



REPUBLIC OF KENYA



KENYA LAW

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**D Manji Construction Ltd v Associated Construction
Company (K) Ltd (Miscellaneous Application 378 of 2017)
[2022] KEHC 11819 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 378 OF 2017**

**A MABEYA, J
AUGUST 12, 2022**

BETWEEN

D MANJI CONSTRUCTION LTD CLAIMANT

AND

ASSOCIATED CONSTRUCTION COMPANY (K) LTD RESPONDENT

RULING

1. Before court is a motion on notice dated 26/8/2019. The same was brought under sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, order 45 rule 1, order 22 rule 25 and order 12 rule 7 of the *Civil Procedure Rules*.
2. The applicant sought that the consent order dated December 17, 2018 be reviewed and for leave to liquidate the balance of the decretal sum of Ksh 17,370,846/= in one lump sum instalment within 6 months ending on the 26/2/2020; a review of the interest payable on the balance of the decretal amount from 18% per month to the court rate of 12% per annum.
3. Consequently, that the Deputy Registrar do determine the total outstanding decretal amount payable based on 12% per annum court interest rate.
4. The grounds for the application were that the consent order was entered into by the parties to repay the decretal amount in the manner provided therein; that the applicant, at the time of filing the application, had honoured the payments as per the consent and had paid a total sum of Ksh 53,200,000/= out of the total of Ksh 70,570,846/-; that the interest on the decretal amount of 18% per month was erroneous and had bloated the balance of the decretal amount.



5. Further, that the warrants of attachment and sale are defective having erroneously stated that the balance of the decretal amount was Kshs 25,370,845/= instead of Kshs 17,370,846/=.
6. The applicant pleaded that if the court does not intervene, it would be prejudiced by the intended execution and would suffer irreparable loss even if it had paid a substantial part of the decretal amount.
7. The respondent opposed the application *vide* a replying affidavit sworn on 29/8/2019 by Grace Wangui Koech, its counsel on record.
8. She averred that the applicant conceded in its affidavit dated 26/8/2019 that it had defaulted in settling the decretal amount as per the consent; that the consent provided that interest shall be charged at the rate of 18% per month (compounded) for delayed payments and on that basis the respondent had calculated the balance of the decretal amount.
9. That the applicant is merely seeking to set aside the consent order issued on December 17, 2018 which emanated from the arbitral award granted to the respondent more than three years ago.
10. Having analysed the entire record, the issue for determination is whether the consent order dated December 17, 2018 should be reviewed.
11. The aforementioned consent was duly entered into by the parties and adopted as a court order. Paragraph 4 thereof provided: -

“... no interest will be charged for delayed payments for the first four (4) months from January 15, 2019. After the first four months aforesaid interest shall be charged on the balance then due and owing at the rate of 18% per month (compounded) and shall be paid on the instalments set out in paragraph 3 above.”
12. It is undisputed that the applicant has defaulted in the payment or rather completion of the payment of the decretal sum as stipulated in the consent. This led the respondent to apply and obtain warrants of attachment and a proclamation dated 19/8/2019 and 25/8/2019 respectively for the unpaid decretal amount.
13. The applicant prayed to have the interest rate varied to 12% per annum as opposed to 18% per contained in the consent. Further, to have the balance paid out in a lumpsum figure within 6 months from the date of the application.
14. The applicant’s main reason for its default was that it did not have the funds due to the government failing to honour payments to it.
15. A consent is a contractual agreement between the parties to which they are bound. A court cannot intervene and re-write a contract entered into by the parties. See *National Bank of Kenya Ltd v Pipelastik Samkolit (K) Ltd & another* [2001] eKLR.
16. As for the prayer to liquidate the balance of the decretal amount within 6 months ending on 26/2/2020, the court finds that the prayer has been overtaken by events as it is more than 2 years since the application was made and the proposed dated of full payment. in any case, allowing such a prayer would be tantamount to rewriting the terms of the consent.
17. It is noted that these proceedings emanated from an arbitral award made in 2016 in favour of the respondent. More than 5 years have elapsed since then. It is only in the interests of justice to have the respondent reap the fruits of a favourable award as soon as possible.



18. On the basis of the foregoing, the court finds no merit in the application dated 26/8/2019 and the same is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

