



**Fidelity Commercial Bank Limited v Rajwani (Civil Case 717 of 2006)
[2022] KEHC 15968 (KLR) (Commercial and Tax) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 717 OF 2006
DAS MAJANJA, J
NOVEMBER 30, 2022**

BETWEEN

FIDELITY COMMERCIAL BANK LIMITED PLAINTIFF

AND

AZIM JIWA RAJWANI DEFENDANT

RULING

Introduction and Background

1. Before the court for consideration is the plaintiff's appeal from the decision of the Deputy Registrar dated May 18, 2022 allowing the defendant to proceed with execution against the plaintiff ("the bank") following the finding that it had not complied with the court's judgment dated November 2, 2018. The substance of the appeal is set out in the memorandum of appeal dated July 14, 2022.
2. In the judgment delivered by Tuiyott J, dated November 2, 2018 ("the judgment"), the court ordered the bank to pay into the defendant's account No 11****31 or if the account is closed, into an account to be opened in favour of the defendant, but over which the bank has a right of lien and set off, the sum of Kshs 10,222,832.17, plus whatever interest the money would have earned if it had not been unlawfully debited from the time of the debit upto full payment.
3. The bank contends that it has complied with the judgment and that it has shown why execution should not proceed against it. It avers that the Deputy Registrar failed to appreciate that in the notice to show cause dated November 8, 2021, the defendant sought execution by way of committal to civil jail as opposed to attachment and sale of the bank's moveable property. It complains that the Deputy Registrar erred by holding that the bank had not given reasons why it opened a new account for the defendant and by disregarding the evidence showing that the bank had notified the defendant that it had opened an account in his favour and deposited Kshs 10,222,832.17 and further notified him of its



intention to exercise lien over the sum of money within 7 days. The bank contends that the Deputy Registrar failed to appreciate that under the judgment it was given the choice of either paying into the defendant's account No 11****31 or if the account is closed into an account to be opened in favour of the defendant.

4. The bank submits that the defendant's application for execution was based on a misunderstanding of the judgment and that the Deputy Registrar failed to appreciate that the defendant is indebted to it even after the exercise of the right to lien and setoff. It points out that the total of the principal amount deposited in the defendant's account plus interest is Kshs 28,932,671.08 while the defendant's outstanding debt to it is Kshs 74,259,790 as set out in its response to the notice to show cause. The bank adds that the Deputy Registrar did not have jurisdiction to consider the issue of lien but still went ahead to allow the defendant's application for execution when the lien was in issue in determining compliance with the judgment. The bank urges the court to find that it has complied with the judgment and allow the appeal.
5. The defendant opposes the appeal. He states that the bank, in a deliberate, misguided, misinformed and illegal attempt to sabotage the process of complying with the judgment proceeded to illegally open a new loan account for an already offset facility with respect to a now wound-up company; Kisii Petroleum Products Limited. That the bank purported to debit therein the entire loan amount and then sent the defendant a notice of set-off for the entire decretal amount plus interest with the consequential effect that the defendant would be left in a net negative position.
6. The defendant submits that it has placed evidence before the court demonstrating that the loan account for which the right of set-off lay, had been fully settled and the loan account closed by the bank. That the closure of the loan account read together with the confirmation of settlement of loan account by the bank permanently dispensed with the question whether a right of lien and set-off lay or not. The defendant contends that this right of lien and set-off may have existed but following settlement of the loan and closure of the account, the right of lien and set-off was determined and could not be resurrected by the bank.
7. It is the defendant's position that the judgment and decree remains unexecuted and that this court, exercising its statutory powers under the section 38 of the *Civil Procedure Act* as read together with order 22 rule 19(2) of the *Civil Procedure Rules* should proceed to order an execution.

Analysis and Determination

8. I have considered the appeal and the parties' respective submissions. The main issue for determination is whether the bank has complied with the court's judgment and whether the Deputy Registrar erred in allowing the defendant to proceed with execution.
9. Since the Deputy Registrar was called upon to execute the judgment, it is important to recall what was in issue. The material part of the judgment reads as follows:

Was the right of lien and set-off properly and lawfully exercised?

- (24) There is evidence that the principal debtor fell into default of the facilities it obtained from the bank. This is admitted by the debtor in the letter of February 28, 2003 (P exhibit page 10). The bank may therefore have been entitled to call up the guarantee given by Rajwani. How was this to be done?
- (25) The terms of the guarantees themselves provide for the trigger. It expressly provides that the guarantors will be liable to pay the guaranteed amount in full 'at the expiration of seven (7) days after demand in thereof shall have been served upon the guarantors'. So there is need for



a 7 day notice. Rajwani had expressly pleaded that there was non-compliance with the term to issue a demand. This is what he avers in paragraph 6 of his defence:-

“In the alternative and without prejudice to the matters pleaded in paragraph 5 a foregoing the defendant states that the plaintiff had not, as at the time of the purported invocation of its rights under the alleged guarantee and supplemental debenture, complied with the mandatory terms of the aforesaid instruments as to the issuance of a demand and as such its right of recovery had not crystallized”.

- (26) Only upon issuance of such a demand and persisted default thereafter could the bank have enforced its right of set-off. Even then the right of set-off could only be exercised after the giving of a further 28 day notice (see clause 13(c) of the General Rules and Regulations governing the Account).
- (27) Even in the face of the notice having been placed at the centre of the controversy by the defence pleaded, the bank was unable to prove that the necessary demands or notices were made. Of course all these would have been unnecessary if it had been proved that the meeting of January 7, 2005 happened and Rajwani gave express authority for the set-off. But as this has not been proved then this court can only conclude that the bank exercised its right of set-off prematurely.

.....

The rendition

[30] Perhaps for clarity I rehash my findings:-

- (i) The bank held a right of lien and set-off over Rajwani’s account in respect to any sums due from him to the bank.
- (ii) Rajwani provided a guarantee and indemnity in favour of the bank for the debt of Kissi to the bank for a principal sum of Kshs 29 million plus interest thereon and other charges.
- (iii) There was default and the bank was entitled to call up the guarantee and exercise its power of setoff.
- (iv) However, the bank never duly called up the guarantee and right of set-off and its exercise of the right of set-off was premature.

.....

(34) These are the final orders:-

- (i)
- (ii)
- (iii) The plaintiff shall pay into the defendant’s account No 11303731 or if the account is closed into an account to be opened in favour of the defendant (but over which the bank has a right of lien and set off), the sum of Ksh 10,222,832.17, plus whatever interest the money would have earned if it had not been unlawfully debited from the time of the debit upto full payment.
- (iv)

10. The totality of the court’s decision was that the defendant was indebted to the Bank and that even though the bank had a right of lien and set off over the defendant’s account, it was exercised



prematurely as the bank had not called up the guarantee by issuing the requisite notices. As a result, the court directed the bank to pay Kshs 10,222,832.17 plus interest prematurely debited from the respondent's account No 11****31 or if that account is closed, that the same be paid into an account opened in favour of the defendant but over which the bank had a right of lien and set off.

11. It is not disputed that on January 27, 2022, the bank opened an account in favour of the defendant and paid into it Kshs 10,222,832.00 together with interest of Kshs 18,709,839.00. Further, on February 4, 2022, the appellant served a 7 days' notice evincing its intention to exercise the right of lien and set off against the said funds and the those in the account held by Kissi Petroleum Products Limited. The bank contended that it was entitled to the sum of Kshs 74,259,790.00 from that account and that it is the defendant who is actually indebted to it. However, the defendant opposes this position. He contends that the loan account of Kisii Petroleum Products Limited, the principal debtor, was fully settled and the account closed by the bank.
12. I have considered the parties' contentions on whether and to what extent the bank was entitled to set off principal debtor's account against the defendant's account. In my view, this issue was not one for the Deputy Registrar to decide. The only positive order the bank was required to comply with was to deposit the Kshs 10,222,832.00 together with accrued interest into the defendant's account or an account opened for that purpose. This amount remained subject to the bank's right of lien and set off. Once the amount was deposited as directed in the judgment, that was the end of the matter.
13. Whether and to what extent the bank was entitled to set-off and whether in fact, the principal debtor or the defendant has settled all liabilities is a matter beyond the jurisdiction of the Deputy Registrar and this decision. The court disclaimed this issue in the judgment as follows:
 - (33) In respect to the counterclaim by Rajwani, he has demonstrated that the bank wrongfully debited his account by exercising its rights hastily. However, for the fact that it had a right of lien over those funds, any orders granted in Rajwani's favour must not prejudice that right of the bank. A fair order is for the sums (with whatever interest the court shall impose) to be paid back into Rajwani's account over which the bank has a right of lien and setoff. Whether or not the principal debt will be owing after the reversal of the affairs and whether the bank can then seek to enforce its right of setoff are matters beyond the scope of this decision and which the parties herein will have to figure out for themselves.
14. Whether the bank rightly or wrongly exercised its right of lien and set-off is beyond the scope of these proceedings. What is relevant is whether the bank complied the judgment. On this issue I am satisfied that the bank opened an account in favour of the defendant, paid into it the principal sum and interest of Kshs 28,932,671.08. While it exercised its right of lien and set-off over the funds over that account, I find and hold that the bank wholly complied with the judgment. I therefore agree with the bank that the Deputy Registrar's decision allowing the defendant to execute against the bank was a clear misapprehension of the judgment. The Deputy Registrar did not have jurisdiction to adjudicate other issues other than ascertain that the terms of the judgment had been met.

Disposition

15. For the reasons I have set out above, I allow the appeal, set aside the ruling of the Deputy Registrar dated May 18, 2022 and is substitute it with a finding and order that the plaintiff has shown cause why execution should not proceed against it as it has complied with the judgment.



16. The defendant shall pay the costs of the proceedings before the Deputy Registrar and of this appeal assessed at Kshs 40,000.00 only.

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

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango.

Mr Kanjama, SC with him Mr Muoki instructed by Muma Kanjama and Company Advocates for the Plaintiff.

Mr Otieno with him Mr Maina instructed by Owiti, Otieno and Ragot Advocates for the Defendant.

