



**Jiwa v Idrata Developers Limited (Miscellaneous Application E1119 of 2020)  
[2022] KEHC 283 (KLR) (Commercial and Tax) (1 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E1119 OF 2020**

**EC MWITA, J**

**APRIL 1, 2022**

**BETWEEN**

**NAJMUDEN DHANJI JIWA ..... APPLICANT**

**AND**

**IDRATA DEVELOPERS LIMITED ..... RESPONDENT**

**RULING**

1. Najmuden Dhanji Jiwa, (Mr. Jiwa) entered into a sale agreement with the Idrat Development Limited (Idrat), to purchase a certain property. The sale agreement entered into between the parties contained an arbitration clause. The sale fell through leading to the dispute being referred to arbitration. An arbitral award was made in favour of Mr. Jiwa, who then applied for recognition of that arbitral award as a judgment of the court.
2. Mr. Jiwa asserted that on 21<sup>st</sup> March 2021 this court entered judgment in his favour against Idrat for Kshs. 27,500,000 being a refund of the money he had paid, Kshs. 2,000,000 general damages and interest, bringing the total amount to Kshs. 55,000,000. Although Idrat sought to negotiate the mode of liquidating that amount, not much came out of it and Idrat has not paid to date.
3. Mr. Jiwa took out a motion on notice dated 30<sup>th</sup> September 2021 under several provisions of the *Civil Procedure Act* and rules made thereunder and section 68 of the *Land Registration Act*, seeking several orders. These were, a prohibitory order restraining Idrat from dealing with LR. NO. Nairobi /Block 22/198, (the property), in any manner until further orders of the court; leave to execute the decree before ascertainment of costs and that the property be sold by public auction and the proceeds paid to him. He also sought an order directing Idrat to grant access to the property.
4. The application was premised on the grounds on the face of the motion, the supporting affidavit sworn on 30<sup>th</sup> September 2021 and written submissions dated 9<sup>th</sup> December 2021.



5. Mr. Jiwa asserted that he applied for entry of judgment in terms of the award and the application was allowed. Although he was willing to allow Idrat time to pay the money, Idrat had not shown willingness to do so, hence this application.
6. Mr. Jiwa stated that he was apprehensive that Idrat would secretly dispose of the property to escape liability arising from the judgment and decree. Mr. Jiwa relied on a joint venture agreement entered into between Idrat and Shemim Akhter Hosein, to argue that Idrat was the legal owner of apartments on the property. He therefore prayed that his application be allowed.

### **Response**

7. Idrat filed a replying affidavit sworn on 24<sup>th</sup> November 2021 by Tariq Nazir Ahmed, its director and CEO. It was contended that the application was premature, frivolous, devoid of merit and an abuse of court process. According to Idrat, no decree had been extracted; the amount of Kshs. 55,000,000 was grossly overstated and was substantially disputed.
8. It was Idrat's case that the arbitral award was for a monetary claim comprising the principal amount, fluctuating dynamic commercial interest rates and unascertained costs. In the absence of a decree and a certificate of costs to confirm the amount payable, the application could not be allowed, otherwise it would cause prejudice and miscarriage of justice.
9. According to Idrat, parties were had sought to negotiate on costs and interest which could not be agreed. It had therefore not paid the amount due because of the extortionist tendency adopted by Jiwa. Idrat maintained that the application was in furtherance of the coercion Jiwa was subjecting it to and the attempt to sell the property was in bad faith.
10. According to Idrat, the property belongs to one Shamin Fazil Hosein also known as Shamim Akhter Hosein and attached a certificate of title dated 15<sup>th</sup> June 2017 ("TAN1"). Idrat further denied owning apartment No. 3 that was the subject of the agreement between Idrat and him.
11. Idrat stated that a decree can only be enforced against a party to the suit and no one else. In the absence of a decree and certificate of costs ascertaining the amount payable, meant that the application to sale property by public auction was premature and could not be allowed. the application could not also be allowed because it sought to sell a property that belonged to someone else.
12. Idrat relied section 34 of the [Civil Procedure Act](#) and [Roseline Violet Akinyi v Celestine Opiyo Wagweru \[2020\] eKLR](#) for the argument that a decree holder cannot enforce the decree against a person who is not a party to the proceedings.

### **Determination**

13. I have considered this application, the response and perused the record. Mr. Jiwa moved this court seeking leave to execute before costs were ascertained. For that execute, he wanted the court to allow sale of the property by public auction and the proceeds paid to him. He asserted that the amount due was Kshs. 55,000,000 made up of the principal amount of Kshs. 27,500,000; general damages of Kshs. 2,000,000 and interest.
14. On its part Idrat maintained that a decree had been extracted and costs had not been ascertained. Idrat also argued that the amount of Kshs. 55,000,000 was disputed since interest had not been agreed and that the property to be sold belong to a person not party to the suit.
15. Section 94 of the [Civil Procedure Act](#) gives the court discretion to allow execution before taxation or ascertainment of costs whenever it deems it necessary, in a matter it has entered judgment while exercising its original jurisdiction.



16. However, as correctly argued by Idrat, Mr. Jiwa did not attach a copy of the decree to show the principal amount that was allowed. The only relevant document attached was a copy of the ruling which adopted the arbitral award as judgment in terms of that award. After judgment was entered, Jiwa was required to extract a decree which he did not do.
17. In that regard, therefore, Mr. Jiwa did not establish that the amount of Kshs. 55,000,000 he said was due to him was indeed due and the court could allow execution before taxation. Execution is ordered where there is a decree of the court showing the amount given by that court. In the absence of such a decree, there cannot be execution for unknown amount.
18. This is so because Order 22 which deals with execution talks of execution of decrees. Rule 1 gives the mode of payment, stating that all money payable under a decree or order should be paid into the court whose duty it is to execute the decree; direct to the decree-holder; or otherwise as the court which made the decree directs.
19. That notwithstanding, Idrat also argued that the property Mr. Jiwa wanted sold by public auction belongs to a person who is not a party to these proceedings. In that respect, a certificate of title dated 15<sup>th</sup> June 2017 was attached showing that the property belonged to Shamim Fazil Hosein also known as Shamim Akther Hosein. Mr. Jiwa did not challenge the facts as stated by Idrat that the property belonged to someone else. Mr. Jiwa did not attach a search to show otherwise and satisfy the court that it could sanction the sale of that property.
20. It was Mr. Jiwa's duty, as the person seeing leave to execute, to satisfy the court that, first; the property belonged to Idrat, the judgment debtor, Idrat's surety or that the owner of the property was enjoined into these proceedings to settle the decree before the court could sanction sale of that property, whether by public auction or otherwise, in execution of the decree.
21. Mr. Jiwa relied on a joint venture agreement to argue that the property belonged to Idrat. A joint venture agreement is not conclusive evidence of ownership and cannot override a provision of a statute. Section 26(1) of the *Land Registration Act*, (No 2 of 2012), is clear that a certificate of title shall be taken by courts as prima facie evidence of by the person named therein as proprietor of that land. Mr. Jiwa did not deny that the certificate of title showed that the land did not belong to Idrat.
22. Section 34 of the *Civil Procedure Act* provides for settlement of issues regarding enforcement of decrees and who are parties to proceedings and their representatives. In this case, the owner of the property is not Idrat's representative and, therefore, he cannot be ordered to satisfy a decree he was not party to.
23. In this respect, I agree with Aburil J's observation in *Roseline Violet Akinyi v Celestine Opiyo Wagweru (supra)* that section 34 does not provide for settlement of a decree by a person who is not a judgment debtor and a party to the proceedings in question and, therefore, a decree cannot be enforced against a non suited party.
24. In *james g. k. njoroge t/a baraka tools & hardware v apa insurance company limited & 3 others* [2018] eKLR, the Court of Appeal considered sections 92 and 94 of the *Civil Procedure Act* and stated:

We have considered these provisions, and find that under section 92 of the *Civil Procedure Act*, for the application to succeed the appellant had to satisfy the court that the 1st respondent had become liable, for the payment of the decree or part thereof, either as a surety, or in fulfillment of a condition imposed upon him in the proceedings by the court
25. Mr. Jiwa did not attempt at all to link the owner of the property with Idrat, the judgment debtor, to satisfy the court that the property could be sold in satisfaction of the decree on his behalf.



26. In the circumstances, the inevitable conclusion I come to is that the application cannot succeed. It is declined and dismissed with costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 1<sup>ST</sup> DAY OF APRIL 2022.**

**EC MWITA**

**JUDGE**

