



**AMK (Suing as the Mother and Next Friend of JMK - Minor) v
Kenya Power & Lighting Company Limited (Civil Suit 28 of 2019)
[2022] KEHC 13207 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL SUIT 28 OF 2019
EM MURIITHI, J
SEPTEMBER 29, 2022**

BETWEEN

**AMK (SUING AS THE MOTHER AND NEXT FRIEND OF JMK -
MINOR) PLAINTIFF**

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

RULING

1. Before the court for determination is the application under certificate of urgency dated March 24, 2022 by Kenya Power & Lighting Company Limited, the applicant herein, brought under order 21 rule 8 of the Civil Procedure Rules, section 1A, 2A, 3, 3A & 34(1) of the Civil Procedure Act, seeking
 1. Spent
 2. Spent
 3. That any decree and/or warrants of attachment issued in this matter be recalled and set aside forthwith for being erroneous and for non-compliance with the provisions of order 21 rule 8 of the Civil Procedure Rules.
 4. That costs of the application and any incidental costs be borne by the respondent.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Erastus Mbaka, the applicant's legal officer sworn on even date. He avers that judgment in this case was entered on April 14, 2020 in favour of the respondent for the sum of Ksh 23,056,160. The applicant lodged an appeal at the Court of Appeal, and it paid the sum of Ksh 9,800,000 which was ordered by the court as a condition for stay pending that appeal. After the appeal was unsuccessful, the applicant opted to satisfy the decretal sum. On October 26, 2021, its advocates on recorded computed



the balance of the decretal sum, costs and interests payable at Ksh 16,004,205.60. The applicant proceeded to write to the respondent's advocates who indeed confirmed the balance payable was Ksh 16,004,205.60. On December 6, 2021, the agreed decretal sum of Ksh 16,004,205.60 was paid to the respondent's advocates bringing the total sum paid to Ksh 25,804,205.60, which payment was duly acknowledged by the respondent. According to him, the applicant has satisfied the entire decretal sum, costs and interests in this matter. He avers that the respondent has extracted a decree/ warrants of attachment showing that there is a balance of Ksh 1,407,353, which is incorrect as the entire decretal sum, agreed costs and interest was paid in full. Even if there was a balance payable, the amounts appearing on the warrants of attachment are erroneous arising from wrong computations, since the already paid sum of Ksh 25,804,205 is higher than the decretal sum of Ksh 23,804,205. It is unclear how the interest amounts of Ksh 680,946 and Ksh 2,629,138 were arrived at, and the respondent's advocate did not send a draft decree to the applicant for approval or rejection, before extracting the illegal warrants of attachment. He avers that since the applicant was not heard on computations of interest and the balance payable if any before the decree was issued, it was condemned unheard and is now being compelled to pay colossal sums. He prays for any decree issued herein and the consequence warrants of attachment to be recalled and set aside forthwith.

3. The respondent opposed the application vide her replying affidavit sworn on March 25, 2022. She accuses the applicant of approaching the court with pure falsehoods and concealment of material facts with a view of misleading it into issuing unwarranted orders. She avers that the applicant used the decree herein on or about April 30, 2020 in its appeal to the Court of Appeal. Before the ruling on costs/ taxation was delivered, she approached the applicant on a without prejudice basis wherein it orally undertook to settle the then compromised figure/sum of Ksh 16,004,205.60 on or before November 19, 2021. The said sum of Ksh 23,056,160 attracted interest (Ksh 680,946) at court rates(14%) from April 14, 2020 until July 2, 2020 when a sum of Ksh 9,800,000 was paid pursuant to the ruling of June 19, 2020. The balance of Ksh 13,256,160 continued attracting interest (Ksh 2,629,138) at court rates from July 2, 2021 until December 6, 2021 when it was paid. According to the ruling of December 2, 2021, costs were taxed at Ksh 842,364. Therefore the computation is Ksh 680,964 (1st interest) + Ksh 2,629,138 (2nd interest) + Ksh 842,364 (Costs) + Ksh 23,056,160 (Decretal sum) = Ksh 27,208,608 less paid (Ksh 9,800,000+ Ksh 16,004,205.60) = Ksh 1,404,402.4 (unpaid balance) + Ksh 2,950 (court collection fees) = Ksh 1,407,352.4. She avers that the indicated outstanding balance of Ksh 1,407,352.4 was well computed and fully justified hence the application ought to be dismissed with costs, as it is baseless and a waste of the court's time.
4. The applicant filed a further affidavit sworn on March 28, 2022 stating that it was a stranger to the decree dated June 22, 2020, as it had used the decree dated April 21, 2020 to lodge the appeal at the Court of Appeal. In any event, the decretal sum adjudged on April 14, 2020 was fully satisfied by the sum of Ksh 25,804,205 paid to the respondent, and the issue in the application is the subsequent decree/ warrants of attachment which was extracted without the involvement of the applicant. He avers that the respondent's decision to rescind the compromised figure/sum did not take away the respondent's obligation to comply with the provisions of order 21 rule 8 before extracting the subsequent decree and warrants for execution. He avers that since the trial court while passing the decree did not order payment of interest at 14%, the respondent's computation of interest at 14% was erroneous, and the applicable rate should be 6%.

Analysis and determination

5. This court has considered the application, the responses and the arguments by the parties. The respondent is accused of flouting the provisions of order 21 rule 8 of the Civil Procedure Rules, by not forwarding the draft decree to the applicant for approval or rejection before extracting the warrants of



attachment. The said order provides for preparation and dating of decrees and orders as follows: '(1) A decree shall bear the date of the day on which the judgment was delivered. (2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly. (3) If no approval or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly. (4) On any disagreement with the draft decree any party may file the draft decree marked as 'for settlement' and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.'

6. The court in its judgment of April 14, 2020 awarded the respondent a total sum of Ksh 22,056,160, and a decree was extracted therefrom. Paragraph 47 of the said judgment read as follows: 'I award costs to the plaintiff and interest. Interest on special damages to run from the date of filing the suit while the rest is from the date of judgment.' The court in its ruling of June 18, 2020 reviewed the decretal sum from Ksh 22,056,160 to Ksh 23,056,160, plus costs and interest. It is therefore clear that the decree issued on June 22, 2020 for Ksh 23,056,160 was not erroneous as wrongly alluded to by the applicant. This court is in full agreement with the holding of the court (Kasango J) in *Eco Bank Limited v Elsek & Elsek (Kenya) Limited & 3 others [2015] eKLR* where it was held as follows: 'The plaintiff, has not denied it did not forward the draft decree for approval as provided under the above mentioned rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. It would only lead to the setting aside of the execution if the decree was shown not to conform to the judgment.'
7. It is agreed by the parties that a total sum of Ksh 25,804,205.60 has already been paid to the respondent by the applicant, and receipt has been duly acknowledged. The bone of contention is the sum of Ksh 1,407,352.4, which comprises of interests and court collection fees.
8. Section 26 of the *Civil Procedure Act* provides as follows:- '(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit. (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.'
9. The applicant and the respondent engaged on a without prejudice basis, as a result of which Ksh 16,004,205.60 was agreed to be paid on or before November 19, 2021. Although the respondent emailed the applicant on November 21, 2021 rescinding all concessions made between the parties herein, because the applicant had failed to settle the agreed decretal sum on the date agreed upon, the applicant anyway proceeded to pay the said sum on December 6, 2021. This court finds that the respondent cannot be faulted for rescinding the concession, which was occasioned by the applicant's default.
10. On October 20, 2021, the applicant was served with the respondent's bill of costs dated October 19, 2021, the taxation notice dated October 22, 2021 together with the hearing notice dated November 5, 2021, and there is an affidavit of service on record to that effect. When the matter came for taxation



before the taxing master on November 11, 2021, the applicant did not either appear or file a response thereto and the bill was taxed on December 2, 2021 at Ksh 842,364. The applicant cannot be heard to say that it was condemned unheard yet it was duly served with the respondent's bill of costs, notice of taxation and a hearing notice.

11. Since the judgment of the court and the subsequent decree were silent on the rate of interest applicable, this court, in line with the provisions of section 26(2) of the *Civil Procedure Act*, finds that the applicable rate is 6% and not 14%.
12. The interest is thus calculated as follows: a) $23,056,160 \times 6\%$ of 77 days = Ksh 291,834. b) $Ksh\ 13,256,160 \times \frac{6}{100} \times \frac{17}{12} = Ksh\ 1,126,774$.
13. The computation is as follows: Ksh 291,834(1st interest) + Ksh 1,126,774 (2nd interest) + Ksh 842,364(costs)+ Ksh 23,056,160 (decretal sum)= Ksh 25,317,132.
14. The total sum that has been paid by the applicant and duly acknowledged by the respondent is Ksh 25,804,205.60, but the duly owed sum stands at Ksh 25,317,132. This court cannot allow the respondent to unjustly enrich herself at the expense of the applicant.
15. The court finds the application dated March 24, 2022 merited and it is allowed in the following terms:

Orders

16. Consequently, there shall be an order for the refund by the respondent is to the applicant the sum of Ksh 487,073.60 being the overpayment.
17. Costs of the application are awarded to the applicant.

Order accordingly.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2022.

EDWARD M MURIITHI

JUDGE

Appearances:

M/S Ngunjiri Michael & CO Advocates for the Plaintiff.

M/S Mithega & Kariuki Advocates for the Defendant.

