



Eugenes v Jomo Kenyatta University of Agriculture and Technology (Miscellaneous Application E019 of 2019) [2022] KEHC 15972 (KLR) (Commercial and Tax) (30 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15972 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E019 OF 2019
DAS MAJANJA, J
NOVEMBER 30, 2022

BETWEEN

FURAHA EUGENES APPLICANT

AND

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY RESPONDENT

RULING

1. The applicant, who is also the decree holder, has filed the Notice of Motion application dated February 25, 2020 made under sections 1, 1A, 1B, 3A, 3B and 63 of the *Civil Procedure Act* (chapter 21 of the Laws of Kenya), order 25 rule 5(1) and order 51 rule 1 of the *Civil Procedure Rules*. He seeks an order that judgment be entered for USD 119,538.00 with interest without conversion and such other orders that the court may consider just and convenient. The application is supported by the applicant's affidavit sworn on February 25, 2020 and opposed by the respondent through the replying affidavit of its chief legal officer, Vivian Nyambura, sworn on June 3, 2020. The court referred the application to mediation on November 18, 2021 but the mediator reported on January 26, 2022 that the parties had failed to reach an agreement.
2. The facts leading to this application are common cause. The parties herein entered into a lease agreement in Rwanda. The respondent fell in arrears in rent payment whereupon the applicant filed a recovery suit in the commercial court in Rwanda. On October 19, 2017, the court delivered judgment in favour of the applicant ("the foreign judgment") as follows:
 - a. USD 209,300.00 - for the space of 350m² occupied without mutual consent
 - b. USD 158,700.00 - for rent of 6 months for the period when the Defendant issued the notice to terminate the lease contract but never paid.



- c. USD 19,121 as interest.
 - d. RWF 100,000 as follow up costs.
 - e. RWF 700,000 as lawyer fees.
 - f. RWF 50,000 as court fees.
3. Thereafter, the applicant instituted this suit seeking registration and execution of the foreign judgment in Kenya under the *Foreign Judgments (Reciprocal Enforcement) Act* (chapter 43 of the Laws of Kenya). The court considered the application and issued the following orders on May 8, 2019 (“the recognition order”):
- i. That leave is hereby granted to the applicant to register in the High Court of Kenya the judgment delivered and made by the Honourable Justice Hameyimana Telesphore seating in the commercial court of Nyarugunge within the Republic of Rwanda on October 19, 2017 in case no RCOM01249/2017/TC/NYGE.
 - ii. That the applicant shall not in any manner whatsoever pursue execution of the now registered judgment at the commercial court of Nyarugunge, Rwanda.
 - iii. The respondent shall within 7 days hereof file and serve an application to pay the decree by installments and the applicant shall be at liberty to respond thereto within 7 days of service.
 - iv. That the hearing of the intended application on April 24, 2019.
4. In compliance with the recognition order, the respondent filed a Notice of Motion dated April 16, 2019 seeking to settle the balance of the decretal sum in monthly installments of kshs 1,154,507.00 over a period of 24 months from March 30, 2019. Its position was that it had paid kshs 11,000,000.00 as part of the decretal sum of kshs 38,712,100.00.
5. The applicant opposed the application through his replying affidavit sworn on April 24, 2019. He stated that the foreign judgment was for USD 387,121.00 as the principal arrears and interest together with Rwanda Francs (RWF) 800,000.00 as lawyer’s follow up cost and fees. Further that the decretal sum was in USD since it was an express term of the lease agreement that rent would be paid in USD. The applicant disputed the respondent’s contention that the decretal sum was kshs 38,712,100.00 since the proper currency was USD.
6. The applicant acknowledged receipt of kshs 11,000,000.00 (approximately USD 108,354.40) which he states was paid in violation of the express terms of the judgment. The applicant opposed the respondent’s proposal to pay monthly the decretal sum as proposed since it was not only in the wrong currency but also in minimal installments which would cause unreasonable delay in its settlement. He insisted that the payment should only be made in USD.
7. On December 18, 2019, the court adopted the consent order dated May 9, 2019 and made the following orders:
- a. That the sum of Rwandese Francs One Hundred and Thirteen Million, Three Hundred and Twenty-Three Thousand Seven Hundred (RWF 113,323,700) has been paid to the applicant by the respondent.
 - b. That the parties to agree and verify the applicable exchange rate for the US Dollars in regards to the payments made in Rwandese Francs in (1) above.
 - c. That the respondent to pay the sum of kshs 15,000,000 on or before May 10, 2019.



- d. That the exchange rate applicable to the US Dollars for any payments made in Kenya shillings to be applied as at the date of payment.
 - e. That the respondent to pay the balance of the judgment sum in eight (8) equal monthly installments with effect from June 30, 2019 at the end of each succeeding month until payment in full.
 - f. That in default of payment of any installment, execution to issue.
 - g. That the court to determine the issue of interest and costs.
 - h. That parties be and are at liberty to apply.
8. On October 18, 2019, the court made the following orders:
- a. That the applicant shall have interest at court rates of the High Court of Kenya on unpaid sums at the date of registration with effect from the date until payment in full.
 - b. That the applicant shall have reasonable costs and disbursements in respect of registration of judgment and the disbursements shall include but will not be limited to, costs of copying the judgment and/or making a translation thereof.
9. Turning to the application before the court, the applicant now seeks judgment for the sum of USD 119,538.00 plus interest without conversion which is the loss he has incurred as a result of the respondent paying using the incorrect currency. The applicant's position is that the loss has been ascertained by his accountant, Clyde Atsango Mutsotso a certified public accountant trading as Clyde and Associates.
10. The respondent confirms the judgment of USD 387,121 and the part-payment of kshs 11,000,000.00. It confirms the consent which required it to pay kshs 15,000,000.00 in May 2019 and the balance in 8 equal monthly installments. It further confirms that the exchange rate applicable to the USD for any payments in Kenya Shillings was to be calculated as at the date of payment. The respondent stated that it has paid USD 245,414.41, RWF 17,905,300 and kshs 11,000,000 on diverse dates between November 29, 2018 and October 30, 2019.
11. The respondent states that the applicant allowed it to retain a sum of kshs 621,817.22 from the judgment of the ELC court and therefore what is due is a minimal balance of the judgment sum occasioned by the USD exchange rate difference together with costs and interest on the balance of the judgment sum. The respondent claims that the alleged balance of USD 119,538.00 is exorbitant and unjustified and holds that the audit report prepared by the account was erroneous since it did not capture the amount paid. The respondent therefore urges the court to dismiss the application since it fails to disclose material facts and is an abuse of the court process.
12. Both parties filed their statement of accounts. The applicant filed a statement of accounts as at June 15, 2021 which shows the interest per month, interest to date, principal balance, payment made and balances expected which was USD 87,326.48. The respondent also filed a Statement of account dated September 27, 2021 which shows the particulars of payments made such as the date, amount, currency, conversion to USD, the balance, the interest and the total outstanding balance of USD 18,823.47.
13. I have considered the depositions and submissions by both parties. There is no dispute that respondent remains indebted to the applicant. The dispute between the parties revolves around the exchange rate applied to the payments made and the interest due on the outstanding amount. The question for resolution then is how much does the respondent owe the applicant?



14. At this stage I would point out that that the court cannot grant the orders sought in the application since there is already a judgment in force as a result of the recognition order. The law and procedure does not contemplate or permit another or second judgment in the matter where the judgment on record is a final judgment unless there is a preliminary judgment on a specific issue which is not the case here. Despite this defect in the application, I believe that it is the duty of this court to resolve the dispute at hand with finality in line with the overriding objective. The issue really is one of taking accounts in order to ascertain what is due to the applicant as the judgment creditor.
15. Before I proceed with the necessary directions. It important to set out the parameters of the dispute. The judgment being enforced is in foreign currency. In *Beluf Establishment v Attorney General* NRB CA Civil Appeal no 134 of 1986 [1993] eKLR, the Court of Appeal held that judgment may be expressed judgment in foreign currency which is convertible at the rates prevailing on the date of payment or enforcement of the judgment. In that case, the Court of Appeal cited with approval the dictum of Lord Denning, who observed in the *Despina R* [1974] QB 491, 514, that the, "The plaintiff should be compensated for the expense or loss in the currency which most truly expressed his loss". Thus, in this case, and following the Recognition Order, the judgment is in foreign currency and as starting point the Applicant is entitled to payment in USD and RWF in accordance with the judgment. Since the foreign judgment is to be executed in Kenya, for purposes of taking accounts, the exchange rate is that Central Bank of Kenya prevailing on the date of payment.
16. As regards the interest payable, it is not in dispute that interest was awarded both in foreign judgment and Kenyan court. I have confirmed that on October 18, 2019, the court awarded at interest at court rates, that is 12% per annum, on unpaid sums at the date of the registration order until payment in full. I note that the court in Rwanda had already awarded interest which is included in the registration order.
17. Finally, the other contested issue concerns costs awarded in the ELC Case no 291 of 2018 being kshs 621,817.22. Unless the parties agree that this amount be set off from the judgment debt, it can only be recovered by execution.
18. Against the aforesaid background, I consider the taking of accounts a technical exercise. I intend to invoke alternative modes of resolution noting that court ordered mediation between the parties failed. I therefore invoke order 46 rule 20 of the Civil Procedure Rules which empowers the court to adopt any means to resolve the dispute before it and it states as follows:
 - (1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.
 - (2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.
 - (3) Where a court mandated mediation adopted pursuant to this rule fails, the court shall forthwith set the matter down for hearing and determination in accordance with the Rules.
19. In order to conclude the matter with finality, I now order as follows:



- a. The parties shall agree on and appoint an independent certified public accountant within 14 days to take those accounts and file a report on the amount due to the applicant within 45 days of the date of that appointment.
- b. In default of such agreement each party to appoint an accountant and the two accountants to appoint an umpire and the three to prepare a report of the amount due to the applicant within 45 days of the appointment of the umpire.
- c. Where parties are unable to agree as directed in (a) or (b) above, the chairperson of the Institute of Certified Public Accountants of Kenya appoint a single Accountant to take accounts and report on the amount due to the Applicant within 45 days of appointment.
- d. Where parties agree on one accountant or a single accountant is appointed, the costs will be shared equally by the parties. However, where three accountants are appointed each party will bear the costs of its accountant while the cost of the umpire will be shared equally by the parties.
- e. The parties be at liberty to apply for further and other directions.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2022.

D S MAJANJA

JUDGE

Court Assistant: Mr M Onyango

Mr Shikanda instructed by Osundwa and Company for the applicant.

Mr Lutta instructed by Lutta and Company Advocates for the respondent.

