussions regarding the settlement of the decretal sum which led to an agreement that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/respondents would waive the interest and that the defendant/applicant would only settle the sum of USD.200,000 and advocate's costs.
  - v. That the fact that Odera Were Advocates was on record and acting for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/respondents is not contested and we had no reason to believe otherwise.
  - vi. That based on the agreement, the defendant/applicant went ahead to make specific payments towards the settlement of the sum of USD.200,000 and advocate's costs.
  - vii. That the subsequent waiver of interest by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/respondents was a product of discussions and eventually the agreement entered into by the parties *vide* the advocates on record at the time on 8<sup>th</sup> December 2021; in similar manner to the consent judgment which the parties' advocates recorded in court on 14<sup>th</sup> July, 2017.
  - viii. That in light of the above, the defendant/applicant is no longer indebted to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/ respondents.
  - ix. That the defendant/applicant wishes to travel and, in this regard, seeks that the court do authorize release of his passport and effect a discharge of the said warrants of arrest against him.
  - x. That it is in the interests of justice that this honorable court grants the orders prayed herein.
  - xi. That the defendant/applicant will suffer prejudice which is incapable of being remedied by way of costs if the application herein is not allowed.
  - xii. That it is also in the interest of justice that this suit be heard and determined on merit.
  - xiii. That unless the orders sought are granted, the defendant/applicant shall be condemned without recourse.
3. The application is supported by the affidavit of the defendant/ applicant which reiterates the grounds stated above.
  4. The 1<sup>st</sup> plaintiff/responded filed a replying affidavit dated 30/5/2022 opposing the application dated 19/5/2022 and a further affidavit dated 8/7/2022.
  5. The 1<sup>st</sup> plaintiff/respondent stated in the replying affidavit that it is not true that the interest was waived.
  6. She deposed that the defendant visited their premises and told her his relatives were going to pay the principal sum but he would sort out the issue of interest.



7. The parties filed written submissions in the application which I have duly considered.
8. The defendant submitted that he has fully settled the decretal sum of USD 200,000 or its equivalent in Kenya shillings.
9. He said there was no basis for issuing warrants of attachment and warrants of arrest issued on 4/10/2021.
10. The defendant/applicant further submitted that the email correspondences by the parties amounted to a binding agreement between the parties.
11. Further that on 8/12/2021 the respondent had willfully agreed to waive charging any interest using the express words;

“If payment is not made then we may consider asking for interest.”
12. The defendant/applicant further submitted that the applicant’s advocate had a legitimate expectation that the parties had consensus and idem (mutual minds) that interest would not be charged and that was the basis for settling the debt.
13. The plaintiff/respondent submitted that no consent was entered into on waiver of interest and further that the firm that was on record was K K Njenga & Associates and not the current firm.
14. The plaintiff/respondent further submitted that the defendant/ applicant went to their home and told them that his relatives would pay the principal sum but he would pay the interest.
15. The plaintiff/respondent further submitted that the documents annexed to the applicant’s supporting affidavit do not add up to kshs.20,000,000 and therefore it is not certain when the kshs.20,000,000 was paid.
16. The plaintiff/respondent also submitted that there was only USD 45,000 and kshs.350,000 that was paid and the balance is not stated anywhere.
17. Further that the amount to be paid to the plaintiff were captured in the warrants and at no time had the amounts been varied.
18. The plaintiff/respondent also submitted that the judgment was for USD 200,000 or its equivalent in Kenya shillings and further that the defendant/applicant has not demonstrated that USD 200,000 is equivalent to kshs.20,000,000.
19. Further that no evidence has been placed before court as to what was the exchange rate.
20. The plaintiff/respondent urged the court to dismiss the application dated 19/5/2022 and to allow the plaintiff/ respondent to proceed with execution.
21. I have carefully considered the submissions filed in the application dated 19/5/2022.
22. The issues for determination in the application are as follows;
  - i. Whether the plaintiff/respondent waived interest.
  - ii. Whether the decretal sum has been settled.
23. On the issue as to whether the plaintiff/respondent waived the interest, there are email communications that spoke about that issue.
24. I also find that the condition upon which the decretal sum was settled was that interest be waived.



25. The Defendant/Applicant attached email communications to the supporting Affidavit sworn on 19/5/2022 which show that the parties negotiated on the issue of interest and the plaintiff/respondent's advocate confirmed that interest was not going to be charged so long as the principal sum was settled.
26. It is not the duty of the court to rewrite contracts between parties.
27. In *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”.
28. I find that the intention of the parties can be ascertained from the emails which are annexed to the supporting affidavit.
29. The plaintiff/respondent's averments that the Defendant visited their premises and told her his relatives were going to pay the principal sum but he would sort out the issue of interest has not been supported by any documentary evidence.
30. On the issue as to whether the decretal sum has been settled, I find that there is evidence that the 1<sup>st</sup> plaintiff/respondent confirmed that the principal sum was settled and the only outstanding issue was the interest.
31. The plaintiff was seeking USD 299,000 together with interest.
32. I find that there is evidence that the plaintiff waived interest.
33. I allow the application dated 19/5/2022 in the following terms:
  - i. That the warrants of attachment pursuant to the decree dated 14/7/2017 and warrant of arrest issued on 4/10/2021 be and are hereby set aside.
  - ii. That the defendant/applicants passport be released to him forthwith.
  - iii. That each party to bear its own costs of the application.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21<sup>ST</sup> DAY OF DECEMBER, 2023.**

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**A. N. ONGERI**

**JUDGE**

